

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

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SC Court of Appeals

Angela H. Bain Appellant,

v.

Denise C. Lawson and Kenneth L. Childs Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

CASE NO. _____

Angela H. Bain,

Plaintiff,

v.

Denise C. Lawson and Kenneth L. Childs,

Defendants.

SUMMONS

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is served upon you, and to serve a copy of your answer to this Complaint upon the subscriber at the address shown below within thirty (30) days (thirty five (35) days if served by United States Mail) after service hereof, exclusive of the date of such service, and if you fail to answer the Complaint, judgment by default will be rendered against you for the relief demanded in the Complaint.

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July 23, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

CASE NO. _____

Angela H. Bain,

Plaintiff,

v.

Denise C. Lawson and Kenneth L. Childs,

Defendants.

**COMPLAINT
(Jury Trial Demanded)**

The Plaintiff complaining of the Defendants respectfully alleges as follows:

PARTIES & JURISDICTION

1. The Plaintiff, Angela H. Bain ("Bain" or "Plaintiff"), is a resident and citizen of Chester County, South Carolina and is presently the Superintendent of Chester County School District where she has served for more than two and a half years.

2. Defendant Denise C. Lawson ("Lawson" or "Board Chair") is a resident of Chester County, South Carolina and is presently the Chairman of the Board of Trustees for Chester County School District.

3. Defendant Kenneth L. Childs ("Childs") is a resident of Richland County, South Carolina where he practices law with the law firm of Duff & Childs and formerly represented Chester County School District whom he now still claims to represent and charges legal fees.

4. The majority of the events and occurrences giving rise to this action occurred in Chester County. One of the Defendants resides in Chester County and this case is brought pursuant to the common law of South Carolina and jurisdiction is proper.

FACTUAL ALLEGATIONS

5. The Plaintiff, Angela Bain, has an excellent background and reputation in education, having worked as a teacher, administrator, and ultimately as Superintendent of the Chester County School District, having accepted the position of interim Superintendent in February of 2016, and having been selected by the School Board as Superintendent in May of 2016 on a continuing basis.

6. Over the last two and a half years, the Plaintiff has worked hard to perform all of the duties required of her as Superintendent and, to her knowledge and belief, has made substantial progress for the children of Chester County in terms of educational achievement and has also done her best to promote good relationships for the District and its operations with business industry and other interests of Chester County.

7. Lawson has served for many years as a trustee on the Chester County School Board of Trustees ("Board") and was elected the Board Chair by her current Board in January of 2017.

8. Childs is a practicing attorney focusing in employment and education law and has, over many years, represented school districts in South Carolina, including the Chester County School District along with members of his former law firms and the present law firm of Duff & Childs.

9. Childs and his then law firm, Childs & Halligan, represented Chester County School District in 2015 and 2016. He was a representative at the time Agnes Slayman, the former Superintendent of the District, was forced to resign from her office, and Childs was the senior partner of the law firm giving advice to the Board, including Lawson, during those tumultuous events.

10. The Board was displeased with the actions of Childs and other members of the firm in the handling of these issues as well as alleged excessive legal fees charged to the District.

11. The District's written policy BB states, "All powers of the board lie in its action as a body. Board member acting as individuals have no authority over personnel or school affairs except when such authority is specifically delegated to a member of the board." Thus, Lawson is bound to act with the Board as a body, not through her own unilateral actions. (See Exhibit A attached hereto).

12. The District's written policy BDG states, "...the board, by majority vote, may designate an attorney to counsel the board and administration on legal matters involving the district's welfare." Thus, if the Board hires legal counsel the Board body must select the legal counsel through a majority vote. (See Exhibit B attached hereto).

13. On November 16, 2015, a motion was made by the Board to terminate the attorney client relationship with the firm of Childs & Halligan beginning in January of 2016.

14. Andrea White, a member of the then firm of Duff White & Turner, was then considered as a replacement for the old Childs firm.

15. On January 25, 2016, after the announced resignation of Keith Callicutt as Interim Superintendent, the Board voted to terminate the services of Childs & Halligan and to hire the law firm of Duff, White & Turner to do legal work for the School District.

16. Sometime around March 17, 2016, the law firm of Duff, White & Turner separated as did the firm of Childs & Halligan, and the law firm of White & Story was formed, as well as the new firm of Duff & Childs.

17. At this time, the Superintendent chose to conduct all of the District's legal business through Andrea White and her newly formed firm, White & Story, and not to use the law firm with which Childs remained a partner. The Board Chair was aware of these decisions.

18. In March of 2017, Lawson approached the Plaintiff and asked that Childs's new law firm be hired to handle all legal business for the School District and that the firm of White & Story no longer serve as the District's lawyers.

19. The Plaintiff explained to Lawson that Childs & Halligan had been dismissed in January of 2016 by the previous Board as attorneys because of, among other things, the excessive amount of bills tendered for legal services for the past three years, amounting to over \$300,000 for the single school year of 2015-2016.

20. While the Plaintiff had no personal objection to Childs or any question as to his legal ability, the Plaintiff, as Superintendent, agreed with the earlier vote of the Board and did not believe that Childs' firm should be involved as legal representatives of the Chester County School Board or the School District.

21. Childs persisted in trying to represent the School District in a matter involving the principal of one of the high schools who had resigned and filed a demand letter through his attorney complaining to the district.

22. The Plaintiff was unaware of Childs' firm's involvement and had obtained the needed assistance directly from the South Carolina School Board Insurance Trust to deal with the situation.

23. Childs nevertheless persisted and sent a large bill to the District even though he had not been authorized by the Superintendent or Board action to be involved in the case.

24. In July of 2017, Childs invited the Plaintiff to lunch and made a gratuitous suggestion that the Board should hold a workshop about its rules and responsibilities and recommended someone for the Superintendent to contact. Childs did not indicate that he was going

to charge for sending a resume of a Board relations consultant offered by Childs, and the Plaintiff was unaware of any charge associated with this offer.

25. Nevertheless, Childs rendered a bill to the district for approximately \$1,100 for services, which the Plaintiff did not authorize and objected to, and ultimately Childs withdrew his bill and agreed not to engage in any other legal services without the Superintendent's permission or action of the Board.

26. Childs was told and informed in writing at that time that he should not undertake further representation of the District without first obtaining the authorization of the Superintendent and the Board. This did not sit well with him.

27. No such permission was ever given, and no subsequent Board action was taken, to the Plaintiff's knowledge, which would allow Childs to render legal services and receive payment from the District.

28. Around December of 2017, it became obvious that Lawson was becoming hostile and contentious with the Plaintiff.

29. Even though the Plaintiff's annual evaluation with the Board was positive there were negative suggestions made in the same, presumably made by the Board Chair that reflected negatively on the Plaintiff. The Plaintiff responded, and the evaluation remained basically a high one.

30. Lawson has and continues to interfere with the Plaintiff's duties as Superintendent by constantly bypassing the chain of supervision, directly contacting her subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and all without the Plaintiff's knowledge or permission.

31. Such conduct violates the Plaintiff's rights to manage her subordinates and the separation of powers between the Board and the Superintendent where such requests and contacts should come through the Superintendent's office. (See Exhibit C attached hereto).

32. Further, Lawson the Board Chair has regularly exhibited a hostile and disrespectful attitude toward the Plaintiff publicly at Board meetings; thus, creating a bad environment for positive action and portraying the Plaintiff in a negative light, all without any reasonable basis.

33. The Plaintiff is informed and believes that Lawson from time to time met with others, including public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove the Plaintiff from her position as Superintendent in large measure because she did not support bringing back Childs and his law firm to engage in legal work and receive compensation from the district.

34. In February of 2018, Lawson began to raise questions about the Plaintiff's contract and amendments and suggest to others that the Plaintiff was taking advantage of the District and charging more money and benefits than she properly should be receiving.

35. Upon information and belief, Lawson was meeting planning and conspiring with Childs to look for ways to remove the Plaintiff from her position and to put in her position someone they could better manipulate.

36. Both Lawson and Childs, or his law firm, had been involved in the same conduct with Agnes Slayman, a prior Superintendent of the District.

37. With the addition of new members to the Board throughout the Spring of 2017, the Plaintiff continued to receive reports of negative remarks made by Lawson and meetings and plans to remove the Plaintiff, which continued and began to escalate.

38. In June of 2018, Lawson and Childs's agenda of interference became obvious when it was reported that the Plaintiff was making excessive amounts of money by consulting with other school districts and was personally involved in an organization called ACOFEE to promote her outside consultations and other income producing activities with school districts and that she was a partner or part owner of that organization. Lawson accused the Plaintiff falsely of violating her contract, presumably with input from Childs.

39. When the Plaintiff was hired as interim Superintendent she was authorized to work only limited time with the district and for that reason was allowed to perform extensive work for other school districts and to earn other income from the same. All Board members, including Lawson, were well aware of that situation.

40. When the Plaintiff was hired as Superintendent, it was specifically stated in her contract that she could continue to perform outside work for other school districts as long as it did not interfere with her duties as the District's Superintendent.

41. The Plaintiff obtained the permission of the previous Board Chairman, Eugene Boyd, to do any consultation and outside work so long as it did not interfere with her Chester duties. (See Exhibit D attached hereto).

42. Lawson was a member of the Board at the time and was fully aware of approval given to the Plaintiff to perform such work.

43. In the course of performing consultations for other school districts, the Plaintiff consulted with the interim Superintendent of Marlboro County School District, on her own time and without interfering with her position with the Chester County School District, to give him any advice he might request relating to the conduct of his office.

44. One of the items involved in her consulting was what appeared to be excessive attorney's fees charged to the Marlboro County School District by Childs's law firm, although at the time the identity of the law firm was unknown to the Plaintiff.

45. Upon information and belief, Childs was made aware of the Plaintiff's consultation and, together with the assistance of Lawson, made an exhaustive effort to find out all of the school districts who had been consulted by the Plaintiff during her tenure with Chester County School District, as well as the amount of compensation paid to her.

46. Having assembled such information, Childs, together with Lawson, began to openly report to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and she was a partner in an enterprise to publicize and expand her personal income as a consultant; all of which both Defendants knew were false and untrue statements.

47. No action was authorized by the Board, yet a special Board meeting was called by Lawson for June 16, 2018, with the knowledge and approval of Childs, about which the Plaintiff was not notified, which was illegal.

48. 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. No Board action had been taken authorizing Childs to perform such work or to be paid by the Chester County School District for doing so.

49. On the other hand, at all times mentioned therein and at other times, Childs did not represent the Chester County School Board, but rather represented his own interests in bringing the charges against the Plaintiff, which they hoped would result in her termination.

50. Both Defendants were notified on many occasions by the Plaintiff to cease and desist from their efforts to vilify, defame, and interfere with the Plaintiff's contractual relationship with the District and to cease their defamatory actions, but neither heeded such admonitions and the same in fact intensified.

51. On July 16, 2018, the above matters came to a head when a letter dated July 11, 2018 was sent to the Plaintiff, but was not received by her, and a copy of the letter was sent to Childs by an attorney representing a former employee of Chester County threatening potential legal action against the Plaintiff for alleged actions taken in her own personal capacity and outside of the course and scope of her duties as Superintendent.

52. Although the Plaintiff never received the communication, on Sunday, July 15, 2018, an email was sent by Childs to all members of the School Board indicating that he had been asked by Lawson to represent the District and to respond to the letter involved. All of this came to the attention of the Plaintiff only after Board members had already received Childs's communication.

53. These actions may result in adverse action taken against the Plaintiff as Superintendent, are unnecessary, and are the result of a conscious and continuing agenda by the Defendants to remove the Plaintiff as Superintendent and to interfere with her contract.

54. Lawson has admitted that she does not like the Plaintiff, that she did not vote for her as Superintendent and that she wants to remove her from that position.

55. Childs, upon information and belief, is assisting and abetting Lawson for the purpose of his own benefit in receiving legal fees from the District for services performed under the direction of the Board Chair or others.

56. Neither Childs nor his law firm has been authorized by any vote of the Board, nor by the consent of the Superintendent, to perform any work for Chester County School District although it is likely that he has charged or will charge the District for services that he is now allegedly performing in these matters.

57. At all times mentioned herein, communications and actions taken by Childs were outside of the course and scope of any attorney-client privilege.

58. Upon information and belief, Lawson and/or Childs have instructed Chester County Board Members to not communicate with Plaintiff.

**FOR A FIRST CAUSE OF ACTION
AGAINST BOTH DEFENDANTS
(Defamation)**

59. Where not inconsistent herewith, the Plaintiff realleges the foregoing paragraphs.

60. The Plaintiff has been falsely accused of willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was guilty of misfeasance and/or unlawful "double dipping" and receiving excessive compensation, and as such was incompetent in the performance of her job and engaging in improper, unethical and unlawful conduct have been published and republished by the Defendants and many others who have heard the same on

numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

62. These statements and others were made to persons within and outside of the School District in the absence of a need to know basis. The defamatory statements were published to, including but not limited to, the Superintendent of Marlboro County School District and to the News & Reporter.

63. Publication from Defendants was made during 2017 and 2018.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made throughout the last several months and with charges of escalating severity.

65. Such publications made by the Defendants and others who have transmitted them, are false and have been knowingly made in reckless disregard for the truth when the means of ascertaining the truth was readily apparent.

66. Such statements and actions have been published and disseminated widely to third persons and were done so maliciously and in bad faith.

67. Such defamatory statements, actions and insinuations are *per se* defamatory accusing the Plaintiff of unfitness in her profession and of unlawful, unethical and improper conduct.

68. As a direct and proximate result of the defamatory conduct described herein, the Plaintiff has been embarrassed, humiliated, and has sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering, and she is entitled to an award of actual damages against the Defendants as well

as punitive damages. Where permitted the Plaintiff is entitled to pre-judgment interest on the above damages.

FOR A SECOND CAUSE OF ACTION
AGAINST BOTH DEFENDANTS
(Civil Conspiracy)

69. Where not inconsistent herewith, Plaintiff realleges the forgoing paragraphs.

70. The Defendants have met, schemed, planned and conspired with one another and with others to terminate Plaintiff's contract with Chester County School District, remove her from the position of Superintendent, and to prevent Plaintiff from any future employment with Chester County School District or any other school district by defaming her.

71. Further, all of such communications and actions alleged are within the "crime fraud" exception to the attorney-client privilege.

72. Any advice or communication given to the Board, Board members or others concerning the matters alleged herein were not communications between an attorney and client but were rather intentional and unwarranted acts done to harm the Plaintiff and to potentially gain advantage for Childs.

73. These actions were done together with the actions and statements of Lawson contained herein for the purpose of harming the Plaintiff.

74. The same constitutes an unlawful civil conspiracy which has caused the Plaintiff special damages which could not otherwise have been inflicted upon her.

75. As a direct and proximate result of the wrongful civil conspiracy referred to herein, the Plaintiff has been ostracized and blacklisted in her field and profession and has incurred the costs and fees of prosecuting this action, has suffered loss of sleep, loss of companionship, and severe mental anguish as a result of the same.

76. Upon information and belief, the Plaintiff's ability to obtain supplemental income through her consulting work with other school districts, including but not limited to Marlboro County School District, has been diminished because of the Defendants' conspiracy. The contact of the Defendants was willful, and wanton and Plaintiff is entitled to punitive damages for the same. Plaintiff is also entitled to pre-judgment interest where recoverable on the above listed damages.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays for judgment against Defendants Denise C. Lawson and Kenneth L. Childs for the claims alleged against them of civil conspiracy and defamation to be assessed and awarded as reasonable by a jury for all damages alleged herein including actual and punitive damages as well as pre-judgment interest. The Plaintiff further prays for the costs and attorney's fees of this action and any other relief the Court deems proper.

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July 23, 2018
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Policy BB Board Legal Status

Issued 05/13

Purpose: To establish the legal foundation for board operations.

The legally constituted governing body of the school district is the board of trustees of Chester County School District. The board is composed of seven members, each of whom is elected for a four-year term. State law has provided that each school district will be under the management and control of its board of trustees.

The board's powers are derived from the state constitution and acts of the general assembly. Consequently, the board may perform only those acts for which some authority exists. This authority may be expressly stated or implied either in state law or in rules and regulations of the state board of education. The board's authority to exercise permissive powers within the framework of state laws and regulations allows for freedom of action.

While the board is responsible to the state board of education, it is, by law and tradition, responsible to the community it serves and represents. It is, therefore, the duty of the board to carry out the will of the community in matters of public education, within the boundaries set by the laws and regulations of the state of South Carolina and Chester County.

* All powers of the board lie in its action as a body. Board members acting as individuals have no authority over personnel or school affairs except when such authority is specifically delegated to a member of the board.

Adopted 3/7/87; Revised 5/29/03, 2/16/10, 5/20/13

Legal references:

S.C. Constitution:

Article II, Sections 3 & 4 - Definition of qualified electors.

Article XVII, Sections 1 & 1A - Qualifications for office and prohibition against dual office holding.

S.C. Code, 1976, as amended:

Section 7-5-120 - Qualifications for voter registration.

Title 8 - Deals with rights and responsibilities of public officers.

Section 59-15-50 - Oath of board members.

Section 59-17-10 through 59-17-90 - School district organization, consolidation, etc.

Section 59-19-10 - Each school district will be under the management of the board of trustees.

Section 59-19-315 - Commencement of trustee's term of office.



Policy BDG School Attorney/Legal Services

Issued 5/03

Purpose: To establish the basic structure for the board's need for and relationship with its attorney.

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.

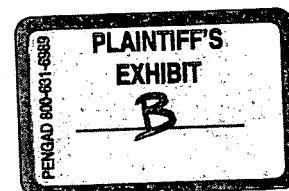
The attorney will serve at the pleasure of the board and will be paid for services rendered.

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.

Adopted 1974; Revised 3/7/87, 5/29/03

Chester County Schools



Policy BBAA Board Member Authority and Responsibilities

Issued 5/03

Purpose: To establish the basic structure of the authority and responsibilities of the board and its members.

Because all powers of the board of trustees lie in its action as a group, individual board members exercise their authority over district affairs only as they vote to take action at a legal meeting of the board.

* In other instances, an individual board member, including the chairman, will have power only when the board, by vote, has delegated authority to him/her. The board will not be bound in any way by any action or statement on the part of any individual board member not delegated by the board.

The board and its members will deal with administrative services through the superintendent and will not give orders to any subordinates of the superintendent either publicly or privately, but may make suggestions and recommendations.

* The board will make its members, the district staff and the public aware through its actions and policies that only the board acting as a whole has authority to take official action.

The members of the board of trustees are officers of the state. Constitutional provisions that apply to officers apply to school board members.

Adopted 3/7/87; Revised 5/29/03

Legal references:

S.C. Constitution:

Article II, Sections 3 & 4 - Definition of qualified electors.

Article XVII, Sections 1 & 1A - Qualifications for office and prohibition against dual office holding.

S.C. Code, 1976, as amended:

Section 7-5-120 - Qualifications for voter registration.

Title 8 - Deals with rights and responsibilities of public officers.

Section 59-15-50 - Oath of board members.

Attorney General's Opinion:

1960-61, No. 1092, p. 164 - Any action taken by the board of trustees must be taken at a regularly called and assembled meeting with a quorum present.

Chester County Schools



Affadavit of Eugene O. Boyd

I, Eugene O. Boyd, served as Chairman of the Chester County School District Board of Trustees from 1/2016 through 1/2017. At the time that the Board interviewed Dr. Bain in 2016 as a candidate for District Superintendent, Dr. Bain disclosed to the Board that she owned a consulting firm and that if she was employed as Superintendent, she would request that the Board allow her to continue consulting so long as her consulting did not interfere with her Superintendent duties.

As I recall, no Trustee expressed any opposition to Dr. Bain's request.

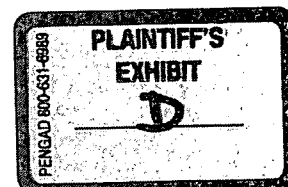
After Dr. Bain was hired and her contract signed, she asked me as Board Chair for permission to continue to perform occasional consulting work on her own time and using her own technology. I assured her that her contract did not prohibit her from doing consulting work as long as it did not interfere with her performance of her Superintendent responsibilities and so long as she performed that work on her own time.

During the time that I was on the Board, I did not have any concerns that Dr. Bain's consulting work was interfering with the performance of her duties and I do not recall any other Trustee ever raising a question or an objection to Dr. Bain's consulting work.

Signed Eugene O. Boyd

Eugene O. Boyd

Date June 28th 2018



STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

v.

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

C/A No.: 2018-CP-12-00334

**MOTION TO DISMISS
OF DEFENDANT DENISE C. LAWSON**

NOW COMES Defendant Denise C. Lawson (hereinafter "Lawson") hereby files this Motion to Dismiss pursuant to Rule 12(b)(6), SCRCPP, concerning the Complaint of Plaintiff Angela Bain (hereinafter "Plaintiff"). Plaintiff brings two causes of action against Lawson: (1) Defamation and (2) Civil Conspiracy.

For the reasons listed below, Lawson respectfully requests that the Court dismiss these claims with prejudice, and award Lawson any other such relief as the Court deems just and proper.

STANDARD OF REVIEW

A complaint must be dismissed where it fails to "state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCPP.

The trial court must construe the complaint in a light most favorable to the nonmovant and determine if the "facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (S.C. App. 2001); *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

LEGAL ARGUMENT

I. DEFAMATION.

In her defamation claim, Plaintiff alleges that “Plaintiff has been falsely accused of willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due to the same.” (Complaint, ¶ 60). Plaintiff also alleges that Lawson accused “Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts...[and] fraudulently was a partner or owner of a business to promote these outside activities.” (Complaint, ¶ 60).

Plaintiff does not reference any specific communication to support this allegation, including its content, date, recipient, or the place or manner of its communication.

Plaintiff also alleges that “these statements and others were made to persons within and outside of the School District in the absence of a need to know basis. The defamatory statements were published to, including, but not limited to, the Superintendent of Marlboro County School District and to the News & Reporter.” (Complaint, ¶ 62).

The tort of defamation permits a plaintiff to recover for injury to her reputation as the result of a defendant’s communications to others of a false message about the plaintiff. *McBride v. School Dist. of Greenville Cty.*, 389 S.C. 546, 559, 698 S.E.2d 845, 852 (S.C. App. 2010). The plaintiff in a defamation action must prove “(1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” *Id.* at 559-60, 698 S.E.2d at 852 (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)). “The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter

third persons from associating or dealing with him.” *Id.* at 560, 698 S.E.2d at 852 (quoting *Fleming*, 350 S.C. at 494, 567 S.E.2d at 860).

In this case, Plaintiff has failed to sufficiently allege a defamation claim against Lawson. She makes conclusory allegations that fail to identify any specific communications. Even when Plaintiff alleges that Lawson made defamatory statements to the Superintendent of Marlboro County School District and to the News & Reporter, she fails entirely to allege with any specificity what was said that was defamatory.

Moreover, to the extent Plaintiff’s allegations can be discerned, they concern statements that relate to Plaintiff’s job performance. Lawson is a member of the Board of Trustees for Chester County School District, which is charged with the management and control of the Chester County School District. S.C. Code Ann. § 59-19-10.

The South Carolina Court of Appeals recently affirmed dismissal of a similar case in *Paradis v. Charleston Cty. Sch. Dist.*, 2018 WL 3636581, at *3 (S.C. App. Aug. 1, 2018), where it ruled that a defamation claim built on conclusory allegations was insufficient to survive a motion to dismiss under Rule 12(b)(6), SCRCPP.

In deciding whether a claim should be dismissed pursuant to Rule 12(b)(6), SCRCPP, this court should consider whether Paradis has “state[d] facts sufficient to constitute a cause of action.” “Rule 12(b)(6), SCRCPP, ‘retains the Code Pleading standard ... rather than the more lenient notice pleading standard found in the federal rules.’ ” *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan, *South Carolina Civil Procedure* 93 (2nd ed. 1996)). When a plaintiff states nothing more than legal conclusions, a claim should fail. *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889). Paradis failed to provide any *facts* to support her claims. She states she “was slandered by oral and written statements as well as by actions of the Defendant District and Defendant JCHS” and “[t]hese statements and actions, including false accusations that Plaintiff could not effectively teach her students and manage her classroom, injured Plaintiff in her trade business and profession.” **She never indicates who made defamatory statements about her, what they said, or to whom those statements were published.** We recognize the pleadings must be liberally construed. *Gaskins*, 343 S.C. at 671, 541 S.E.2d at 271. Rule 12(b)(6) requires the plaintiff to allege facts.

Paradis failed to do so. Accordingly, we affirm the circuit court's order dismissing her defamation claim.

2018 WL 3636581, at *3 (emphasis added); *McNeil v. S.C. Dep't of Corr.*, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (S.C. App. 2013) (Plaintiff “did not set forth with any specificity what the alleged false statements were. She also did not allege any of the statements were published to a third party or that SCDC made the alleged statements. Additionally, she did not assert to whom SCDC made the alleged statements. Therefore, we find McNeil’s allegations do not support an action for defamation, and the trial court did not err in dismissing her cause of action.”).

For these reasons, Plaintiff’s defamation claim as to Lawson should be dismissed with prejudice.

II. CIVIL CONSPIRACY.

As with her defamation claim, Plaintiff makes few if any factual allegations regarding the alleged “civil conspiracy”¹ in which Lawson purportedly engaged. Plaintiff alleges that, in “February of 2018, Lawson began to raise questions about the Plaintiff’s contract and amendments and suggest to others that the Plaintiff was taking advantage of the District and charging more money and benefits than she properly should be receiving.” (Complaint, ¶ 34). Notably, even if true, there is absolutely nothing wrong with a School Board member “raising questions” about the conduct of a District Superintendent’s job performance or compensation.

Strangely, Plaintiff also alleges that Lawson’s “conspiracy” was aimed at injuring Plaintiff by “defaming” her. (Complaint, ¶ 70).

¹ Curiously, Plaintiff alleges the Lawson and Childs have “met, schemed, planned and conspired with one another and with [unnamed] others to terminate Plaintiff’s contract with Chester County School District, remove her from the position of Superintendent, and to prevent Plaintiff from any future employment with Chester County School District or any other school district by defaming her.” (Complaint, ¶ 70). None of these actions have taken place, although Lawson is perfectly within her rights as a Board Member to question Plaintiff’s performance and compensation. In any event, other than these conclusory and bald allegations, Plaintiff fails to allege any facts that might support her claims.

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing special damage.” *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (S.C. App. 2009). “The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas, in civil conspiracy, the gravamen of the tort is the damage resulting from an overt act done pursuant to a common design.” *Id.* Further, a claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Id.* Because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action.” *Id.*

Failing to adequately allege either (1) additional acts or (2) special damages is fatal to a civil conspiracy claim. In this case, Plaintiff fails to do either.

In Paragraph 70 of her Complaint, Plaintiff alleges that Lawson’s “conspiracy” was aimed at injuring Plaintiff by “defaming” her. In essence, Plaintiff’s civil conspiracy claim is a warmed-over version of her defamation claim, and equally conclusory and lacking in specificity. Further, there are no specific allegations, other than formulaic and conclusory accusations, that hint as to how Lawson acted outside the scope of her duty as a Board Member. *McMillan v. Oconee Mem’l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006).

Furthermore, Plaintiff’s recitation of purported “special damages” is formulaic and has likewise been rejected by our appellate court in *Paradis*, where the Court of Appeals found as follows:

The circuit court found “[t]he only mention of special damages in Plaintiff’s complaint, beyond the conclusory statement that she sustained them generally, is that she has been ostracized or blacklisted from the profession of education and that she incurred legal fees to pursue the claims set forth in her [c]omplaint.” However, the circuit court found “Plaintiff fails to plead any specific facts to support such an assertion, such as an inability to obtain other employment in the

education profession.” The circuit court further noted Paradis’s “alleged damages of being blacklisted and ostracized are simply a re-wording of the ‘injury to her professional reputation’ that are the claimed damages under her defamation cause of action.” Finally, the circuit court found Paradis could not rely on the costs she bore for prosecuting her civil conspiracy claim as special damages.

....

She claims the reputational damages she asserts in her defamation claim are separate and distinct from the “alleged damages of being blacklisted and ostracized.” However, those reputational damages are precisely the damages one would expect from defamatory statements. Furthermore, in her brief, Paradis fails to address the circuit court’s decision that her attorney’s fees would not constitute special damages.

2018 WL 3636581, at *4-5.

For these reasons, Plaintiff’s civil conspiracy claim as to Lawson should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons above, the Defendant Denise C. Lawson respectfully requests that the Court grant her Motion to Dismiss, dismiss Plaintiff’s claims with prejudice, and grant any further such relief as this Court deems just and proper.

Dated this the 9th day of August, 2018.

RICHARDSON PLOWDEN & ROBINSON, P.A.

/s/ Eugene H. Matthews

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COUNSEL FOR DEFENDANT DENISE C. LAWSON

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER	)	CASE NO: 2018-CP-12-00334
	)	
ANGELA H. BAIN,	)	
	)	
Plaintiff,	)	
	)	NOTICE OF MOTION AND
vs.	)	MOTION TO DISMISS
	)	COMPLAINT AGAINST
	)	KENNETH L. CHILDS
DENISE C. LAWSON and	)	<i>(Rule 12(b)(6), S.C.R.C.P.)</i>
KENNETH L. CHILDS,	)	
	)	
Defendants.	)	
_____	)	

TO: The Plaintiff Angela H. Bain and through her Attorneys, J. Lewis Cromer and Shannon M. Polvi:

PLEASE TAKE NOTICE that Pursuant to the South Carolina Rules of Civil Procedure, Defendant Kenneth L. Childs by and through his undersigned Counsel, on the tenth day after service of this Motion or as soon thereafter as the matter may be heard will move and hereby move to dismiss the allegations contained in Plaintiff's Complaint against him pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, as Plaintiff's Complaint fails to state a cause of action against these defendants upon which relief can be granted.

In the Alternative, these Defendants will also move for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, as construing every fact pled in a light most favorable to the Plaintiff; no action properly lies against this Defendant.

Even accepting the well-pled allegations in the Complaint as true and drawing all reasonable and factual inferences from those facts in the Plaintiff's favor, it appears certain that the Plaintiffs cannot prove any set of facts in support of her claim entitling her to relief for the following reasons:

As to the Defamation Claim:

1. Plaintiff's Complaint fails to allege the publication of any specific communication to any party which might be deemed to be defamatory.
2. Plaintiff's Complaint fails to allege any unprivileged communication to any party which might be deemed to be defamatory.
3. Plaintiff's Complaint fails to allege any actual malice which is a required component of defamation against a public figure. As Superintendent of Schools in Chester County, Plaintiff is a public figure.
4. Plaintiff's complaint fails to allege any cognizable damage suffered as a result of any alleged statement or the publication of any unprivileged statement by Defendant Childs.
5. Plaintiff's complaint fails to allege any fact that Defendant Childs made or published any statement with knowledge of falsity or reckless disregard for the truth as required in a public official defamation case.

As to the Conspiracy Claim:

1. Plaintiff's complaint fails to allege acts in furtherance of a conspiracy different and apart from the alleged Defamation.
2. Plaintiff's complaint fails to allege special damages apart from a conclusory statement that she sustained them generally and that she incurred legal fees to pursue the claims set forth in her complaint.

This motion may be supplemented with memoranda of law, and such argument or other matter or presentation as the Court will allow.

Respectfully submitted,

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ATTORNEYS FOR KENNETH L. CHILDS

August 17, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER	)	CASE NO: 2018-CP-12-00334
	)	
ANGELA H. BAIN,	)	
	)	
Plaintiff,	)	KENNETH L. CHILDS'
	)	MEMORANDUM IN SUPPORT OF
vs.	)	MOTION TO DISMISS
	)	COMPLAINT AGAINST
	)	KENNETH L. CHILDS
DENISE C. LAWSON and	)	<i>(Rule 12(b)(6), S.C.R.C.P.)</i>
KENNETH L. CHILDS,	)	
	)	
Defendants.	)	
	)	

Defendant Kenneth L. Childs, through his undersigned counsel, submits this memorandum in support of his Motion to Dismiss the Complaint in the above-referenced action.

FACTS

Angela H. Bain is the Superintendent of Schools for Chester County South Carolina. She is employed by a contract with the Chester County School District which is governed by the Chester County School Board. Defendant Lawson is the elected Chair of the Chester County School Board. Defendant Childs is an attorney with the law firm of Duff & Childs, LLC. Duff and Childs has and continues to represent the school district and has been retained by the School Board to assist with matters of contract involving the School District.

Plaintiff filed an action against Lawson and Childs alleging that the two conspired to "remove her from the position of Superintendent, and to prevent Plaintiff from any future employment with Chester County school district by defaming her." The complaint alleges no specific publication or statement made by Defendant Childs which is actionable nor does it reference any particular communication which purports to support its allegation. No reference is

made to a specific representation, its content, date, recipient, or the place or manner of the communication.

Defendant Childs moved to Dismiss the Complaint as it fails to state facts sufficient to constitute a cause of action under Rule 12(b)(6), S.C.R.C.P.

STANDARD OF REVIEW

Rule 12(b)(6), *S.C.R.C.P.* requires a court to dismiss a complaint where it fails to “state facts sufficient to constitute a cause of action.”

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). “The trial court. .must presume all well pled facts to be true.” *Morrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988). “[P]leadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts.” *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991) (citation omitted).

I. Plaintiff is a Public Figure

A public official is one who has a governmental role and whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). Such interest must go "beyond the general public interest in the qualifications and performance of all government employees." *Id.* "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz v. Robert Welch, Inc.*, 418 U.S. 322, 344, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808 (1974). For a public official, "society's interest . . . is not strictly limited to the formal discharge of official duties," but "extends to 'anything which might touch on an official's fitness for office.'" *Id.* at 344-45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)). Here, whether or not Plaintiff is complying with her contractual obligations touches on her fitness for office. It is a matter of significant concern and statements about her actions and performance as a public official and the issues emanating therefrom enjoy the highest level of constitutional protection.

Because she is a public official, Plaintiff has the burden to "prove by clear and convincing evidence" the Defendant made the statement with actual malice, which means "with the knowledge of its falsity or with reckless disregard for its truth." *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (S.C. 2000) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964)). The courts have held not only that: A "reckless disregard: for the truth . . . requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323,

1325, 20 L.Ed.2d 262, 267 (1968). There must be evidence the defendant had a “high degree of awareness . . . of probable falsity.” *Garrison v. Louisiana*, 379 U.S. 64, 74 85 S.Ct. 209, 216, 13 L.Ed.2d 125, 133 (1964).

Our State Supreme Court has further held that “Whether the evidence is sufficient to support a finding of actual malice is a question of law.” *Elder, supra* at 341 S.C. at 113, 533 S.E.2d at 901-902. So, unlike a traditional libel or slander case where the defendant has the burden of proving the truth of the matter asserted, here, the Plaintiff has the burden of proving not only that the statements about which she complains were false, but that Mr. Childs doubted the truth of his words or had a high degree of awareness that his statements were false. Here, Plaintiff has neither made any allegation showing any basis or malice nor alleged a specific statement attributable to Mr. Childs. Her complaint contains only general, conclusory statements where she alleges that such statements¹ “have been published and disseminated widely to third persons and were done so maliciously and in bad faith.”

Plaintiff’s complaint fails to plead facts from which a reasonable court might conclude that she has met the minimum burden required by Rule 12(b)(6) that Defendant Childs made any statement with actual malice. Therefore, the Court should dismiss her cause of action for defamation.

II. Plaintiff’s Defamation Claim Should be Dismissed.

A person makes a defamatory statement if the statement tends to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him. *Fountain v. First Reliance Bank*, 398 S.C. 434, 730 S.E.2d 305 (S.C. 2012) (quoting *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857, 860 (S.C. 2002)). The tort of defamation,

¹ Which are ambiguous, unidentified and do not meet required standards for pleading defamation.

therefore, permits a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653, 664 (2006). A plaintiff must prove the following four elements to state a claim for defamation: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Id.*, 629 S.E.2d at 664.

Plaintiff's complaint fails to allege facts sufficient to meet the requirements of Rule 12(b)(6) as it relates to her claim of defamation against Childs. Her Complaint consists exclusively of conclusory allegations but fails to identify, define or allege any specific statement or publication. Her complaint consists of nothing but general conclusions without identifying a single allegedly defamatory statement.

Likewise, the comments that she complains of relate exclusively to her job performance as a public official. As mentioned hereinabove, this requires a higher standard, and the public – and especially the School Board Chair and the Board's attorneys have a profound interest in speaking out about that.

Just this month, the Court of Appeals affirmed the dismissal of a very similar complaint in *Paradis v. Charleston Cty. Sch. Dist.*, Op. No., 5583, 2018 S.C. App. LEXIS 59 (Ct. App. 2018). There, the Court affirmed dismissal under Rule 12(b)(6) where a plaintiff based a defamation claim solely on conclusory allegations exactly as is the case here. The Court held:

In deciding whether a claim should be dismissed pursuant to Rule 12(b)(6), SCRCP, this court should consider whether Paradis has "state[d] facts sufficient to constitute a cause of action." "Rule 12(b)(6), SCRCP, 'retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.'" *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (quoting Harry M. Lightsey, Jr. & James F. Flanagan,

South Carolina Civil Procedure 93 (2nd ed. 1996)). When a plaintiff states nothing more than legal conclusions, a claim should fail. *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889). Paradis failed to provide any facts to support her claims. She states she "was slandered by oral and written statements as well as by actions of the Defendant District and Defendant JCHS" and "[t]hese statements and actions, including false accusations that Plaintiff could not effectively teach her students and manage her classroom, injured Plaintiff in her trade business and profession." **She never indicates who made defamatory statements about her, what they said, or to whom those statements were published.** We recognize the pleadings must be liberally construed. *Gaskins*, 343 S.C. at 671, 541 S.E.2d at 271. Rule 12(b)(6) requires the plaintiff to allege facts. Paradis failed to do so. Accordingly, we affirm the circuit court's order dismissing her defamation claim.

[Emphasis Added]

Here, Plaintiff failed to meet her burden to plead allegations of defamation with any specificity as to what the false statement was, to whom it was published or allege that she suffered any cognizable damages.

The Court should dismiss her defamation claim against Kenneth Childs with prejudice.

III. Plaintiff's Civil Conspiracy Cause of Action Should be Dismissed.

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (If a Plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed). It is essential that a plaintiff prove all of these elements in order to

recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord. *Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005).

Here, Plaintiff makes no factual allegation about Mr. Childs' involvement in the conspiracy. Additionally, her only allegations of damages from the conspiracy is that Mr. Childs conspired with Ms. Lawson to "defame" her.

Plaintiff fails to allege both additional acts and special damages as required to fulfill the burden under Rule 12(b)(6) as the same relates to successfully sustaining a civil conspiracy claim.

The Court of Appeals' recent decision in *Paradis*, supra is dispositive as it relates to Ms. Lawson's claim of Civil Conspiracy.

The circuit court dismissed *Paradis*'s civil conspiracy claim, finding she failed to state with specificity the special damages she sustained as a result of Bohnstengel and Spann's alleged conspiracy and the actions she alleges constituted the conspiracy were done in the scope of Bohnstengel's and Spann's employment.

"Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct." *Hackworth*, 385 S.C. at 116, 682 S.E.2d at 875. "General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of." *Id.* at 116-17, 682 S.E.2d at 875. "Special damages, on the other hand, are not implied at law because they do not necessarily result from the wrong." *Id.* at 117, 682 S.E.2d at 875. "Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party." *Id.* "If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Id.*

The circuit court found "[t]he only mention of special damages in Plaintiff's complaint, beyond the conclusory statement that she sustained them generally, is that she has been ostracized or blacklisted from the profession of education and that she incurred legal fees to pursue the claims set forth in her [c]omplaint." However, the circuit court found "Plaintiff fails to plead any specific facts to support such an assertion, such as an inability to obtain other employment in the education

profession." The circuit court further noted Paradis's "alleged damages of being blacklisted and ostracized are simply a re-wording of the 'injury to her professional reputation' that are the claimed damages under her defamation cause of action." Finally, the circuit court found Paradis could not rely on the costs she bore for prosecuting her civil conspiracy claim as special damages.

The language in the Plaintiff's complaint is indistinguishable from that found insufficient in Paradis. In paragraph 75 of the Complaint, she alleges "As a direct and proximate result of the wrongful civil conspiracy referred to herein, the Plaintiff has been ostracized and blacklisted in her field and profession and has incurred the costs and fees of prosecuting this action, has suffered loss of sleep, loss of companionship and severe mental anguish as a result of the same"² Her allegations in her civil conspiracy claim are simply the exact claims from her defamation claim -- warmed over and reworded.

The Court should follow the findings of the Court of Appeal in Paradis and dismiss the Plaintiff's complaint against Mr. Childs for Civil Conspiracy with prejudice.

CONCLUSION

Plaintiff's complaint fails to state facts sufficient to constitute either cause of action identified in that complaint. For the reasons enumerated herein, Defendant Kenneth L. Childs respectfully requests that the Court grant his Motion to Dismiss and dismiss the Plaintiff's claims with prejudice together with such other and further relief as the Court deems just and proper.

² In paragraph 68 of the Complaint she alleges almost identical general damages in her claim for defamation there she alleges, inter alia, "the Plaintiff has been embarrassed, humiliated, and has sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering, . . ."

Respectfully submitted,

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s:/ Michael H. Montgomery

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ATTORNEYS FOR KENNETH L. CHILDS

August 17, 2018

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER	)	CASE NO: 2018-CP-12-00334
	)	
ANGELA H. BAIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NOTICE OF MOTION AND
	)	MOTION TO STRIKE
	)	COMPLAINT AGAINST
	)	KENNETH L. CHILDS
DENISE C. LAWSON and	)	<i>(Rule 12(f), S.C.R.C.P.)</i>
KENNETH L. CHILDS,	)	
	)	
Defendants.	)	

To: The Plaintiff Angela H. Bain by and through her Attorneys, J. Lewis Cromer and Shannon M. Polvi:

Subject to his previously filed Rule 12(b)(6) Motion.

You will please take notice that Defendant, Kenneth L. Childs (hereinafter "Childs"), by and through his undersigned attorney, Michael H. Montgomery, in ten (10) days or as soon thereafter as the matter may be heard, will and does hereby move that this Honorable Court issue its Order pursuant to Rule 12(f), S.C.R.C.P., striking redundant, immaterial, impertinent or scandalous matter from the Plaintiff's Complaint.

This Defendant would show that the Complaint is rife with material that is nothing more than redundant, immaterial, impertinent or scandalous matter described by Rule 12(f), apparently interposed in the Complaint for no purpose save that of humiliating the Defendant and tarnishing his reputation in a transparent attempt to inflame the media and any trier of fact. Moreover, the Defendant would suggest that Plaintiff included this material in the Complaint in a malicious and transparently bad-faith effort to interfere with the Attorney-Client relationship between Kenneth Childs and the Chester County School Board. Defendant Childs would show the Court as follows:

The Plaintiff's Complaint contains numerous allegations regarding Defendant Childs personally and professionally that appear to be nothing more than inflammatory and defamatory statements published with the idea that the Plaintiff can defame Mr. Childs in a protected forum. None of the allegations relating to the Plaintiff's claims of defamation and civil conspiracy relate to Mr. Childs' prior and continuing service as Attorney for the Chester County School District and Board or any dispute relating to them. None of the claims of conspiracy or defamation are even cursorily associated with his or his prior and existing firm's provision of legal services. These allegations appear to be nothing more than the opinion of the Plaintiff, her counsel or third parties who were not fact witnesses, and have no bearing or place in this Complaint except to inflame or add supposed credibility to Plaintiff's claims without sworn testimony.

It is apparent that Plaintiff included these matters for the purpose of inciting publicity and for the purpose of coloring the perception of a trier of fact with allegations that do nothing more than tarnish Defendant Childs with irrelevant, scandalous, and immaterial information¹; for that reason, the following paragraphs of the Complaint should be stricken pursuant to Rule 12(f) S.C.R.C.P.: Paragraphs 9,10,13,15,18,19,20,21,22,23,24,25,26,27,36 and 56.

The grounds for this Motion are that considering the allegations in the Complaint and the Causes of Action contained therein, the allegations to be stricken constitute nothing more than the redundant, immaterial, impertinent or scandalous matter described by Rule 12(f).

This Motion is based upon the pleadings in this matter, such memoranda as may be submitted by the parties, applicable case law and the South Carolina Rules of Civil Procedure.

¹ Notwithstanding Plaintiff's gratuitous insertion of the phrase "While the Plaintiff had no personal objection to Childs or any question as to his legal ability,..." Complaint ¶20. It is evident from reading the material included in the Complaint that Plaintiff is attempting to use this Complaint as a 'hit job' on Childs in an effort to discredit him and provide fodder for gossip and comment in the legal and school community.

WHEREFORE, this Defendant, respectfully requests that this Honorable Court enter an Order striking the redundant, immaterial, impertinent or scandalous matter from the Plaintiff's Complaint, or in the alternative striking the entire Complaint, and for such other and further relief as the Court deems just and proper, including any sanctions pursuant to Rule 11, *S.C.R.C.P.* including striking the Complaint *in toto*, money sanctions or such other appropriate relief allowed by the applicable rules.

Respectfully submitted,

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ATTORNEYS FOR KENNETH L. CHILDS

August 17, 2018
Columbia, South Carolina

Pursuant to Rule 11, *S.C.R.C.P.*, I hereby certify the I have determined through prior discussions with Plaintiff's counsel that consultation about the resolution of this Motion would serve no useful purpose.

s:/Michael H. Montgomery
Michael H. Montgomery
S.C. Bar No. 4034

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

-versus-

Denise C. Lawson and Kenneth L.
Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-12-00334

**PLAINTIFF'S RESPONSE IN
OPPOSITION TO DEFENDANT
CHILDS' MOTION TO STRIKE**

TO THE HONORABLE BRIAN M. GIBBONS, CIRCUIT COURT JUDGE:

Plaintiff Angela Bain files this Response in Opposition to Defendant Childs' ("Childs" and "Defendant") Motion to Strike Paragraphs 9, 10, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, and 56 of Plaintiff's Complaint. *See* Dkt. No. 6.

I. A Motion to Strike is the Improper Means for Resolving Childs' Issues.

In his Motion to Strike, Defendant Childs is essentially asking the Court to remove from the Complaint a substantial portion of the factual pleadings that are necessary to establish Plaintiff's causes of action. Seemingly, Childs seeks to strike these paragraphs because they put the Defendant in a negative light. The factual pleadings of the Complaint, which South Carolina Rule of Civil Procedure ("SCRCP") Rule 8(a)(2) requires, should not be removed because they make the Defendant uncomfortable or state facts which reflect negatively upon him. To strike the enumerated Paragraphs for this reason would mute the purpose of SCRCP 8(a)(2), which requires a Complaint to contain "a short and plain statement of the facts showing that the pleader is entitled to relief."

Further, the Supreme Court of the United States elaborated on these pleadings requirements in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009). From these cases, it is clear that the U.S. Supreme Court requires more than “labels and conclusions” or “a formulaic recitation” in order to satisfy the pleading requirements. *Iqbal*, 556 U.S. 662, 678; *Twombly*, 550 U.S. 544, 555. Instead, a plaintiff’s complaint must contain “further factual enhancement” that bring her entitlement to relief above the speculative level. *Id.* Considering the U.S. Supreme Court’s holdings in *Twombly* and *Iqbal*, requiring more than mere broad factual assertions, the Defendant’s Motion to Strike attempts to defeat this purpose. The Defendant is asking this Court to remove from Plaintiff’s Complaint the factual enhancements that bring her claims above the speculative level and should therefore be denied.

The form of the motion and the stage at which Childs files his Motion to Strike is uncommon for the issues he has raised. A denial of the complained of allegations in an Answer or a Motion to Dismiss, which Childs also filed, would be the more appropriate avenue for addressing his concerns with the enumerated factual pleadings. The majority of South Carolina case law dealing with motions to strike come from plaintiffs challenging the sufficiency of a defense raised in an answer or more nuanced and specific issues with the factual allegations. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 362, 368, 798 S.E.2d 555, 557, 560 (2017) (upholding the lower court’s decision to strike class action allegations from the complaint based on the plain language of a statute prohibiting such allegations); *Mayes v. Paxton*, 313 S.C. 109, 115, 437

S.E.2d 66, 70 (1993) (holding that a finding of insufficiency of a defense will not be reversed absent an abuse of discretion); *Brown v. Coastal States Life Ins. Co.*, 264 S.C. 190, 192, 195, 213 S.E.2d 726, 727, 728 (1975) (holding that striking facts from the defendant's answer that occurred between the service of the summons and the service of the complaint was an error of law); *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990) (holding that on a Motion to Strike the court decides whether a defense can be pled, not whether there are facts supporting it). Therefore, a Motion to Strike is not the proper avenue for the Defendant to raise his issues with the Complaint.

Finally, Plaintiff notes that within Childs' SCRPC 12(b)(6) Motion to Dismiss, Childs also seemingly filed an 'in the alternative' motion for a Rule 12(c) Judgment on the Pleadings, though it was not argued in Childs' Memorandum in Support filed therewith. *See* Dkt. No. 5 and 5-1. However, filing for a judgment based on the pleadings would be unachievable without pleadings with which to rely upon. Defendant is asking this Court to remove a substantial portion of Plaintiff's pleadings, the same pleadings that are necessary for the causes of action Plaintiff has pled against the Defendant.

II. A Motion Brought Pursuant to SCRPC 12(f) is Inapplicable to the Complaint.

South Carolina Rule of Civil Procedure 12(f) states:

Upon motion *pointing out the defects complained of*, and made by a party before responding to a pleading or, if no responsive pleading is required within 30 days after the service of the pleading upon him or upon the court's own initiative, at any time the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter. (emphasis added).

As an initial matter, Plaintiff points out that Childs has failed to “point out the defects complained of” for the Complaint and the specific paragraphs he seeks to strike, as required by Rule 12(f). The relief sought in Defendant Childs’ Motion to Strike is “Defendant, respectfully requests that this Honorable Court enter an Order striking the redundant, immaterial, impertinent or scandalous matter from the Plaintiff’s Complaint, or in the alternative striking the entire Complaint, and for such other and further relief as the Court deems just and proper, including any sanctions pursuant to Rule 11, *S.C.R.C.P.* including striking the Complaint *in toto*, money sanctions or such other appropriate relief allowed by the applicable rules.” Dkt. No. 6, p. 3. Plaintiff resolutely argues that there is no basis for such a Motion to Strike the Complaint or paragraphs therein and no basis for a request for sanctions pursuant to Rule 11, SCRCF.

Childs makes broad and conclusory allegations that the complained of paragraphs within the Complaint are “redundant, immaterial, impertinent or scandalous.” Dkt. No. 6, p. 2. Childs provides no basis for what specifically about the sixteen paragraphs that he is attempting to remove from the Complaint cause them to be “redundant, immaterial, impertinent or scandalous.” *Id.* Plaintiff is not in a position to assume what the Defendant’s arguments are or to make his arguments for him.

Plaintiff establishes that none of the Paragraphs enumerated in the Motion to Strike are “redundant, immaterial, impertinent or scandalous.” First, Defendant provides no indication of how the paragraphs are redundant. The paragraphs are not repetitive of one another and are not found elsewhere in the pleadings. Second, nothing about the enumerated paragraphs are scandalous so as to warrant them being stricken, and Childs has failed to point out any details to the contrary. Third, prior to filing the lawsuit, on

several occasions, Plaintiff attempted to resolve the issues complained of before filing her Complaint, to no avail. (Compl. ¶ 50). Childs asserts that the allegations are “inflammatory and defamatory statements published with the idea that the Plaintiff can defame Mr. Childs in a protected forum.” Dkt. No. 6, p. 2. Such assertions are inaccurate. Plaintiff has sufficient grounds to allege and prove the defamation and civil conspiracy claims based on evidence. Plaintiff’s attempts, prior to suit, to resolve these legitimate bases for litigation show her good faith in trying to resolve these problems before the need for public litigation. Fourth and finally, the paragraphs, which Childs is attempting to have stricken from the Complaint, are material and pertinent to Plaintiff’s causes of action.

The Paragraphs complained of provide relevant information to establish why Childs initiated the civil conspiracy to have Plaintiff removed from her position. They further show Childs’ attempts to be reinstated as legal counsel for the Chester County School District thus showing a personal motive, and the paragraphs illustrate the breakdown in the relationship between Plaintiff and Childs which led to the civil conspiracy and defamatory as alleged.

Childs has failed to identify the defects in the Complaint which would warrant a Rule 12(f) Motion to Strike and none of the Paragraphs are “redundant, immaterial, impertinent or scandalous”; thus, Plaintiff’s Complaint and the paragraphs therein should not be stricken from the Complaint.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court deny Defendant's Motion to Strike Plaintiff's Complaint. In the event the Court decides to strike any paragraph of Plaintiff's Complaint, Plaintiff instead asks for leave to amend her Complaint.

Respectfully Submitted,

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September 18, 2018
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STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

-versus-

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-12-00334

**PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO
DEFENDANT CHILDS'
MOTION TO DISMISS**

TO THE HONORABLE JUDGE BRIAN M. GIBBONS, CIRCUIT COURT JUDGE:

This case concerns two claims arising under the common law of South Carolina: 1) Defamation and 2) Civil Conspiracy. Plaintiff Angela Bain ("Plaintiff") filed this case on July 23, 2018 and alleges defamation and civil conspiracy against Defendants Denise C. Lawson ("Lawson") and Kenneth L. Childs ("Childs" and "Defendant").

Childs filed the instant motion to dismiss on August 17, 2018. The Motion is brought pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 12(b)(6), and alternatively under SCRCP 12(c). However, Plaintiff notes that Defendant's Memorandum in Support of his Motion to Dismiss makes no mention of his SCRCP 12(c) Motion for Judgment on the Pleadings.

Childs argues: 1) that Plaintiff is a public figure; 2) that Plaintiff has not stated facts sufficient to constitute a claim for defamation and 3) that Plaintiff has failed to allege additional acts or special damages which is fatal to her civil conspiracy claim.

Plaintiff opposes Childs' Motion on all grounds and asks that the Court allow this case to proceed on all claims.

SUMMARY OF THE FACTS

Plaintiff accepted the position of Interim Superintendent of Chester County School District (the "District") in February of 2016 and was then selected by the Chester County School Board of

Trustees (the “Board”) as Superintendent in May of 2016 on a continuing basis. (Compl. ¶ 5). Lawson was elected the Board Chair by the Board in January of 2017 after serving as a trustee for several years. (Compl. ¶ 7). Childs is a practicing attorney and has represented school districts in South Carolina, including his representation of the Chester County School District in 2015 and 2016. (Compl. ¶¶ 8, 9). During Childs’ representation, the then Superintendent of the District, Dr. Agnes Slayman, resigned her position, and Childs was providing legal advice to the Board that included Lawson, concerning these events. (Compl. ¶ 9). In March of 2016, the District began using exclusively Andrea White with the firm of White & Story for all legal advice and counsel following a January 25, 2016 vote to terminate the attorney-client relationship with Childs’ firm. (Compl. ¶¶ 15-17). This decision was based, in part, on the Board being displeased with Childs’ handling of the events surrounding Slayman’s resignation and allegedly excessive legal fees charged to the District. (Compl. ¶ 10).

Though Lawson was aware of this decision, she approached Plaintiff in March of 2017 about hiring Childs to handle the District’s legal business and to cease the District’s representation by Andrea White’s firm. (Compl. ¶ 18). Plaintiff explained to Lawson that Childs’ firm had been dismissed by the Board for excessive fees and other reasons. (Compl. ¶ 19). Despite the decision to terminate representation, Childs persisted in representing the District in legal matters, including an issue with a principal of a high school, for which Plaintiff had already sought other legal counsel for the District, and Childs billed the District for that unauthorized representation. (Compl. ¶¶ 21-23). In September of 2017, the District informed Childs in writing that he should not undertake further representation of the District without first obtaining the authorization of the Superintendent and the Board. (Compl. ¶¶ 24, 26). No such permission was ever given, and no subsequent Board

action was taken up to the filing of this lawsuit, which allowed Childs to render legal services and receive payment from the District. (Compl. ¶ 27).

Around December of 2017, it became obvious to Plaintiff that Lawson was becoming hostile and contentious, and this behavior, including Lawson's interference with Plaintiff's duties as Superintendent by constantly bypassing the chain of supervision, directly contacting her subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and all without Plaintiff's knowledge or permission, continues to the present. (Compl. ¶¶ 28, 30). Lawson has met with others, including public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove Plaintiff from her position as Superintendent in large measure because she did not support bringing back Childs and his law firm to engage in legal work and receive compensation from the District. (Compl. ¶ 33). Lawson and Childs were also meeting, planning and conspiring to find ways to remove Plaintiff from her position so that they could replace her with someone more easily manipulated. (Compl. ¶ 35). Such plans became apparent when Lawson raised questions about Plaintiff's contract and suggested that Plaintiff was taking advantage of the District and charging more money and benefits than she should have been receiving. (Compl. ¶ 34).

In the Spring of 2017, Plaintiff continued to receive reports of meetings and plans by Lawson to remove Plaintiff. (Compl. ¶ 37). Such plans escalated in June of 2018 when it was reported that Plaintiff was making excessive amounts of money by consulting with other school districts and was personally involved in an organization to promote her outside consultations and other income producing activities with school districts and that she was a partner or part owner of that organization. (Compl. ¶ 38). Lawson further falsely accused Plaintiff of violating her contract,

presumably with input from Childs. (Compl. ¶ 38). Lawson was well aware that Plaintiff was authorized to perform this outside consulting work as it was stated in her contract with the District and approved by the Board, of which Lawson was a member, at the time Plaintiff was hired as Superintendent. (Compl. ¶¶ 39-42). The timing of such allegations were convenient given that Plaintiff had recently consulted with the interim Superintendent of Marlboro County School District, on her own time and without interfering with her position with the Chester County School District, to give him advice on issues he faced in his position, including what appeared to be excessive attorney's fees charged to the Marlboro County School District by Childs' law firm. (Compl. ¶¶ 43, 44). Childs was made aware of this consultation and, together with the assistance of Lawson, made an exhaustive effort to find out all of the school districts who had been consulted by Plaintiff during her tenure with Chester County School District, as well as the amount of compensation paid to her. (Compl. ¶ 45).

After gathering this information, Childs and Lawson reported to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and was a partner in an enterprise to publicize and expand her personal income as a consultant. (Compl. ¶ 46). Lawson called a Special Board meeting on June 16, 2018, with the knowledge and approval of Childs but without the authorization of the Board or the knowledge of Plaintiff, which was illegal. (Compl. ¶ 47). At this meeting, Childs, representing his own interests, not the Board or its interests, presented the alleged violations of contract and law made against Plaintiff for her consulting work, though no Board action had been taken authorizing Childs to perform such work or to be paid by the Chester County School District for doing so. (Compl. ¶¶ 48, 49).

The culmination of these events occurred on July 15, 2018 when Childs informed the Board via email that Lawson had asked him to represent the District in a matter that involved Plaintiff in her individual capacity and had no relation to her duties as Superintendent. (Compl. ¶¶ 51, 52). The District's written policy BB states, "All powers of the board lie in its action as a body. Board member acting as individuals have no authority over personnel or school affairs except when such authority is specifically delegated to a member of the board." (Compl. ¶ 11) (Attach exhibit?). Specifically, the District's written policy BDG states, "...the board, by majority vote, may designate an attorney to counsel the board and administration on legal matters involving the district's welfare." (Compl. ¶ 12) (Attach exhibit?). Thus, if the Board hires legal counsel the Board body must select the legal counsel through a majority vote. (Compl. ¶ 12).

Lawson has admitted that she does not like the Plaintiff, that she did not vote for her as Superintendent, and that she wants to remove her from that position, and Childs is conspiring with Lawson for the purpose of his own benefit in receiving legal fees from the District for services performed under the direction of the Board Chair. (Compl. ¶¶ 54, 55). These actions may result in further adverse action taken against Plaintiff as Superintendent, are unnecessary, and are the result of a conscious and continuing agenda by the Defendants to remove Plaintiff as Superintendent and to interfere with her contract. (Compl. ¶ 53). Further, Lawson and Childs have defamed Plaintiff by accusing her of willfully defrauding the District, being unfit for her position, violating state law, and by insinuating that she is guilty of unlawful "double dipping" and engaging in unethical conduct. (Compl. ¶¶ 60, 61). These statements and others were made to persons within and outside of the School District during 2017 and 2018 in the absence of a need to know basis, including but not limited to, publication to the Superintendent of Marlboro County School District and to the News & Reporter. (Compl. ¶¶ 62, 63).

STANDARD OF REVIEW

Defendant's Motion to Dismiss states that it is filed pursuant to Rule 12(b)(6), SCRCP. Alternatively, Defendant states that he intends to move for a Judgment on the Pleadings pursuant to Rule 12(c), SCRCP. However, Defendant makes no mention of said motion within his Memorandum in Support of his Motion to Dismiss the Complaint.

I. Rule 12(b)(6) Standard of Review

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116 (2006). A court may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). If, in viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory of the case, then the Rule 12(b)(6) motion to dismiss should be denied. *Baird*, 333 S.C. at 511; *Gentry v. Yonce*, 337 S.C. 1, 5 (1999); and *Stiles*, 318 S.C. at 300. Looking at facts in the light most favorable to the plaintiff, and with all doubts resolved on her behalf, the court must consider whether the pleadings articulate any valid claim for relief. *Id.*

The U.S. Supreme Court utilizes a two-pronged approach in assessing the sufficiency of a complaint. *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937 (2009)). First, there must be factual allegations and legal conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1955 (2007).

Second, there must be sufficient facts that, if taken as true, state a claim that is plausible on its face. *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). The plaintiff's claim must be "more than a mere probability, but it need not rise to the level of evincing a probability of success." *Id.* Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quoting *Ashcroft*, 556 U.S. at 679). The court may grant a motion to dismiss only if the facts alleged in the complaint do not support relief under any theory of law. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001). Here, the facts pled in Plaintiff's complaint are sufficient to support relief for defamation and civil conspiracy.

II. Rule 12(c) Standard of Review

"A judgment on the pleadings shall be granted 'where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor.'" *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013) (quoting *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009) citing *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991)). "A judgment on the pleadings is "a drastic procedure." *Id.* (citing *Russell*, *supra*, cited in *Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct.App.2000)). Therefore, a motion for judgment on the pleadings will only be sustained where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. *See Rosenthal v. Unarco Industries, Inc.*, 278 S.C. 420, 297 S.E.2d 638 (1982); *Wooten v. Standard Life and Cas. Ins. Co.*, 239 S.C. 243, 122 S.E.2d 637 (1961).

When considering a motion for judgment on the pleadings, the court must regard all properly pleaded factual allegations as admitted. *Russell*, 305 S.C. at 406, S.E.2d 338. The court

may not consider matters outside the pleadings on a review of the motion. *Firemen's Ins. Co. v. Cincinnati Ins. Co.*, 302 S.C. 234, 394 S.E.2d 855 (Ct.App.1990). A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle her to judgment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever; thus, pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Russell*, 305 S.C. at 89, 406 S.E.2d at 339. Here, the standard is not met for a Judgment on the Pleadings.

III. Amendment of Complaint

In the alternative, if the court determines the pleadings are deficient, plaintiffs should ordinarily be given leave to amend. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962) (“Leave to amend complaint should be freely given in absence of any apparent or declared reasons such as undue delay, bad faith or dilatory motive on part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of amendment, and futility of amendment.”). Accordingly, Plaintiff respectfully requests leave to amend her pleadings if the Court were to hold that deficiencies exist that require an amendment for Plaintiff to bring her case further.

All arguments as set forth below rebut Defendant’s Rule 12(b)(6) and 12(c) Motions.

ARGUMENT

Plaintiff, for the above reasons elaborated upon below, respectfully asks the Court to deny Defendant’s Motion on all claims.

I. Plaintiff has pled an actionable defamation claim against Defendant Childs.

Defamation requires: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) actionability of the statement or existence of special harm. *McBride v. School Dist. Of Greenville County*, 389 S.C. 546, 559-560 (Ct. App. 2010). “A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.* (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

“It is established that a defamatory insinuation may be made by actions or conduct as well as by word.” *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 458, 272 S.E.3d 633, 634 (1980). “It is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.” *Id.* (quoting *Timmons v. News and Press, Inc.*, 232 S.C. 639 at 644, 103 S.E.2d 277 at 280 (1958)). Defamation is actionable *per se* if it charges a person with one of five types of acts or characteristics including “unfitness in one’s business or profession.” *Holtzsheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998).

A. Plaintiff has pled her defamation claim with the required level of specificity.

Defendant argues that “Plaintiff’s Complaint fails to allege the publication of any specific communication to any party which might be deemed to be defamatory.” Dkt. No. 5, p. 2. It is important to remember that “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Plaintiff pleads more than “recitals of the elements of a

cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. Plaintiff has fully plead an actionable defamation claim against Defendant Childs. Specifically, Plaintiff pled:

46. Having assembled such information, *Childs, together with Lawson, began to openly report to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and she was a partner in an enterprise to publicize and expand her personal income as a consultant*; all of which both Defendants knew were false and untrue statements.

60. The Plaintiff has been falsely accused of willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was *guilty of misfeasance and/or unlawful “double dipping”* and receiving excessive compensation, and as such was incompetent in the performance of her job and engaging in *improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.

62. These statements and others were *made to persons within and outside of the School District* in the absence of a need to know basis. The defamatory statements were published to, *including but not limited to, the Superintendent of Marlboro County School District and to the News & Reporter*.

63. Publication from Defendants was made *during 2017 and 2018*.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made *throughout the last several months* and with charges of escalating severity.

(Compl. ¶¶ 46, 60-64). Based on the pleadings, including but not limited to the above quoted paragraphs of the Complaint, it is clear that Plaintiff sufficiently pled, with the required specificity at this stage of litigation, her defamation claim against Childs.

Plaintiff has pled to whom the defamatory statements were made, the Superintendent of Marlboro County, the News & Reporter and others, and when the statements were made, 2017 and 2018. Solely because Plaintiff was not present during the communications to give the exact specifics as to what was said does not mean that she has failed to plead her defamation claim with enough specificity. Plaintiff's claims are fact determinative and must be developed through discovery. Discovery needs to occur for the defamation claim to be further developed through discoverable evidence and witness testimony.

B. Defendant inappropriately relies on *Paradis v. Charleston County School District*.

Defendant Childs cites to *Paradis v. Charleston County School District* as a "similar case" in support of his efforts to dismiss the defamation claim. Dkt. No. 5-1, pp. 5-6. However, Plaintiff argues that *Paradis* is not factually similar to the instant case and is therefore distinguishable. In *Paradis*, the Court of Appeals of South Carolina was considering a defamation claim brought by a school teacher against a school district and her former employer after being placed on an evaluation plan and subsequently terminated. *Paradis*, 2018 WL 3636581, at *1 (S.C. App. August 1, 2018). As an initial matter, Plaintiff is the current Superintendent of Chester County School District not a teacher at a school within the district. Further, Plaintiff is not suing the Chester County School District or any school within said district. Instead, she has brought claims against two individuals, Lawson, the Chairman of the Board of Trustees, and Childs, an attorney. Plaintiff is also not basing her defamation claim solely on actions as the teacher in *Paradis* did. Instead, she has pled with great specificity the defamatory statements made by the Defendant about her to members of the community, including allegations of illegal and unethical behavior.

It is also vital to note that the Court in *Paradis* found that the act of a teacher being placed on a SAFE-T review was not defamatory, that issue is not applicable to the case at hand. The Court

in *Paradis* based the dismissal of the plaintiff's defamation case on the finding that there was a statute explicitly stating that the government has the explicit discretion to place teachers on SAFE-T plans thus the act of placing a teacher on a remedial SAFE-T plan could not be defamatory. Because there was a statute giving them explicit discretion for the specifically alleged defamatory act, there was the Court's stated basis of dismissal. There is no statute in existence in South Carolina that grants Childs the discretion to defame Plaintiff to Marlboro County School District, the News & Reporter, and others. Therefore, the facts of Plaintiff's case are sufficiently distinguishable from the facts before the Court of Appeals in *Paradis*.

In affirming the Circuit Court's decision to dismiss the teacher's defamation claim in *Paradis*, the S.C. Court of Appeals relied on the fact that the teacher "never indicates who made defamatory statements about her, what they said, or to whom those statements were published." 2018 WL 3636581, at *3. To argue that Plaintiff in the instant case has failed to provide all of the information that the Court of Appeals was looking for in *Paradis* does not reflect an accurate read of Plaintiff's Complaint.

Plaintiff has pled all of the facts mentioned by the S.C. Court of Appeals in *Paradis*, perhaps with more specificity than is required considering that on a motion to dismiss "the pleadings must be liberally construed." 2018 WL 3636581, at *3 (citing *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000)). Plaintiff has pled that the Defendants Lawson and Childs made the defamatory statements about her. (Compl. ¶¶ 60, 65). Plaintiff has also pled to whom the statements were published:

62. These statements and others were made to persons within and outside of the School District in the absence of a need to know basis. The defamatory statements were published to, including but not limited to, the ***Superintendent of Marlboro County School District*** and to the ***News & Reporter***.

(Compl. ¶ 62). Plaintiff set forth with specificity what the defamatory statements concerned:

60. The Plaintiff has been falsely accused of ***willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job*** due to the same. The Defendants further ***accuse the Plaintiff of violations of state law*** by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the ***Plaintiff violates her contract and her actions interfere with her job with Chester County School District*** and that ***she fraudulently was a partner or owner of a business to promote these outside activities***.

61. The allegations and insinuations that the ***Plaintiff was guilty of misfeasance and/or unlawful "double dipping" and receiving excessive compensation***, and as such was incompetent in the performance of her job and ***engaging in improper, unethical and unlawful conduct*** have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

(Compl. ¶¶ 60, 61). Finally, Plaintiff pled when the Defendants made such defamatory statements, which is in excess of the specificity required by the Court of Appeals in *Paradis*:

63. Publication from Defendants was made ***during 2017 and 2018***.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made ***throughout the last several months*** and with charges of escalating severity.

(Compl. ¶¶ 63, 64). Though Plaintiff argues that *Paradis* is distinguishable from her case, she has clearly met the requirements discussed by the S.C. Court of Appeals in *Paradis*, even if this Court decides to apply said holding to this case.

C. Damages

Defendant argues that Plaintiff has failed to allege "any cognizable damage suffered as a result of any alleged statement or the publication of any unprivileged statement by the Defendant Childs." Dkt. No. 5, p. 2. Such an argument is in direct contradiction with Plaintiff's well pled complaint. Specifically, Plaintiff has pled the following damages resulting from the defamatory and unprivileged statements of Defendant Childs:

68. As a *direct and proximate result of the defamatory conduct* described herein, the Plaintiff has been *embarrassed, humiliated, and has sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation* as well as *embarrassment, humiliation and mental suffering*, and she is entitled to an award of actual damages against the Defendants as well as punitive damages. Where permitted the Plaintiff is entitled to pre-judgment interest on the above damages.

(Compl. ¶ 68). Based on the damages pled in Plaintiff's Complaint, including the above quoted language, there is simply no merit to Defendant's argument that Plaintiff has failed to allege any cognizable damage as a result of his defamatory statements.

D. Plaintiff has sufficiently met the pleading requirements for her defamation claim.

Defendant argues that Plaintiff has failed to adequately plead her defamation claim, including arguments regarding public figure status and the maliciousness with which the Defendant made defamatory statements about the Plaintiff. Dkt. No. 5, p. 2. Rule 8(a)(2) requires a pleading to include "short and plain statement of the claim showing that the pleader is entitled to relief." Rule (8)(a)(2), SCRCP. A complaint does not need detailed factual allegations to survive a Rule 12(b)(6) motion to dismiss but must provide the grounds of her entitlement to relief. *Twombly*, 550 U.S. at 545.

In her Complaint, Plaintiff pled the following as it relates to Defendant Childs and the defamatory statements he made:

66. Such statements and actions have been published and disseminated widely to third persons and were done so *maliciously and in bad faith*.

(Compl. ¶ 66). Plaintiff has sufficiently met the pleading requirements of Rule 8(a)(2) and has pled a sufficient level of malice to bring a defamation claim against Defendant Childs.

Defendant argues, "whether or not Plaintiff is complying with her contractual obligations touches on her fitness for office. It is a matter of significant concern and statements about her

actions and performance as a public official and the issues emanating therefrom enjoy the highest level of constitutional protection.” Dkt. No. 5-1, p. 3. Plaintiff has plead:

60. The Plaintiff has been falsely ***accused of willfully defrauding the Chester County School District*** by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of ***violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff*** by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that ***she fraudulently was a partner or owner of a business*** to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was ***guilty of misfeasance and/or unlawful “double dipping” and receiving excessive compensation***, and as such was incompetent in the performance of her job and ***engaging in improper, unethical and unlawful conduct*** have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.

(Compl. ¶¶ 60, 61). As evidenced by the above quoted language, the defamatory statements and allegations by Defendant Childs included in Plaintiff’s Complaint go far beyond Plaintiff’s job performance. These statements accuse Plaintiff of unlawful, unethical and immoral conduct and meet the requisite standard necessary for Plaintiff’s position as the current Superintendent of the Chester County School District.

The Complaint, including the above quoted paragraphs, provides a “short and plain statement” of the facts as they relate to Plaintiff’s defamation claim to show that she is entitled to relief. Therefore, Defendant’s Motion should be denied.

II. Plaintiff has sufficiently pled her civil conspiracy claim separate and apart from the defamation claim.

A properly pled civil conspiracy claim asserts three elements: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E. 2d 91, 95 (Ct. App. 1989). To establish the first two elements, a plaintiff needs to allege “additional acts in furtherance of the conspiracy.” *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). The third element, special damages, must be satisfied to prevent a double recovery. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); *see also, Anthony v. Ward*, 336 Fed. Appx. 311, 318, C.A.4 (S.C.) (2009) (interpreting South Carolina civil conspiracy law and recognizing: “The case law makes clear that the concern is with the plaintiff receiving a double recovery.”). Therefore, to establish special damages, “the damages alleged must go beyond the damages alleged in the other causes of action.” *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (citing *Vaught*, at 209, 387 S.E.2d 95).

A. Acts in Furtherance of the Conspiracy

To establish the first two elements of a claim of civil conspiracy, a plaintiff needs to allege “additional acts in furtherance of the conspiracy.” *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Childs argues that Plaintiff has failed to present any such acts that Childs took in furtherance of the conspiracy to have Plaintiff removed from her position as Superintendent and to have Childs reinstated as counsel for the District. However, Plaintiff has pled such acts, including, but not limited to, the following:

33. The Plaintiff is informed and believes that Lawson from time to time met with others, including public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove the Plaintiff from her position as Superintendent in large measure because she did

not support bringing back Childs and his law firm to engage in legal work and receive compensation from the district.

35. Upon information and belief, ***Lawson was meeting planning and conspiring with Childs to look for ways to remove the Plaintiff*** from her position and to put in her position someone they could better manipulate.

43. In the course of performing consultations for other school districts, the Plaintiff consulted with the interim Superintendent of Marlboro County School District, on her own time and without interfering with her position with the Chester County School District, to give him any advice he might request relating to the conduct of his office.

44. One of the items involved in her consulting was what appeared to be ***excessive attorney's fees charged to the Marlboro County School District by Childs's law firm***, although at the time the identity of the law firm was unknown to the Plaintiff.

45. Upon information and belief, Childs was made aware of the Plaintiff's consultation and, ***together with the assistance of Lawson, made an exhaustive effort to find out all of the school districts who had been consulted by the Plaintiff during her tenure with Chester County School District***, as well as the amount of compensation paid to her.

47. No action was authorized by the Board, yet ***a special Board meeting was called by Lawson for June 16, 2018, with the knowledge and approval of Childs, about which the Plaintiff was not notified, which was illegal.***

53. These actions may result in adverse action taken against the Plaintiff as Superintendent, are unnecessary, and are the result of a ***conscious and continuing agenda by the Defendants to remove the Plaintiff as Superintendent and to interfere with her contract.***

(Compl. ¶¶ 33, 35, 43-45, 47, 53). Such acts were taken by the Defendant in furtherance of the conspiracy to have Plaintiff removed from employment as Superintendent of the Chester County School District.

B. Special Damages

As stated above, the third element of a civil conspiracy requires that the conspiracy caused plaintiff special damages. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). To establish special damages, "the damages alleged must go beyond the damages alleged in the

other causes of action.” *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (citing *Vaught*, at 209, 387 S.E.2d 95)). Defendant argues that the Complaint “fails to allege special damages apart from a conclusory statement that she sustained them generally and that she incurred legal fees to pursue the claims set forth in her complaint.” Dkt. No. 5, p. 2. Plaintiff has pled damages for her civil conspiracy cause of action that are specific and separate and distinct from the damages of her defamation claim.

The damages pled under the defamation cause of action are as follows:

68. As a direct and proximate result of the defamatory conduct described herein, the Plaintiff has been embarrassed, humiliated, and has ***sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering***, and she is entitled to an award of actual damages against the Defendants as well as punitive damages. Where permitted the Plaintiff is entitled to pre-judgment interest on the above damages.

(Compl. ¶ 68). Plaintiff pled different damages under her civil conspiracy claim, including, but not limited to, the following:

75. As a direct and proximate result of the wrongful civil conspiracy referred to herein, the Plaintiff has been ***ostracized and blacklisted in her field and profession*** and has incurred the ***costs and fees of prosecuting this action***, has ***suffered loss of sleep, loss of companionship***, and severe mental anguish as a result of the same.

76. Upon information and belief, the ***Plaintiff's ability to obtain supplemental income through her consulting work with other school districts, including but not limited to Marlboro County School District, has been diminished*** because of the Defendants' conspiracy. The contact of the Defendants was willful, and wanton and Plaintiff is entitled to punitive damages for the same. Plaintiff is also entitled to pre-judgment interest where recoverable on the above listed damages.

(Compl. ¶¶ 75,76). Plaintiff has alleged damages that are separate from the damages alleged in her defamation cause of action, most notably her loss of sleep, loss of companionship, and the loss of supplemental income she received from performing outside consulting work for other counties. Plaintiff has shown special damages and has satisfied the final element of a civil conspiracy claim.

Based on the foregoing, Plaintiff has properly pled a claim for civil conspiracy against the Childs, including the pleading of special damages to preclude a double recovery, and Defendant's motion must be denied.

CONCLUSION

Plaintiff, for these reasons, respectfully requests that the Court deny Defendant's Motion to Dismiss and direct this matter to proceed to trial.

Respectfully submitted,

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September 18, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

-versus-

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-12-00334

**PLAINTIFF'S MEMORANDUM
IN OPPOSITION TO
DEFENDANT LAWSON'S
MOTION TO DISMISS**

TO THE HONORABLE JUDGE BRIAN M. GIBBONS, CIRCUIT COURT JUDGE:

This case concerns two claims arising under the common law of South Carolina: 1) Defamation and 2) Civil Conspiracy. Plaintiff Angela Bain ("Plaintiff") filed this case on July 23, 2018 and alleges said claims against Defendants Denise C. Lawson ("Lawson") and Kenneth L. Childs ("Childs").

Lawson filed the instant Motion to Dismiss on August 9, 2018. The Motion is brought pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 12(b)(6).

Lawson argues: 1) that Plaintiff has not stated facts sufficient to constitute a claim for defamation and 2) that Plaintiff has failed to allege additional acts or special damages which is fatal to her civil conspiracy claim.

Plaintiff opposes Lawson's Motion on all grounds and asks that the Court allow this case to proceed on all claims.

SUMMARY OF THE FACTS

Plaintiff accepted the position of Interim Superintendent of Chester County School District (the "District") in February of 2016 and was then selected by the Chester County School Board of Trustees (the "Board") as Superintendent in May of 2016 on a continuing basis. (Compl. ¶ 5). Lawson was elected the Board Chair by the Board in January of 2017 after serving as a trustee for

several years. (Compl. ¶ 7). Defendant Childs is a practicing attorney and has represented school districts in South Carolina, including his representation of the Chester County School District in 2015 and 2016. (Compl. ¶¶ 8, 9). During Childs' representation, the then Superintendent of the District, Dr. Agnes Slayman, resigned her position, and Childs was providing legal advice to the Board that included Lawson, concerning these events. (Compl. ¶ 9). In March of 2016, the District began using exclusively Andrea White with the firm of White & Story for all legal advice and counsel following a January 25, 2016 vote to terminate the attorney-client relationship with Childs' firm. (Compl. ¶¶ 15-17). This decision was based, in part, on the Board being displeased with Childs' handling of the events surrounding Slayman's resignation and allegedly excessive legal fees charged to the District. (Compl. ¶ 10).

Though Lawson was aware of this decision, she approached Plaintiff in March of 2017 about hiring Childs to handle the District's legal business and to cease the District's representation by Andrea White's firm. (Compl. ¶ 18). Plaintiff explained to Lawson that Childs' firm had been dismissed by the Board for excessive fees and other reasons. (Compl. ¶ 19). Despite the decision to terminate representation, Childs persisted in representing the District in legal matters, including an issue with a principal of a high school, for which Plaintiff had already sought other legal counsel for the District, and Childs billed the District for that unauthorized representation. (Compl. ¶¶ 21-23). In July of 2017, the District informed Childs in writing that he should not undertake further representation of the District without first obtaining the authorization of the Superintendent and the Board. (Compl. ¶¶ 24, 26). No such permission was ever given, and no subsequent Board action was taken up to the filing of this lawsuit, which allowed Childs to render legal services and receive payment from the District. (Compl. ¶ 27).

Around December of 2017, it became obvious to Plaintiff that Lawson was becoming hostile and contentious, and this behavior, including Lawson's interference with Plaintiff's duties as Superintendent by constantly bypassing the chain of supervision, directly contacting her subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and all without Plaintiff's knowledge or permission, continues to the present. (Compl. ¶¶ 28, 30). Lawson has met with others, including public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove Plaintiff from her position as Superintendent in large measure because she did not support bringing back Childs and his law firm to engage in legal work and receive compensation from the District. (Compl. ¶ 33). Lawson and Childs were also meeting, planning and conspiring to find ways to remove Plaintiff from her position so that they could replace her with someone more easily manipulated. (Compl. ¶ 35). Such plans became apparent when Lawson raised questions about Plaintiff's contract and suggested that Plaintiff was taking advantage of the District and charging more money and benefits than she should have been receiving. (Compl. ¶ 34).

In the Spring of 2017, Plaintiff continued to receive reports of meetings and plans by Lawson to remove Plaintiff. (Compl. ¶ 37). Such plans escalated in June of 2018 when it was reported that Plaintiff was making excessive amounts of money by consulting with other school districts and was personally involved in an organization to promote her outside consultations and other income producing activities with school districts and that she was a partner or part owner of that organization. (Compl. ¶ 38). Lawson further falsely accused Plaintiff of violating her contract, presumably with input from Childs. (Compl. ¶ 38). Lawson was well aware that Plaintiff was authorized to perform this outside consulting work as it was stated in her contract with the District

and approved by the Board, of which Lawson was a member, at the time Plaintiff was hired as Superintendent. (Compl. ¶¶ 39-42). The timing of such allegations were convenient given that Plaintiff had recently consulted with the interim Superintendent of Marlboro County School District, on her own time and without interfering with her position with the Chester County School District, to give him advice on issues he faced in his position, including what appeared to be excessive attorney's fees charged to the Marlboro County School District by Childs' law firm. (Compl. ¶¶ 43, 44). Childs was made aware of this consultation and, together with the assistance of Lawson, made an exhaustive effort to find out all of the school districts who had been consulted by Plaintiff during her tenure with Chester County School District, as well as the amount of compensation paid to her. (Compl. ¶ 45).

After gathering this information, Childs and Lawson reported to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and was a partner in an enterprise to publicize and expand her personal income as a consultant. (Compl. ¶ 46). Lawson called a Special Board meeting on June 16, 2018, with the knowledge and approval of Childs but without the authorization of the Board or the knowledge of Plaintiff, which was illegal. (Compl. ¶ 47). At this meeting, Childs, representing his own interests, not the Board or its interests, presented the alleged violations of contract and law made against Plaintiff for her consulting work, though no Board action had been taken authorizing Childs to perform such work or to be paid by the Chester County School District for doing so. (Compl. ¶¶ 48, 49).

The culmination of these events occurred on July 15, 2018 when Childs informed the Board via email that Lawson had asked him to represent the District in a matter that involved Plaintiff in

her individual capacity and had no relation to her duties as Superintendent. (Compl. ¶¶ 51, 52). The District's written policy BB states, "All powers of the board lie in its action as a body. Board member acting as individuals have no authority over personnel or school affairs except when such authority is specifically delegated to a member of the board." (Compl. ¶ 11) (Attach exhibit?). Specifically, the District's written policy BDG states, "...the board, by majority vote, may designate an attorney to counsel the board and administration on legal matters involving the district's welfare." (Compl. ¶ 12) (Attach exhibit?). Thus, if the Board hires legal counsel the Board body must select the legal counsel through a majority vote. (Compl. ¶ 12).

Lawson has admitted that she does not like the Plaintiff, that she did not vote for her as Superintendent, and that she wants to remove her from that position, and Childs is conspiring with Lawson for the purpose of his own benefit in receiving legal fees from the District for services performed under the direction of the Board Chair. (Compl. ¶¶ 54, 55). These actions may result in further adverse action taken against Plaintiff as Superintendent, are unnecessary, and are the result of a conscious and continuing agenda by the Defendants to remove Plaintiff as Superintendent and to interfere with her contract. (Compl. ¶ 53). Further, Lawson and Childs have defamed Plaintiff by accusing her of willfully defrauding the District, being unfit for her position, violating state law, and by insinuating that she is guilty of unlawful "double dipping" and engaging in unethical conduct. (Compl. ¶¶ 60, 61). These statements and others were made to persons within and outside of the School District during 2017 and 2018 in the absence of a need to know basis, including but not limited to, publication to the Superintendent of Marlboro County School District and to the News & Reporter. (Compl. ¶¶ 62, 63).

I. RULE 12(b)(6)

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Spence v.*

Spence, 368 S.C. 106, 116 (2006). A court may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). “Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.” *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). If, in viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory of the case, then the Rule 12(b)(6) motion to dismiss should be denied. *Baird*, 333 S.C. at 511; *Gentry v. Yonce*, 337 S.C. 1, 5 (1999); and *Stiles*, 318 S.C. at 300. Looking at facts in the light most favorable to the plaintiff, and with all doubts resolved on her behalf, the court must consider whether the pleadings articulate any valid claim for relief. *Id.*

The U.S. Supreme Court utilizes a two-pronged approach in assessing the sufficiency of a complaint. *Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 288 (4th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937 (2009)). First, there must be factual allegations and legal conclusions. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 127 S. Ct. 1955, 1955 (2007)). Second, there must be sufficient facts that, if taken as true, state a claim that is plausible on its face. *Id.* (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955). The plaintiff’s claim must be “more than a mere probability, but it need not rise to the level of evincing a probability of success.” *Id.* Determining plausibility is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* (quoting *Ashcroft*, 556 U.S. at 679). The court may grant a motion to dismiss only if the facts alleged in the complaint do not support relief under any theory of law. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18

(2001). Here, the facts pled in Plaintiff's complaint are sufficient to support relief for defamation and civil conspiracy.

II. Amendment of Complaint

In the alternative, if the court determines the pleadings are deficient, plaintiffs should ordinarily be given leave to amend. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962) ("Leave to amend complaint should be freely given in absence of any apparent or declared reasons such as undue delay, bad faith or dilatory motive on part of movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of allowance of amendment, and futility of amendment."). Accordingly, Plaintiff respectfully requests leave to amend her pleadings if the Court were to hold that deficiencies exist that require an amendment for Plaintiff to bring her case further.

All arguments as set forth below rebut Defendant's Rule 12(b)(6) Motion.

ARGUMENT

Plaintiff, for the above reasons elaborated upon below, respectfully asks the Court to deny Defendant's Motion on all claims.

I. Plaintiff has pled an actionable defamation claim against Defendant Lawson.

Defamation requires: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) actionability of the statement or existence of special harm. *McBride v. School Dist. Of Greenville County*, 389 S.C. 546, 559-560 (Ct. App. 2010). "A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

“It is established that a defamatory insinuation may be made by actions or conduct as well as by word.” *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 458, 272 S.E.3d 633, 634 (1980). “It is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.” *Id.* (quoting *Timmons v. News and Press, Inc.*, 232 S.C. 639 at 644, 103 S.E.2d 277 at 280 (1958)).

Defamation is actionable *per se* if it charges a person with one of five types of acts or characteristics including “unfitness in one’s business or profession.” *Holtzsheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998). Defendant Lawson argues, “[p]laintiff does not reference any specific communication to support this allegation [defamation], including its content, date, recipient or the place or manner of its communication” and that “[s]he makes conclusory allegations that fail to identify any specific communications.” Defendant also makes a broad and unclear assertion under S.C. Code Ann. § 59-19-10 regarding Lawson’s position as it relates to Plaintiff. Plaintiff disagrees on all accounts.

A. Plaintiff has pled her defamation claim with the required level of specificity.

Defendant argues Plaintiff has not stated facts sufficient to constitute a cause of action for a defamation claim. It is important to remember that “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Here, Plaintiff pleads more than “recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. Plaintiff has fully plead an actionable defamation claim against Defendant Lawson. Specifically, Plaintiff pled:

46. Having assembled such information, ***Childs, together with Lawson, began to openly report to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in***

charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and she was a partner in an enterprise to publicize and expand her personal income as a consultant; all of which both Defendants knew were false and untrue statements.

60. The Plaintiff has been falsely accused of willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was *guilty of misfeasance and/or unlawful "double dipping"* and receiving excessive compensation, and as such was incompetent in the performance of her job and engaging in *improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

62. These statements and others were *made to persons within and outside of the School District* in the absence of a need to know basis. The defamatory statements were published to, *including but not limited to, the Superintendent of Marlboro County School District and to the News & Reporter.*

63. Publication from Defendants was made *during 2017 and 2018.*

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made *throughout the last several months* and with charges of escalating severity.

(Compl. ¶¶ 46, 60-64). Based on the pleadings, including but not limited to the above quoted paragraphs of the Complaint, it is clear that Plaintiff sufficiently pled, with the required specificity at this stage of litigation, her defamation claim against Lawson.

Further, Defendant includes in her argument specific allegations from the Complaint when she says, "[e]ven when Plaintiff alleges that Lawson made defamatory statements to the Superintendent of Marlboro County School District and to the News & Reporter, she fails entirely

to allege with any specificity what was said that was defamatory.” This argument makes clear that, contrary to Lawson’s earlier argument, Plaintiff has pled to whom the statements were made, the Superintendent of Marlboro County, the News & Reporter and others, and when the statements were made, 2017 and 2018. Solely because Plaintiff was not present during the communications to give the exact specifics as to what was said does not mean that she has failed to plead her defamation claim with enough specificity.

If a plaintiff ‘has alleged specific defamatory statements made to [other] employees, and discovery will permit the plaintiff to specifically identify those individuals by name,” then defamation is properly pled. *Alford v. Wang, Inc.*, 11 F.Supp.3d 584, 591 (D.S.C. 2014). Defendant Lawson is attempting to impose a standard for pleading defamation that does not exist under current case law. In *Wang*, where a Motion to Dismiss under Rule 12(b)(6) was also at issue, the plaintiff pled that her employer “told other employees that she had been demoted because she was stealing from the store because she was a racist.” *Id.* at 588. The District Court of South Carolina found this was a sufficient defamation claim. *Id.* at 591. Here, Plaintiff has alleged more information than that which was found sufficient in *Wang*. Therefore, it would be premature to dismiss her claim of defamation against Defendant Lawson. Plaintiff’s claims are fact determinative and must be developed through discovery. Discovery needs to occur for the defamation claim to be further developed through discoverable evidence and witness testimony.

B. Defendant inappropriately relies on *Paradis v. Charleston County School District*.

Defendant Lawson cites to *Paradis v. Charleston County School District* as a “similar case” in support of her lack of specificity argument. However, Plaintiff argues that *Paradis* is not factually similar to the instant case and is therefore distinguishable. In *Paradis*, the Court of Appeals of South Carolina was considering a defamation claim brought by a school teacher against a school district and her former employer after being placed on an evaluation plan and

subsequently terminated. *Paradis*, 2018 WL 3636581, at *1 (S.C. App. August 1, 2018). As an initial matter, Plaintiff is the current Superintendent of Chester County School District not a teacher at a school within the district. Further, Plaintiff is not suing the Chester County School District or any school within said district. Instead, she has brought claims against two individuals, Lawson, the Chairman of the Board of Trustees, and Childs, an attorney. Plaintiff is also not basing her defamation claim solely on actions as the teacher in *Paradis* did. Instead, she has pled with great specificity, as discussed in section I.A. above, the defamatory statements made by the Defendant about her to members of the community, including allegations of illegal and unethical behavior.

It is also vital to note that the Court in *Paradis* found that the act of a teacher being placed on a SAFE-T review was not defamatory, that issue is not applicable to the case at hand. The Court in *Paradis* based the dismissal of the plaintiff's defamation case on the finding that there was a statute explicitly stating that the government has the explicit discretion to place teachers on SAFE-T plans thus the act of placing a teacher on a remedial SAFE-T plan could not be defamatory. Because there was a statute giving them explicit discretion for the specifically alleged defamatory act, there was the Court's stated basis of dismissal. There is no statute in existence in South Carolina that grants Lawson the discretion to defame Plaintiff to Marlboro County School District, the News & Reporter, and others. Therefore, the facts of Plaintiff's case are sufficiently distinguishable from the facts before the Court of Appeals in *Paradis*.

Defendant seem to argue that the decision in *Paradis* gives people carte blanche discretion to defame individuals, that is a misreading and misapplication of the Court's ruling in *Paradis*. In affirming the Circuit Court's decision to dismiss the teacher's defamation claim, the S.C. Court of Appeals relied on the fact that the teacher "never indicates who made defamatory statements about

her, what they said, or to whom those statements were published.” 2018 WL 3636581, at *3. To argue that Plaintiff in the instant case has failed to provide all of the information that the Court of Appeals was looking for in *Paradis* does not reflect an accurate read of Plaintiff’s Complaint.

Plaintiff has pled all of the facts mentioned by the S.C. Court of Appeals in *Paradis*, perhaps with more specificity than is required considering that on a motion to dismiss “the pleadings must be liberally construed.” 2018 WL 3636581, at *3 (citing *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000)). Plaintiff has pled that the Defendants Lawson and Childs made the defamatory statements about her. (Compl. ¶¶ 60, 65). Plaintiff has also pled to whom the statements were published:

62. These statements and others were made to persons within and outside of the School District in the absence of a need to know basis. The defamatory statements were published to, including but not limited to, the ***Superintendent of Marlboro County School District*** and to the ***News & Reporter***.

(Compl. ¶ 62). Plaintiff set forth with specificity what the defamatory statements concerned:

60. The Plaintiff has been falsely accused of ***willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job*** due to the same. The Defendants further ***accuse the Plaintiff of violations of state law*** by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the ***Plaintiff violates her contract and her actions interfere with her job with Chester County School District*** and that ***she fraudulently was a partner or owner of a business to promote these outside activities***.

61. The allegations and insinuations that the ***Plaintiff was guilty of misfeasance and/or unlawful “double dipping” and receiving excessive compensation***, and as such was incompetent in the performance of her job and ***engaging in improper, unethical and unlawful conduct*** have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.

(Compl. ¶¶ 60, 61). Finally, Plaintiff pled when the Defendants made such defamatory statements, which is in excess of the specificity required by the Court of Appeals in *Paradis*:

63. Publication from Defendants was made *during 2017 and 2018*.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made *throughout the last several months* and with charges of escalating severity.

(Compl. ¶¶ 63, 64). Though Plaintiff argues that *Paradis* is distinguishable from her case, she has clearly met the requirements discussed by the S.C. Court of Appeals in *Paradis*, even if this Court decides to apply said holding to this case.

C. S.C. Code Ann. § 59-19-10 is inapplicable to Plaintiff's defamation claim.

Defendant argues, “[m]oreover, to the extent Plaintiff's allegations can be discerned, they concern statements that relate to Plaintiff's job performance.” This argument is a misquotation and gross mischaracterization of Plaintiff's Complaint. To say that Plaintiff's Complaint relates to job performance is an understatement of her allegations that is comparative to describing a monsoon as simply a light rain.

Plaintiff has plead:

60. The Plaintiff has been falsely *accused of willfully defrauding the Chester County School District* by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of *violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff* by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that *she fraudulently was a partner or owner of a business* to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was *guilty of misfeasance and/or unlawful “double dipping” and receiving excessive compensation*, and as such was incompetent in the performance of her job and *engaging in improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

(Compl. ¶¶ 60, 61). As evidenced by the above quoted language, the defamatory statements and allegations by Defendant Lawson included in Plaintiff's Complaint go far beyond Plaintiff's job performance as Superintendent of the Chester County School District. The accusations made accuse Plaintiff of unlawful, unethical, and immoral conduct. To argue that such statements simply relate to Plaintiff's job performance is an understatement and mischaracterization of the severity of the Defendant's statements, and Plaintiff therefore objects to said argument.

Further, for reasons unclear to Plaintiff, Defendant Lawson asserts in her Motion that she is a "member of the Board of Trustees for Chester County School District" followed by a citation to S.C. Code Ann. § 59-19-10. This statutory provision reads as follows:

Each school district shall be under the management and control of the board of trustees provided for in this article, subject to the supervision and orders of the county board of education.

S.C. Code Ann. 59-19-10 is a general provision found in the School Trustees statute. S.C. Code Ann. § 59-1-10, *et seq.* As stated above, Plaintiff is unclear as to why Defendant includes a citation to the above quoted statute in her Motion as no further explanation is given by Defendant for such citation. Plaintiff is not disputing the fact that Defendant Lawson is on the Board of Trustees for Chester County. (Compl. ¶¶ 2, 7). Nothing in this general provision suggests that it pertains to Plaintiff's defamation claim, and it clearly does not give Defendant Lawson carte blanche discretion to defame Plaintiff by accusing her of, among other things, illegal and unethical activity. Therefore, S.C. Code Ann. § 59-19-10 is inapplicable to Plaintiff's claims against Defendant Lawson.

II. Plaintiff has sufficiently pled her civil conspiracy claim.

A properly pled civil conspiracy claim asserts three elements: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E. 2d 91, 95 (Ct. App. 1989). To establish the first two

elements, a plaintiff needs to allege “additional acts in furtherance of the conspiracy.” *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). The third element, special damages, must be satisfied to prevent a double recovery. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); *see also, Anthony v. Ward*, 336 Fed. Appx. 311, 318, C.A.4 (S.C.) (2009) (interpreting South Carolina civil conspiracy law and recognizing: “The case law makes clear that the concern is with the plaintiff receiving a double recovery.”). Therefore, to establish special damages, “the damages alleged must go beyond the damages alleged in the other causes of action.” *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (citing *Vaught*, at 209, 387 S.E.2d 95).

A. Acts in Furtherance of the Conspiracy

To establish the first two elements of a claim of civil conspiracy, a plaintiff needs to allege “additional acts in furtherance of the conspiracy.” *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). Defendant Lawson argues that Plaintiff has failed to present any such acts that Defendant Lawson took in furtherance of the conspiracy to have Plaintiff removed from her position as Superintendent and to have Defendant Childs reinstated as counsel for the District. However, Plaintiff has pled such acts, including, but not limited to, the following:

30. ***Lawson has and continues to interfere with the Plaintiff's duties as Superintendent*** by constantly bypassing the chain of supervision, directly contacting her subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and all without the Plaintiff's knowledge or permission.

33. The Plaintiff is informed and believes that ***Lawson from time to time met with others, including public officials of Chester County, without the consent of School Board members and without them present, to plan and conspire to remove the Plaintiff*** from her position as Superintendent in large measure because she did not support bringing back Childs and his law firm to engage in legal work and receive compensation from the district.

35. Upon information and belief, *Lawson was meeting planning and conspiring with Childs to look for ways to remove the Plaintiff* from her position and to put in her position someone they could better manipulate.

45. Upon information and belief, Childs was made aware of the Plaintiff's consultation and, *together with the assistance of Lawson, made an exhaustive effort to find out all of the school districts who had been consulted by the Plaintiff during her tenure with Chester County School District*, as well as the amount of compensation paid to her.

47. No action was authorized by the Board, yet *a special Board meeting was called by Lawson for June 16, 2018, with the knowledge and approval of Childs, about which the Plaintiff was not notified, which was illegal.*

(Compl. ¶¶ 30, 33, 35, 45, 47). Such acts were taken by the Defendant in furtherance of the conspiracy to have Plaintiff removed from employment as Superintendent of the Chester County School District.

B. Special Damages

As stated above, the third element of a civil conspiracy requires that the conspiracy caused plaintiff special damages. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). To establish special damages, "the damages alleged must go beyond the damages alleged in the other causes of action." *Hackworth v. Greywood at Hammett, L.L.C.*, 358 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009) (citing *Vaught*, at 209, 387 S.E.2d 95)). Plaintiff has pled damages for her civil conspiracy cause of action that are separate and distinct from the damages of her defamation claim. The damages pled under the defamation cause of action are as follows:

68. As a direct and proximate result of the defamatory conduct described herein, the Plaintiff has been embarrassed, humiliated, and has *sustained mental anguish, reputational loss, diminished future earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering*, and she is entitled to an award of actual damages against the Defendants as well as punitive damages. Where permitted the Plaintiff is entitled to pre-judgment interest on the above damages.

(Compl. ¶ 68). Plaintiff pled different damages under her civil conspiracy claim, including, but not limited to, the following:

75. As a direct and proximate result of the wrongful civil conspiracy referred to herein, the Plaintiff has been *ostracized and blacklisted in her field and profession* and has incurred the *costs and fees of prosecuting this action*, has *suffered loss of sleep, loss of companionship*, and severe mental anguish as a result of the same.

76. Upon information and belief, the *Plaintiff's ability to obtain supplemental income through her consulting work with other school districts, including but not limited to Marlboro County School District, has been diminished* because of the Defendants' conspiracy. The contact of the Defendants was willful, and wanton and Plaintiff is entitled to punitive damages for the same. Plaintiff is also entitled to pre-judgment interest where recoverable on the above listed damages.

(Compl. ¶¶ 75,76). Plaintiff has alleged damages that are separate from the damages alleged in her defamation cause of action, most notably her loss of sleep, loss of companionship, and the loss of supplemental income she received from performing outside consulting work for other counties. Plaintiff has shown special damages and has satisfied the final element of a civil conspiracy claim.

Based on the foregoing, Plaintiff has properly pled a claim for civil conspiracy against the Defendant Lawson, including the pleading of special damages to preclude a double recovery, and Defendant's motion must be denied.

C. *McMillan v. Oconee Mem'l Hosp., Inc.* is inapplicable.

In one conclusory sentence embedded within her Motion, Defendant Lawson suggests that the South Carolina Supreme Court case of *McMillan v. Oconee Mem'l Hosp., Inc.* prevents Plaintiff from bringing a civil conspiracy action against her. Plaintiff initially notes that in *McMillan* the S.C. Supreme Court was reviewing the trial court's ruling on a motion for judgment notwithstanding the verdict ("JNOV"), such a JNOV motion will be denied "where either the evidence yields more than one inference or its inference is in doubt." *McMillan v. Oconee Mem'l Hosp., Inc.*, 626 S.E.2d 884, 886, 367 S.C. 559, 562 (2006). Such a standard is more stringent than

the motion to dismiss standard presently before this Court, which requires that a court must consider whether the pleadings, viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the plaintiff, articulate any valid claim for relief and if so finding the Rule 12(b)(6) motion to dismiss should be denied. *Baird v. Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999).

Further, in *McMillan*, the S.C. Supreme Court heard a case involving multiple claims, including civil conspiracy, brought by a doctor who lost a contract bid when his former employer, Oconee Memorial Hospital, contracted with a different anesthesiology service provider. *Id.*, 626 S.E.2d at 885-86. After losing the contract bid and his privileges with the hospital, the doctor filed suit against the hospital and the competitor who won the bid. *Id.*, 626 S.E.2d at 886. On review of these facts, the S.C. Supreme Court held, “[a] civil conspiracy cannot be found to exist when the acts alleged are those of employees or directors, in their official capacity, *conspiring with the corporation.*” *Id.* at 887(emphasis added). Based on this holding, Plaintiff is not prevented from bringing her civil conspiracy claim against Defendant Lawson. Plaintiff is not arguing that Defendant Lawson conspired with a corporation. Plaintiff is arguing that Defendant conspired with an individual, specifically Defendant Childs.

Unlike the doctor in *McMillan*, Plaintiff has only named individuals as fellow conspirators and has not named entities such as the School District as a conspirator. Nothing in Plaintiff’s Complaint suggests that Defendant Lawson was conspiring with the District, and instead the Complaint specifically states that Defendant Lawson was meeting, scheming, planning and conspiring with Defendant Childs. (Compl. ¶ 70). Further, it is clear from the facts pled in the Complaint that Defendant Lawson’s actions were outside the normal duties she was prescribed to perform as a Board member. Specifically, it cannot be argued that Lawson’s actions, including her

interference with Plaintiff's contracts, her communications to harm Plaintiff's employment, and her unauthorized calling of meetings with other Board members and with Chester County officials, were in any way within the scope of what she should have been doing as a Chester County School District Trustee. Therefore, Plaintiff's civil conspiracy claim is properly brought against Defendant Lawson, and Defendant Lawson's Motion should be denied.

D. Lawson's position as a School Board member does not allow her to engage in a civil conspiracy.

In a footnote on page four of her Motion, Defendant Lawson argues, "[n]one of these actions have taken place, although Lawson is perfectly within her rights as a Board Member to question Plaintiff's performance and compensation." Again, Defendant is mischaracterizing and understating Plaintiff's cause of action. Defendant suggests that Plaintiff's civil conspiracy claim rests on Lawson's questioning of Plaintiff's "performance and compensation." However, such a suggestion ignores the well-pled facts of Plaintiff's Complaint relating to her civil conspiracy claim. Plaintiff has set forth at length in section II.A. above the acts that Lawson has taken in furtherance of the conspiracy and her agenda to have Plaintiff removed as Superintendent. To briefly summarize those facts here, Defendant Lawson has interfered with and undermined Plaintiff in her position as Superintendent, has conducted Board meetings and meetings with other County officials without the authorization of the School Board in clear violation of its policy and conducted an extensive and unnecessary search into Plaintiff's personal and financial matters and in so doing seeking out a way to ruin Plaintiff's career. None of said acts are in any way related to Defendant's "right" to question Plaintiff's performance and compensation with the Chester County School District. Defendant Lawson's position on the Board does not allow her to engage in the civil conspiracy, as sufficiently pled by Plaintiff.

CONCLUSION

For these reasons and those to be argued at the hearing, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss and direct this matter to proceed to trial.

Respectfully submitted,

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September 18, 2018
Columbia, South Carolina

1 STATE OF SOUTH CAROLINA

2 COURT OF COMMON PLEAS

3 COUNTY OF CHESTER

4 2018-GS-12-00334

5 Angela H. Bain

6 Vs.

7 Kenneth L. Childs, Denise C. Lawson

8)

9 Chester, South Carolina

10 September 26, 2018

11 Before the Honorable Brian M. Gibbons

12 APPEARANCES

13 For the Plaintiff: Shannon Polvi

14 For the Defendants: Eugene Matthews, Michael Montgomery

15

16 Reported by: Michael C. Watkins

17 Official Court Reporter

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1 THE COURT: Case number 18-CP-12-334, it's Bain versus
2 Childs and Lawson. We are before the Court today for a
3 couple of motion hearings. Thank y'all for accommodating
4 the Court's schedule this week, and we will go ahead and get
5 started. I guess we'll just go in the order in which these
6 motions were filed and so I will hear -- unless y'all want
7 to do it differently. Do y'all wish to go forward?

8 MR. MATTHEWS: Thank you, Your Honor. I'm Gene
9 Matthews from Columbia and it's my pleasure to represent
10 Ms. Lawson. The lawsuit was filed on two causes of action;
11 one defamation and the other a civil conspiracy claim. Both
12 defendants have moved to dismiss, and we're -- since we
13 filed first we're happy to speak first, although the
14 arguments, I think, you'll find my colleague's may be more
15 eloquent, I think they're legally similar.

16 THE COURT: Well, why don't we do it this way then,
17 you'll go, then you go, and then Ms. Polvi, I'll let you
18 present your client's position and then we'll go that way,
19 okay? All right, go ahead.

20 MR. MATTHEWS: And, Your Honor, if I may approach
21 first?

22 THE COURT: Yes.

23 MR. MATTHEWS: I just hand up a case recently passed by
24 the court of appeals. The Paradis case is, we believe, very
25 similar to the one before you today. The allegations made

1 by Ms. Bain in our view are conclusory, they don't really
2 tell us what it is in terms of a defamation claim. She
3 doesn't let us know exactly what statements that were made
4 that she believes were defamatory. We believe that her
5 conclusions -- in her motion she pointed to those and in our
6 motion we pointed them out as well, paragraphs 46 in her
7 complaint, and then 60 to 64. The reason we believe that in
8 Paradis these allegations are insufficient is because -- and
9 I will quote from the Paradis case -- she never indicates
10 who made the defamatory statements about her, what they said
11 or to whom the statements were published. Her response
12 indicates, "Well, we said that you made statements that we
13 violated state law," or, "We falsely alleged that her
14 contract with the Chester County School District was
15 breached by the plaintiff by earning compensation from other
16 districts." That's in paragraph 60 of her complaint.
17 "Defendants allege that plaintiff violates her contract and
18 her actions and interfered with her job at the Chester
19 County School District that she fraudulently was a partner
20 or owner of a business promoting these other activities."
21 Well, we have no clue as to when these statements may have
22 been made other than her stating they're within the statute
23 of limitations in 2017 or 2018. That gives us no clue as to
24 is she talking about statements that were allegedly made at
25 a board meeting in closed session, in open session? We have

1 no clue about to whom these statements were made, were they
2 made between board meetings.

3 THE COURT: All right. Well, let me cut to the chase
4 then because I know Ms. Polvi's response to that is going to
5 be, "Well, that's what discovery is for," or, "That's what a
6 motion to amend pleadings is for. That can be remedied
7 rather than dismissal." What's your response to that?

8 MR. MATTHEWS: Well, I have two response. One is
9 there's no motion to amend before you, which would be
10 important. The second would be, if that's your inclination
11 then dismiss it without prejudice with instructions to her
12 to tell us exactly what it is we did to defame her. It's
13 unfair to smear a sitting board member to say, "You've done
14 all of these evil things," and not to have done your
15 homework, then tell us exactly what was done and when it was
16 done. To say it's 2017 and 2018 connotes that she doesn't
17 know what she's talking about, that she either is rehashing
18 or repeating rumors that she heard, and whatever else that
19 is that's not defamation, certainly not to haul in Ms.
20 Lawson into court to embarrass her. That's nothing that
21 this Court should be involved with, and Paradis is the
22 perfect example. Again, if you take these allegations on
23 their face, what she's essentially saying is, "Hey, Ms.
24 Lawson, board member, you were questioning my performance."
25 Well, that's exactly what she was elected to do. That's not

1 defamation, that's Ms. Lawson doing her job, and whatever
2 else that is, that's not defamation. And the statute that
3 we cite -- and again, Paradis has an interesting point on
4 this. One of the things in Paradis was a claim brought
5 by -- where they accuse -- they say it's defamatory in that
6 case, and I'm quoting from I think page three or astrict
7 three -- in essence Paradis asserts they acted improperly by
8 placing her on the safety adept evaluation was a self
9 defamation that requiring other actions by school employees.
10 And the court notes that well, you know, you're saying you
11 are defaming for something you have not only a right but
12 you're kind of directed to do as part of your job. Moreover
13 it's discretionary, the State Tort Claims Act applies under
14 15-78-67 subsection five. If this is something -- if
15 Ms. Lawson is charged to oversee, you know, activities and
16 operations of the school district, which is exactly what
17 she's charged to do, then she has the discretion to do so
18 and at that point the State Tort Claims Act kicks in and
19 she's immune.

20 THE COURT: On that note, hang on a second. Ms. Polvi,
21 I want you to respond to this when it comes your turn. I
22 had a situation in Lancaster, and your firm is familiar with
23 it, I think it's on appeal right now from an issue I decided
24 against the Lancaster County, the county council members
25 involving the same argument that Mr. Matthews is making now,

1 i.e. the immunity -- alleged immunity for elected
2 representatives acting in the course and the scope of their
3 official capacity criticizing a governmental employee, okay?
4 So I'm just giving you -- I want to hear something on that
5 when I come to it.

6 MS. POLVI: Yes, sir.

7 THE COURT: Go ahead, sorry.

8 MR. MATTHEWS: Thank you, Your Honor. If I may, unless
9 you have any questions, move on to the civil conspiracy.

10 THE COURT: Yes sir. No, I am fine with that. And I
11 have read your -- I'm not that great at the e-filing stuff
12 yet --

13 MR. MATTHEWS: I understand, Your Honor.

14 THE COURT: So I had my law clerk print out all of the
15 stuff that I think I needed, so I have reviewed everything
16 in writing. So go ahead.

17 MR. MATTHEWS: Well, if I could Your Honor, let's talk
18 for a moment about the civil conspiracy claim. We think
19 there are a number of defects with that claim. One of the
20 things that is of interest to us is how the claim is --
21 number one, the claims are familiar to us, we see them
22 often, they're somewhat formulaic. One of the reasons it
23 catches our eye that it's representative of the defamation
24 claim is that she claims in paragraph 68 she is
25 sustaining -- in her defamation clause she says she

1 sustained mental anguish, reputational loss, diminished
2 future earning capacity and lost reputation as well as
3 embarrassment, humiliation and mental suffering. Well, when
4 you look at her civil conspiracy claim she claims pretty
5 much the same things, and the notes in Paradis I think are
6 instructive here, and I'll read from the last page of it.
7 Alleged damages being black-listed and ostracized, are
8 reputation damages, precisely -- which are precisely what
9 you would expect from defamatory claims. When you look at
10 what she says that she has suffered again, plaintiff's
11 ability to obtain supplemental income through other
12 consulting work -- and this is upon information I believe
13 she alleges -- the plaintiff's ability to obtain
14 supplemental income through her consulting work with other
15 school districts including but not limited to the Marlboro
16 County School District has been diminished. Well, that's
17 repetitive of her defamatory damages. You've injured my
18 reputation and done what? Diminished my earning capacity.
19 Well, the courts traditionally and historically are
20 rightfully skeptical of civil conspiracy claims. They say
21 you have to allege something other than -- you can't simply
22 repeat the types of damages, or even the types of acts that
23 you have alleged in your defamation claim. Civil conspiracy
24 is not a me too claim, you have to have something different
25 or we will dismiss it. That's the law of the state. Now,

1 even when you come to other acts, our concerns are in some
2 cases similar to the defamatory concerns. When you look at
3 what she alleges we can't really tell other than formulaic
4 discussions and allegations about what we allegedly did.
5 And we allegedly met, schemed, planned and conspired with
6 one another and with "unnamed others" to terminate her
7 contract with Chester County School District, remove her
8 from her position as superintendent, prevent plaintiff from
9 any future employment with Chester County School District or
10 any other school district by what? Defaming her. Well, you
11 just warmed over your defamation claim and dressed it up as
12 a civil conspiracy claim and the law doesn't permit that.
13 And that's from paragraph 70 of her complaint. Now, as we
14 said in our footnote none of these actions have been taken,
15 although take her allegation as true, Ms. Lawson has a right
16 to do exactly that if it's within her discretion as the
17 school board to say, "Look, I have concerns about your
18 performance and the minute I voice those concerns I'm not
19 guilty of defamation, and if I talk to someone about them
20 I'm not guilty of a civil conspiracy." If that's so then we
21 can't manage anything ever, and it's not so and South
22 Carolina law prevents that not to be so. Now, if you look
23 again at her complaint, I think it is paragraph 34, she
24 alleges that for 2018 Lawson began to raise questions about
25 plaintiff's contract and amendments and suggests to others

1 that the plaintiff was taking advantage of the district
2 charging more money and benefits than probably should have
3 been receiving. What else do you expect her to do if she
4 has questions about it? She has every right as a board
5 member and it would be neglectful of her duty if she didn't.
6 That's what she was elected to do. Ms. Bain might not like
7 it, she might not like to be supervised but she is. She
8 answers to a board, she has to answer to the board. And to
9 say that anytime Ms. Lawson does something that she doesn't
10 like or questions something she doesn't like she's guilty of
11 defamation and a civil conspiracy if she's so unfortunate as
12 to talk to someone else and say, "Hey, do you think I'm
13 right here?" That's just lunacy and it's not the law and
14 that's why we've moved to dismiss both claims. I'm ready to
15 stand to any questions you may have.

16 THE COURT: All right. I may come back to you. Thank
17 you, Mr. Matthews. Mr. Montgomery?

18 MR. MONTGOMERY: Your Honor, may it please the Court?
19 I represent Ken Childs who is an attorney, been licensed and
20 practiced law in South Carolina for over 40 years now. Just
21 from an order standpoint I will address our motion to
22 dismiss, and then if we go beyond that I think it would be
23 best to deal with a motion to strike separately, so I'm just
24 going to argue on the motion to dismiss.

25 THE COURT: Yes, sir.

1 MR. MONTGOMERY: One of the fundamental issues here is
2 that -- and you see it in two paragraphs in the plaintiff's
3 complaint, they recognize one of the big problems they have
4 both with their conspiracy claim and with their defamation
5 claim and that is the privilege. Mr. Childs has represented
6 the board, was consulted as an attorney in this instance, so
7 you have an attorney/client privilege. So all of these
8 communications that they refer to between Ms. Lawson and
9 Mr. Childs are privileged communications, and that privilege
10 has to be overcome and there's been no pleading to overcome
11 that privilege. Now, I would suggest to the Court --

12 THE COURT: Let me ask you this because I know -- I'm
13 sorry to interrupt but I know -- that was one of the initial
14 allegations in the complaint which I read in preparation for
15 today's hearing was that Mr. Childs was acting outside of
16 the course and scope of his attorney/client privilege
17 because he was not the actual contracted attorney for the
18 school board, i.e. Ms. Lawson as the chairperson of the
19 school board, and because of that all of this stuff
20 happened. Go ahead.

21 MR. MONTGOMERY: Well -- and let me address two things
22 here. First I would suggest that the plaintiff's own
23 pleading contradicts that. If you note in paragraph 71 of
24 the complaint they have pled that there's a crime fraud
25 exception to the attorney/client privilege. Well first, you

1 can't have a crime fraud exception if you don't acknowledge
2 that there's attorney/client privilege. And secondly, as
3 the Court is aware, in order to establish a crime fraud
4 exception you have to allege specific facts and demonstrate
5 that there is a crime taking place or that fraud is taking
6 place, neither of which is the case. The other, you know,
7 claim you have is that this outside the scope of the
8 attorney/client privilege in paragraph 57, but there's no
9 factual basis for that, that's merely a conclusory
10 allegation, and it is not pled with facts that demonstrate
11 anything other -- and I could go into the complaint
12 otherwise -- Ms. Bain says that Mr. Childs is not the
13 attorney because she didn't want him to be, which is exactly
14 the opposite of what else she pleads which is only the board
15 can make that decision. So I would suggest to the Court
16 that her pleading there is insufficient, but most
17 importantly the issue is what other consultations -- and if
18 I may approach, Your Honor.

19 THE COURT: Yes.

20 MR. MONTGOMERY: I want to hand you a copy of the
21 contract that's referenced in the complaint but that is
22 not -- it's not attached as an exhibit. I would note to the
23 Court obviously that the rule of law is that if you
24 reference a document in the complaint it's incorporated in
25 the complaint, so for purposes of 12B6 or 12C would be

1 there. But the most important thing here, I think, that
2 goes to the impropriety of this entire action that we're
3 subject to here is is the -- there's a presumption implied
4 in this complaint that the superintendent has this absolute
5 right to do these things that are being questioned. Now,
6 obviously that would be a contract question, it's not a
7 question of defamation or conspiracy. But I would call the
8 Court's attention to page three of the complaint, which --
9 or excuse me, page three of the contract which addresses
10 this right she claims she has to do all of this consulting,
11 and suggests to the Court that it is not nearly so clear as
12 they would have the Court believe. It says, "The
13 superintendent may undertake various professional duties,
14 obligations including writing, lecturing and speaking
15 engagements so long as these activities do not interfere
16 with her duties as superintendent and have been approved by
17 the board chair." Well, obviously Ms. Lawson is the board
18 chair so she has some discretion as to whether she approves
19 these things or not. And she certainly has a right to
20 consult with counsel as to whether she should, and she
21 certainly has a right to inquire about what's been done and
22 to try to obtain information, all of these things that are
23 alleged to be the elements of the conspiracy. So I would
24 suggest to the Court that that privilege exists, that
25 there's no pleading here other than again, a conclusory

1 statement. There's no fact pleading under Rule 8 to say why
2 there is no attorney/client relationship. Everything is
3 conclusory and it's based on, you know, hearsay and
4 allegations that is not factually pled. Moreover if we look
5 at the complaint we go back -- and I'm going to join into
6 Mr. Matthews' arguments rather than try to restate those
7 because I think their ethicacy is applicable to both
8 parties. But I think that first of all we have the
9 privilege relationship which hasn't been dealt with. Second
10 of all there's a public figure here and that's where our
11 case is even stronger than the Paradis case, because in the
12 Paradis case you were dealing with a teacher, you were not
13 dealing with a superintendent who is a public figure, who is
14 the public figure hired by the board to represent the
15 district. And so she's not only got to allege that this --
16 allege that this defamation occurred, which she hasn't
17 alleged with any specificity, she hasn't put anyone on
18 notice, she hasn't met the heightened requirements that you
19 have in pleading the tort of defamation. Moreover she has
20 to plead the actual malice standard, and she has to show not
21 that these allegations were false, the standard goes beyond
22 that, the standard goes not when you're dealing with a
23 public figure that they're merely false, not that you had
24 reason to believe they're false, but that the person who
25 transmitted that allegation knew as a fact that the

1 statement that they were making was false.

2 THE COURT: Can the trier of fact infer malice based
3 upon the allegations of the complaint?

4 MR. MONTGOMERY: It's a question of law, not a question
5 of fact, Your Honor. So I think the Court can make that
6 determination, but I don't know how you infer it without a
7 recitation of fact, okay? You have to say they knew this
8 was false and here is how they knew this was false, and
9 there's no such allegation in this complaint from which you
10 can infer that. The allegations in this complaint don't
11 ever say my client made a statement to anyone other than
12 Ms. Lawson. They conclude or say that he talked to other
13 people, but they don't say who he talked to, what he said,
14 when he said it. They're all just conclusory sort of what I
15 would say whispered rumored kind of things that you would
16 say if you were trying to discredit someone, but they're not
17 well-pled facts that establish a cause of action,
18 particularly again when you deal with the heightened
19 requirements of pleading. You know, we're not dealing with
20 notice pleadings, and the courts have said that notice
21 pleading doesn't work when you have to plead defamation.
22 It's like fraud, you have to plead it with specify. You
23 have to give facts that lead to that cause. You can't
24 simply say -- you can't infer it, you can't do it upon
25 information and belief, you have to show those facts and

1 they're not pled here. And after beating that horse, the
2 next thing I would go to conspiracy, and again, I will join
3 Mr. Matthews in his arguments. But I would point out to the
4 Court that both the damages and the claim are nothing but a
5 recitation of the defamation claim. From a conspiracy
6 standpoint she alleges that Mr. Childs and Ms. Lawson met
7 for the purpose of conspiring to defame her, so that was
8 their conspiracy. And her claim of special damages clearly
9 falls, because not only do the damages emanate identically
10 from the defamation, but what the plaintiff would have the
11 Court do is say, "Well, here is what I can do. I can decide
12 that part of my damages that would naturally come from one
13 cause of action are my special damages for conspiracy and
14 that's what I'm doing to sustain my conspiracy." Other than
15 her claim that she has attorney fees in bringing this
16 action, she has no claim of damages that she can point out
17 in any way for the conspiracy. And I would suggest to the
18 Court that I don't think it's the policy or the law that I
19 can cause myself to have damages by filing a lawsuit and
20 creating a cause of action or create special damages in that
21 way. So the simple fact is, if you look at every damage it
22 all emanates from the tort of defamation, again, if you have
23 that. There is no separate action, there is no separate
24 damage that she can say the only reason this damage occurred
25 is because of the conspiracy, and that's the legal test.

1 It's got to be the only reason this damage occurred is but
2 for the conspiracy. And if you look at her response and
3 what she filed with the Court, listen to the verbatim
4 damages that she cited in paragraph 74 -- or 75 and 76. "As
5 a direct and proximate result of the wrongful civil
6 conspiracy referred to in the complaint, plaintiff has been
7 ostracized and black-listed in her field and profession, has
8 incurred the cost of fees in prosecuting this action, has
9 suffered loss of sleep, loss of companionship and severe
10 mental anguish." Okay. "The plaintiff's ability to take
11 supplemental income" -- and this is upon information and
12 belief -- "through her consulting work with other districts
13 including but limited to Marlboro County has been diminished
14 because of defendants' conspiracy." Well the interesting
15 thing about that, Judge, if you look at that is her
16 complaint with regard to defamation is that they defamed her
17 to Marlboro County. So how can that have any causal
18 relationship to this conspiracy? Likewise, if you look at
19 each of these other claims that she's listed as claims for
20 damages in her civil conspiracy action, every one of them
21 emanates from this alleged defamation, okay? So just in
22 conclusion, Your Honor, they haven't met the standard burden
23 for pleading facts, the heightened standard that's required
24 for defamation, everything they've pled is conclusory. It's
25 suggestive, it does not approach the standard for saying,

1 and I think it's really relevant when you look at
2 defamation, who, what, when, where and how, your traditional
3 defamation case is that someone made a false statement and
4 they knew when they made the false statement but you say
5 they said this, here is who they said it to, here is when
6 they said it. None of that is present here. And I would
7 suggest to the Court none of it is present because it didn't
8 occur. But we don't get to those facts yet, we only get to
9 what -- believing what they said is true, and believing what
10 they said is true there's nothing -- it's sort of like
11 alleging that it's daylight, I mean, yeah, you can allege
12 that but what does that prove? And so they don't meet the
13 standard there again. In civil conspiracy they have to show
14 that these people acted for the purpose of injuring her, and
15 all they've said is they had meetings. Well, you have, I
16 think, by virtue of their claim of the fraud crime exception
17 you have an attorney/client relationship, so it's
18 appropriate for attorneys and clients to meet. And if you
19 take the logical step that they're trying to get the Court
20 to take here, every attorney meeting with his client or her
21 client is engaged in a conspiracy with that person if
22 they're looking. And again, you have to have a wrongful
23 purpose. And I would ask you -- I would suggest to the
24 Court that it is an important public interest in how a
25 school district is run, and it is an important public

1 purpose for people to meet to evaluate that, to critique it,
2 to make determinations as to whether things are being done
3 properly, and questioning those things fulfills an important
4 public purpose. So you also have this public purpose
5 exception to come here. These people -- you know, to look
6 at the public purpose, is the school district getting value?
7 Is the superintendent abiding by her contract? Those are
8 important questions. And, you know, there's this argument
9 in these pleadings that the board chair somehow has no
10 authority to talk to anyone, but I would suggest to the
11 Court that the contract belies that argument. The board
12 chair clearly has the ability to seek counsel as to, for
13 example, whether she should approve the activities that the
14 superintendent is requesting, whether the superintendent has
15 made a valid request, is the superintendent fulfilling her
16 obligation to devote her time, skill, labor and attention to
17 her employment. And those are the questions we're dealing
18 with here, not this sort of malice "They're trying to get
19 rid of me." Well, A, if they were they have a right to do
20 that. They can determine that she's breached her contract
21 for cause or they can attempt to deal with her contract in
22 other ways. All of that is a valid purpose and you can't
23 conspire to do something legally unless you have some
24 indication you're doing it only to harm the person, and
25 there's been no allegation of that. So we have the damages

1 issue and the conspiracy, we have -- there's no evidence of
2 conspiracy, we have the privilege and we have the public
3 figure, which are two additional things I would add to
4 Mr. Matthews' argument that haven't been pled around and
5 that must be pled around in order to state a cause upon
6 which relief can be granted. I would also note to the Court
7 that I did file a 12C motion, and the Court certainly has
8 the opportunity to find that these pleadings based on those
9 legal concepts as a matter of law the plaintiff can obtain
10 relief and therefore the claim should be dismissed. And I
11 will answer any questions the Court has.

12 THE COURT: Thank you. I'm going to come back to y'all
13 after I hear from Ms. Polvi. Appreciate it. Thank you for
14 your patience. Yes, ma'am, I'll be glad to hear from you.

15 MS. POLVI: Thank you, Your Honor. First I would like
16 to address kind of -- let's talk about the parties in this
17 case. Board Chairman, Attorney Ken Childs, and Dr. Bain,
18 Superintendent. The school district is not a party in this
19 case. And you hear frequently from both of my peers,
20 they're talking about they, and decision makers and
21 essentially them performance evaluating Dr. Bain. The
22 context is entirely different in terms of the allegations we
23 have here. When we look at the attachments to the
24 pleadings, exhibit A, exhibit B and exhibit C, each speak to
25 the legal policy regulations that allow and give power to

1 the body of the school board. So in essence they as a total
2 body have to make decisions with regard to Dr. Bain serving
3 as superintendent, her performance, all of that. What's
4 different here is that Ms. Lawson, the board chair, was not
5 acting as a body, she's unilaterally acting of her own
6 personal -- as we pled in the complaint, her own personal
7 motives to no longer have Dr. Bain be the superintendent of
8 the school district.

9 THE COURT: But doesn't the contract that they
10 referenced give the board chair the right to do that?

11 MS. POLVI: Your Honor, and I would tie that directly
12 to exhibit D where the board chair who established this
13 contract with Dr. Bain specifically says that the contract
14 allows her to have work outside of the district that doesn't
15 interfere. And his statement clearly puts especially
16 showing that Ms. Lawson in her actions knowingly as a board
17 chairman -- or not board chairman, but a chair person with
18 regard to the district previously, she was aware that Dr.
19 Bain was allowed to perform contract duties and to be able
20 to work outside of just solely Chester County School
21 District. So when we look in the context of what the
22 allegations were, the allegations accused Dr. Bain of
23 wrongfully performing work outside of the district,
24 wrongfully earning money, defrauding the districts, all of
25 these are far beyond any scope that the law or the

1 district's own policies give to a board chair. And in
2 regard with Mr. Childs, we've alleged and we have evidence
3 to show through discovery that Mr. Childs was not the
4 attorney for Ms. Lawson or for the district during this time
5 frame. And as we've pled in the complaint, his actions are
6 motivated by an intent to actually become the attorney again
7 for the district when he was not serving in that capacity.

8 THE COURT: So your belief is that shows the inference
9 of malice, because allegedly as -- again, I'm not making any
10 findings when I say this, allegedly based upon the
11 allegations of the pleadings that in and of itself would be
12 evidence, or circumstantial evidence of malice where the
13 trier of fact could infer because he was acting outside of
14 the course and scope of any contractual relationship with
15 the county.

16 MS. POLVI: Exactly, Your Honor. And with regard to
17 the malice element, it is included within the pleadings
18 itself. It is referenced in the paragraph and the
19 paragraphs that precede it, the factual paragraphs give or
20 take one through 60, support the two causes of action that
21 have been pled, as well as the two exhibits that are
22 supporting. If I may, Your Honor, transition to the Paradis
23 case that both my peers have referenced in terms of their
24 arguments supporting why this case should be dismissed. And
25 if I may approach, Your Honor, I have the actual Judge

1 Nicholson order that was prior to the court of appeals
2 decision.

3 THE COURT: Okay.

4 MS. POLVI: I would like to draw the Court's attention
5 to page five, Your Honor. If you'll look at the paragraphs
6 it states -- it starts with, however, it talks about
7 absolute immunity and a statutory duty of all school
8 districts in South Carolina for a teacher to be evaluated,
9 and it cites back to the statute 59-26-40. And it's key to
10 consider the context of Paradis because it's not applicable
11 here, is that the Court, Judge Nicholson, and then the
12 appellate court, what they consider is that a safety
13 evaluation of a teacher in the Paradis case. Specifically
14 is statutorily granted for a school district to evaluate, is
15 that school districts have teachers of revolving contracts
16 and that they need to be continuously evaluated on that
17 basis. It talked about essentially that there is a scope of
18 duty within that statute. Well, only in Ms. Lawson's motion
19 filed by Mr. Matthews is there a reference to any type of
20 statutory duty, Your Honor. And as I describe in more depth
21 in the memo is that that statute gives a board chair and the
22 board essentially responsibilities to evaluate a
23 superintendent, but nothing in that statute gives any type
24 of statutory protection to an individual for defaming
25 someone or intentionally interfering with her ability to

1 work with Marlboro County School District and other school
2 districts. In essence she goes far beyond any type of duty
3 that could have been placed in the first place, much less
4 it's not the body as a total school district who voted to
5 take these actions. You'll note that Dr. Bain is the
6 current superintendent, she has continued to be in that
7 position continuously since she was hired into it, and so
8 any type of evaluation process would need to occur formerly
9 with the entire board as a body determining her performance
10 and any type of contractual concerns. Ms. Lawson and Mr.
11 Childs unilaterally seeking to find out every other district
12 type of work that Dr. Bain performed and then using that to
13 try to argue that somehow she's breached a contract, somehow
14 she is defrauding Chester County School District, somehow
15 doing work that is not allowed, which explicitly is within
16 her contract, and as Mr. Boyd noted in the attachment to our
17 pleadings she was authorized to do. So any type of duty or
18 scope that was present is not in place when these actions
19 were taken. With regard to the pleading standards, Your
20 Honor, I would cite back for -- in terms of the defamation
21 when we look at kind of standard cases that talk about it,
22 McBride, Erickson, other types of cases that hit the
23 elements of what defamation requires in South Carolina,
24 we've hit those, Your Honor, is that we establish the false
25 statements. We establish that they were public outside of

1 any privilege. We establish to whom they were made to, at
2 least the superintendent of the Marlboro County School
3 District, and to the News and Reporter time frame 2017 and
4 2018.

5 THE COURT: They say you're not specific enough.
6 What's your response to that?

7 MS. POLVI: Yes, Your Honor. And I think first and
8 foremost it's important to note that would have to be
9 developed through discovery as to what publication and when
10 it occurred. Because my client was not present when Ms.
11 Lawson and Mr. Childs made such defamatory statements, so I
12 would need the opportunity to depose both of them and
13 further address the exact essential date of it. But
14 unequivocally we have a basis to determine that that
15 publication had occurred because of documentation and other
16 things that have validated a publication of defamatory
17 statements that she breached a contract, that she's
18 defrauding the school district, that somehow she's
19 performing duties she was not authorized to do, et cetera.

20 THE COURT: All right.

21 MS. POLVI: And one thing, Your Honor, I hadn't yet
22 addressed with regard to both the defamation and civil
23 conspiracy causes of actions relate to damages.

24 THE COURT: Well, let's go back while we're on this,
25 sorry to interrupt again, I interrupting them, I'm

1 interrupting you. All right. Public figure privilege
2 issue, talk to me about that.

3 MS. POLVI: With public figure, the case law largely
4 shows that a superintendent is a public figure in an acting
5 role, and then in terms that does have a higher level of
6 malice requirement. And we hit that here is that both in
7 terms --

8 THE COURT: Again, these are just allegations, I
9 understand. Go ahead.

10 MS. POLVI: Exactly, Your Honor. Is that in terms of
11 the malice that's required, both Mr. Childs and Ms. Lawson
12 both have a personal malicious motive to say the statements
13 that they made about Dr. Bain, and to try to prevent her
14 from continuing in her current job as well as interfering
15 with her potential jobs with other school districts around
16 the state, so that in terms of the malice level we have pled
17 their personal intent and reasons why that they have those
18 motives in terms of a higher level of malice required for a
19 public figure.

20 THE COURT: Okay. What about privilege?

21 MS. POLVI: With regard to privilege, Your Honor, I
22 think that goes -- if I can draw the Court's attention to
23 exhibit B, which is policy BDG, school attorney, legal
24 services. "The attorney will serve at the pleasure of the
25 board and will be paid for services rendered," that's an

1 exert from there, and that the board ultimately has to make
2 such determinations with regard to what we pled in the
3 complaint is that White and Storey were the actual attorneys
4 of record for the district. Any type of conduct that
5 Mr. Childs was having with Ms. Lawson was not in the scope
6 of a representative capacity, it would have been -- Andrea
7 White essentially was the attorney of record for the board
8 and for any individual who is on the board who is doing, as
9 they argue, any type of duties that relate to the school
10 district.

11 THE COURT: Okay. Go ahead.

12 MS. POLVI: Thank you. And then with regard to the
13 damages, Your Honor, I would say, you know, a plain reading
14 of the paragraphs that relate distinguish several
15 differences. Defamation, the damages paragraph is paragraph
16 68, and then civil conspiracy, it's 75 and 76, just a plain
17 reading of it shows that there's very distinguishable
18 damages, several are different. So I note that their
19 special damages are required under those causes of action
20 and our firm was cognizant of that and is able to
21 distinguish between the damages --

22 THE COURT: Well, I got you, I understand that.
23 Because I think that the paragraph for civil conspiracy
24 notes loss of sleep, loss of -- which is not denoted in
25 defamation, but isn't that just -- but it's all relied upon

1 the previous cause of action for defamation, so it's really
2 not special or different, do you understand? And -- that's
3 the way I'm following the argument, what's your response to
4 that?

5 MS. POLVI: Yes, Your Honor. With regard to
6 distinguishably different is that the defamation essentially
7 is the false statements occurring so they were kind of
8 localized of when my client is being defamed. The civil
9 conspiracy continues in terms of when you look at their
10 efforts, Mr. Childs and Ms. Lawson, their efforts to remove
11 my client from her job, efforts to prevent her from finding
12 alternative employment outside, you know. As we pled her
13 efforts to find out every district that she's ever worked
14 with in terms of any contractual works. Those efforts are
15 separate and apart, and the damages are separate in terms of
16 ultimately the impact will be ongoing. So I think the best
17 way to distinguish it is looking at it in terms of timing.

18 THE COURT: Okay. All right. Anything else?

19 MS. POLVI: With regard to civil conspiracy, Your
20 Honor, I want to address that a little bit further that I
21 have not already covered. With regard to the two arguments
22 by Ms. Lawson and Mr. Child's attorneys, both focus largely
23 on damages being the key in terms of not being pled with
24 requirements. But with regard to any other type of
25 substantive argument as to why they should be dismissed in

1 terms of the civil conspiracy claims against both
2 defendants, it's key to look at the concerted effort, Your
3 Honor, is that the pattern of communicating with one another
4 isn't separate and outside of any type of privilege, any
5 type of authority that either Mr. Childs would have had and
6 did not have from the school board as a body, and that
7 Ms. Lawson did not have as an individual acting outside of
8 the scope of the board as a body, and for personal motives
9 to remove Dr. Bain. I think I've covered most of the
10 things, but I would direct the Court's attention to the
11 memorandums because I feel like I followed more succinctly
12 each of the parties' positions in showing essentially the
13 burdens that are required for a motion to dismiss, and for a
14 motion for judgment on the pleadings as also filed by
15 Mr. Child's attorneys, the burdens just aren't met here.
16 When we look at Twamley (phonetically) and Iqbal
17 (phonetically) and other cases that delineate how all cases
18 in federal and state court what are necessary for the
19 pleadings requirements, we've met those, Your Honor, and
20 taking facially as the pleadings and taken as true do meet
21 each of the elements required for both defamation and civil
22 conspiracy.

23 THE COURT: All right, thank you. Gentlemen, I'll come
24 back to y'all for any reply.

25 MR. MATTHEWS: Thank you, Your Honor. Well, let me --

1 although I don't represent Mr. Childs let me explain why we
2 believe that even if there were communications between Mr.
3 Childs and Ms. Lawson that Ms. Bain took exception to,
4 they're privileged. And let me explain why I think that is.
5 My brother happens to be the principal of Camden High
6 School. Let's say he picks up the phone and calls me and
7 says, "Gene, I've got a legal problem I need your help
8 with." I don't represent Kershaw County School District, I
9 don't represent anybody in Kershaw, but my brother calls me.
10 He is a person seeking legal advice from an attorney even --
11 and I can't charge him a dime because he's my older brother
12 and he'll beat me up, but if he calls me and says, "Gene, I
13 need help, you're an attorney, I need legal advice," that's
14 a privileged conversation from start to finish. So I don't
15 understand at all the grounds that if Ms. Lawson picks up
16 the phone and calls her friend, Ken Childs, who is a
17 licensed attorney in South Carolina for decades, she has a
18 legal question she wants to run by Ken, I don't care whose
19 paying whom, that is a privileged conversation from start to
20 finish and cannot be in this action at all. Now, let's talk
21 about some off the actions here.

22 THE COURT: Well, let me stop you there. What's your
23 reply to that?

24 MS. POLVI: Yes, Your Honor. I very much so have a
25 reply. That is not at all what happened here. Ms. Lawson

1 was not calling up her friend, Mr. Childs, for legal advice.
2 What Ms. Lawson and Mr. Childs were doing --

3 THE COURT: The allegations, again, these are
4 allegations.

5 MS. POLVI: Yes, Your Honor. Is that what Ms. Lawson
6 and Mr. Childs were doing was seeking to find a way to
7 remove Dr. Bain, calling up and trying to determine where
8 has she worked elsewhere, finding a way, a pattern as the
9 pleadings indicate when we look at say the 20's and 30's of
10 the paragraphs the complaint indicate that it's a far more
11 than any type of legal advice could be, and it was not legal
12 advice because Mr. Child's was not hired by the district for
13 any type of legal capacity, and there's been nothing in
14 terms of a rebuttal in terms of that Ms. Lawson somehow
15 hired Mr. Child's on her individual basis in terms of
16 representation. And I'll note, Your Honor, paragraph 26 in
17 the complaint, "Mr. Childs was told and informed in writing
18 at that time that he should not undertake further
19 representation of the district without first obtaining the
20 authorization of the superintendent and the board, this did
21 not sit well with him." So that shows in terms of their
22 subsequent communications are not in any scope acting as an
23 attorney and it is on a personal basis of a vendetta to
24 remove Dr. Bain.

25 THE COURT: Got you. Sorry, go ahead.

1. MR. MATTHEWS: I'll be honest, Your Honor, I need to
2 address that. If what Ms. Polvi -- and I don't blame
3 Ms. Polvi, she's arguing as best she can and capably for her
4 client, I've got no problems with Ms. Polvi, but let's be
5 careful about what she's suggesting. Because the moment you
6 agree with her argument, what stops us from counterclaiming
7 against Lewis Cromer because Ms. Bain met with Lewis? Ms.
8 Bain we allege had all sorts of nefarious motives. What
9 prevents her from counterclaiming to our counterclaim, "Oh
10 no, Gene, you met with Ms. Lawson and you had some nefarious
11 purpose, we can't prove it but we can allege it." What
12 stops any lawyer from accusing -- from bringing such a claim
13 against any other lawyer by saying, "Oh no, we understand
14 you claim, ha ha, that you were talking about legal things,
15 but we can allege that it was not that. We can allege it
16 was for some unspoken nefarious purpose and we get to sue
17 you for it." If that is so, if that is the law, and it's
18 not, but if it is you will hear nothing but lawsuits like
19 that, and frankly the primary defendant will be Mr. Cromer,
20 so let's not tarry for a moment over that argument. The law
21 is there doesn't need to be an exchange in consideration,
22 the law is the minute someone -- and we learned this in our
23 malpractice class in law school, if someone approaches you
24 with an intent to seek legal advice and you give them
25 advice, whatever else that is, that's privileged, and

1 frankly you've probably formed an attorney/client
2 relationship at that point even without a fee agreement. In
3 fact, the reason when we talk to people we tell them,
4 look -- unless we want to form that agreement, "Look, we
5 can't give you advice." If someone comes to me, if my
6 brother calls me and says, "Gene, look, I need help, I need
7 legal advice," and I give it to him, we may be brothers but
8 we're also attorney and client at that point even if he
9 hasn't given me a dime. That's the basic law that we
10 learned in law school. So I don't understand at all the
11 argument that Ms. Lawson's communication with Ken Childs was
12 anything other than legal and anything other than
13 privileged. Now, let's talk for a moment, if we could,
14 about the immunity. Ms. Polvi, I think shrewdly, says,
15 "Well, isn't there a difference between 59-19-10," which is
16 the statute that gives Ms. Lawson the authority she has as
17 board chair to supervise and is accountable for the
18 operations of the school district under her charge. Not
19 just -- she's not being nosey, she is accountable for that.
20 Accountable to who? The voters. Accountable to students.
21 And it is -- this is in my view not a difficult concept
22 because it occurs to every other public official. It may be
23 that the statute that grants the director of the Department
24 of Public Safety his authority to oversee the highway
25 patrol, the state transport police, the bureau of protective

1 service and all of the other ancillary entities that he's
2 responsible for. If he is sued in the course and scope of
3 his duty of representing them, or doing his duty, the State
4 Tort Claims Act applies. There doesn't have to be a special
5 statutory exception or a brand of immunity in Title 56 to
6 protect the director of the Department of Public Safety, he
7 is created in that title. Similarly in Title 59 that
8 addresses the board chair's responsibility and authority.
9 Now, once that is done the State Tort Claims Act in Title 15
10 kicks in. And those are the immunities, including
11 subsection five of 15-78-60 that says, "Look, when you have
12 discretion you're immune." Moreover it's important to note
13 there is no cutout there for gross negligence and are in say
14 subsection 25, which would involve supervision of prisoners.
15 That is an absolute cut out of immunity that, in its wisdom,
16 the legislature has indicated this is law and the rest of us
17 are to follow that. So even though she's saying there's so
18 many differences between Paradis and this case, actually
19 none at all. In fact, Paradis itself, and I'll invite your
20 attention to it, I believe it's on page five, I may be
21 mistaken, but it actually references -- and I'm mistaken,
22 it's astrict three. It talks about in this case Paradis is
23 claiming response defamed to her by utilizing the discretion
24 given them by state law to place her on an evaluation plan.
25 The State Tort Claims Act specifically excludes liability

1 for this type of exercise of discretion and quotes
2 subsection five. So I think resourceful as she is, as
3 shrewed as she is, she can't overcome that block, that
4 immunity that's granted to Ms. Lawson. Now, let's also talk
5 about -- and this is actually something that's more
6 troubling for the public. She says, "Look, I get to allege
7 stuff and then find out in discovery if I'm right."
8 Actually in defamation claims, no, that puts the cart before
9 the horse. You don't get to allege somebody defamed me by
10 saying to others that I'm bad and then try to fill in the
11 gaps. That's not the truth at all and it's not the law.
12 And not only do we rely on Paradis for that, the Cromer firm
13 was involved in the McNeil case and that's cited at page
14 four of our brief. McNeil, again, involved a similar set of
15 allegations. You know, at this point if McNeil was saying
16 somebody at the -- somebody in SCDC said bad things about me
17 to others and it hurt me. And the Court is crystal clear,
18 plaintiff did not set forthwith with any specificity what
19 the alleged false statements were. She did not allege that
20 any statements were published to a third party or that SCDC
21 made the alleged statements. Additionally she did not
22 assert to whom SCDC made the alleged statements, therefore
23 we find McNeil's allegations do not support an actual
24 defamation. A trial court did not err in dismissing her
25 cause of action. In this case we are left with putting --

1 the classic putting the cart before the horse. You can't
2 allege we think you said stuff to Marlboro. Well, what?
3 And oh, by the way, if you have good faith to make that
4 allegation then, you know, you know the basis of that very
5 conclusory allegation, and that's what South Carolina law
6 requires, especially as my colleague pointed out when you're
7 a public official, when you're a public figure. Ms. Bain
8 essentially wants to insulate herself from any criticism by
9 filing this lawsuit, and that's wrong. That's wrong. Ms.
10 Lawson has a duty which she was elected to do, not
11 appointed, elected to do. She has every right to do exactly
12 what she has done, and for Ms. Bain to file this lawsuit to
13 keep her from doing that is wrong. That's why we think you
14 would have every right and every authority to grant our
15 motion.

16 THE COURT: Thank you, sir.

17 MR. MONTGOMERY: Your Honor, again, I will join Mr.
18 Matthews' arguments and won't try to duplicate them in the
19 sake of time, and I think the Court understands them so no
20 reason for me to repeat them, but there are a couple of
21 things I do want to point out. First of all, we have this
22 argument about Ms. Bain communicating with school counsel,
23 now they argue he's not school counsel. I would suggest to
24 you that while that evidentiary fact is out there, it
25 doesn't matter for purposes of this 12B6 motion, but what

1 does matter is that the Court looks at exhibit B to their
2 complaint. The last sentence of that, Ms. Polvi published
3 some of that during her argument, the last sentence of that
4 says except in unusual circumstances the board will make all
5 communications to the school attorney through the
6 superintendent or board chairman. So there's every reason
7 for Ms. Lawson to be talking with Mr. Childs on behalf of
8 the board. Board policy BDG says that's the normal and
9 usual course of the way it works. And the board chair has a
10 special relationship if you will in that the board members
11 or the community have elected that person to be in charge,
12 to run the meetings, to coordinate, to work more directly on
13 the agenda or other items that the entire board doesn't do.
14 And in this case the board chair is expressly authorized by
15 the board policy to communicate with the council. And so I
16 would suggest to you that this whole argument about echoing
17 not only what Mr. Matthews says, but there's even more to it
18 than that, it comports with board policy. You know, it is
19 convenient for Dr. Bain to assert that Mr. Childs is not
20 counsel for the Chester County School District. However, in
21 the complaint they allege that he met with the entire board,
22 which seems to me that would be rather unusual for the
23 entire board to meet with him unless the entire board
24 believed that he, in fact, was their counsel. And in fact,
25 I think the entire board's records, which I think the Court

1 can take judicial notice of, have actually entered into a
2 motion that reaffirmed the representation of his firm both
3 past and present. So the only person, the only allegations
4 before the Court that Mr. Child's isn't representing the
5 school district are those self-serving conclusory
6 allegations made in Dr. Bain's complaint. I would also
7 point out to the Court that, you know, again, there are two
8 things that I heard counsel say in arguments that
9 demonstrate why -- and I'll digress a second before I get to
10 those. Counsel cites Iqbal and I think everyone understands
11 what Iqbal says, it says if you're going to allege fraud,
12 which is alleged in the same manner as defamation, you have
13 to allege specifics, it has to be pled with specificity, the
14 who, what, when, where, how, which is totally absent from
15 this case. Yet counsel says that the statements they made
16 about Dr. Bain, those are her exact words. Well, what
17 statements are those? They're not any statements that have
18 been made about Dr. Bain specifically articulated in this
19 complaint. And then there's something talking about
20 conspiracy, she said that someone has attempted to remove
21 her client from her job. Well again, Your Honor, there's
22 only one way, or two ways I guess her client can be removed
23 from the job, one is the school board has a meeting and the
24 school board, of course, in that capacity is allowed to meet
25 without her present, but the school board has a meeting and

1 they take a public vote to remove her from the job, okay?
2 Or they engage counsel, which you would think they would
3 want to engage counsel different than the counsel she
4 regularly relies upon to advise them, and they make some
5 offer to terminate her employment. Or three, she resigns.
6 And I would point out to the Court that as we sit here today
7 on September 26, 2018, none of those things have happened.
8 As Ms. Polvi says, she still retains her job, she's still
9 the superintendent. So how can there be any evidence that
10 someone has acted to try to remove her from her job when
11 none of those things have occurred? There hasn't been a
12 vote that's failed, there hasn't been any approach by anyone
13 as I understand it to assert that she leave and she hasn't
14 resigned. What she's really talking about if you will is
15 what I would characterize is political speech now, she's
16 trying to make that defamatory. The newspaper prints that
17 she got these extra monies and somehow she's attributing
18 that to our clients, when all of that information that she's
19 referring to is available in the public record in the public
20 domain. All you have to do is go to the school district
21 website and you can find that information, every check they
22 write. So the fact that someone did that, how is that a
23 conspiracy? How is doing that -- that is simply a citizen
24 exercising their right to look at public information and
25 comment on it, which is again first amendment public

1 political speech. You can criticize an elected office, you
2 can criticize the President of the University of South
3 Carolina who is hired by a board, or you can criticize the
4 superintendent of the Chester County School District for
5 what she does or doesn't do, that's fair political speech.
6 She is subject to criticism and if she doesn't like it she
7 is in the wrong profession. But the fact that someone
8 criticizes her does not make them liable for defamation
9 absent demonstration of malice, and malice is not something
10 that is presumed, you've got to show facts to demonstrate
11 malice. And, you know, there is nothing here pled that
12 demonstrates that. They want to plead all of these things
13 that my client is a bad guy or he wants the business or he's
14 going to do this and she's keeping him from getting the
15 business, that doesn't establish malice. Maybe it
16 establishes she has malice against him, perhaps he ought to
17 be looking at a counterclaim in that regard, but the simple
18 fact is the pleadings don't do it. Making public
19 information public is not a problem for anyone. And the
20 information that she complains about being disclosed if you
21 will, or investigated, which are consulting fees that she
22 earned from other school districts, is public information,
23 nothing false about that. And there's nothing defamatory,
24 because as a matter that's true unless she wants to allege
25 that somehow those school districts who posted the

1 information about her compensation that they paid her, or
2 her web page that she posts on the internet somehow is false
3 and republication of those statements exposes my client and
4 I would say his client for liability, okay? Suggesting that
5 someone breached a contract is not defamatory, okay? And
6 this other stuff that's alleged that they said she committed
7 fraud. Well, gee, if they allege she committed fraud in
8 order to make that allegation somebody ought to have a set
9 of facts as to who, what, when, where and how that happened
10 and that hasn't been pled. Likewise these other things that
11 she's professionally unfit, again, I would suggest the Court
12 as a matter of law, the fact that she got compensation for
13 other work outside of her duties as superintendent to the
14 district, they've admitted that, they've pled it so that is
15 a fact before the Court. I would suggest to the Court that
16 what we have here is what I would call an offensive lawsuit.
17 It is a lawsuit that has been filed only in an effort to
18 thwart Ms. Lawson and the school board from attempting to
19 find out what the facts are and make an informed decision as
20 to whether the superintendent is acting within the scope of
21 her contract and to stop them from getting advice on that
22 except from who had she wants them to get advice from.
23 That's what's this lawsuit is about when you get to the
24 nexus of it. And what it doesn't do as we've said and I
25 think demonstrated and as I think Dr. Bain's counsel has

1 been unable and Dr. Bain can't because the facts aren't
2 there show, one, that the pleading is adequate. And again,
3 Iqbal is really clear, it requires specificity and there is
4 no specificity here for her to get into the federal law.
5 And it requires specificity under a scheme of pleading that
6 is more lenient than that that we have in South Carolina.
7 Likewise the damages, the argument, and I'm going to respond
8 very briefly, I'm just going to respond very briefly and I
9 will sit down, but the argument on the damages makes no
10 sense. "Oh well, the damages are different because we've
11 described them differently." Well, that isn't the test.
12 The test for special damages is there has to be some unique
13 damage suffered by the parties as a direct and proximate
14 result of conspiracy. Every single damage that they alleged
15 in those two paragraphs, paragraph 75 and 76 of the
16 complaint dealing with civil conspiracy could have been
17 absolutely and properly alleged as a damage for the
18 defamation claims. They're the same, and therefore there
19 are no special damages and that cause has to fall as a
20 matter of law. So while we can talk about, and I think
21 we've done an adequate job of demonstrating how there's been
22 no pleading of conspiracy, even if the Court were to find
23 that broadly as you could that they somehow met that test,
24 they can't meet the test of demonstrating special damages or
25 pleading special damages, and that conspiracy claim must be

1 dismissed under Rule 12B6 for that reason. And as it
2 relates again to the defamation they can't get past
3 privilege, they can't get past the public duty. They can't
4 get past the fact that we have a public figure and there
5 is -- they want you to presume malice from a set of facts
6 that doesn't lead to that if you could even presume it. I
7 would suggest to you that they have to allege it and it's
8 not just, well, we have it. And the other thing I would
9 suggest to you is that as it relates particularly to
10 Ms. Lawson, she's an elected official supervising this
11 person and she's a board member and she has responsibilities
12 that go far beyond traditional employer and employee
13 relationship. Her responsibility is not just to the
14 business, it is to the entire public, to every citizen in
15 Chester County. And her pursuing that diligence that Dr.
16 Bain doesn't like is probably exactly what the citizens of
17 Chester County would prefer, and it's certainly within both
18 of her rights and obligation to do that. So she has that
19 and she certainly has the right in making that determination
20 in seeking that information to get good legal counsel so
21 that she does it appropriately, and that's what they're
22 trying to say is wrong. Thank you, Your Honor.

23 THE COURT: Thank you. I'll give you some brief reply,
24 yes, ma'am.

25 MS. POLVI: Thank you, Your Honor. First and foremost

1 the pleadings are clear that Ms. Lawson and Mr. Childs acted
2 far outside of any scope, duty or privilege that they had in
3 their actions. Ms. Lawson is a board chair. She must,
4 according to the statutes and regulations and policies, act
5 as a body with the school district. She is not authorized
6 to act in any separate unilateral decision making, and what
7 Mr. Matthews and Mr. Montgomery have both described is
8 trying to connect somehow her administrative duties and that
9 she can do them all alone and that's just in the factually
10 accurate. The policy that they attached to the pleadings is
11 quite clear that Ms. Lawson acted outside of the scope of
12 what she was authorized to do, and that she was doing it for
13 her own personal purposes to remove Dr. Bain, someone who
14 she has admitted she doesn't like. And Mr. Childs, as we've
15 pled here in the complaint, was not authorized to take any
16 action on behalf of the school district. So when we look at
17 when was he actually placed in terms of an attorney giving
18 advice for the district, not until the end of July 2018, not
19 at all when these actions were happening. So both Ms.
20 Lawson and Ms. Childs -- or excuse me, Ms. Lawson and
21 Mr. Childs were acting outside of any type of authority that
22 they had. And it's key to consider that it's been described
23 as an offensive lawsuit in some kind of way. And I noted in
24 our memorandum in opposition to the motion to strike, my
25 client sought to resolve these issues well in advance of a

1 lawsuit, and that these two individuals continued to seek
2 and escalated in their efforts to remove her and to take
3 actions. And it's very important to note, I think there was
4 some reference to that somehow a breach of contract is not
5 defamatory, and calling Dr. Bain professionally unfit is not
6 defamatory, those are defamatory per se. Those are facially
7 alleging that she's breaching a contract, that she's
8 violating the law, that she's not performing her job
9 accurately. Both Mr. Childs and Ms. Lawson, when they're
10 seeking to publish to a newspaper and publish to another
11 school district these types of accusations, it is directly
12 harming Dr. Bain. And as we pled here is that Marlboro
13 County no longer employed Dr. Bain for consulting work, so
14 she has been damaged as a result of their actions. And it's
15 also key when we think about with the news media when they
16 were seeking to find information, think about what prompted
17 them to seek that information? These two individuals, and
18 we've pled that to that affect. So in terms of pleadings
19 they facially meet all of the requirements for us to proceed
20 with discovery, and, you know, taken in the light most
21 favorable to the non-moving party, Dr. Bain has brought
22 groundful complaints with regard to Ms. Lawson.

23 THE COURT: What about Mr. Matthews' argument that he
24 made initially when I deferred to them for reply about the
25 attorney/client relationship?

1 MS. POLVI: Yes, Your Honor. With regard to --

2 THE COURT: I am very concerned about that. Go ahead.

3 MS. POLVI: It's key to look first and foremost at the
4 policy that we've attached to the pleadings, is that Ms.
5 Lawson is not authorized to seek legal advice without the
6 body of the board voting as to who would be their counsel.
7 They had counsel and that's Andrea White with White and
8 Storey.

9 THE COURT: Right, I got you, that goes to her. What
10 about Mr. Childs?

11 MS. POLVI: With regard to Mr. Childs is that he can't
12 give legal advice in terms of for the purpose of the whole
13 body without them voting on it, and for Ms. Lawson to have
14 contacted him wouldn't just automatically make all
15 communication that they have --

16 THE COURT: Even if he had a 20 year relationship with
17 the school board, or whatever y'all's presentation said or
18 whatever the paperwork said, that doesn't exempt him from
19 that? He had an ongoing relationship, or his firm did with
20 the school board for years.

21 MS. POLVI: I understand the Court's concern on that.
22 I think it's important with the context of when was Mr.
23 Childs actually employed with the district and when he was
24 not. He was previously, but there's a clear delineation of
25 vote that determines that he was no longer in an official

1 capacity and he was informed of that.

2 THE COURT: When was that?

3 MS. POLVI: Let me give you the exact date, Your Honor.
4 It is within the pleadings. Paragraph 13 of the complaint,
5 "On November 16, 2015, a motion was made by the board to
6 terminate the attorney/client relationship with the firm of
7 Childs and Halligan beginning in January of 2016." So when
8 Mr. Child -- he clearly knows by vote he is not authorized
9 to be counsel for the district and vicariously any type of
10 legal advice sought for the district if that is indeed what
11 Ms. Lawson was doing as they're arguing. And then we look
12 at he is not returned as counsel until the end of July 2018.
13 That's a significant period of time in which he knows by
14 vote he's not authorized to give legal advice. So any type
15 of actions as we've pled here, his intent to my client had
16 potentially, you know, brought concerns about in terms of
17 the legal fees that were with regard she supported the
18 board's determination that there was concern about legal
19 fees.

20 THE COURT: Right. I follow your reasoning on that.
21 But, I mean, you know, when I was a lawyer I represented
22 city councils and town councils and cooperative bodies and
23 everything. I mean, if the cooperative body isn't satisfied
24 with legal counsel and wants to get somebody else, some
25 other firm, doesn't the board chair or the mayor or whoever

1 the designated appointee for that board have the right to
2 talk to other lawyers to see if they want to possibly switch
3 representation? You follow me?

4 MS. POLVI: I'm following you entirely, Your Honor.
5 But I think that's distinguishable, it's very different from
6 what was happening here. I think if Ms. Lawson was solely
7 speaking with Mr. Childs and saying, "You know, you
8 represented our district before, I would like you to come
9 back. Can you come and talk to the school board and we'll
10 decide it as a body?" That's not the context at all of what
11 happened. As our pleadings show here is that specifically
12 Ms. Lawson, for example, as we've pled calls two board
13 meetings insuring that my client is not informed of them,
14 can't be present to try to essentially insulate her from
15 being, you know, continuing her employment, and to somehow
16 place Mr. Childs back in terms of legal counsel for the
17 district. So in terms of their concerted actions, the
18 communications between Ms. Lawson and Mr. Childs go far
19 beyond any legitimate concerns for attorney/client privilege
20 when there's a two year time period, he is not representing
21 the board, is not authorized to do so and their
22 communications are clearly in an intent to return him to
23 employment with the district, but are not some kind of
24 attorney/client privilege then and there.

25 THE COURT: Okay.

1 MS. POLVI: I think it begins before and it again
2 initiates once the board has voted as a body to have
3 Mr. Childs be counsel for the district.

4 THE COURT: All right.

5 MR. MATTHEWS: Your Honor, I know you're tiring of
6 hearing from lawyers, I sympathize with you but I can't
7 resist this. She can't have it both ways. She said before,
8 "Oh, we're not suing the district, we're suing poor old
9 Ms. Lawson," and that's true, she's suing not the school
10 district, Ms. Lawson. And if Ms. Lawson for whatever reason
11 calls an attorney Ken Childs and says, "I have legal issues
12 or I want to seek advice from you," she doesn't need the
13 board's permission for that. She doesn't need a policy to
14 do that. She can do that. You know, why? Because she has
15 a pulse, because she was an American citizen.

16 THE COURT: Well, that was my question going to -- I
17 understand where y'all are.

18 MR. MONTGOMERY: Your Honor, I want to clarify one
19 other thing too that I think is important here because I
20 don't think that the facts are being accurately represented
21 as they relate to what the pleading says, and this attorney
22 relationship. While I tend to agree with Mr. Matthews, I
23 call your attention to paragraph 14 of the complaint.
24 And --

25 THE COURT: Let me get there.

1 MR. MONTGOMERY: -- paragraph 13 of the complaint.
2 Because there's an entity difference here that's important
3 that's in the pleadings but without it being explained may
4 not be clear. So paragraph 13 talks about the termination
5 of the firm of Childs and Halligan, okay? And Mr. Childs
6 isn't with the firm of Childs and Halligan, hasn't been with
7 the firm of Childs and Halligan probably since sometime in
8 2016, okay? Instead paragraph 14 talks about retaining the
9 firm of Duff, White and Turner. And the firm that Mr.
10 Childs is now with, which is Duff and Childs, is a successor
11 firm to Duff, White and Turner. And the motion that she's
12 referring to that "hired Mr. Child's back" merely reaffirmed
13 that Duff and Childs, a successor to Duff, White and Turner
14 continued to be counsel for the district. So the idea is we
15 don't retain lawyers, we generally retain firms. The firm
16 was retained. There's no allegation in this complaint that
17 Duff, White and Turner or its successor, and if look at the
18 records in the Secretary of State's Office, which are clear,
19 Duff and Childs is the entity that was Duff, White and
20 Turner. So I know I'm getting hyper technical here but I
21 think it's important for clarification, even though I don't
22 think it's important for the Court's decision, that that is
23 a distinction with a difference, and that the allegations
24 that they're trying to make are premised on a relationship
25 that isn't the relationship that exists now or that arguably

1 would have existed with Ms. Lawson.

2 THE COURT: All right. I think I've heard everything I
3 needed to hear. Y'all have provided me with y'all's
4 memorandum and I believe everything I need to have to make a
5 decision. I will allow -- obviously I can't make a decision
6 right now, I've got a lot of reading to do. I know the
7 parties want me to make a decision right now but I can't do
8 that, I need to read everything and consider and deliberate
9 and think about it, so I don't like to sit on things for a
10 long time. I anticipate having a decision as soon as
11 possible. Having said that, if y'all wish to make any --
12 present me with any further memorandum I will allow y'all to
13 do that, let's just have a cutoff of let's say by the middle
14 of next week. Yes, sir?

15 MR. MATTHEWS: Your Honor, in that vain did you want
16 proposed orders or --

17 THE COURT: No, I don't want to do that. Whenever I
18 issue a decision I'll instruct one of y'all, whoever I issue
19 a decision to, I will pick on one of y'all to do the order
20 for me. Or I may have my trustee rusty law clerk draft up
21 something and run it by y'all, we'll see where we go from
22 there. Anything else?

23 MR. MONTGOMERY: Your Honor, we do have our motion to
24 strike, and I'll be really, really short on that.

25 THE COURT: Okay. Go ahead.

1 MR. MONTGOMERY: Your Honor, I will call the Court's
2 attention to a couple of cases, and they predate the rules
3 but they meet the same test that the rule says. And the
4 rule says just for the courts, "The Court may order stricken
5 from any pleading any insufficient defense or any redundant
6 immaterial and pertinent or scandalous matter." And the
7 test, Your Honor, is we've identified if our motion the
8 paragraphs that we believe contain that matter, and the
9 tests, Your Honor, is really pretty clear, and it dates back
10 actually to 1897. And the case which has been cited
11 favorably 26 times as I shepardized it and I laid it down
12 here, it's called Smith versus Smith, 50 South Carolina 54,
13 20 Southeast Second -- or Southeast 545. It says, "An
14 allegation is irrelevant when it has no substantial relation
15 to the controversy. And they also quote -- says an
16 allegation is irrelevant when the issue formed by a -- can
17 have no connection nor affect on the cause of actions. And
18 we would suggest to you that the number of allegations which
19 appeared to impugn Mr. Childs are offered for no purpose
20 other than to impugn Mr. Childs, and if you look at what the
21 test is they don't make any fact more likely to be true.
22 They don't allege any fact that's material to either of the
23 causes of action, and therefore we believe under that case
24 as well as under Rule 12F they're redundant, immaterial,
25 impertinent and scandalous and should be stricken from the

1 complaint. I'm going to go for the shortest argument.

2 THE COURT: Thank you. Reply?

3 MS. POLVI: Thank you, Your Honor. As addressed in the
4 memorandum in opposition is that under 12F I used examples
5 of where it's more likely used in terms of a motion to
6 strike. The paragraphs that are sought to be stricken here
7 are all material to the allegations that are brought, is
8 that essentially they're seeking to almost eliminate any
9 paragraph that references Mr. Childs within the complaint
10 when they're key. As I enumerated in the memorandum, Your
11 Honor, is that they argue that they're redundant,
12 immaterial, impertinent or scandalous. First, there's no
13 indication as to what's redundant. Each one is specially
14 alleged with different facts with different information.
15 Second, in terms of any type of scandalous, they are
16 allegations necessary for the causes of action brought. And
17 again we, as I've noted within the memorandum, we sought to
18 resolve these issues well before litigation. If Mr. Childs
19 did not want these public concerns being brought public
20 there was ample time and opportunity to address those.
21 Thirdly, it's key to note that there's no delineation as to
22 what is essentially material versus nonmaterial, is that
23 when we look at each of the paragraphs I think it delineates
24 between nine and on down to the causes of action, they're
25 all necessary for the pleading standards. And I would note

1 that they also did a 12C motion for judgment on the
2 pleadings, and if there's no pleadings here it would defeat
3 the whole purpose of being able to plead these causes of
4 action with any type of factual basis.

5 THE COURT: All right, thank you.

6 MR. MONTGOMERY: And, Your Honor, if I may respond
7 briefly. Counsel has proven my point. "Mr. Childs was
8 offered before this suit was filed an opportunity to stop
9 this from happening before this information came out."
10 Well, if that doesn't show the very offensive nature of what
11 we're talking about and the fact that the only purpose they
12 did this was to try to smear him to stop him and to back him
13 off, I don't know what does, Your Honor. And I would
14 suggest to the Court, and I think the Court will take notice
15 of this, that among other things accusing an attorney of
16 overbilling and misconduct is certainly scandalous and is
17 certainly improper, and that's what those allegations that
18 we've asked to strike do. Thank you, Your Honor.

19 THE COURT: Here is what we're going to do, ladies and
20 gentlemen. If y'all could -- if you wish to present
21 anything additional I would ask you to do so by next
22 Wednesday, that's essentially five days. You don't have to
23 if you don't want to, I think I have plenty enough
24 documentation to make my decision on, but if you want to I
25 would invite you to, just try to have that to me by close of

1 business by next Wednesday. Anything else? That concludes
2 this hearing.

3 (End of the hearing.)

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1 I, the undersigned, Michael C. Watkins,
2 Official Court Reporter for the Sixth Judicial
3 Circuit of the State of South Carolina, do hereby
4 certify that the foregoing is a true, accurate and
5 complete transcript of the proceedings had and
6 evidence introduced in the trial of the captioned
7 case relative to appeal in the Court of Common Pleas
8 for Chester County, South Carolina, on the 26th day
9 of September, 2018.

10 I do further certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12

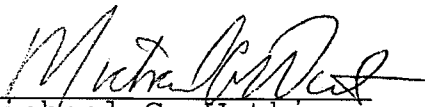
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January 9, 2019

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Michael C. Watkins

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Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

-versus-

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Case No.: 2018-CP-12-00334

**PLAINTIFF'S SUPPLEMENTAL
MEMORANDUM IN OPPOSITION TO
THE MOTIONS FILED BY DEFENDANTS
LAWSON AND CHILDS**

TO THE HONORABLE JUDGE BRIAN M. GIBBONS, CIRCUIT COURT JUDGE:

INTRODUCTION

This case concerns two claims arising under the common law of South Carolina: 1) Defamation and 2) Civil Conspiracy. Plaintiff Dr. Angela Bain ("Plaintiff") filed this case on July 23, 2018 and alleges defamation and civil conspiracy against Defendants Denise C. Lawson ("Lawson") and Kenneth L. Childs ("Childs" and "Defendant").

Lawson filed the Motion to Dismiss on August 9, 2018. Dkt. No. 4. Lawson's Motion is brought pursuant to South Carolina Rules of Civil Procedure ("SCRCP") 12(b)(6). Lawson asserts: 1) that Plaintiff has not stated facts sufficient to constitute a claim for defamation and 2) that Plaintiff has failed to allege additional acts or special damages which is fatal to her civil conspiracy claim. Plaintiff opposes Lawson's Motion on all grounds and asks that the Court allow this case to proceed on all claims.

Childs filed the Motion to Dismiss on August 17, 2018. Dkt. No. 5. Childs' Motion is brought pursuant to SCRCP 12(b)(6), and alternatively under SCRCP 12(c). However, Plaintiff notes that Defendant's Memorandum in Support of his Motion to Dismiss makes no mention of his SCRCP 12(c) Motion for Judgment on the Pleadings. In his Motion to Dismiss Childs argues:

1) that Plaintiff is a public figure; 2) that Plaintiff has not stated facts sufficient to constitute a claim for defamation and 3) that Plaintiff has failed to allege additional acts or special damages which is fatal to her civil conspiracy claim. Plaintiff opposes Childs' Motion on all grounds and asks that the Court allow this case to proceed on all claims.

Childs also filed a Motion to Strike on August 17, 2018. Dkt. No. 6. Childs' Motion is brought pursuant to SCRCP 12(f). In his Motion, Childs argues Paragraphs 9, 10, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, and 56 should be stricken from Plaintiff's Complaint. Plaintiff opposes Childs' Motion on all grounds and asks that no paragraphs from the Complaint be stricken.

Plaintiff respectfully requests the Court deny Defendants' Motions on all claims. Plaintiff intends this Memorandum to supplement Plaintiff's prior Memoranda and the oral arguments heard on September 26, 2018. *See* Dkt. No. 7, 8, and 9.

All arguments as set forth in Plaintiff's prior Memoranda rebut Defendants' Rule 12(b)(6), 12(c), and 12(f) Motions. However, as noted in Plaintiff's prior Memoranda (*See* Dkt. No. 7, p. 6; Dkt. No. 8, p. 8; Dkt. No. 9, p. 7), Plaintiff respectfully requests leave to amend her pleadings if the Court were to hold that deficiencies exist that require an amendment for Plaintiff to bring her case further.

The Court requested additional briefing on the attorney-client privilege issue that was brought up in oral arguments on September 26, 2018. Accordingly, Plaintiff supplements her prior Memoranda on that issue.

ARGUMENT

I. The actions and statements of Defendant Lawson and Defendant Childs are not subject to the attorney-client privilege.

In the case at hand, an attorney-client privilege did not exist, and if it did in any context, the communications that took place as described in the Complaint were outside the scope of the privilege. The attorney-client privilege is not a general defense to a lawsuit. The attorney-client privilege attaches to specific communications and it is not as a bar to a lawsuit when Defendants Childs and Lawson acted personally, with malice, to harm Plaintiff. *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 12910907, at *3 (D.S.C. Sept. 23, 2015), report and recommendation adopted, No. 2:13-CV-1831-DCN, 2015 WL 12907896 (D.S.C. Nov. 5, 2015) *citing State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980) (The Court held that “the party asserting privilege **over the contested communications** bears the burden of proving its applicability” (emphasis added)). Wherein, the attorney-client privilege is not a defense to the claims; rather, the party raising attorney-client privilege can raise it within the context of purported protected documents and communications. In *Wellin*, a highly contested estate case, the Court considered production and waiver concerns during discovery.).

The key things for the Court to know in the context of attorney-client privilege arguments for these Rule 12 motions are:

- Childs was not serving as attorney for Lawson. *See* Compl., ¶11, 17, 19, 27, 49, 56, 57, and Exhibit B to Complaint.
- Childs was not serving as the District’s counsel. *See* Compl., ¶10, 12, 13, 15, 16, 17, 19, 22, 25, 26, 27, 47, 48, 49, 56, and 57.
- Andrea White was the District’s counsel. *See* Compl., ¶14, 16-17.
- Lawson had no authority to seek legal advice from Childs. *See* Compl., ¶11, 33, 35, 47, 56, Exhibit A, B, and C to Complaint.

- Childs was not hired as legal counsel for the actions he took with regard to Plaintiff as plead in the Complaint. *See* Compl., ¶10, 12, 13, 15, 16, 17, 19, 26, 27, 38, 45, 47, 48, 56, and 57.
- Childs, nor Lawson, had any authority from the District to engage in the tortious acts plead in the Complaint. *See* Compl., 56 and 57 and *see generally* Complaint and attachments thereto.
- Communications between Childs and Lawson were not privileged. *See* Compl., 56 and 57 and *see generally* Complaint and attachments thereto.

The classic test for application of the attorney-client privilege is set forth in *United States v. United Shoe Machinery Corp.* The privilege applies only if:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
 - (a) is a member of the bar of a court, or his subordinate and
 - (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed**
 - (a) by his client
 - (b) without the presence of strangers
 - (c) for the purpose of securing primarily either**
 - (i) an opinion on law or**
 - (ii) legal services or**
 - (iii) assistance in some legal proceeding, and not**
 - (d) for the purpose of committing a crime or tort; and**
- (4) the privilege has been
 - (a) claimed and
 - (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (D. Mass. 1950). In this case, Childs was not acting as a representative lawyer, and the communications that he and Lawson engaged in were not for the purposes of securing an opinion on law, legal services, or assistance in some legal proceeding; therefore, the discussions of Lawson and Childs were not privileged.

In *State v. Poster*, 276 S.C. 647, 652, 284 S.E.2d 218, 219 (1981), the South Carolina Supreme Court explained that “the [attorney-client] privilege must be tailored to protect only confidences disclosed within the [attorney-client] relationship.” *Wellin v. Wellin*, No. 2:13-CV-1831-DCN, 2015 WL 12910907, at *3 (D.S.C. Sept. 23, 2015), report and recommendation

adopted, No. 2:13-CV-1831-DCN, 2015 WL 12907896 (D.S.C. Nov. 5, 2015) (quoting *State v. Poster*, 276 S.C. 647, 652, 284 S.E.2d 218, 219 (1981)). “As the assertion of privilege is viewed as an obstacle to ‘the truth seeking mission’ of the litigation process, the privilege must be narrowly construed and applied only where the exclusion of otherwise relevant evidence ‘has a public good transcending the normally predominant principle of utilizing all rational means for ascertain the truth.’” *Id. quoting In Re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 (4th Cir. 2005).

In order to establish the attorney-client privilege, it must be shown that the relationship between the parties was that of attorney and client and that the communications were of a confidential nature. *Marshall v. Marshall*, 282 S.C. 534, 538, 320 S.E.2d 44, 47 (Ct. App. 1984) citing *State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (1980). Here, they were not. The South Carolina Court of Appeals has held that “to establish attorney-client privilege, communication involved must relate to fact of which attorney was informed by his client without presence of strangers for purpose of securing primarily either opinion on law or legal services or assistance in some legal proceeding.” *Marshall*, 282 S.C. at 538, 320 S.E.2d at 47. Further, “in order to protect a communication on the ground of attorney-client privilege, it must appear that the attorney was acting, at the time, as a legal advisor.” *Branden & Nether v. Gowing*, 7 Rich. 459 (S.C.1854). When defaming Plaintiff and purposefully taking action to ruin Dr. Bain’s career, Plaintiff properly plead that Childs was not serving as a legal advisor and Lawson was not acting or seeking counsel from Childs because Childs was not authorized to be the District’s counsel. There is a low burden to meet the pleadings requirements for these Rule 12 Motions, they are met here. Plaintiff has plead that allegations, which taken as true, clearly fall outside any purported attorney-client privilege either Defendant can raise.

Furthermore, the South Carolina Supreme Court declined to extend attorney-client privilege to General Counsel where the lawyer is acting in a different role. *Ross v. Med. Univ. of S.C.*, 317 S.C. 377, 384, 453 S.E.2d 880, 885 (1994). The *Ross* case is a very different set of facts from the case at hand, but the *Ross* analysis of the attorney-client privilege is relevant here. In *Ross*, the Court determined that the lawyer was acting in a “representative capacity” for the defendant and not “counsel” for one of defendant’s employees. *Id.* In *Ross*, the lawyer was prosecuting another employee during a grievance hearing when communication took place with an employee acting as the adjudicator. *Id.* The *Ross* defendant claimed attorney-client privilege for that communication based upon General Counsel’s permission to “confer with other members of the agency.” *Id.* The Court determined that General Counsel was not merely a “member” of defendant’s company, but also represented defendant in “prosecuting” cases before the Agency’s Review Committee. *Id.*

Comparatively, in the case at hand, Dr. Bain unequivocally makes it clear, in writing, that, during the time at issue in Plaintiff’s Complaint, Childs was not authorized to act in a representative capacity. As stated in Paragraph 26 of Plaintiff’s Complaint, “Childs was told and informed in writing at that time that he should not undertake further representation of the District without first obtaining the authorization of the Superintendent and the Board. This did not sit well with him.” Compl., ¶26. The writing that is referred to in that paragraph of the Complaint is a letter dated August 22, 2017, within which Dr. Bain stated, “In light of these concerns, 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.” Exhibit 1, 8-22-

2017 Ltr from Angela Bain to Duff and Childs.¹ Accordingly, there can be no question that Childs knew that he was not authorized by Dr. Bain, the Superintendent, to take any such action and he knew that the Chester County School Board had not voted to take any of the actions alleged in the Complaint.

Furthermore, Lawson was not seeking Childs' legal advice and she was not authorized to seek Childs legal advice. Per Policy BB Board Legal Status, "all powers of the board lie in its action as a body. Board members acting as individuals have no authority over personnel or school affairs except when such authority is specifically delegated to a member of the board." Dkt. No. 1, Ex. A.

Based on the pleadings, it is clear that Plaintiff sufficiently pled, with the required specificity at this stage of litigation, her defamation and civil conspiracy claims against Childs and Lawson. The attorney-client privilege is not a bar to either of Plaintiff's claims. Plaintiff understands the Court's prudent consideration of the importance of the attorney-client privilege. Neither Plaintiff or her counsel seek to limit the attorney-client privilege. The pleadings clearly identify that the Defendants were acting outside of authorized or official capacities, that neither could insulate with attorney-client privilege arguments, and that they were acting with personal malice toward Plaintiff.

Respectfully, Plaintiff requests the Court deny the Defendants' Motions and the attorney-client privilege issue can be properly revisited for scope purposes during discovery in this case.

¹ Plaintiff is not producing this Exhibit 1 document, that is outside for the four-corners of the pleadings, for any intent other than to supply the Court with additional information, that was requested by the Court, related to the attorney-client privilege issue raised by the Defendants. This Exhibit is not intended to convert these pending Motions to Motions for Summary Judgment. The parties are entitled to proceed with discovery in this case prior to any Motions for Summary Judgment.

Plaintiff and her counsel fully anticipate that the Court's ruling to deny the Defendants' Motions would not end the attorney-client privilege assertions by the Defendants in the case. The proper way to deal with such concerns is during discovery and only if particular documents or specific testimony is purported by either Defendant as protected by the attorney-client privilege. Only at that time, in the proper scope of discovery, should any party raise such objections to a particular document or communication. Whereas, here, the Defendants are newly arguing at the hearing, not in their briefs, that that attorney-client privilege protects them from all liability, despite the fact that the attorney-client privilege was never so intended to protect either Defendant from engaging in tortious conduct toward the Plaintiff.

CONCLUSION

For these reasons and those set forth in Plaintiff's prior Memoranda (Dkt. No. 7, 8, and 9) and the oral arguments on September 26, 2018, Plaintiff respectfully requests that the Court deny Defendants' Motions.

Respectfully submitted,

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Attorneys for Plaintiff

October 2, 2018
 Columbia, South Carolina



THE SCHOOL DISTRICT OF CHESTER COUNTY

509 DISTRICT OFFICE DRIVE
CHESTER, SOUTH CAROLINA 29706

Angela H. Bain, PhD, SPHR
Superintendent

August 22, 2017

Mr. David Lyon, Esquire
Duff & Childs, LLC
PO Box 1486
Columbia, SC 29202

Dear David,

After a review of your August 8, 2017 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.

- The first charge is for activity related to Mr. Childs' offer to me to forward a colleague's resume. In case I wanted to hold a board retreat. He asked if I would like for him to forward the resume, and I agreed that he could do that. My concern is the charges of \$572.50 related to that task. I was not aware that I would be charged for something that Mr. Childs suggested and offered.
- The second item relates to a conversation between Mr. Childs and Frannie Heizer, our bond attorney. Our bill indicates a charge of \$245.00 for this. I confirmed that Mr. Childs placed a call to Ms. Heizer, however, I am concerned that we are being charged for a task that I did not authorize.
- The third item on the July 2017 bill shows reviews of emails with you and a conference with Mr. Duff, however, I do not know to what this relates. That charge was a total of \$259.80. Again, I am not clear on what was authorized and the case.

In light of these concerns, 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.

Sincerely,

Angela H. Bain, PhD, SPHR
Superintendent

STATE OF SOUTH CAROLINA)
COUNTY OF CHESTER)
IN THE COURT OF COMMON PLEAS
FOR THE SIXTH JUDICIAL CIRCUIT

Angela H. Bain,)
Civil Action No: 2018-CP-12-0334

Plaintiff,)

v.)

Denise C. Lawson and)
Kenneth L. Childs, Defendants.)

DEFENDANT CHILDS'
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
JUDGMENT ON THE PLEADINGS

TO: Hon. Brian M. Gibbons, Circuit Court Judge:

The Court requested that the parties provide additional information regarding the effect of the Attorney-Client Relationship between Defendants Lawson and Childs as the same relates to the Plaintiff's allegations of Defamation and Conspiracy. Defendant Childs, adopting and realleging all argument and briefing previously submitted by both Mrs. Lawson and him, would respond as follows:

THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege protects communications between a client and her attorney in two key ways: (1) by prohibiting the attorney from disclosing the communications, and (2) by protecting the client from being compelled to disclose the communication in legal proceedings. In South Carolina, the privilege the Common Law governs the Attorney-Client Privilege. (SCRE Rule 501). The seminal case on the Attorney-Client Privilege is *Drayton v. Industrial Life & Health Ins.*, 205 S.C.98, 31 S.E.2d 148 (1944). There the Court held "The general rule excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege." *Clary v.*

Blackwell, 160 S.C. 142, 158 S.E. 223; *State v. Chandler*, 126 S.C. 149, 119 S.E. 774; *State v. Rook*, 174 S.C. 225, 177 S.E. 143. Rule 502 Federal Rules of Evidence further establishes the protections afforded the confidential communications between Attorney and Client. Other Common Law authorities have defined the basic elements of the attorney-client privilege: (1.) a communication; (2.) made between privileged persons (i.e., attorney, client or agent); (3.) in confidence; and (4.) for the purpose of obtaining or providing legal assistance for the client. The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney's professional judgment is sought. The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client's legal problems, and (2) a client will reveal details required for proper representation only if his confidences are protected. But because the privilege can prevent a judge and jury from learning of otherwise relevant and admissible evidence, courts construe the privilege narrowly.⁶ There are two fundamental aspects of the attorney-client privilege, both of which must be met for the privilege to apply. The first is that the communication must have been made to obtain legal advice, rather than business or other advice. The second is that there must be an expectation that the communication will not be disclosed.

Even considering the allegations Plaintiff's complaint in a light most favorable to the Plaintiff, the Communications between Mr. Childs and Mrs. Lawson meet these requirements. Moreover, they also deal with important matters of public policy – the performance of a School Superintendent who is a public official and a public figure.

Plaintiff wishes to mischaracterize the nature of the privilege and its purpose in this case. She argues the privilege as a function of discovery to assert that the crime-fraud exception invalidates the privilege or the purpose. Ironically, the effort to plead around the privilege makes

it evident that any reading of the Plaintiff's complaint recognizes the privilege and that it existed here. In this instance, the purpose of the privilege is to demonstrate the nature of the communications between Mr. Childs and Mrs. Lawson, the legitimate purpose of those communications as a matter of law and the qualified privilege inherent in their discussions and legitimate inquiry.

PLAINTIFF ERRONEOUSLY RELIES UPON CONCLUSIONS OF LAW TO SURVIVE THE 12(b)(6) MOTIONS.

Plaintiff further misapprehends what constitutes valid allegations for purposes of a Rule 12(b)(6) finding. She wishes the court to accept as "fact" her conclusions of law. Every one of her allegations regarding the alleged attorney-client relationship between Mr. Childs and Mrs. Bain is not an averment of fact, but instead, a legal conclusion. The Court should not allow plaintiff's averments on the law to have any impact on its decision. A ruling here must rely only on well-pled facts.

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the **factual** allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). [emphasis added]

Rule 702 S.C.R.E. prevents the admission of legal conclusions as they are strictly within the purview of the court. The question before the court here is one that as a matter of law, from its own pleadings, the Plaintiff cannot aver the legal conclusion that there was no attorney-client or other privileged relationship, the absence of which undergirds her entire claim. Her own

writings belie the legal conclusions counsel cites in her complaint. Here, Plaintiff merely attempts to plead opinion as fact and relies on those legal conclusions as her only basis to survive dismissal. In general, expert testimony on issues of law is inadmissible. See generally Note, Expert Legal Testimony, 97 *Harv.L.Rev.* 797, 797 (1984); see also *Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "such testimony is a legal opinion and inadmissible."); *United States v. Sinclair*, 74 F.3d 753, 758 n.1 (7th Cir. 1996) (commenting that HN5 Federal Rules of Evidence 702 and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

If testimony about a legal conclusion is inadmissible for any purpose, legal conclusions in a pleading have no worth and should not be considered by the Court. An analysis of the Complaint reveals that no case can stand without the Court adopting the Plaintiff's legal conclusions as fact.

PLAINTIFF'S SUPPLEMENTAL ATTACHMENTS TO HER COMPLAINT BELIE HER CLAIMS.

Most telling here is the supplemental information provided by the Plaintiff, which demonstrates that Superintendent Bain was questioning legal bills of Mr. Childs after the time frame where Plaintiff alleges that his representation was terminated and he was no longer an attorney for the School District.

Since the Plaintiff has offered additional evidence, outside the four corners of the complaint for the ostensible purpose of "supplying the Court with additional information, that was requested by the Court, related to the Attorney-Client issues raised by the defendants." The Defendant will

take the same liberty. Defendant suggests that the Court treat these documents as Attachments to the Complaint or Motion to Dismiss and properly consider them in making that determination.

Plaintiff's complaint and argument suggest that there was not and couldn't be any attorney-client relationship. Besides the fact that these are legal conclusions, not averments of fact, the contemporaneous evidence disproves the allegations. Paragraphs 12 -17 of the Complaint all center upon this claim. Interestingly, the Plaintiff suggests that as of March 2017, "the Superintendent chose to conduct all of the District's legal business through Andrea White and her newly formed firm, White & Story, and not to use the law firm with which Childs remained a partner."

The Superintendent's own e-mail communications demonstrate that these allegations are false.

On April 3, 2017, Dr. Bain sent an e-mail to both firms (Exhibit 1):

*Hi all,
Please deliverer all electronic and hard copy files from 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*

On June 2, 2017, Dr. Bain sent an e-mail (Exhibit 2) to Mr. Childs and his partner David Lyon which states:

*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.*

And on June 6, 2017, Dr. Bain sent an e-mail (Exhibit 3) to the School Board – including Mrs. Lawson. That e-mail reads:

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.

[Emphasis added]

Dr. Bain's own e-mail demonstrates that in June of 2017 she was asking for legal work from Mr. Childs and directing him to transmit this to the Board. She directly referred to him, in an e-mail to the School Board as "one of our attorneys". Her own words contradict the allegations contained in her complaint.¹ This e-mail, coupled with the letter provided by Plaintiff dated August 22, 2017, complaining about charges on several matters unequivocally demonstrates that the firm of Duff & Childs (and Mr. Childs had an attorney-client relationship with the School District. The Court cannot and should not rely upon allegations which are demonstrably false based upon the documents attached to the complaint and the verbiage therein.

So, what was Mrs. Lawson to understand? She has been advised the district is going to use both firms (Duff & Childs and White & Story) and she received a memo from Mr. Childs authorized by the Superintendent reflecting that his firm was representing the District. Likewise, Exhibit B to the Plaintiff's complaint reveals that communications with the Board's attorneys are

¹ We have not included attachments to the e-mail exhibits as the same are Attorney-Client privileged communications – absolutely demonstrating that Mr. Childs was and is an attorney for the District and that Dr. Bain's complaint must be dismissed.

either accomplished by the Superintendent or Board Chair. Mrs. Lawson is the Board Chair. Mrs. Lawson had every reason to understand that Mr. Childs was an approved attorney representing the District and there is no factual averment after the date of the Superintendent's e-mails to suggest anything to the contrary -- even construing those allegations in a light most favorable to the Plaintiff.

Moreover, 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 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) (quotation 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 attached the Board Policies to her complaint. The letter exhibit to her supplemental brief and the attachments to his memo are authentic, incorporated and dispositive. The Plaintiff cannot question the veracity or authenticity of her own letter and electronic mails.

PLAINTIFF CANNOT SURVIVE A MOTION TO DISMISS AS SHE HAS FAILED TO ALLEGE THE REQUISITE FACTS TO PROVE MALICE WHICH IS REQUIRED BECAUSE SHE IS A PUBLIC OFFICIAL.

The parties agree that Plaintiff is a public official. A public official is one who has a governmental role, and whose "position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it." *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966). Such interest must go "beyond the general public interest in the qualifications and performance of all government employees." *Id.* "An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case." *Gertz v. Robert Welch, Inc.*, 418 U.S. 322, 344, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789, 808 (1974). For a public official, "society's interest . . . is not strictly limited to the formal discharge of official duties," but "extends to 'anything which might touch on an official's fitness for office.'" *Id.* at 344-45 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 77, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964)). Here, whether or not Plaintiff is fulfilling her contract or working as an outside consultant for other school districts when she should be working in Chester County Schools fundamentally touches on her fitness for office. It is a matter of significant concern and statements about her performance and whether or not she is fulfilling all of her contractual obligations and is obtaining required approvals from the sitting Board Chair enjoy the highest level of constitutional protection.

Because she is a public official, Plaintiff has the burden to "prove by clear and convincing evidence" the Defendant made the statement with actual malice, which means "with the knowledge of its falsity or with reckless disregard for its truth." *Elder v. Gaffney Ledger*, 341 S.C. 108, 114,

533 S.E.2d 899, 902 (S.C. 2000) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686, 706 (1964)). The courts have held not only that: A “reckless disregard: for the truth . . . requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant, in fact, entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262, 267 (1968). There must be evidence the defendant had a “high degree of awareness . . . of probable falsity.” *Garrison v. Louisiana*, 379 U.S. 64, 74 85 S.Ct. 209, 216, 13 L.Ed.2d 125, 133 (1964).

Our State Supreme Court has further held that “Whether the evidence is sufficient to support a finding of actual malice is a question of law.” *Elder, supra* at 341 S.C. at 113, 533 S.E.2d at 901-902.

So, unlike a traditional libel or slander case where the defendant has the burden of proving the truth of the matter asserted, here, the Plaintiff has the burden of proving not only that the statements about which she complains were false, but that Mr. Childs and/or Mrs. Lawson doubted the truth of their words or had a high degree of awareness that their statements were false. She must meet this burden of proof not by a mere preponderance of the evidence, but, rather, by clear and convincing evidence. This is particularly problematic because she has failed to allege any specific statement made by either Mr. Childs or Mrs. Lawson that was false, defamatory or injurious, much less when such a statement was made and to whom it was published – which is why her claim must be dismissed.

The allegations contained in her Complaint fail to provide any averments from which this Court might conclude, even giving all inferences in a favorable light to the Plaintiff that she has met her burden of pleading these issues.

Here, she is unable to show the Court in her pleadings allegations that identify a statement made, to whom it was made and how it was false, much less to support a finding of malice by the Court inherent in that statement. Her complaint fails as a matter of law and should be dismissed.

CIVIL CONSPIRACY

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (If a Plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed). It is essential that a plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord. Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005).

As previously argued, Plaintiff has failed to plead the elements with specificity and has failed to plead special damages. Moreover, based upon the attorney-client relationship which existed as a matter of law, none of plaintiff's allegations survives the fact that the Defendants had a privileged and proper reason for meeting nor is there any pleading of an intent or purpose to injure the Plaintiff.

CONCLUSION

The Matter should be dismissed pursuant to Rule 12(b)(6) or in the alternative; the Court should grant the Defendants judgment on the Pleadings.

Respectfully Submitted,

MONTGOMERY WILLARD, LLC

s/ Michael H. Montgomery

Michael H. Montgomery, SC Bar No. 4034

1002 Calhoun Street

Post Office Box 11886

Columbia, South Carolina 29211-1886

(803) 779-3500 (telephone)

(803) 799-2755 (facsimile)

mhm@montgomerywillard.com

Attorneys for Defendant Kenneth L. Childs

Columbia, South Carolina
October 3, 2018

EXHIBIT 1

From: Angela Bain <abain@chester.k12.sc.us>
Sent: Friday, June 2, 2017 9:00 AM
To: David Lyon <dlyon@duffchilds.com>
Cc: Kenneth Childs <kchilds@duffchilds.com>
Subject: Re: FOIA Memo

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

From: David Lyon <dlyon@duffchilds.com>
Sent: Thursday, June 1, 2017 11:40 AM
To: Angela Bain
Cc: Kenneth Childs
Subject: FOIA Memo

Hi Dr. Bain,

I hope this email finds you well.

Ken asked me to send you the attached memo re: FOIA. We've made a few minor revision to the previous version he sent you last week.

With your approval, Ken would like to send this on to the board.

I look forward to hearing from you.

David

David N. Lyon

Duff & Childs, L.L.C.

P.O. Box 1486

Columbia, SC 29202

Ph. (803) 790-0603

Fax (803) 790-0605

Firm Website www.duffchilds.com

Duff & Childs - Focused on your
Future

www.duffchilds.com

Focused on your Future Duff & Childs, L.L.C.
represents businesses and educational institutions
throughout the Carolinas in five practice areas.

EXHIBIT 2

From: Angela Bain <abain@chester.k12.sc.us>
Sent: Monday, April 3, 2017 12:33 PM
To: Andrea White <awhite@dwtlawfirm.com>; David Lyon <dlyon@dwtlawfirm.com>
Cc: Dave Duff <dduff@dwtlawfirm.com>
Subject: Files for Chester County School District

Hi all,

Please deliver all electronic and hard copy files from 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

Angela H. Bain, PhD, SPHR
Superintendent
Chester County School District
abain@chester.k12.sc.us

EXHIBIT 3

From: Angela Bain <abain@chester.k12.sc.us>

Sent: Tuesday, June 06, 2017 4:11 PM

To: Lawson, Denise <Denise.Lawson@usfoods.com>; Denise Lawson <dlawson@chester.k12.sc.us>; Lawson, Denise <mmlawson@truvista.net>; Anne H. Collins <ahcollins@chester.k12.sc.us>; Dr Ann Collins <collins@truvista.net>; Maggie James <MJames@chester.k12.sc.us>; Maggie James <maggiejames2010@hotmail.com>; sandstrom10@yahoo.com; Sandra Stroman <ssstroman@chester.k12.sc.us>; Patricia Hampton <hamptp1957@yahoo.com>; Patricia W. Hampton <phampton@chester.k12.sc.us>; Sandra C. Lovern <slovern@chester.k12.sc.us>; tslovern@truvista.net

Subject: Media announcement for tonight's meeting

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

Angela H. Bain, PhD, SPHR

Superintendent

Chester County School District

abain@chester.k12.sc.us

This email message and any attachments are for the sole use of the intended recipient(s) and may contain information that is confidential or proprietary to US Foods. If you have received this message in error, please notify the sender by reply, and delete all copies of this message and any attachments.
<Memo re Public Meeting 06062017fin.doc>

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

Angela H. Bain,

Plaintiff,

v.

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT

C/A No.: 2018-CP-12-00334

**SUPPLEMENTARY MEMORANDUM OF LAW
IN SUPPORT OF THE
MOTION TO DISMISS
OF DEFENDANT DENISE C. LAWSON**

NOW COMES Defendant Denise C. Lawson (hereinafter "Lawson") hereby files this supplementary Memorandum of Law in support of her Motion to Dismiss the Complaint of Plaintiff Angela Bain (hereinafter "Plaintiff") pursuant to Rule 12(b)(6), SCRCF.

In her Complaint, Plaintiff attempts to rely on communications between the Defendants to support her claims for defamation and civil conspiracy. The law forbids her from doing so.

- With regard to Plaintiff's defamation claim, "[w]hen a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, *i.e.*, an action will not lie even if the report is made with malice." *Hainer v. American Med. Intern., Inc.*, 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (citations omitted).
- With regard to Plaintiff's civil conspiracy claim, statements that are absolutely privileged also cannot be used to support a claim for civil conspiracy. See *Kovach v. Whitley*, 2015-CP-08-02380, pp. 15-20 (attached as Exhibit "A").

A. Formation of an Attorney-Client Relationship.

There are no "magic words" required to form an attorney-client relationship. Under South Carolina law, a person is deemed a client when he (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 Plaintiff has alleged, Mrs. Lawson clearly knew and understood that Mr. Childs was an attorney, and according to Plaintiff's own Complaint, often met with him to seek his counsel:

The Defendants have met, schemed, planned and conspired with one another and with others to terminate Plaintiff's contract with Chester County School District, remove her from the position of Superintendent, and to prevent Plaintiff from any future employment with Chester County School District or any other school district by defaming her.

(Complaint, ¶ 70).

For these reasons, and with reference to Plaintiff's own allegations, this Court should find that any communications between Mrs. Lawson and Mr. Childs relevant to this case are protected by the attorney-client privilege.

B. Attorney-Client Communications are Absolutely Privileged.

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. See *Kovach*, supra.

For these reasons, Plaintiff is simply not allowed to use communications protected by the attorney-client privilege to form the basis of a defamation or civil conspiracy claim.

Dated this the 3rd day of October, 2018.

RICHARDSON PLOWDEN & ROBINSON, P.A.

/s/ Eugene H. Matthews

Eugene H. Matthews, SC Bar #10193

Post Office Drawer 7788

Columbia, South Carolina 29202

T: (803) 771-4400

F: (803) 779-0016

Email: gmatthews@RichardsonPlowden.com

COUNSEL FOR DEFENDANT DENISE C. LAWSON

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0802380

Amy Kovach
M. Dawes Cooke Jr.

Joshua A Whitley

Joshua S. Whitley
Rodney Thompson

Amy Kovach
Nancy Bloodgood

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Toal

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

See attached order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Nancy Bloodgood 895 Island Park Drive Ste 202 Charleston, SC 29492

Lucy Clark Sanders 895 Island Park Dr. Ste. 202 Daniel Island, SC 29492

M. Dawes Cooke Jr. PO Drawer H Charleston, SC 29402-0197

Jeffrey Brcit 600 22Nd Street, Suite 402 Virginia Beach, VA 23451

Ellore A. Ganes Hood Law Firm, LLC PO Box 1508 Charleston, SC 29402-1508

Benjamin Houston Joyce PO Box 1508 Charleston, SC 29402-1508

Kathleen Fowler Monoc 25 Calhoun Street Suite 250 Charleston, SC 29403

Laura Johnson Evans 25 Calhoun Street Ste. 250 Charleston, SC 29401

Mary Barnwell Ramsay 25 Calhoun Street, Ste. 250 Charleston, SC 29401

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Mary P. Brown - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ELECTRONICALLY FILED - 2018 Oct 04 10:11 AM - CHESTER - COMMON PLEAS - CASE#2018CP1200334

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

AMY KOVACH,

Plaintiff,

vs.

JOSHUA S. WHITLEY AND KAREN
WHITLEY, IN HER INDIVIDUAL
CAPACITY,

Defendants.

JOSHUA S. WHITLEY,

Defendant/
Counterclaimant,

vs.

AMY KOVACH,

Plaintiff/Counterclaim
Defendant.

JOSHUA S. WHITLEY,

Defendant/
Third-Party Plaintiff,

vs.

RODNEY THOMPSON,

Third-Party Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO: 2015-CP-8-2380

ORDER GRANTING DEFENDANTS
JOSHUA S. WHITLEY'S AND KAREN
WHITLEY'S MOTIONS FOR SANCTIONS

FILED
CLERK OF COURT
BERKELEY COUNTY, S.C.

16 OCT 24 PM 1:41

FILED

This matter is before the Court on the Amended Motions for Sanctions (the Motions)

filed herein by Defendants Joshua S. Whitley (Mr. Whitley) and Karen S. Whitley (Dr. Whitley)

(collectively, Defendants) against Plaintiff Amy Kovach (Ms. Kovach) and her former counsel,

Nancy Bloodgood, Esquire (Ms. Bloodgood), pursuant to Rule 11, SCRCF, and the South Carolina Frivolous Proceedings Act, section 15-36-10 of the South Carolina Code (2005) (the FCPSA). Arguments on the Motions were heard on September 16, 2016, where all parties were represented by counsel.

After considering the arguments of counsel, the exhibits submitted, and all filings including post-hearing submissions, the Court grants Defendants' Motions for Sanctions against Ms. Kovach and Ms. Bloodgood and awards Defendants their costs and reasonable attorneys' fees incurred in defending against the frivolous filings and monetary sanctions pursuant to the FCPSA and Rule 11. Respective counsel for Defendants are directed to submit affidavits of attorneys' fees and related defense costs to the Court for consideration of reasonableness within seven (7) days of receipt of this Order. The Court will set a hearing regarding attorneys' fees and related costs and the amount of the monetary sanctions, if any.

FINDINGS OF FACT

1. Ms. Kovach is the former Director of Communications and Community Relations for the Berkeley County School District (BCSD). She was fired from that position after she pled guilty to two crimes related to her leadership role in Berkeley County's 2012 School Bond Referendum (the Referendum). The Referendum called for a \$198 million bond offering to pay for the building of five (5) new schools and renovations on nineteen (19) schools. In support of the Referendum, a campaign known as the "Vote Yes 4 Schools" was established.

2. During the campaign, Mr. Whitley, a private citizen, attorney, and taxpayer in Berkeley County, became concerned that Ms. Kovach and others at the BCSD were campaigning in favor of the Referendum using the BCSD's resources in violation of section 8-13-1346 of the South Carolina Code. Mr. Whitley investigated the matter by gaining access to relevant

documents from the BCSD through the South Carolina Freedom of Information Act (the FOIA).

3. After the election, the BCSD responded to the FOIA request and provided e-mail communications demonstrating that Ms. Kovach was actively campaigning for passage of the Referendum using the BCSD's resources in violation of state law. Mr. Whitley brought this information to the attention of the Attorney General of South Carolina and, thereafter, the South Carolina Law Enforcement Division (SLED) began an investigation into Ms. Kovach's activities.

4. SLED's investigation eventually led the Attorney General's office to indict Plaintiff on five charges: (1) misconduct in office in violation of the common law of South Carolina; (2) criminal use of public funds to influence an election in violation of section 8-13-1346 of the South Carolina Code; (3) two counts of forgery based on Ms. Kovach's efforts to cover up her criminal misconduct; and (4) and one count of perjury related to fraudulently conducting procurement matters to cover up her criminal misconduct related to the campaign and use of district resources.

5. Ms. Kovach was provided with a defense attorney by her employer (the BCSD), pursuant to section 59-17-110 of the South Carolina Code, based on her claim that she had done nothing illegal and had always acted in good faith.

6. After spending eighteen months on paid leave from the school district, Ms. Kovach ultimately pled guilty in a negotiated plea to the misconduct in office and criminal use of public funds charges in exchange for dismissal of the remaining three charges. Ms. Kovach's guilty plea and sentencing occurred on August 28, 2015. During the proceedings, Ms. Kovach admitted under oath to the material facts supporting all five charges against her, including the two felony forgery charges and the perjury charge related to her efforts to cover up her misconduct.

7. At the hearing on August 28, 2015, Assistant Deputy Attorney General Creighton Waters set forth the factual predicate for the charges and the state's proof in detail. *See generally*, Transcript of Record of Guilty Plea and Sentencing, Aug. 28, 2015 at 8-28. After hearing the State's recitation of the facts, Ms. Kovach told the Court under oath that she "agre[ed] with the facts as stated by the attorney general." *Id.* at 28. As part of the guilty plea, Plaintiff also admitted to the facts underlying the charges against her that were dismissed as part of the negotiated plea deal. *Id.* at 3, 10 (stating plea to misconduct covers and incorporates *all* of the charged conduct in addition to the underlying ethics act count); *id.* at pp. 6-7 (Ms. Kovach admitting that the allegations in the indictment were truthful after the Court read them to her, including the statement that she engaged in "covering up her actions with dishonesty"); *id.* at 28 (Ms. Kovach agreeing under oath with the facts that the State set forth including those supporting the forgery and perjury charges); *id.* at 30, 33-35 (Ms. Kovach agreeing under questioning from the Court that she was guilty of the charges).

8. Based on Ms. Kovach's representations to the Court, the Honorable W. Jeffrey

#4
8/11/17 Young accepted the negotiated plea.

9. Judge Young sentenced Ms. Kovach to five years' imprisonment, suspended upon the completion of two years' probation and payment of a \$25,000 fine. The judge characterized Ms. Kovach's actions as follows:

All right, I've considered the presentations given by the attorney general and Mr. Theos; and even in my limited exposure to this case was [sic] started a month ago, what I see here is lies, lies, and lies. Ms. Kovach from what I see ignored every warning sign that was available to her. Again, she lied to every opportunity reading one's emails somebody warned her that this was not the right thing to do. The email says all fixed. Well, it's not all fixed. Her actions included, again, lies, fabrication of document, and at every opportunity she chose deceit over the truth.

Id. at 55-56.

10. In light of the guilty plea and admissions to her illegal role in the Referendum, the superintendent of the BCSD recommended Ms. Kovach's termination to the Berkeley County School Board (the Board).

11. The Board sought input from the Attorney General's office regarding the evidence in the criminal case against Ms. Kovach. To this end, on August 31, 2015, Deputy Assistant Attorney General Waters wrote a lengthy letter to the Board detailing the facts supporting the charges that Ms. Kovach admitted to during the guilty plea proceedings.

12. On or about September 3, 2015, Ms. Kovach met with Ms. Bloodgood to discuss filing a grievance with the BCSD and filing civil claims in circuit court. Ms. Bloodgood apparently agreed to assist Plaintiff with these filings after reviewing "voluminous documents" related to the criminal matter and speaking with Ms. Kovach's criminal defense attorney.

13. After having Ms. Bloodgood review materials prepared by her, they submitted a grievance package to the Board, which included an Affidavit signed by Ms. Kovach and notarized by Mrs. Bloodgood and dated September 8, 2015. The essence of her Affidavit is that Ms. Kovach was falsely accused, that SLED and the Attorney General's Office had improper motives, and that the perjury and forgery charges "were completely bogus." Additionally, Ms. Kovach's affidavit contains material contradictions of her sworn admissions made during the guilty plea hearing. By way of example, Ms. Kovach stated under oath that "[n]o public funds were used to create or pay for any campaign video." Affidavit, ¶ 21. However, at her guilty plea and sentencing on August 28, 2015, Ms. Kovach admitted under oath that she "did use public funds to pay for the creation of a campaign video," which admission was material to her indictments and guilty plea.

14. On or about September 16, 2015, the Board denied Ms. Kovach's employment

grievance appeal, which finalized her termination.

15. Beginning in October 2015, Ms. Bloodgood began drafting the Complaint in the present action. To accomplish this, Ms. Bloodgood met with Ms. Kovach on several occasions and reviewed the guilty plea transcript. Ms. Bloodgood had received a copy of the criminal hearing transcript on October 13, 2015, wherein her client admitted to all of the charged conduct. Further, Ms. Bloodgood had in her possession Mr. Waters' letter to the Board prior to filing the Complaint, as she submitted a FOIA request for the letter on September 24, 2015. Ms. Bloodgood received the documents sometime in early October, as her billing records indicate that she reviewed the Waters letter and edited the Complaint based on the letter on October 6 and 7, 2015. The Waters letter set forth specific proof for the several charges for which Ms. Kovach had been indicted.

16. Nevertheless, on October 15, 2015, Ms. Kovach, through her attorney, filed the instant civil action against the BCSD, Mr. Whitley, Scott Marino, Dr. Whitley, Terry Hardesty, and the Berkeley County Republican Party, LLC. The Complaint is thirty pages in length and continues with the central theme contained in Ms. Kovach's affidavit—that she was not in fact guilty of the crimes to which she pled guilty and others were to blame for her conduct.

17. The Complaint alleges the following causes of action: (1) breach of the covenant of good faith and fair dealing against the BCSD; (2) grossly negligent and/or intentional misrepresentation against the BCSD; (3) breach of fiduciary duty against the BCSD; (4) civil conspiracy against Mr. Whitley, Terry Hardesty, Scott Marino, Dr. Whitley, and the Berkeley County Republican Party, LLC; and (5) civil assault against Terry Hardesty.

18. As noted, the fourth cause of action contains allegations for civil conspiracy against Defendants and others, and is the subject of the Motions for Sanctions. The essence of

the conspiracy allegation is that Defendants conspired with others to have Ms. Kovach prosecuted. More specifically, the Complaint alleges that Defendants conspired with others to bring Ms. Kovach's criminal conduct to the attention of the Attorney General's Office, which ultimately resulted in Ms. Kovach's indictment and admission to the criminal conduct.

19. The Complaint also contains various allegations of wrongdoing against non-parties. More specifically, the Complaint alleges obstruction of justice, fraud on the court, and ethical breaches against the Attorney General, his lawyers, SLED, and one if its agents. (See, e.g., Complaint at ¶¶ 104–06: perjury and forgery indictments were "retaliatory" and "completely bogus;" ¶ 110: SLED agent "drafted a false interview report with witness . . . ;" ¶ 112: the Attorney General attributed a doctored document to Ms. Kovach knowing that it was not her document, and a SLED agent "obstructed justice;" ¶ 115: SLED knew that "smurfing" charges were "patently false;" and ¶ 117: the Attorney Generals' Office "manufactured" smurfing charge to injure Ms. Kovach). While these allegations do not comprise actual claims against these parties, the Complaint questions the credibility of the investigation and indictment and implies that Ms. Kovach was not actually guilty of the crimes to which she pled guilty or the indicted charges dismissed in her plea deal. Indeed, Plaintiff alleges that the dismissed charges were "completely bogus." (Complaint, ¶ 106).

20. Further, the Complaint impugns State Senator Larry Grooms (a Vice President of Santee Cooper) and his wife, and the law firm that represented the BCSD. However, the Complaint does not allege an actual claim against these parties. (Complaint, ¶¶ 60, 65–66, 71, 163–64).

21. In sum, the Complaint contains numerous material contradictions of Ms. Kovach's sworn testimony at her guilty plea hearing. In response to the sworn contradictions in Ms.

Kovach's affidavit and her allegations of misconduct by SLED and the Attorney General's Office, on November 9, 2015, the Attorney General filed with plea and sentencing judge, W. Jeffrey Young, a Petition for Rule to Show Cause "why Amy Kovach should not be held in contempt of court for her statements to this Court and her subsequent actions relating to her plea of guilty before this Court on August 28, 2015."

22. Meanwhile, on November 3, 2015, in this civil action, Mr. Whitley filed: (1) and Answer containing affirmative defenses, counterclaims, and a third-party complaint against Rodney Thompson (the former superintendent of the BCSD); (2) a motion to dismiss with an accompanying memorandum; and (3) a motion for sanctions against Ms. Bloodgood.

23. On November 16, 2015, Dr. Whitley filed: (1) a motion to dismiss pursuant to Rule 12(b)(6), SCRCP; and (2) a motion for sanctions against Ms. Bloodgood.

24. Judge Young signed the Rule to Show Cause on November 20, 2015, requiring Ms. Kovach to attend a hearing on February 8, 2016.

25. At the hearing on the Rule to Show Cause on February 8, 2016, the Attorney General alleged that Ms. Kovach committed perjury when she submitted her affidavit directly contradicting her previous sworn testimony, and committed constructive contempt "by making a mockery of the criminal justice system and false statements after her solemn plea of guilty before this Court." At the hearing, the Court addressed the Complaint in this action, which largely contains the same material contradictions as Ms. Kovach's affidavit.

26. Ultimately, Judge Young agreed not to hold Ms. Kovach in contempt based on her sworn reaffirmation that her admissions under oath at her guilty plea were in fact true and her express representation that she would immediately dismiss with prejudice the civil Complaint against all parties.

27. Ms. Kovach also admitted under oath that her Complaint contained information that was inconsistent with her sworn testimony at the guilty plea hearing.

28. Ms. Kovach and her criminal attorney attempted to shift the blame for the filing of the Complaint to Ms. Bloodgood, claiming that Ms. Bloodgood failed to perform due diligence before filing the Complaint.

29. Shortly after the hearing on the Rule to Show Cause, Ms. Kovach and Ms. Bloodgood began the process of trying to dismiss the lawsuit against all of the Defendants.

30. However, Dr. Whitley and Mrs. Whitley objected to their attempted dismissals on the grounds that they had pending motions for sanctions, the proposed dismissal was "without prejudice" as to Defendants, and, in the case of Mr. Whitley, counterclaims against Ms. Kovach were pending.

31. On February 12, 2016, Mr. Whitley filed an amended motion for sanctions, adding a claim for sanctions against Ms. Kovach.

32. On February 23, 2016, Dr. Whitley filed an amended motion for sanctions, adding a claim for sanctions against Ms. Kovach.

33. At the hearing on September 16, 2016, Dr. Whitley requested to be dismissed with prejudice from the lawsuit, which was consented to at that time.

CONCLUSIONS OF LAW

I. Dr. Whitley's Motion Is Properly before the Court.

As a threshold matter, this Court has jurisdiction over Dr. Whitley's Motion. Ms. Bloodgood's attorneys contend that Dr. Whitley's motion was not properly before this Court because Kovach, acting through Ms. Bloodgood, had dismissed Dr. Whitley from this case before she answered.

The Court rejects this argument for three reasons. First, Ms. Kovach's attempted dismissal of Dr. Whitley was procedurally improper and therefore is invalid. Second, even if Ms. Kovach had voluntarily dismissed Dr. Whitley, such dismissal is ineffective if legal prejudice is shown or important issues of public policy are present, and this matter involves both. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314 (1992). Finally, assuming arguendo that Dr. Whitley was no longer a party to this action, this Court retains jurisdiction to consider post-dismissal motions such as a motion for sanctions and/or motion for sanctions and attorneys' fees.¹

Ms. Kovach filed this lawsuit on October 15, 2015. Dr. Whitley was not served until October 27, 2015. On November 9, 2015, Dr. Whitley filed and served both a Rule 12(b)(6) Motion to Dismiss the Complaint and a Notice and Motion for Rule 11 Sanctions. On November 23, 2015, Ms. Kovach filed a purported "Stipulation of Dismissal" as to Dr. Whitley, which counsel for Dr. Whitley received on December 1, 2015.² The transmittal letter, dated November 24, 2015, included no certificate of service. Although captioned a "Stipulation of Dismissal," the filing contained only the signature of Ms. Kovach's counsel, and not any of the other parties to the action.

Rule 41(a)(1), SCRCP, provides the procedure for the Plaintiff to voluntarily dismiss an

¹ See *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990) (recognizing that courts "may consider collateral issues after an action is no longer pending," including "motions for costs or attorney's fees."); *Sequa Corp v. Cooper*, 245 F.3d 1036, 1037 (8th Cir. 2001) ("As to the jurisdictional argument, a voluntary dismissal without prejudice under Rule 41(a)(1)(i) does not deprive a District Court of its authority to award costs."); *Kurkowski v. Volcker*, 819 F.2d 201, 203 (8th Cir. 1987) (holding that a district court had jurisdiction to impose Rule 11 sanctions on plaintiffs after voluntary dismissal without prejudice); *Nelson v. QHG of S.C., Inc.*, 354 S.C. 290, 302, 580 S.E.2d 171, 177 (Ct. App. 2003) (stating that federal version of rule 41 "is identical to Rule 41, SCRCP.").

² Prior to receiving service, Dr. Whitley filed her Answer that same morning with the Clerk of Court.

action. Subsection (A) allows the filing of a notice of dismissal "at any time before service by the adverse party of an answer or motion for summary judgment" If a defendant has already so answered or moved, then a plaintiff can only voluntarily dismiss under subsection (a)(1)(B), which allows the filing of a stipulation of dismissal with the consent of all parties. Ms. Kovach's attempted dismissal of Dr. Whitley from this action followed the procedure of neither subsection. The "Stipulation of Dismissal" does not specify which subsection Ms. Kovach is filing under and contains only the signature of Ms. Kovach's counsel and none of the other parties to the action. It was, therefore, invalid as a stipulation under subsection (a)(1)(B).³

Ms. Bloodgood's counsel argued at the motions hearing that the "Stipulation of Dismissal" was intended to be a Notice of Dismissal under Rule 41(a)(1)(A), and the caption was a typographical error. Regardless, the Court need not reach this issue because, had Ms. Kovach intended to file under subsection (A) as a voluntary dismissal, this was not an available option to her, as Dr. Whitley had previously filed her Motion to Dismiss the Complaint and her Motion for Sanctions.⁴

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Even had Plaintiff followed the proper procedure for voluntary dismissal, such dismissal is ineffective if "legal prejudice is shown by the defendant or important issues of public policy are present." *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 531, 426 S.E.2d 313, 314

³ Dr. Whitley's counsel argues that Ms. Kovach's purported filing was also objectionable to Defendant for being *without* prejudice. On December 2, 2015, Dr. Whitley filed a timely Notice and Motion to Strike Stipulation of Dismissal as to Defendant Karen Whitley.

⁴ Ms. Bloodgood argues that since Dr. Whitley had not answered or moved for summary judgment, Ms. Kovach was free to voluntarily dismiss. However, Dr. Whitley's Motion to Dismiss and Motion for Sanctions precluded Ms. Kovach from voluntarily dismissing. Ms. Kovach's Motion to Dismiss attached, incorporated, and relied upon Ms. Kovach's guilty plea transcript, which would have converted that motion into one for summary judgment. See *Johnson v. Dailey*, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (stating that 12(b)(6) motion is converted into summary judgment if court is presented with, and does not exclude, matters outside the pleadings). This Court does consider the attached transcript.

(1992). The facts of this matter involve both.

In *Newman v. Old West, Inc.*, 286 S.C. 394, 334 S.E.2d 275 (1985), the Supreme Court of South Carolina upheld a trial judge's decision to deny the plaintiff's request for voluntary dismissal where the defendants had "expended significant sums of money" *Id.* at 396, 334 S.E.2d at 276. The record reflects that Dr. Whitley's attorney had likewise expended significant effort in defending the claim against his client prior to its dismissal and in attempting to secure dismissal. Should Dr. Whitley be procedurally barred from pursuing her motion for sanctions, she would suffer the full impact of being forced to defend against a frivolous claim without recourse. It would not be equitable to permit a party to knowingly file a patently frivolous civil claim, thus forcing a defendant to the trouble and expense of formally defending, only to later permit plaintiff—after being confronted with the repercussions—to dismiss the frivolous claim without consequence. Therefore, the Court finds that Dr. Whitley should be able to proceed with her Motion for Sanctions against Ms. Kovach and Ms. Bloodgood.

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The Court notes that at the September 16, 2016 hearing, Dr. Whitley requested to be dismissed from the lawsuit with prejudice, which was consented to at that time; therefore, she is hereby dismissed with prejudice, except as to her Motion for Sanctions disposed of herein.

II. Sanctions are Appropriate in this Matter.

Distilled to its essence, Defendants argue that Ms. Bloodgood and Ms. Kovach should not have filed the Complaint containing allegations of civil conspiracy against them based upon two items: (a) Ms. Kovach's criminal plea testimony; and (b) the August 31, 2015 letter from Assistant Attorney General Waters to the BCSD. Further, Mr. Whitley argues that a civil conspiracy claim is not colorable against him because he was a "private citizen" reporting what he believed to be criminal conduct. According to their arguments, these two items absolutely preclude a civil conspiracy claim against them. Ms. Bloodgood and Ms. Kovach argue that the

essence of the Complaint does *not* revolve around Ms. Kovach's prosecution or Defendants' participation in encouraging it, but rather the appropriateness of her termination by the BCSD. Ms. Bloodgood argues that Defendants took inappropriate and conspiratorial actions in furtherance of securing Ms. Kovach's termination from employment. She further argues that: (a) Ms. Kovach's criminal plea does not preclude the filing of the civil conspiracy claim; and (b) that Assistant Attorney General Waters' August 31, 2015 letter has no precedential value and, in fact, misrepresented both fact and law to the BCSD in an ongoing effort (at the behest of Mr. Whitley) to secure Ms. Kovach's termination.

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The Court finds that Defendants are entitled to sanctions and sanctions are appropriate against both Ms. Kovach and Ms. Bloodgood on the basis that both directly participated in and contributed to the filing of a frivolous claim. The Complaint itself contradicts Ms. Kovach's admissions under oath during her guilty plea, which was known by Ms. Kovach and Ms. Bloodgood at the time of the filing of the Complaint.⁵ The facts admitted under oath at the guilty plea, and the plea itself, foreclosed the claim against Defendants for civil conspiracy, because the allegations against them directly contradict Ms. Kovach's material admissions under oath. In addition to the guilty plea transcript that Ms. Bloodgood possessed, the detailed elaboration on those predicate facts, set forth in the letter of Deputy Assistant Attorney General Creighton Waters of August 31, 2015, was available to Ms. Bloodgood contemporaneous with the preparation, filing, and service of the Complaint and should have served to drive home the point that the civil action was irreconcilable with Ms. Kovach's admissions in the matter and resulting

⁵ To this end, the civil conspiracy cause of action as pled in the Complaint plainly centers around Defendants role in the criminal prosecution of Ms. Kovach—and not in her termination from the BCSD, as now argued by Ms. Bloodgood and Ms. Kovach. However, even if the Complaint centered on Defendants' role in Ms. Kovach's termination, Ms. Kovach's admissions in her guilty plea of misconduct in office and illegal use of BCSD funds and resources would fully justify—and even mandate—her termination.

in her criminal conviction. *See Heck v. Humphrey*, 512 U.S. 477, 484-85 (1994) (discussing the "hoary legal principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" and holding state prisoner cannot bring a civil claim for constitutional tort that necessarily implies the invalidity of his criminal conviction unless the conviction was previously invalidated); *see also Tozier v. City of Temple Terrace*, No. 8:10-cv-2750, 2011 WL 3961816 (M.D. Fla. 2011) (applying *Heck* as a basis for an award of sanctions against an attorney).

A. Legal Standard

Defendants have moved for sanctions pursuant to both Rule 11 of the South Carolina Rules of Civil Procedure and the FCPSA. The Court is also vested with inherent authority to award sanctions. *See Holmes v. Haynsworth Sinkler Boyd, P.A.*, 408 S.C. 620, 641, 760 S.E.2d 399, 410 (2014) (abrogated on other grounds).

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Under Rule 11(a) a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *Ex Parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 51 (2008) (citing *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996)). Further, "[w]hile [R]ule 11 is evaluated by a subjective standard, the rule still may be violated with a filing that is so patently without merit that no reasonable attorney could have a good faith belief in its propriety." *Ex parte Bon Secours St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597-98, 713 S.E.2d 624, 628 (2011). Our Supreme Court has affirmed sanctions against a lawyer for filing a frivolous suit without first conducting a reasonable investigation into the facts underlying the claim. *See Gregory*, 378 S.C. at 430, 663 S.E.2d at 46.

The FCPSA provides for liability for attorneys' fees and costs of frivolous suits. *See S.C.*

Code Ann. § 15-36-10 (2005). The FCPSA provides that any person who takes part in the procurement, initiation, and continuation of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney fees and court costs of the other party if . . . (2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs. Sanctions are appropriate where "a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact." *Id.* The Act utilizes a reasonable attorney standard to determine whether sanctions are warranted. *See Se. Site Prep, LLC v. Atl. Coast Builders & Contractors, LLC*, 394 S.C. 97, 107, 713 S.E.2d 650, 655 (Ct. App. 2011). In determining if an attorney or party has violated the Act, the court shall take into account, *inter alia*, the length of time available to the attorney or party to investigate the claims and the information disclosed to the attorney/party. *See* S.C. Code §15-36-10(E).

B. Ms. Kovach's Guilty Plea and Admissions Under Oath Foreclosed Her Claim for Civil Conspiracy Against Defendants.

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Ms. Kovach's Complaint, filed on her behalf by Ms. Bloodgood, alleges a cause of action against Defendants for civil conspiracy. Pursuant to several legal doctrines, no actionable claim for civil conspiracy could exist against Defendants because of Ms. Kovach's admissions under oath at the sentencing hearing.

The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. *See Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006); *see also LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Peoples Federal Savings & Loan Ass'n of S.C. v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) (holding "[a] civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage"). It is essential that the plaintiff prove

all of these elements in order to recover. *See Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938).

The conspiracy claim filed by Ms. Kovach and Ms. Bloodgood against Defendants had no "good ground to support it." The sum total of the conspiracy allegations against Defendants are as follows:

- a) Defendants and others "conspired with each other" to file a complaint with the Attorney General, and took actions to ensure a Resolution was passed by the Berkeley County Republican Party, LLC encouraging the Attorney General to prosecute Plaintiff. (Complaint, ¶ 159.)
- b) Defendants and others "played an active and inappropriate role in SLED's investigation and upon information and belief provided false statements to SLED and the Attorney General." (Complaint, ¶ 160.)
- c) Defendants and others "suggested stories and provided false information to the press" and "communicated directly with Defendant BCSD Board members to turn them against Plaintiff." (Complaint, ¶¶ 161-162.)
- d) State Senator Larry Grooms, who sat in the front row at Plaintiff's criminal case hearings and "acknowledged [Mr. Whitley's] actions towards [Ms. Kovach] when he stated publicly, 'Josh has got the goods on her.'" (Complaint, ¶ 163.)
- e) Defendants exchanged emails regarding the lease of Dr. Whitley's private property while Dr. Whitley was at work. (Complaint ¶ 168.)
- f) Dr. Whitley used her work computer to negotiate the lease of her private property. (Complaint, ¶ 167.)
- g) Mr. Whitley "knew and encouraged his mother [Dr. Whitley] to use public

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resources while she was working to lease her personal property which personally benefited her." (Complaint, ¶ 174).

- h) Dr. Whitley advocated and spoke publicly in favor of the Referendum. (Complaint, ¶ 166.)
- i) Mr. Whitley violated Rule 3.6 of the Professional Rules of Conduct for Lawyers by repeatedly commenting on a pending matter that SLED was investigation in order to influence the outcome of the SLED investigation. (Complaint, ¶ 170.)
- j) Mr. Whitley "threatened to sue volunteer Campaign Coordinator Co-Chair Jane Pulling if she continued to support [Ms. Kovach]." (Complaint, ¶ 171).
- k) Mr. Whitley "bragged publically that he hoped to harm the [BCSD]." (Complaint, ¶ 172).
- l) Mr. Whitley "issued multiple FOIA requests for emails of other BCSD employees who publically expressed support for Plaintiff." (Complaint, ¶ 173).

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The gravamen of Ms. Kovach's conspiracy claim against Defendants is that they and others conspired to report to the Attorney General as to Ms. Kovach's criminal activity and to encourage the Berkeley County Republican Party to pass a resolution encouraging her prosecution. (See Complaint, ¶159). Thus, the only specific actions alleged by Ms. Kovach and Ms. Bloodgood to support the claim for civil conspiracy between Defendants and others were that they: (1) filed a complaint with the Attorney General, and (2) ensured a Resolution was passed by the Berkeley County Republican Party, LLC, encouraging the Attorney General to prosecute Ms. Kovach. Both Defendants were within their rights when they undertook these actions. Even if they had so conspired, bringing Ms. Kovach's now-admitted criminal activity to the attention of the authorities, resulting in her indictment and conviction, is not actionable as a

matter of law.

The Complaint also alleged that Defendants and others made false statements to SLED and the press, but they fail to identify any such statements. They complain that Mr. Whitley sought information through the FOIA, which is a right reserved to any person under section 30-4-30 of the South Carolina Code. They assert that Mr. Whitley violated Rule 3.6 of the Rules of Professional Conduct, Rule 407, SCACR, which is inapplicable to Defendant's speech as a concerned private citizen and taxpayer and does not prevent Mr. Whitley from exercising his First Amendment rights. To the contrary, Mr. Whitley's action in bringing Ms. Kovach's criminal activity to the attention of the authorities, resulting in her indictment and conviction, is not actionable as a matter of law.

First, a citizen's efforts to have a corrupt public employee prosecuted are not actionable in a civil case. This Court notes that "a public official is answerable to the public; members of the public are not third-party interlopers." *See Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 170, 628 S.E.2d 261, 262 (2006) (holding terminated County Administrator could not sue county council, newspaper or a private citizen for civil conspiracy to have her terminated). Defendants had every legal right as citizens to report Ms. Kovach's illegal acts to the authorities.

Furthermore, Defendants' actions are protected by the doctrine of judicial privilege. Ms. Kovach alleges that Defendants' roles as witnesses in SLED's investigation are actionable civil conspiracy. To the contrary, such statements provided as part of the judicial process are absolutely privileged and cannot be the basis for a civil conspiracy claim. *See Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (holding that an "absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official

nature . . .").

The civil conspiracy claim was also foreclosed by the related doctrines of collateral and judicial estoppel. In essence, Ms. Kovach's Complaint represents an attempt to re-litigate the factual basis for her indictment and re-litigate the question of her guilt or innocence. But Ms. Kovach was *bound by her guilty plea* and could not take a position contrary to her previous admissions under oath at the guilty plea hearing during her civil action. In South Carolina, "once a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction." *Doe v. Doe*, 346 S.C. 145, 146, 551 S.E.2d 257, 258 (2001). In this context, a plea of guilty is a "confession of guilt, made in a formal manner and has the same effect in law as a verdict of guilty." *Sanders v. Leeke*, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970). Thus, a defendant who enters a guilty plea "may be collaterally estopped from litigating the same issue in a subsequent civil suit." *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008).

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Finally, the Court finds that Ms. Kovach has not alleged—and could not allege—any special damages flowing from the conspiracy. Ms. Kovach's purported damages flowing from the conspiracy (for example, public humiliation, reputational damage, loss of career opportunities) proximately flow not from the alleged conspiracy but from the SLED investigation, the criminal indictments, Ms. Kovach's guilty plea, sentencing, resulting termination from her employment, and the public notoriety surrounding all of those proceedings that were brought upon her by her own criminal acts. These damages cannot qualify as special damages required supporting a claim for civil conspiracy. *See, e.g., Lawson v. S.C. Dept. of Corrections*, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000) (finding summary judgment proper where no special damages alleged).

Ms. Bloodgood argued in her Affidavit that the type of conduct alleged in the civil conspiracy claim is similar to conduct alleged in other reported civil conspiracy cases. She cites the following cases in support of this theory: *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39, 46 (Ct. App. 2010); *City of Hartsville v. S.C. Mun. Ins. & Risk Fin. Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009); *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 514 S.E.2d 592 (1999); *Coleman v. Stevens*, 124 S.C. 8, 117 S.E. 305 (1923). However, none of these cases are relevant to the facts at hand, because none involved a plaintiff who pled guilty, admitted to her crimes and subsequently sued a defendant for conspiring to have her prosecuted. There simply exists no legal basis to support the alleged civil conspiracy claim against Defendants. The guilty plea and admissions under oath at the sentencing foreclosed the possibility of such an action as a matter of law.

A. The Civil Conspiracy Claims Against Defendants Are Sanctionable.

The Court finally addresses the question of whether the filing of the civil conspiracy claims brought against Defendants warrant sanctions. The Court finds that they do as against both Ms. Kovach and Ms. Bloodgood.

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JBT
"[T]he standard for sanctions under Rule 11 is essentially the same as that of the FCPSA," and the Court finds that Ms. Kovach and Ms. Bloodgood are subject to sanctions under both. *See Father v. S.C. Dept. of Social Servs.*, 353 S.C. 254, 261, 578 S.E.2d 11, 15 (2003). There was no factual or legal basis to support the conspiracy claim, and the inference is unavoidable that improper motives on the part of Ms. Kovach and poor judgment on the part of Ms. Bloodgood drove the filing of the complaint against Defendants. Further, the attorney's filing of allegations that are directly contradicted by her client's previous sworn admissions and plea is troubling. While it appears to the Court that Ms. Bloodgood's actions in the filing of the Complaint may have been the result of a combination of factors, including pressure from her

client, it was not reasonable to do so in light of the information Ms. Bloodgood had at her disposal.

To this end, Ms. Bloodgood's conduct in the instant case is similar to that which the Supreme Court found to be sanctionable in *Ex Parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 51 (2008). In *Gregory*, the Court upheld a sanctions award against a plaintiff's attorney who failed to contact the defendant, plaintiff's previous attorney, before filing suit against him for conversion of settlement funds. The Court deemed the reliance by the plaintiff's counsel solely on information received from the plaintiff to be a breach of counsel's duty to conduct a reasonable investigation.

Here, before filing her Complaint, Ms. Bloodgood had available to her the transcript of her client's plea and an explanatory letter from the Attorney General's Office that directly contradicted the allegations in the Complaint, yet she proceeded to file the Complaint anyway. Thus, if the *Gregory* scenario were adjusted such that the plaintiff's counsel in that case actually contacted the defendant before filing suit, learned through that contact that no viable claim for conversion could be maintained, and still filed suit, it would be comparable to the situation at bar. In other words, plaintiff's counsel in *Gregory* simply failed to take an act the Court properly believed he should, whereas in the present case Ms. Bloodgood had knowledge of the claim's lack of viability prior to filing the Complaint. Thus, sanctions are appropriate as to Ms. Bloodgood.

Ms. Bloodgood maintains that she conducted a thorough investigation into the facts, and that the Complaint was carefully considered. Ms. Bloodgood offers evidence that she performed some thirty-seven (37) hours of work on the Complaint, talked with Ms. Kovach's criminal defense attorneys, reviewed all relevant documents, including the criminal transcript, and went

through multiple versions of the Complaint. The Court does not discount Ms. Bloodgood's diligence or professionalism, as attested to by the character affidavits submitted by lawyer colleagues on her behalf. However, Rule 11's requirement for the attorney to make a reasonable investigation necessarily means that an attorney cannot contradict sworn testimony from his or her own client regarding the same facts and circumstances. Ms. Bloodgood had a copy of the guilty plea transcript and the letter of Deputy Assistant Attorney General Creighton Waters at the time she filed the Complaint. She cannot claim that she had to rely merely upon her client's representations.

Ms. Kovach is even more responsible for making the frivolous filing. Both Ms. Kovach's Affidavit and Complaint contain factual allegations that are irreconcilable with material aspects of her sworn testimony at her guilty plea and sentencing hearing and with conduct she has admitted under oath to committing. Ms. Kovach pled guilty to a detailed and clear factual predicate to her crimes as set forth by the Attorney General. Thereafter, she perjured herself in an Affidavit to the Board in which she attempted to deny her guilt. When that was unsuccessful, she urged Ms. Bloodgood to file, and succeeded in filing, a lawsuit with similar false accusations. The Attorney General then moved for contempt, wherein Ms. Kovach reaffirmed her guilt and blamed her attorney, Ms. Bloodgood, for the filing of the lawsuit. Now, through counsel, she is qualifying what she testified to under oath at her Rule to Show Cause hearing and, through counsel, does not blame Ms. Bloodgood for the filing of the frivolous lawsuit. Thus, in one venue (the criminal one), Ms. Kovach took a position as to Ms. Bloodgood's representation to evade a finding of contempt and then in this hearing took a contrary position. In short, Ms. Kovach should be held accountable for her duplicitous and frivolous filings.

However, despite Ms. Kovach's egregious behavior throughout these proceedings,

because the suit was filed under Ms. Bloodgood's signature, the Court is compelled to order sanctions against her, as well. Neither Ms. Kovach nor Ms. Bloodgood have presented any substantive explanation for the material contradictions. At the end of the day, a complaint that materially contradicts a plaintiff's previous sworn testimony from a criminal proceeding lacks the factual foundation that is required by Rule 11 and must be deemed frivolous.

This Court is mindful that sanctions are an extreme measure not to be imposed lightly. This case warrants this measure. Rule 11 requires attorneys to make a reasonable investigation. Here, Ms. Bloodgood had the benefit of a transcript of Ms. Kovach's guilty plea proceedings. However, she signed and filed a Complaint that contradicted the transcript and made sensational and unsupported averments. Ms. Bloodgood also inexplicably ignored the letter from the Attorney General that she had in her possession prior to filing the lawsuit. By choosing to ignore the transcript and the Attorney General's letter, Ms. Bloodgood filed a frivolous lawsuit and must be sanctioned. Further, Ms. Kovach's attempt to re-litigate her criminal conviction through the civil justice system amounts to bad faith and also requires the Court to sanction her.

This Court is further mindful that not awarding sanctions sets a dangerous precedent. The Defendants in this action, who suspected criminal activity, had the right to make a complaint to the Attorney General. In fact, they had the right to be wrong, that is, had the Attorney General not found criminal activity, a civil conspiracy claim would still not exist against the persons that reported suspected criminal activity to authorities. Nevertheless, Defendants got it right, in that Ms. Kovach had indeed committed the very criminal acts they complained of to the Attorney General. In fact, Ms. Kovach admitted to committing these criminal acts, pled guilty, and was sentenced. After reviewing the guilty plea transcript, Ms. Bloodgood should have counseled Ms. Kovach that filing a civil complaint would not only subject her to Rule 11 sanctions, but it would

place her back in criminal jeopardy (as it in fact did via the Rule to Show Cause motion and order). Ms. Bloodgood's failure to properly counsel her client that a civil action would place her in jeopardy ultimately cost Defendants great expense and subjected them to needless harassment.

In sum, both attorney and client acted together to file a frivolous lawsuit and both shall be liable for sanctions, to be apportioned at a later date.

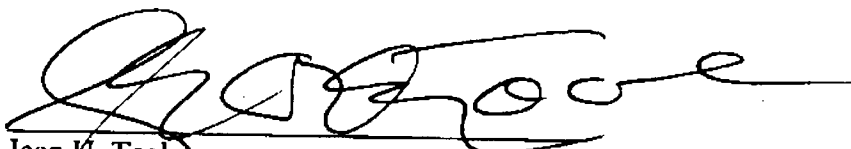
B. An Award Of Attorney Fees Is Appropriate

The Court finds that Defendants are entitled to be reimbursed their reasonable attorneys' fees and litigation costs incurred in defending this action and prosecuting his Motion for Sanctions. *See Ex parte Gregory*, 378 S.C. 430, 438, 663 S.E.2d 46, 48 (2008) (holding an order under Rule 11 sanctioning a party and/or attorney for filing a frivolous claim "may include an order to pay the reasonable costs and attorney fees incurred by the party or parties defending against the frivolous action"). In addition, the FCPSA specifically provides for liability for attorney fees, costs, and other sanctions. *See* S.C. Code Ann. § 15-36-10 (2005).

CONCLUSION

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For the reasons stated herein, the Court finds that an award of attorneys' fees and defense costs to the Defendant is reasonable and grants the Defendant's Motion for Sanctions against both Plaintiff and Bloodgood. The Court will consider the amount of attorneys' fees and costs due and any other sanctions provided for by the FCPSA and Rule 11 at a later hearing.

IT IS SO ORDERED.


Jean H. Toal
Presiding Judge, Ninth Judicial Circuit

October 21, 2016
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF Chester
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1200334

Angela H Bain
PLAINTIFF(S)

Denise C Lawson et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

After due consideration of all matters presented, the Court issues the following instructions/findings for an order:

- 1) Defendant Childs' Motion to Dismiss is granted based on the narrow attorney-client privilege issue argued and subsequently briefed in detail.
- 2) The civil conspiracy cause of action for both Defendants is dismissed since Defendant Childs is no longer a party.
- 3) Defendant Lawson's Motion to Dismiss the Plaintiff's defamation cause of action is denied.

A formal order to follow.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/04/2018.

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Chester Common Pleas

Case Caption: Angela H Bain VS Denise C Lawson , defendant, et al

Case Number: 2018CP1200334

Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-10-04 14:30:12 page 3 of 3

Shannon Polvi

From: Gibbons, Brian Law Clerk (Ryan Swancy) <bgibbonslc@sccourts.org>
Sent: Thursday, October 04, 2018 12:26 PM
To: Shannon Polvi; Michael H. Montgomery (mhm@montgomerywillard.com);
GMatthews@RichardsonPlowden.com
Cc: Gibbons, Brian M.; Kate Ray; datkinson@chestercounty.org
Subject: Bain v. Childs and Lawson

Counsel,

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- 1) Defendant Childs' Motion to Dismiss is granted based on the narrow attorney-client privilege issue argued and subsequently briefed in detail.
- 2) The civil conspiracy cause of action for both Defendants is dismissed since Defendant Childs is no longer a party.
- 3) Defendant Lawson's Motion to Dismiss the Plaintiff's defamation cause of action is denied.

Judge Gibbons directs that Mr. Montgomery prepare a proposed order consistent with his arguments for the first two findings above and that Ms. Polvi prepare a proposed order consistent with her arguments as to finding #3.

Please submit these proposed orders by next Wednesday October 10, 2018. Thank you,

Ryan S. Swancy

Law Clerk to Judge Brian M. Gibbons
6th Judicial Circuit

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STATE OF SOUTH CAROLINA  
COUNTY OF CHESTER

Angela Bain

Plaintiff,

v.

Denise C. Lawson and Kenneth L. Childs,

Defendants.

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

Civil Action No.: 2018-CP-12-0334

**PROPOSED ORDER DENYING  
DEFENDANT LAWSON'S MOTION TO  
DISMISS**

This matter is before the Court on Defendant Denise Lawson's Motion to Dismiss. The parties provided memorandums of law setting forth their positions and oral arguments were heard on September 26, 2018. That motion is denied with respect to Plaintiff's defamation cause of action for the reasons that follow:

**FACTUAL BACKGROUND**

The facts are viewed and applied in the light most favorable to the nonmoving Plaintiff. According to the Complaint, Plaintiff accepted the position of Interim Superintendent of Chester County School District (the "District") in February of 2016 and was then selected by the Chester County School Board of Trustees (the "Board") as Superintendent in May of 2016 on a continuing basis. Lawson was elected the Board Chair by the Board in January of 2017 after serving as a trustee for several years. Plaintiff alleges that in June of 2018, Lawson began reporting that Plaintiff was making excessive amounts of money by consulting with other school districts and was personally involved in an organization to promote her outside consultations and other income producing activities with school districts and that she was a partner or part owner of that organization.

Plaintiff alleges that Lawson falsely accused Plaintiff of violating her contract. Lawson was allegedly aware that Plaintiff was authorized to perform this outside consulting work as it was stated in her contract with the District and approved by the Board, of which Lawson was a member at the time Plaintiff was hired as Superintendent. Lawson allegedly published that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District and was a partner in an enterprise to publicize and expand her personal income as a consultant.

Plaintiff alleges that Lawson has defamed her by accusing her of willfully defrauding the District, being unfit for her position, violating state law, and by insinuating that she is guilty of unlawful “double dipping” and engaging in unethical conduct. These statements and others were allegedly made to persons within and outside of the School District during 2017 and 2018 in the absence of a need to know basis, including but not limited to, publication to the Superintendent of Marlboro County School District and to the News & Reporter, the local news outlet in Chester County.

### **STANDARD OF REVIEW**

“Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action.” *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). “A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory.” *Id.* Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id. Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). Rather, “[t]he question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.” *Williams v. Condon*, 347 S.C. 227,

233, 553 S.E.2d 496, 499-500 (Ct. App. 2001); citing, *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999).

### **DISCUSSION**

To state a claim for defamation, a plaintiff must prove the following elements: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) actionability of the statement or existence of special harm. *McBride v. School Dist. Of Greenville County*, 389 S.C. 546, 559-560 (Ct. App. 2010). “A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Id.* (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

“It is established that a defamatory insinuation may be made by actions or conduct as well as by word.” *Tyler v. Macks Stores of South Carolina, Inc.*, 275 S.C. 456, 458, 272 S.E.3d 633, 634 (1980). “It is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.” *Id.* (quoting *Timmons v. News and Press, Inc.*, 232 S.C. 639 at 644, 103 S.E.2d 277 at 280 (1958)).

Defamation is actionable *per se* if it charges a person with one of five types of acts or characteristics including “unfitness in one’s business or profession.” *Holtzsheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 511, 506 S.E.2d 497, 502 (1998).

**A. Plaintiff has pled her defamation claim with the required level of specificity.**

Defendant argues Plaintiff has not stated facts sufficient to constitute a cause of action for a defamation claim. It is important to remember that “[t]he plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Here, Plaintiff pleads more than “recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 556 U.S. at 678. Plaintiff has fully plead an actionable defamation claim against Defendant Lawson. Specifically, Plaintiff pled:

46. Having assembled such information, *Childs, together with Lawson, began to openly report to the Board members of the Chester County School District and others that the Plaintiff had violated her contract, was wrongfully involved in charging large and excessive fees to other school districts at the expense of her work with Chester County School District, and she was a partner in an enterprise to publicize and expand her personal income as a consultant*; all of which both Defendants knew were false and untrue statements.

60. The Plaintiff has been falsely accused of willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was *guilty of misfeasance and/or unlawful “double dipping”* and receiving excessive compensation, and as such was incompetent in the performance of her job and engaging in *improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.

62. These statements and others were *made to persons within and outside of the School District* in the absence of a need to know basis. The defamatory statements were published to, *including but not limited to, the Superintendent of Marlboro County School District and to the News & Reporter.*

63. Publication from Defendants was made *during 2017 and 2018*.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made *throughout the last several months* and with charges of escalating severity.

(Compl. ¶¶ 46, 60-64). Based on the pleadings, including but not limited to the above quoted paragraphs of the Complaint, it is clear that Plaintiff sufficiently pled, with the required specificity at this stage of litigation, her defamation claim against Lawson.

Further, Defendant includes in her argument specific allegations from the Complaint when she says, “[e]ven when Plaintiff alleges that Lawson made defamatory statements to the Superintendent of Marlboro County School District and to the News & Reporter, she fails entirely to allege with any specificity what was said that was defamatory.” This argument makes clear that, contrary to Lawson’s earlier argument, Plaintiff has pled 1) to whom the statements were made — the Superintendent of Marlboro County, the News & Reporter and others — and when the statements were made, 2017 and 2018. Solely because Plaintiff was not present during the communications to give the exact specifics as to what was said does not mean that she has failed to plead her defamation claim with enough specificity.

If a plaintiff ‘has alleged specific defamatory statements made to [other] employees, and discovery will permit the plaintiff to specifically identify those individuals by name,’ then defamation is properly pled. *Alford v. Wang, Inc.*, 11 F.Supp.3d 584, 591 (D.S.C. 2014). Defendant Lawson is attempting to impose a standard for pleading defamation that does not exist under current case law. In *Wang*, where a Motion to Dismiss under Rule 12(b)(6) was also at issue, the plaintiff pled that her employer “told other employees that she had been demoted because she was stealing from the store because she was a racist.” *Id.* at 588. The District Court of South Carolina found this was a sufficient defamation claim. *Id.* at 591. Here, Plaintiff has alleged more

information than that which was found sufficient in *Wang*. Therefore, it would be premature to dismiss her claim of defamation against Defendant Lawson. Plaintiff's claims are fact determinative and must be developed through discovery. Discovery needs to occur for the defamation claim to be further developed through discoverable evidence and witness testimony.

**B. The holding in *Paradis v. Charleston County School District* is not dispositive on this case.**

Defendant Lawson cites to *Paradis v. Charleston County School District* as a "similar case" in support of her lack of specificity argument. However, *Paradis* is not factually similar to the instant case and is therefore distinguishable. In *Paradis*, the Court of Appeals of South Carolina was considering a defamation claim brought by a school teacher against a school district and her former employer after being placed on an evaluation plan and subsequently terminated. *Paradis*, 2018 WL 3636581, at \*1 (S.C. App. August 1, 2018). Plaintiff is the current Superintendent of Chester County School District not a teacher at a school within the district. Further, Plaintiff is not suing the Chester County School District or any school within said district. Instead, she has brought claims against two individuals, Lawson, the Chairman of the Board of Trustees, and Childs, an attorney. Plaintiff is also not basing her defamation claim solely on actions as the teacher in *Paradis* did. Instead, she has pled that the defamatory statements made by the Defendant about her to members of the community, include allegations of illegal and unethical behavior.

The Court in *Paradis* found that the act of a teacher being placed on a SAFE-T review was not defamatory, that issue is not applicable to the case at hand. The Court in *Paradis* based the dismissal of the plaintiff's defamation case on the finding that there was a statute explicitly stating that the government has the explicit discretion to place teachers on SAFE-T plans thus the act of placing a teacher on a remedial SAFE-T plan could not be defamatory. Because there was a statute giving explicit discretion for the specifically alleged defamatory act, there was the Court's stated

basis of dismissal. There is no statute in existence in South Carolina that grants Lawson the discretion to defame Plaintiff to Marlboro County School District, the News & Reporter, and others. Therefore, the facts of Plaintiff's case are sufficiently distinguishable from the facts before the Court of Appeals in *Paradis*.

Defendant seems to argue that the decision in *Paradis* gives people carte blanche discretion to defame individuals, that is a misreading and misapplication of the Court's ruling in *Paradis*. In affirming the Circuit Court's decision to dismiss the teacher's defamation claim, the S.C. Court of Appeals relied on the fact that the teacher "never indicates who made defamatory statements about her, what they said, or to whom those statements were published." 2018 WL 3636581, at \*3. To argue that Plaintiff in the instant case has failed to provide all of the information that the Court of Appeals was looking for in *Paradis* does not reflect an accurate read of Plaintiff's Complaint.

Plaintiff has pled all of the facts mentioned by the S.C. Court of Appeals in *Paradis*, perhaps with more specificity than is required considering that on a motion to dismiss "the pleadings must be liberally construed." 2018 WL 3636581, at \*3 (citing *Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000)). Plaintiff has pled that the Defendant Lawson made the defamatory statements about her. (Compl. ¶¶ 60, 65). Plaintiff has also pled to whom the statements were published:

62. These statements and others were made to persons within and outside of the School District in the absence of a need to know basis. The defamatory statements were published to, including but not limited to, the ***Superintendent of Marlboro County School District*** and to the ***News & Reporter***.

(Compl. ¶ 62). Plaintiff set forth with specificity what the defamatory statements concerned:

60. The Plaintiff has been falsely accused of ***willfully defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job*** due to the same. The Defendants further ***accuse the Plaintiff of violations of state law*** by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning

compensation from other districts. Defendants allege the *Plaintiff violates her contract and her actions interfere with her job with Chester County School District* and that *she fraudulently was a partner or owner of a business to promote these outside activities*.

61. The allegations and insinuations that the *Plaintiff was guilty of misfeasance and/or unlawful "double dipping" and receiving excessive compensation*, and as such was incompetent in the performance of her job and *engaging in improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

(Compl. ¶¶ 60, 61). Finally, Plaintiff pled when the Defendant made such defamatory statements, which is in excess of the specificity required by the Court of Appeals in *Paradis*:

63. Publication from Defendants was made *during 2017 and 2018*.

64. The Plaintiff has thus been defamed by actions as well as words, as the charges made against her were made *throughout the last several months* and with charges of escalating severity.

(Compl. ¶¶ 63, 64). Though *Paradis* is distinguishable from Plaintiff's case, she has met the requirements discussed by the S.C. Court of Appeals in *Paradis*.

**C. S.C. Code Ann. § 59-19-10 is inapplicable to Plaintiff's defamation claim.**

Defendant argues, "[m]oreover, to the extent Plaintiff's allegations can be discerned, they concern statements that relate to Plaintiff's job performance." This argument is a mischaracterization of Plaintiff's Complaint.

Plaintiff has plead:

60. The Plaintiff has been falsely *accused of willfully defrauding the Chester County School District* by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of *violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff* by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that *she fraudulently was a partner or owner of a business* to promote these outside activities.

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(Compl. ¶¶ 60, 61). As evidenced by the above quoted language, the defamatory statements and allegations by Defendant Lawson included in Plaintiff’s Complaint go far beyond Plaintiff’s job performance as Superintendent of the Chester County School District or any discretionary acts a School Board Chair. These actionable accusations accuse Plaintiff of unlawful, unethical, and immoral conduct.

### **CONCLUSION**

The Court holds that Plaintiff sufficiently pled her defamation claim.

THEREFORE, Defendants’ motion to dismiss as to this claim is denied.

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Brian M. Gibbons  
Sixth Circuit Court Judge

\_\_\_\_\_, 2018  
Chester, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF CHESTER

Angela Bain

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**FACTUAL BACKGROUND**

The facts are viewed and applied in the light most favorable to the nonmoving Plaintiff. According to the Complaint, Plaintiff accepted the position of Interim Superintendent of Chester County School District (the "District") in February of 2016 and was then selected by the Chester County School Board of Trustees (the "Board") as Superintendent in May of 2016 on a continuing basis. Lawson was elected the Board Chair by the Board in January of 2017 after serving as a trustee for several years. Plaintiff alleges that in June of 2018, Lawson began reporting that Plaintiff was making excessive amounts of money by consulting with other school districts and was personally involved in an organization to promote her outside consultations and other income producing activities with school districts and that she was a partner or part owner of that organization.

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### DISCUSSION

To state a claim for defamation, a plaintiff must prove the following elements: (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) actionability of the statement or existence of special harm. *McBride v. School Dist. Of Greenville County*, 389 S.C. 546, 559-560 (Ct. App. 2010). "A statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* (quoting *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002)).

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(Compl. ¶¶ 60, 61). Finally, Plaintiff pled when the Defendant made such defamatory statements, which is in excess of the specificity required by the Court of Appeals in *Paradis*:

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Plaintiff has plead:

60. The Plaintiff has been falsely *accused of willfully defrauding the Chester County School District* by accepting compensation from outside sources and being incompetent or unfit for her job due to the same. The Defendants further accuse the Plaintiff of *violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff* by earning compensation from other districts. Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that *she fraudulently was a partner or owner of a business* to promote these outside activities.

61. The allegations and insinuations that the Plaintiff was *guilty of misfeasance and/or unlawful "double dipping" and receiving excessive compensation*, and as such was incompetent in the performance of her job and *engaging in improper, unethical and unlawful conduct* have been published and republished by the Defendants and many others who have heard the same on numerous occasions leading up to the probable if not likely termination of the Plaintiff's contract with said School District.

(Compl. ¶¶ 60, 61). As evidenced by the above quoted language, the defamatory statements and allegations by Defendant Lawson included in Plaintiff's Complaint go far beyond Plaintiff's job performance as Superintendent of the Chester County School District or any discretionary acts a School Board Chair. These actionable accusations accuse Plaintiff of unlawful, unethical, and immoral conduct.

### CONCLUSION

The Court holds that Plaintiff sufficiently pled her defamation claim.

THEREFORE, Defendants' motion to dismiss as to this claim is denied.

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Brian M. Gibbons  
Sixth Circuit Court Judge

\_\_\_\_\_, 2018  
Chester, South Carolina



Chester Common Pleas

**Case Caption:** Angela H Bain VS Denise C Lawson , defendant, et al

**Case Number:** 2018CP1200334

**Type:** Order/Other

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-10-15 18:55:07 page 10 of 10

|                                       |   |                                         |
|---------------------------------------|---|-----------------------------------------|
| <b>STATE OF SOUTH CAROLINA</b>        | ) | <b>IN THE COURT OF COMMON PLEAS</b>     |
|                                       | ) | <b>FOR THE SIXTH JUDICIAL CIRCUIT</b>   |
| <b>COUNTY OF CHESTER</b>              | ) |                                         |
| <b>Angela H. Bain,</b>                | ) | <b>Civil Action No: 2018-CP-12-0334</b> |
|                                       | ) |                                         |
| <b>Plaintiff,</b>                     | ) |                                         |
|                                       | ) |                                         |
| <b>v.</b>                             | ) | <b>ORDER GRANTING MOTION AND</b>        |
|                                       | ) | <b>DISMISSING ACTION</b>                |
| <b>Denise C. Lawson and</b>           | ) | <b>AGAINST DEFENDANT CHILDS</b>         |
| <b>Kenneth L. Childs, Defendants.</b> | ) |                                         |
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This matter is before the Court on Motions by Defendant Kenneth L. Childs to Dismiss the Complaint against him pursuant to Rule 12(b)(6) and in the alternative for Judgment on the Pleadings or an Order striking Portions of the Complaint.

The Court heard the motions during a hearing held in the Chester County Courthouse on September 26, 2018. At that hearing, Plaintiff Angela Bain was present and represented by Shannon Polvi. Defendant Childs was present and represented by Michael H. Montgomery. The matter was argued and briefed extensively by the parties.

# **INTRODUCTION:**

Plaintiff Angela Bain, the Superintendent of Schools for the Chester County School District, ("Bain") brings this conspiracy and defamation action against Denise C. Lawson, ("Lawson") Chair of the Board of Trustees of the Chester County School District and Kenneth L. Childs ("Childs") an attorney who engages in the practice of school law and has represented and represents the Chester County School District.

Bain alleges that Childs and Lawson engaged in a conspiracy to cause her to lose her employment and defamed her by publishing false information designed to discredit her and cast her in an unfavorable light.

Before the Court are Childs' Motion to Dismiss or in the Alternative for Judgment on the Pleadings and Childs' Motion to Strike. Because the Court grants the Motion to Dismiss, no ruling is made on the Motion to Strike. For the reasons discussed below, the Court GRANTS Childs' Motion to Dismiss. The Court also Dismisses the Conspiracy cause of action against all Defendants.

## **FACTUAL BACKGROUND**

Bain, became employed as Acting Superintendent and then as Superintendent of Schools for the Chester County School District in May 2016 (Complaint ¶5). Lawson has served on the Board of Trustees for the Chester County School District for many years and has been Board Chair, most recently, since January 2018 (Complaint ¶7). Childs is an attorney, who has represented school districts in South Carolina, including the Chester County School District (Complaint ¶8). Bain represented that Childs is "one of the district's attorneys" on several occasions by e-mails sent to both Childs and Lawson, as well as other school board members. (See Exhibits 1, 2 and 3 Childs' Supplemental Memorandum in Support of Motion to Dismiss). While the Complaint alleges that Childs was not the District's attorney, at least after March 17, 2018 (Complaint ¶¶9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 49, 56, 57 and 71), additional information provided in reference to the Complaint reveals Bain's e-mail of June 6, 2017, to the School Board – including Mrs. Lawson. That e-mail reads:

*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.*

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Bain alleges that Childs and Lawson defamed her by “falsely accusing her of defrauding the Chester County School District by accepting compensation from outside sources and being incompetent or unfit for her job due the same.” (Complaint ¶ 60). She also alleges that “Defendant further accuse the Plaintiff of violations of state law by falsely alleging that her contract with Chester County School District is breached by the Plaintiff by earning compensations from other districts. (Complaint ¶60). Plaintiff also alleges that “Defendants allege the Plaintiff violates her contract and her actions interfere with her job with Chester County School District and that she fraudulently was a partner or owner of a business to promote these outside activities.” (Complaint ¶60). Bain further alleges that Childs (and Lawson) insinuated that she was guilty of malfeasance and receiving excessive compensation and “as such was incompetent in the performance of her job and engaging in improper, unethical and unlawful conduct.” (Complaint ¶61). Bain also claims that the Defendants have published and republished these allegations on numerous occasions “leading up to the probable if not likely termination of the Plaintiff’s contract with said School District.” (Complaint ¶61). The Complaint alleges that the statements were published to “persons within and outside the School District in the absence of a need to know basis.” They were also allegedly published to “the Superintendent of the Marlboro County School District and to the News

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### **The Attorney-Client Privilege**

The attorney-client privilege protects communications between a client and her attorney in two key ways: (1) by prohibiting the attorney from disclosing the communications, and (2) by protecting the client from being compelled to disclose the communication in legal proceedings. In South Carolina, the privilege the Common Law governs the Attorney-Client Privilege. (*SCRE* Rule 501). The seminal case on the Attorney-Client Privilege is *Drayton v. Industrial Life & Health Ins.*, 205 S.C.98, 31 S.E.2d 148 (1944). There the Court held “The general rule excludes from evidence confidential communications of a professional nature between attorney and client, unless the client, for whose benefit the rule is established, waives the privilege.” *Clary v. Blackwell*, 160 S.C. 142, 158 S.E. 223; *State v. Chandler*, 126 S.C. 149, 119 S.E. 774; *State v. Rook*, 174 S.C. 225, 177 S.E. 143. Rule 502 *Federal Rules of Evidence* further establishes the protections afforded the confidential communications between Attorney and Client. Other Common Law authorities have defined the basic elements of the attorney-client privilege: (1.) a communication; (2.) made between privileged persons (i.e., attorney, client or agent); (3.) in confidence; and (4.) for the purpose of obtaining or providing legal assistance for the client. The purpose of the privilege is the promotion of unrestrained communication and contact between the lawyer and client in matters in which the attorney’s professional judgment is sought. The attorney-client privilege has developed from two assumptions: (1) good legal assistance requires full disclosure of a client’s legal problems, and (2) a client will reveal details required for proper representation only if his

confidences are protected. But because the privilege can prevent a judge and jury from learning of otherwise relevant and admissible evidence, courts construe the privilege narrowly. There are two fundamental aspects of the attorney-client privilege, both of which must be met for the privilege to apply. The first is that the communication must have been made to obtain legal advice, rather than business or other advice. The second is that there must be an expectation that the communication will not be disclosed.

Here, the pleadings establish an attorney-client relationship despite Plaintiff's efforts to plead legal conclusions to the contrary.

Even considering the allegations Plaintiff's complaint in a light most favorable to the Plaintiff, the Communications between Mr. Childs and Mrs. Lawson, both individually and as Board Chair of the School District meet the requirements. The effort to plead around the privilege with various legal conclusions reveals that even the Plaintiff recognizes the privilege and that it existed here and realizes that her claims against Childs will fail as a matter of law unless she can plead around the attorney-client relationship.

**The Plaintiff's Complaint and Attachments Confirm that an Attorney-Client Relationship Existed Between Childs and the School District.**

The exhibits to the Complaint and the supplemental information provided by the Plaintiff, demonstrate that Superintendent Bain was questioning legal bills of Mr. Childs after the time frame where Plaintiff alleges that his representation was terminated and he was no longer an attorney for the School District. The Exhibits to the Complaint demonstrate that "Except in unusual circumstances, the board will make all communications to the school attorney through the superintendent or board chairman. (Board Policy BDG, Complaint, Exhibit B) These documents

arguably establish an attorney-client relationship between Childs and the School district and that Lawson was a proper person, as Board Chair, to communicate with Childs on behalf of the District.

The Superintendent's e-mail communications attached to Defendant Childs Supplemental Memorandum confirm the attorney-client relationship evident in the Complaint, exhibits and supplemental documents filed by the Plaintiff.

On April 3, 2017, Dr. Bain sent an e-mail to both firms (Exhibit 1):

*Hi all,  
Please deliverer all electronic and hard copy files from the old firm to  
Andrea White at 3614 Landmark Drive Suite EF  
We hope to be able to use both firms going forward.  
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On June 2, 2017, Dr. Bain sent an e-mail (Exhibit 2) to Mr. Childs and his partner David Lyon which states:

*Good morning, David and Ken!  
  
Thanks for the memo! Yes, this is fine to go ahead and send to the board with a cc  
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*See attached.*

*Thanks.*

*Angela.*

[Emphasis added]

Dr. Bain's e-mails demonstrate that in June of 2017 she was asking for legal work from Mr. Childs and directing him to transmit this to the Board. She directly referred to him, in an e-mail to the School Board as "one of our attorneys." Her own words contradict the allegations contained in her complaint. This e-mail, coupled with the letter provided by Plaintiff dated August 22, 2017, complaining about charges on several matters unequivocally demonstrates that the firm of Duff & Childs (and Mr. Childs had an attorney-client relationship with the School District. Mrs. Lawson is the Board Chair. Mrs. Lawson had every reason to understand that Mr. Childs was an approved attorney representing the District and there is no factual averment after the date of the Superintendent's e-mails to suggest anything to the contrary -- even construing those allegations in a light most favorable to the Plaintiff. Mr. Childs acting as Ms. Lawson's attorney cannot be held personally liable under the Plaintiff's theory of the case.

Where there is a conflict between allegations in a pleading and the exhibits attached thereto the exhibits control. *Hoefling v. City of Miami*, 811 F.3d. 1271, 1277, (11<sup>th</sup> Cir 2016), *Crenshaw v. Lister*, 553 F.3d. 1283, 1292 (11<sup>th</sup> 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 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) (quotation

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 attached the Board Policies to her complaint. The letter exhibit to her supplemental brief and the attachments to her memo are authentic, incorporated and dispositive of the fact that there was an attorney-client relationship between Childs and the Chester County School District. The Plaintiff cannot question the veracity or authenticity of her letter and electronic mails.

## CONCLUSIONS OF LAW

### A. Standard of Review.

A Rule 12(b)(6) motion to dismiss should be granted when the pleadings, construed in the light most favorable to the non-moving party, fail to allege sufficient facts to state a cause of action. Rule 12(b)(6), *SCRCP, Haskell Co. v. Morgan*, 274 S.C. 261, 262 S.E.2d 737 (1980). As the Court stated in *DeBerry v. McCain*, 275 S.C. 569, 274 S.E. 2d 293 (1981)

A motion to dismiss admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts. In short, a motion to dismiss a complaint does not admit conclusions of law pleaded therein.

274 S.E.2d at 296; *Carolina Winds Owners Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897, 899 (Ct. App. 1988) ("A motion under Rule 12(b)(6) . . . admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.") An allegation of a mere legal conclusion is insufficient to state a cause of action. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (1986); *Russell v. City of*

*Columbia*, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989) (“The court must take well-pleaded factual allegations as true. However, allegations which are conclusory rather than factual should be disregarded.”) To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which, when taken as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. *Ashcroft*, *Id.* at 556 US 678.

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the **factual** allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). [emphasis added]

Rule 702 S.C.R.E. prevents the admission of legal conclusions as they are strictly within the purview of the court. The question before the court here is one that as a matter of law, from her own pleadings, the Plaintiff cannot aver the legal conclusion that there was no attorney-client or other privileged relationship, the absence of which undergirds her entire claim. Her writings belie the legal conclusions pled in her complaint. Here, Plaintiff merely attempts to plead opinion as fact and relies on those legal conclusions as her only basis to survive dismissal. In general, expert testimony on issues of law is inadmissible. *See generally* Note, Expert Legal Testimony, 97 *Harv.L.Rev.* 797, 797 (1984); *see also Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "such testimony is a legal opinion and inadmissible."); *United States v. Sinclair*, 74 F.3d 753, 758 n.1 (7th Cir. 1996) (commenting that Federal Rules of Evidence 702

and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

**B. Plaintiff's Defamation Claim against Childs is Dismissed as a Matter of Law.**

**1. *Childs was the District's Attorney and is Immune From Liability.***

"An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-529, 3239 S.E.2d 887, 889 (Ct. App. 1986). To sustain the cause of action against Childs, it is necessary for the Plaintiff to have pleaded that Childs breached some independent duty to her outside the scope of representation of the client. Here, even looking at the pleadings in a light most favorable to the Plaintiff, Childs was asked to review and comment upon Bain's actions by Lawson and the School Board and his communications, including inquiries and opinions about those actions are not outside the scope of that representation as a matter of law. The facts here establish the attorney-client relationship and the facts alleged and reasonably deducible from the complaint cannot, as a matter of law entitle the Plaintiff to relief on any theory of the case.

**2. Plaintiff's Civil Conspiracy Claim is Dismissed as a Matter of Law.**

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (If a Plaintiff merely repeats the damages from another claim instead of

specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed). It is essential that a plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord. Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005).

Plaintiff has failed to show in her pleadings that the actions that form the apparent basis of Plaintiff's conspiracy claim were done outside the scope and course of the attorney-client relationship, such that no actionable conspiracy exists as a matter of law.

Construing the factual allegations within the Complaint in a light most favorable to Plaintiff, the Court cannot find that the alleged actions of Defendant Childs were beyond the scope of his attorney-client relationship with Defendant Lawson and/or the School District. Since the Court has dismissed Mr. Childs as a party in this matter based upon attorney-client privilege, there is no combination of two or more persons to support a civil conspiracy claim. Plaintiff cannot as a matter of law plead a cause of action for conspiracy under South Carolina Law. Because of this, Childs and Lawson are entitled to dismissal of the Plaintiff's conspiracy cause of action as a matter of law.

## **CONCLUSION**

While Plaintiff is not required to prove any of her claims at this juncture, she is required to state plausible causes of action against Mr. Childs which she has not done, and cannot do. The Complaint against Mr. Childs is therefore subject to dismissal in its entirety, as Plaintiff can prove no set of facts that would entitle her to relief against him on any of her claims. Accordingly, the

Motion to Dismiss the Complaint by Kenneth L. Childs is **GRANTED**. Because Childs is Dismissed from the Complaint entirely, Lawson's Motion to Dismiss is also **GRANTED** as it relates to the Plaintiff's Second Cause of Action alleging Civil Conspiracy. Because the Court has **GRANTED** the Motion to Dismiss, Childs' Motion to Strike is dismissed as Moot.

AND IT IS SO ORDERED THIS \_\_\_\_\_ Day of October, 2018.

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Judge Brian M. Gibbons

|                                       |   |                                         |
|---------------------------------------|---|-----------------------------------------|
| <b>STATE OF SOUTH CAROLINA</b>        | ) | <b>IN THE COURT OF COMMON PLEAS</b>     |
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This matter is before the Court on Motions by Defendant Kenneth L. Childs to Dismiss the Complaint against him pursuant to Rule 12(b)(6) and in the alternative for Judgment on the Pleadings or an Order striking Portions of the Complaint.

The Court heard the motions during a hearing held in the Chester County Courthouse on September 26, 2018. At that hearing, Plaintiff Angela Bain was present and represented by Shannon Polvi. Defendant Childs was present and represented by Michael H. Montgomery. The matter was argued and briefed extensively by the parties.

#### **INTRODUCTION:**

Plaintiff Angela Bain, the Superintendent of Schools for the Chester County School District, ("Bain") brings this conspiracy and defamation action against Denise C. Lawson, ("Lawson") Chair of the Board of Trustees of the Chester County School District and Kenneth L. Childs ("Childs") an attorney who engages in the practice of school law and has represented and represents the Chester County School District.

Bain alleges that Childs and Lawson engaged in a conspiracy to cause her to lose her employment and defamed her by publishing false information designed to discredit her and cast her in an unfavorable light.

Before the Court are Childs' Motion to Dismiss or in the Alternative for Judgment on the Pleadings and Childs' Motion to Strike. Because the Court grants the Motion to Dismiss, no ruling is made on the Motion to Strike. For the reasons discussed below, the Court GRANTS Childs' Motion to Dismiss. The Court also Dismisses the Conspiracy cause of action against all Defendants.

#### **FACTUAL BACKGROUND**

Bain, became employed as Acting Superintendent and then as Superintendent of Schools for the Chester County School District in May 2016 (Complaint ¶5). Lawson has served on the Board of Trustees for the Chester County School District for many years and has been Board Chair, most recently, since January 2018 (Complaint ¶7). Childs is an attorney, who has represented school districts in South Carolina, including the Chester County School District (Complaint ¶8). Bain represented that Childs is "one of the district's attorneys" on several occasions by e-mails sent to both Childs and Lawson, as well as other school board members. (See Exhibits 1, 2 and 3 Childs' Supplemental Memorandum in Support of Motion to Dismiss). While the Complaint alleges that Childs was not the District's attorney, at least after March 17, 2018 (Complaint ¶¶9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 49, 56, 57 and 71), additional information provided in reference to the Complaint reveals Bain's e-mail of June 6, 2017, to the School Board – including Mrs. Lawson. That e-mail reads:

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Angela.

[Emphasis added]

Dr. Bain's e-mails demonstrate that in June of 2017 she was asking for legal work from Mr. Childs and directing him to transmit this to the Board. She directly referred to him, in an e-mail to the School Board as "one of our attorneys." Her own words contradict the allegations contained in her complaint. This e-mail, coupled with the letter provided by Plaintiff dated August 22, 2017, complaining about charges on several matters unequivocally demonstrates that the firm of Duff & Childs (and Mr. Childs had an attorney-client relationship with the School District. Mrs. Lawson is the Board Chair. Mrs. Lawson had every reason to understand that Mr. Childs was an approved attorney representing the District and there is no factual averment after the date of the Superintendent's e-mails to suggest anything to the contrary -- even construing those allegations in a light most favorable to the Plaintiff. Mr. Childs acting as Ms. Lawson's attorney cannot be held personally liable under the Plaintiff's theory of the case.

Where there is a conflict between allegations in a pleading and the exhibits attached thereto the exhibits control. *Hoefling v. City of Miami*, 811 F.3d. 1271, 1277, (11<sup>th</sup> Cir 2016), *Crenshaw v. Lister*, 553 F.3d. 1283, 1292 (11<sup>th</sup> 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 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) (quotation

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 attached the Board Policies to her complaint. The letter exhibit to her supplemental brief and the attachments to her memo are authentic, incorporated and dispositive of the fact that there was an attorney-client relationship between Childs and the Chester County School District. The Plaintiff cannot question the veracity or authenticity of her letter and electronic mails.

## CONCLUSIONS OF LAW

### A. Standard of Review.

A Rule 12(b)(6) motion to dismiss should be granted when the pleadings, construed in the light most favorable to the non-moving party, fail to allege sufficient facts to state a cause of action. Rule 12(b)(6), *SCRCP, Haskell Co. v. Morgan*, 274 S.C. 261, 262 S.E.2d 737 (1980). As the Court stated in *DeBerry v. McCain*, 275 S.C. 569, 274 S.E. 2d 293 (1981)

A motion to dismiss admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from such facts. In short, a motion to dismiss a complaint does not admit conclusions of law pleaded therein.

274 S.E.2d at 296; *Carolina Winds Owners Ass'n v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S.E.2d 897, 899 (Ct. App. 1988) ("A motion under Rule 12(b)(6) . . . admits the well-pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law.") An allegation of a mere legal conclusion is insufficient to state a cause of action. *Jones v. Gilstrap*, 288 S.C. 525, 343 S.E.2d 646 (1986); *Russell v. City of*

*Columbia*, 301 S.C. 117, 390 S.E.2d 463 (Ct. App. 1989) ("The court must take well-pleaded factual allegations as true. However, allegations which are conclusory rather than factual should be disregarded.") To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which, when taken as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation. *Ashcroft*, *Id.* at 556 US 678.

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). [emphasis added]

Rule 702 S.C.R.E. prevents the admission of legal conclusions as they are strictly within the purview of the court. The question before the court here is one that as a matter of law, from her own pleadings, the Plaintiff cannot aver the legal conclusion that there was no attorney-client or other privileged relationship, the absence of which undergirds her entire claim. Her writings belie the legal conclusions pled in her complaint. Here, Plaintiff merely attempts to plead opinion as fact and relies on those legal conclusions as her only basis to survive dismissal. In general, expert testimony on issues of law is inadmissible. *See generally* Note, Expert Legal Testimony, 97 *Harv.L.Rev.* 797, 797 (1984); *see also Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (where the court disallowed a legal expert's opinion on whether corporate officers and directors breached their fiduciary duties because "such testimony is a legal opinion and inadmissible."); *United States v. Sinclair*, 74 F.3d 753, 758 n.1 (7th Cir. 1996) (commenting that Federal Rules of Evidence 702

and 704 prohibit experts from offering opinions about legal issues that will determine the outcome of a case).

**B. Plaintiff's Defamation Claim against Childs is Dismissed as a Matter of Law.**

**1. Childs was the District's Attorney and is Immune From Liability.**

"An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-529. 3239 S.E.2d 887, 889 (Ct. App. 1986). To sustain the cause of action against Childs, it is necessary for the Plaintiff to have pleaded that Childs breached some independent duty to her outside the scope of representation of the client. Here, even looking at the pleadings in a light most favorable to the Plaintiff, Childs was asked to review and comment upon Bain's actions by Lawson and the School Board and his communications, including inquiries and opinions about those actions are not outside the scope of that representation as a matter of law. The facts here establish the attorney-client relationship and the facts alleged and reasonably deducible from the complaint cannot, as a matter of law entitle the Plaintiff to relief on any theory of the case.

**2. Plaintiff's Civil Conspiracy Claim is Dismissed as a Matter of Law.**

A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). Civil conspiracy consists of three elements: 1) a combination of two or more persons, 2) for the purpose of injuring the Plaintiff, 3) which causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). *Cf., Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) (If a Plaintiff merely repeats the damages from another claim instead of

specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed). It is essential that a plaintiff prove all of these elements in order to recover. *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord. *Cowburn v Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005).

Plaintiff has failed to show in her pleadings that the actions that form the apparent basis of Plaintiff's conspiracy claim were done outside the scope and course of the attorney-client relationship, such that no actionable conspiracy exists as a matter of law.

Construing the factual allegations within the Complaint in a light most favorable to Plaintiff, the Court cannot find that the alleged actions of Defendant Childs were beyond the scope of his attorney-client relationship with Defendant Lawson and/or the School District. Since the Court has dismissed Mr. Childs as a party in this matter based upon attorney-client privilege, there is no combination of two or more persons to support a civil conspiracy claim. Plaintiff cannot as a matter of law plead a cause of action for conspiracy under South Carolina Law. Because of this, Childs and Lawson are entitled to dismissal of the Plaintiff's conspiracy cause of action as a matter of law.

## CONCLUSION

While Plaintiff is not required to prove any of her claims at this juncture, she is required to state plausible causes of action against Mr. Childs which she has not done, and cannot do. The Complaint against Mr. Childs is therefore subject to dismissal in its entirety, as Plaintiff can prove no set of facts that would entitle her to relief against him on any of her claims. Accordingly, the

Motion to Dismiss the Complaint by Kenneth L. Childs is **GRANTED**. Because Childs is Dismissed from the Complaint entirely, Lawson's Motion to Dismiss is also **GRANTED** as it relates to the Plaintiff's Second Cause of Action alleging Civil Conspiracy. Because the Court has **GRANTED** the Motion to Dismiss, Childs' Motion to Strike is dismissed as Moot.

AND IT IS SO ORDERED THIS \_\_\_\_\_ Day of October, 2018.

---

Judge Brian M. Gibbons



Chester Common Pleas

**Case Caption:** Angela H Bain VS Denise C Lawson , defendant, et al

**Case Number:** 2018CP1200334

**Type:** Order/Dismissal

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-10-26 07:02:48 page 13 of 13

STATE OF SOUTH CAROLINA )  
COUNTY OF CHESTER )

**IN THE COURT OF COMMON PLEAS  
FOR THE SIXTH JUDICIAL CIRCUIT**

Angela H. Bain, )  
Plaintiff, )

Civil Action No: 2018-CP-12-0334

v. )

**MOTION FOR RECONSIDERATION OF  
ORDER GRANTING MOTION AND  
DISMISSING ACTION AGAINST  
DEFENDANT CHILDS**

Denise C. Lawson and )  
Kenneth L. Childs, Defendants. )

**TO THE HONORABLE BRIAN M. GIBBONS:**

This matter is before the Court on Motions by Defendant Kenneth L. Childs ("Childs") to Dismiss the Complaint against him pursuant to Rule 12(b)(6) and in the alternative for Judgment on the Pleadings or an Order striking Portions of the Complaint. The Court heard the motions during a hearing held in the Chester County Courthouse on September 26, 2018.

Plaintiff respectfully requests the Court reconsider the Order issued on October 26, 2018. Dkt. No. 18. The Order addressed Childs' Motion to Dismiss or in the Alternative for Judgment on the Pleadings and Childs' Motion to Strike. *Id.* The Court's Order on October 26, 2018, granted Childs' Motion to Dismiss; thereby, dismissing the defamation claim against Childs and the civil conspiracy cause of action against both named Defendants. *Id.*

**ARGUMENT**

Plaintiff's arguments for reconsideration are twofold: (1) procedural - the Court improperly relies on documents outside of pleadings for the basis of dismissal and (2) substantive - the Court makes a titanic leap to determine at this early stage of the case, without any discovery occurring, that all of Childs' conduct, statements, and communications are within the attorney-client privilege.

**I. DISMISSAL IS BASED UPON FACTUAL FINDINGS NOT PROPERLY BEFORE THE COURT ON THE MOTIONS FILED BY DEFENDANT CHILDS.**

Plaintiff Angela Bain ("Bain") is the Superintendent for the Chester County School District. Bain brought an action of civil conspiracy and defamation action against Denise C. Lawson, ("Lawson") the Chair of the Board of Trustees of the Chester County School District, and Kenneth L. Childs ("Childs") an attorney.

In the Factual Background of the Order, the Court found:

Bain represented that Childs is "one of the district's attorneys" on several occasions by e-mails sent to both Childs and Lawson, as well as other school board members. (See Exhibits 1, 2 and 3 Childs' Supplemental Memorandum in Support of Motion to Dismiss). While the Complaint alleges that Childs was not the District's attorney, at least after March 17, 2018 (Complaint ¶¶ 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 49, 56, 57 and 71), additional information provided in reference to the Complaint reveals Bain's e-mail of June 6, 2017, to the School Board – including Mrs. Lawson. That e-mail reads:

*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.*

Dkt. No. 18, pp. 2-3. The Order is interwoven with the conclusions of law prefaced upon Childs' additional factual assertions for defense that are outside of the pleadings. Thus, the Court bases its Dismissal on the factual findings that result from supplemental facts outside the record. Specifically, the Court relies upon additional documents filed by Childs with his Supplemental Memorandum after the motion hearing. See Dkt. No. 11, 11-1, 11-2, and 11-3.

In making the determination to dismiss the claims against Childs and the civil conspiracy claim against Lawson, the Court relied upon the ‘outside the pleadings’ factual arguments made by Childs. Dkt. No. 18. The Court should not rely upon matters outside the pleadings. *Gregory v. Riley Pope & Laney, LLC*, No. 2015-000740, 2017 WL 4640146, at \*2 (S.C. Ct. App. May 3, 2017); *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (“In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the [circuit] court must base its ruling solely on allegations set forth in the complaint.”); *id.* (“If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.”). Further, “[a] trial court’s grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law.” *McEachern v. Black*, 329 S.C. 642, 647, 496 S.E.2d 659, 661 (Ct. App. 1998) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). Here, the facts alleged in the Complaint support the relief plead and evidence outside of the pleadings should not be considered.

## **II. THERE ARE BOUNDS TO THE ATTORNEY-CLIENT PRIVILEGE AND THOSE NEED TO BE DETERMINED THROUGH DISCOVERY.**

Childs seeks the Court’s decision to validate that all his actions, communications, and statements were within the scope of the attorney-client privilege. To make such a determination is too overbroad at this initial pleading stage. At minimum, discovery is needed to ascertain when Childs was serving in a role as an attorney that in some manner could shield him from personal liability, if at all.

Plaintiff’s counsel acknowledges the importance of safeguarding the attorney-client privilege. It is a vital part of the American legal system. The Court understandably has that important concern in mind. The Court’s questions at the hearing on September 26, 2018, the

Court's request for supplemental memoranda on the attorney-client privilege issue, and the Court's focus upon that issue as the basis for dismissal in the Order on October 26, 2018, make it abundantly clear that the attorney-client privilege issue is the basis for dismissal. The Court very understandably focuses on that issue when a party is an attorney and sometimes served in a representative capacity to the Chester County School District. However, the attorney-client privilege is not a blanket protection for tortious conduct by an attorney. Importantly, it is also not a blanket protection for the timeframe plead in the Complaint when Childs was not representing the Chester County School District, nor was he representing Lawson.

Plaintiff and her counsel are not seeking to harm the attorney-client privilege or to modify its application to the legal practice in South Carolina. The motions file by Childs are initial motions that precede any discovery in the case. Discovery is necessary to accurately delineate the bounds of the attorney-client privilege.

Plaintiff in practicality and in her pleadings recognizes that the attorney-client privilege might be raised during the litigation of this case, but it is not a one hundred percentage defense to liability for Childs. To respectfully show the extremeness of the Court's determination that the attorney-client privilege attaches to one hundred percent of Childs' actions, communications, and statements plead in the Complaint, we can look to a case of national importance presently pending in federal court.

Comparatively, with regard to the Michael Cohen matter, an issue of national importance, only a small fraction of the communications between Michael Cohen and President Donald Trump were considered attorney-client privileged. In the matter regarding Michael Cohen's legal representation of President Donald Trump, by Order of Appointment, the Court appointed a Special Master to render decisions regarding "privilege issues relating to materials seized in the

execution of certain search warrants executed on April 9, 2018.” See Exhibit A, Case No. 1:18-mj-03161-KMW, Document 72, filed June 4, 2018, p. 1.<sup>1</sup> The Report and Recommendations of the Special Master designated the items at issues as containing attorney-client privileged documents, partially attorney-client privileged documents, or highly personal information documents. *Id.* The contents of eight boxes of hard copy materials were considered by the Special Master. *Id.*, p. 2. “Out of 639 items consisting of 12,534 pages, the Special Master agrees the Plaintiff and/or Intervenors and finds that 14 items are Privileged and/or Partially Privileged. The Special Master also finds that 3 items are not privileged.” *Id.* Similarly, the contents of two phones and an ipad are at issue in the Michael Cohen matter. *Id.* “Out of 291,770 total items, the Special Master agrees with the Plaintiff and/or Intervenors and finds that 148 items are Privileged and/or Partially Privileged and that 7 items are Highly Personal.” *Id.*

Though the cases are factually different, the application of the attorney-client privilege in *Cohen* compared to the case at hand is striking. Even assuming arguendo, that Childs can raise attorney-client privilege arguments as to some of his actions, communications, and statements that were plead in the Complaint, to assume that one hundred percent of Childs’ actions, communications, and statements in the Complaint are attorney-client privileged is respectfully too far of a stretch before discovery has even begun.

### CONCLUSION

Plaintiff, for these reasons and those previously argued at the hearing and in her memoranda, respectfully requests that the Court reconsider the Order issued on October 26, 2018

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<sup>1</sup> It is important to note that the record in Case No. 1:18-mj-03161-KMW is far larger than this Report found in Exhibit A and the scope of the attorney-client privilege is still being measured in the Cohen case. One consistency has been that the attorney-client privilege does not shield Cohen from culpability for his actions.

that granted Childs' Motion to Dismiss; thereby, dismissing the defamation claim against Childs and the civil conspiracy cause of action against both named Defendants. Plaintiff requests the Court reconsider the grant of the Motion and allow this case proceed into discovery.

Respectfully submitted,

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November 1, 2018  
Columbia, South Carolina

# Exhibit A

Case No. 1:18-mj-03161-KMW

Report and Recommendation of  
the Special Master

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

*In the Matter of Search Warrants Executed on  
April 9, 2018*

MICHAEL D. COHEN,

Plaintiff,

- against -

UNITED STATES OF AMERICA,

Defendant.

18-MJ-3161 (KMW)

**REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER**

BARBARA S. JONES, Special Master:

By Order of Appointment, dated April 27, 2018 [Dkt. No. 30] (the "Order"), the Court appointed the Hon. Barbara S. Jones (Ret.) as Special Master to render decisions regarding "privilege issues related to materials seized in the execution of certain search warrants executed on April 9, 2018 (the "Seized Materials")." *See* Order at 1. This report is submitted to provide the Court and the parties with the Special Master's recommendations regarding the Plaintiff's and Intervenors' designations of items containing potentially privileged ("Privileged" or "Partially Privileged") or highly personal information ("Highly Personal").

Pursuant to the Procedures set forth in the Special Master's Report dated May 29, 2018 [Dkt. No. 65], the following designations are being recommended to the Court for its review:

**1. Contents of Eight Boxes of Hard Copy Materials:**

Out of 639 total items consisting of 12,543 pages, the Special Master agrees with the Plaintiff and/or Intervenors and finds that 14 items are Privileged and/or Partially Privileged. The Special Master also finds that 3 items are not privileged.

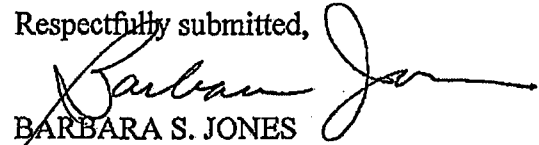
**2. Contents of Two Phones and an iPad:**

Out of 291,770 total items, the Special Master agrees with the Plaintiff and/or Intervenors and finds that 148 items are Privileged and/or Partially Privileged and that 7 items are Highly Personal.

The specific control numbers identifying the items determined to be Privileged, Partially Privileged, Highly Personal, and Not Privileged for these two productions will be provided to the Court, the Plaintiff, and Intervenors.

Dated: New York, New York  
June 4, 2018

Respectfully submitted,

  
BARBARA S. JONES  
Special Master

STATE OF SOUTH CAROLINA )

COUNTY OF CHESTER )

Angela H. Bain. )

Plaintiff, )

vs. )

Denise C. Lawson and )

Kenneth L. Childs, )

Defendants. )

IN THE CIRCUIT COURT FOR  
THE SIXTH JUDICIAL CIRCUIT

C.A. #: 2018-CP-12-0334

**ORDER DENYING PLAINTIFF'S  
MOTION FOR RECONSIDERATION**

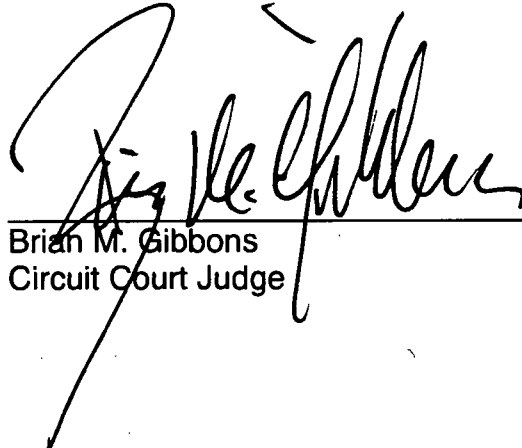
After having considered Plaintiff's motion for reconsideration and accompanying memorandum and after reviewing all of the submissions and the Court's notes, applicable statutory law, case law and evidence presented, I respectfully **deny** Plaintiff's motion to alter or amend.

Oral argument is not necessary.

**AND IT IS SO ORDERED.**

Chester, SC

November 5, 2018



\_\_\_\_\_  
Brian M. Gibbons  
Circuit Court Judge

**Certificate of Counsel**

The undersigned here certifies, in accord with Rule 210(g), SCACR that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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**Certificate of Counsel**

The undersigned here certifies, in accord with Rule 210(g), SCACR that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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