

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

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

Angela H. Bain Appellant

v.

Denise C. Lawson and Kenneth L. Childs Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED DISMISSING APPELLANT'S CLAIMS AGAINST KENNETH CHILDS?
 - A. WHETHER DISMISSAL WAS BASED UPON FACTUAL FINDINGS NOT PROPERLY BEFORE THE COURT?
 - B. WHETHER THE ACTS AND STATEMENTS OF CHILDS AND LAWSON ARE SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE?
 - C. WHAT ARE THE BOUNDS OF THE ATTORNEY-CLIENT AS APPLIED TO RESPONDENT'S INITIAL RULE 12 MOTIONS?
 - D. WHETHER BAIN HAS AN ACTIONABLE DEFAMATION CLAIM AGAINST CHILDS?
- II. WHETHER THE CIRCUIT COURT ERRED DISMISSING APPELLANT'S CIVIL CONSPIRACY CLAIM AGAINST KENNETH CHILDS AND DENISE LAWSON?
 - A. WHETHER BAIN SUFFICIENTLY PLED AN ACTIONABLE CIVIL CONSPIRACY CLAIM?
 - B. WHETHER THERE WAS A COMBINATION OF TWO OR MORE CONSPIRATORS PLED?
- III. SHOULD THE CIRCUIT COURT HAVE GRANTED LEAVE TO AMEND?

STATEMENT OF THE CASE

Appellant, Dr. Angela Bain (“Appellant” and “Bain”), filed this action alleging defamation and civil conspiracy against Respondents Kenneth Childs (“Childs”) and Denise Lawson (“Lawson”) on July 23, 2018. (R. pp. 1-18). Lawson filed a Rule 12(b)(6), SCRCF Motion to Dismiss on August 9, 2018. (R. pp. 19-24). On August 17, 2018, Childs filed a Rule 12(b)(6), SCRCF Motion to Dismiss and in the alternative a Rule 12(c), SCRCF Motion for Judgment on the Pleadings. (R. pp. 25-27). Also, on August 17, 2018, Childs filed a separate Motion to Strike. (R. pp. 37-39). Childs also filed a Memorandum in Support of the Motion to Dismiss on August 17, 2018. (R. pp. 28-36). On September 18, 2018, Appellant filed three memoranda in opposition to each of the three motions filed by the Respondents. (R. pp. 40-45; R. pp. 46-64; R. pp. 65-84).

Oral arguments were held in Chester County, on September 26, 2018, before the Honorable Brian M. Gibbons. (R. pp. 85-139). Judge Gibbons requested additional briefing from counsel for the parties on the attorney-client privilege issue. Appellant filed her Supplemental Memorandum in Opposition to Respondents’ Motions and Exhibit 1 on October 2, 2018. (R. pp. 140-148). Childs filed his Supplemental Memorandum in Support of his Motions and Exhibits 1, 2, and 3 on October 3, 2018. (R. pp. 149-164). Lawson filed her Supplemental Memorandum in Support of her Motion to Dismiss and Exhibit 1 also on October 3, 2018. (R. pp. 165-167).

On October 4, 2018, the Court issued the following instructions/findings: “(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.” (R. pp. 168-169). Judge Gibbons directed that counsel for Childs prepare a proposed order consistent with his arguments for the first two findings

above and that counsel for Bain prepare a proposed order consistent with her arguments as to finding number three above. Judge Gibbons instructed submission of the proposed orders by October 10, 2018. (R. pp. 197-198).

On October 10, 2018, Bain submitted her proposed order. (R. pp. 199-207). On October 15, 2018, Judge Gibbons issued an Order denying Lawson's Motion to Dismiss. (R. pp. 208-217).

On October 18, 2018, Childs submitted his proposed order.¹ (R. pp. 218-229). On October 26, 2018, Judge Gibbons issued an Order granting Childs' Motion and dismissing the action against Childs. (R. pp. 230-242). Thereby, both claims against Childs were dismissed and the civil conspiracy claim against Lawson was also dismissed.

Appellant filed a Motion for Reconsideration on November 2, 2018. (R. pp. 243-251). Appellant's Motion for Reconsideration was denied on November 5, 2018. (R. p. 252).

Appellant timely filed her Notice of Appeal on November 8, 2018. Appellant appeals the dismissal of her case against Childs and civil conspiracy claim against both Respondents.

PLEADINGS

Appellant accepted the position of Interim Superintendent of Chester County School District (the "District") in February of 2016, and in May of 2016 she was selected by the Chester County School Board of Trustees (the "Board") as Superintendent on a continuing basis. (R. p. 3 ¶ 5). Lawson was elected the Board Chair² by the Board in January of 2017, after serving as a trustee for several years. (R. p. 3 ¶ 7). Childs is a practicing attorney, and he has represented school districts in South Carolina, including his representation of the Chester County School District in 2015 and 2016. (R. p. 3 ¶¶ 8, 9). During Childs' representation of the District, the previous

¹ Childs' counsel had a family emergency causing the delay.

² Bain is no longer on the Board and she is no longer the Board Chair.

Superintendent resigned, and Childs provided legal advice to the Board, which included Lawson, concerning these events. (R. p. 3 ¶ 9). In March of 2016, the District began exclusively employing 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. (R. p. 4 ¶¶ 15-17). This decision was based, in part, on the Board being displeased with Childs' handling of the events surrounding the previous Superintendent's departure and allegedly excessive legal fees charged to the District. (R. p. 3 ¶ 10).

Though Lawson was aware of this decision to no longer employ Childs and his firm, Lawson approached Bain 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. (R. p. 5 ¶ 18). Bain explained to Lawson that Childs' firm had been dismissed by the Board for excessive fees and other reasons. (R. p. 5 ¶ 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 Bain had already sought other legal counsel for the District, and Childs billed the District for that unauthorized representation. (R. p. 5 ¶¶ 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. (R. pp. 5-6 ¶¶ 24, 26). As of the time the Complaint was filed on July 23, 2018, no such permission was 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. (R. p. 6 ¶ 27).

Around December of 2017, it became obvious to Bain that Lawson was becoming hostile and contentious. (R. p. 6 ¶ 28). Lawson continued to interfere with Bain's duties as Superintendent

by constantly bypassing the chain of supervision, directly contacting Bain's subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and without Appellant's knowledge or permission. (R. p. 6 ¶ 30). Lawson 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 Bain 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. (R. p. 7 ¶ 33). Lawson and Childs were also meeting, planning, and conspiring to find ways to remove Bain from her position so that they could replace her with someone more easily manipulated. (R. p. 7 ¶ 35). Such plans became apparent when Lawson raised questions about Bain's contract and suggested that Bain was taking advantage of the District and charging more money and benefits than she should have been receiving. (R. p. 7 ¶ 34).

In the Spring of 2017, Bain continued to receive reports of meetings and plans by Lawson to remove Bain. (R. p. 7 ¶ 37). Such plans escalated in June of 2018 when it was reported that Bain was making excessive amounts of money by consulting with other school districts, 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. (R. p. 8 ¶ 38). Lawson further falsely accused Appellant of violating her contract, presumably with input from Childs. (R. p. 8 ¶ 38). Lawson was well aware that Bain 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 Appellant was hired as Superintendent. (R. p. 8 ¶¶ 39-42). These facts were confirmed by another Board member in an affidavit. (R. p. 18 Exhibit D).

The timing of such allegations was convenient, given that Bain 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. (R. pp. 8-9 ¶¶ 43, 44). Childs was made aware of this consultation and, together with the assistance of Lawson, made an exhaustive effort to find all the school districts who Bain had consulted during her tenure with Chester County School District, as well as the amount of compensation paid to her. (R. p. 9 ¶ 45).

After gathering this information, Childs and Lawson reported to the District's Board members, and others, that Bain 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. (R. p. 9 ¶ 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 Bain, which was illegal. (R. p. 9 ¶ 47). At this meeting, Childs, representing his own interests rather than the Board or its interests, presented the alleged violations of contract and law made against Bain 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. (R. p. 9 ¶¶ 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 Bain in her individual capacity. (R. p. 10 ¶¶ 51, 52). The District's written policy BB states, "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.” (R. p. 4 ¶ 11; R. p. 15 Exhibit A). 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.” (R. p. 4 ¶ 12; R. p. 16 Exhibit B). Thus, if the Board hires legal counsel, the Board body must select the legal counsel through a majority vote. (R. p. 4 ¶ 12; see R. pp. 15-17 Exhibits A, B, and C).

Lawson admitted that she does not like Bain, that she did not vote for her as Superintendent, and that she wants to remove her from that position. (R. p. 10 ¶ 54). She also admitted that Childs conspired with Lawson for his own benefit to receive legal fees from the District. (R. p. 10 ¶ 55). These actions harm Bain and are the result of a conscious and continuing agenda by the Respondents to remove Bain as Superintendent and to interfere with her contract. (R. p. 10 ¶ 53).

Respondents defamed Appellant 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. (R. p. 11 ¶¶ 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. (R. p. 12 ¶¶ 62, 63).

STANDARD OF REVIEW

This is an appeal of an order granting Rule 12(b)(6), SCRCF Motions to Dismiss. “[T]he appellate court [on Rule 12(b)(6)] applies the same standard of review implemented by the trial court.” *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 279, 648 S.E.2d 295, 298 (Ct. App. 2007) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)).

“The trial court's ruling on a Rule 12(b)(6) motion must be bottomed and premised solely upon the allegations set forth by the plaintiff.” *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001); *citing, Holy Loch Distribs. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct.App.1997). “The [Trial Court’s Order] will not be sustained 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*, 553 S.E.2d at 499; *citing, Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). “The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.” *Williams*, 553 S.E.2d at 499-500; *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).

ARGUMENT

The Circuit Court held that “[w]hile 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.” October 26, 2018 Order. (R. pp. 230-242). Bain appeals that finding and Order.

I. CHILDS IS NOT ENTITLED TO DISMISSAL AS A MATTER OF LAW.

The basis for dismissal in the October 26, 2018 Order was the finding that “The Plaintiff’s Complaint and Attachments Confirm that an Attorney-Client Relationship Existed Between Childs and the School District.” (R. p. 234). Appellant’s arguments to the contrary are twofold: (1) procedural - the Circuit Court improperly relied on documents outside of pleadings for the basis of dismissal, and (2) substantive - the Circuit Court made 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.

A. DISMISSAL WAS BASED UPON FACTUAL FINDINGS NOT PROPERLY BEFORE THE COURT.

Bain, the Superintendent for the Chester County School District, brought an action of civil conspiracy and defamation action against Lawson, the former Chair of the Board of Trustees of the Chester County School District, and Childs, an attorney.

In the Factual Background of the Order, the Circuit 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. (R. pp. 160-164; R. pp. 149-159). While the Complaint alleges that Childs was not the District’s attorney, at least after March 17, 2018 (R. pp. 3-6, 9, 11, 13 ¶¶ 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.

(R. pp. 231-232). The Order is interwoven with the conclusions of law prefaced upon Childs' additional factual assertions for defense, which are outside of the pleadings. Thus, the Circuit Court based the Dismissal on the factual findings that result from supplemental facts outside the four corners of the pleadings. Specifically, the Circuit Court relied upon additional documents Childs filed with his Supplemental Memorandum after the motion hearing. (R. pp. 160-164 Exhibits 1, 2, and 3).

To make 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. (R. pp. 230-242). The Court incorrectly relied 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 pled, and evidence outside of the pleadings should not have been considered.

B. THE ACTIONS AND STATEMENTS OF CHILDS AND LAWSON ARE NOT SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE.

In the case at hand, an attorney-client privilege did not exist, and if the privilege applies in any context, the communications described in the Complaint were outside the scope of the

attorney-client privilege. The attorney-client privilege is not a general defense to a lawsuit. The attorney-client privilege attaches to specific communications and not as a bar to a lawsuit when Childs and Lawson acted personally, with malice, to harm Bain. *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)). In *Wellin*, a highly contested estate case, the Court considered production and waiver concerns during discovery. Here, as in *Wellin*, 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.

The key pleadings relevant to the analysis of whether the attorney-client privilege should be the basis for the Rule 12(b)(6) dismissal are, during the time relevant to the Complaint allegations:

- Childs was not serving as attorney for Lawson. (R. pp. 4-6, 9, 11, 16 ¶¶ 11, 17, 19, 27, 49, 56, 57, and Exhibit B to Complaint).
- Childs was not serving as the District’s counsel. (R. pp. 3-6, 9, 11 ¶¶ 10, 12, 13, 15, 16, 17, 19, 22, 25, 26, 27, 47, 48, 49, 56, and 57).
- Andrea White was the District’s counsel. (R. p. 4 ¶¶ 14, 16-17).
- Lawson had no authority to seek legal advice from Childs. (R. pp. 4, 7, 9, 11, 15-17 ¶¶ 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 pled in the Complaint. (R. pp. 3-6, 8-9, 11 ¶¶ 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 pled in the Complaint. (R. p. 11 ¶¶ 56 and 57; R. pp. 1-18).

- Communications between Childs and Lawson were not privileged. (R. p. 11 ¶¶ 56 and 57; R. pp. 1-18).

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) (emphasis added). In this case, (1) Childs was not acting as a representative lawyer when he was making these tortious acts and statements, and (2) the communications in which Childs and Lawson engaged were not for the purposes of securing an opinion on law, legal services, or assistance in some legal proceeding; therefore, Lawson and Childs' tortious statements and acts are not shielded by the attorney-client privilege.

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 ascertaining 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.

This Court 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 (emphasis added). 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). Here, Bain properly pled that when defaming Bain and purposefully taking action to ruin Bain’s career, 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. (R. p. 11 ¶ 57) (“At all times mentioned herein, communications and actions taken by Childs were outside of the course and scope of any attorney-client privilege.”). There is a low burden to meet the pleadings requirements for these Rule 12 Motions, and they were met here. Bain pled that allegations, which taken as true, clearly fall outside any purported attorney-client privilege either Respondent can raise.

In further support of Bain's position that the attorney-client privilege is not a proper basis for dismissal is the decision in *Ross* in which the South Carolina Supreme Court declined to extend the attorney-client privilege to the general counsel where the lawyer was 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 defendant in *Ross* claimed attorney-client privilege for that communication based upon the general counsel's permission to "confer with other members of the agency." *Id.* The Court determined that the general counsel was not merely a "member" of the defendant's company, but also represented the defendant in "prosecuting" cases before the Agency's Review Committee. *Id.*

Comparatively, in the case at hand, Bain unequivocally makes it clear, in writing, during the time at issue in her Complaint, that Childs was not authorized to act in a representative capacity. (R. p. 160). As stated in Paragraph 26 of Appellant'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." (R. p. 6 ¶ 26). The writing referred to in that paragraph of the Complaint is from 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." (R. p. 148).

Accordingly, there can be no question that Childs knew that he was not authorized 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 Bain 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 Bain's claims, as the pleadings clearly identify that the Respondents were acting outside of authorized or official capacities, that neither could insulate themselves with attorney-client privilege arguments, and that they were acting with malice toward Bain.

C. THERE ARE BOUNDS TO THE ATTORNEY-CLIENT PRIVILEGE, AND THOSE NEED TO BE DETERMINED THROUGH DISCOVERY.

By motion and oral arguments, Childs sought 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.

It is important to safeguard the attorney-client privilege. It is a vital part of the American legal system. Judge Gibbons understandably had that concern in mind. Judge Gibbons' 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 Circuit Court understandably focused on that issue because Childs is an attorney who, at times, 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 pled in the Complaint when Childs was neither representing the Chester County School District, nor Lawson.

Bain and her legal counsel are not seeking to erode the attorney-client privilege or to modify its application to the legal practice in South Carolina. The motions filed 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.

In practicality and in her pleadings, Bain 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 Circuit Court's determination that the attorney-client privilege attaches to one hundred percent of Childs' actions, communications, and statements that are alleged in the Complaint, a case of national importance presently pending in federal court is pertinent to consider. The Michael Cohen matter is an issue of national importance. *See Cohen v. United States*, Case No. 1:18-mj-03161-KMW.

Comparatively, 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 to Motion for Reconsideration, Case No. 1:18-mj-03161-KMW, Document 72, filed June 4, 2018, p. 1.³

The Report and Recommendations of the Special Master designated the items at issue 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 pled 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. Therefore, the Circuit Court’s decision to the contrary is reversible.

Bain and her counsel fully anticipate that attorney-client privilege will continue to be an issue in the case. The proper way to deal with such concerns is during discovery and only if

³ 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 that 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.

particular documents or specific testimony is purported by either Respondent 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 Respondents newly argued at the hearing, not in their briefs, that that attorney-client privilege protected them from all liability. The purpose of the attorney-client privilege was never so intended to protect either Respondent from engaging in tortious conduct toward Bain.

D. BAIN PLED AN ACTIONABLE DEFAMATION CLAIM AGAINST CHILDS.

Though the Circuit Court's Order dismisses the defamation claim against Childs based on the attorney-client privilege findings, Bain also addresses herein Childs' other arguments as a basis for dismissal. Childs argued that "Plaintiff's Complaint fails to allege the publication of any specific communication to any party which might be deemed to be defamatory." (R. p. 26). Bain pled an actionable defamation claim against Childs.⁴ Specifically, Bain 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

⁴ The October 26, 2018 Order does not reference *Paradis v. Charleston County School District* as a basis for dismissal. *Paradis*, 2018 WL 3636581 (S.C. Ct. App. August 1, 2018). However, since counsel for both Respondents referenced the case in their Motions and oral arguments, Bain footnotes to reiterate that the *Paradis* case is highly distinguishable from this case. (R. pp. 86:23-93:15; R. pp. 97:9-103:11; R. pp. 105:22-108:4). Though *Paradis* is distinguishable from this case, Bain also met the requirements discussed by the Court of Appeals in *Paradis*. (R. pp. 56-60; R. pp. 74-78).

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.

(R. p. 9 ¶ 46; R. pp. 11-12 ¶¶ 60-64). Based on the pleadings, including but not limited to the above quoted paragraphs of the Complaint, Bain sufficiently pled, with the required specificity at this stage of litigation, her defamation claim against Childs.

Bain pled to whom the defamatory statements were made, the Superintendent of Marlboro County, the News & Reporter and others; and Bain pled when the statements were made, in 2017 and 2018. Solely because Bain 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. Bain’s claims are fact determinative and must be developed through discovery. Discovery needs to occur for the defamation claim to further develop through discoverable evidence and witness testimony.

Childs also argued that Bain 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.” (R. p. 28). To the contrary, Bain pled the damages resulting from the defamatory and unprivileged statements of Childs in paragraph 68 of her Complaint. (R. p. 12 ¶ 68).

Childs also argued that Bain failed to adequately plead her defamation claim, including arguments regarding public figure status and the maliciousness with which Childs made defamatory statements about Bain. (R. p. 29). 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. In her Complaint, Bain pled that “such statements and actions have been published and disseminated widely to third persons and were done so maliciously and in bad faith.” (R. p. 12 ¶ 66). Thus, Bain sufficiently met the pleading requirements of Rule 8(a)(2), and she pled a sufficient level of malice to bring a defamation claim against Childs. Childs also argued, “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.” (R. p. 30).

Bain pled:

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.

(R. pp. 11-12 ¶¶ 60, 61). As evidenced by the above quoted pleadings, the defamatory statements and allegations by Childs go far beyond Bain's job performance. Such statements accuse Bain of unlawful, unethical and immoral conduct and meet the requisite standard necessary for Bain's position as the current Superintendent of the Chester County School District. The Complaint, including the above quoted paragraphs, provided a "short and plain statement" of the facts as they relate to Bain's defamation claim to show that she is entitled to relief. Therefore, the dismissal should be reversed.

II. THE RESPONDENTS ARE NOT ENTITLED TO DISMISSAL OF THE CIVIL CONSPIRACY CLAIM.

The basis for dismissal of the civil conspiracy claim was the finding that "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." (R. p. 240). Bain appeals that finding.

A. BAIN SUFFICIENTLY PLED AN ACTIONABLE 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 beyond those alleged in other causes of action, 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); *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). Because the Circuit Court found that Childs' actions were within the scope of the attorney-client relationship and, therefore, that he could not be a conspirator, dismissal is based on the first element, a combination of two or more persons.⁵ (See R. p. 240).

B. THERE WAS A COMBINATION OF TWO OF MORE CONSPIRATORS.

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 argued that Bain failed to present any such acts that Childs took in furtherance of the conspiracy to have Bain removed from her position as Superintendent and to have Childs reinstated as counsel for the District. However, Bain pled such acts that demonstrate a theory of recovery for civil conspiracy. Key paragraphs of the Complaint are 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

⁵ The other two elements are not the basis of dismissal; therefore, Bain does not address them in great detail here. However, Bain addressed such arguments in her memoranda and oral arguments. (See R. pp. 40-45; R. pp. 46-64; R. pp. 65-84; R. pp. 85-139).

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.*

(R. pp.7-10 ¶¶ 33, 35, 43-45, 47, 53). Such acts were taken by the Respondents in furtherance of the conspiracy to have Bain removed from employment as Superintendent of the Chester County School District, impede her from work with other Districts in South Carolina, and to return Childs as legal representative of the District.

III. APPELLANT, ASSUMING ARGUENDO HER PLEADINGS ARE DEFICIENT, IS ENTITLED TO LEAVE TO AMEND.

Appellant requested leave to amend her pleadings if the Court were to hold that deficiencies exist that require an amendment for Bain to bring her case further. (R. p. 53; R. p. 71; R. p. 141). Appellant was not given leave to amend her pleadings.

When a plaintiff is not given the opportunity to file and serve an amended complaint and is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without

prejudice. *Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006). The law is well settled “that leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (Regarding Fed. R. Civ. P. 15). The South Carolina Rules of Civil Procedure should “be construed to secure the just, speedy, and inexpensive determination of every action.” Rule 1, SCRCPP.

Here, should this Court find that Bain cannot bring either of her claims against Childs, justice is served by remanding this matter with leave to amend the civil conspiracy claim against Lawson to name the other conspirators, and setting the statute of limitations on any amended claim in accord with the original statute of limitations when this Complaint was filed. Such an amendment is just because Bain pled that Lawson 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 Bain from her position as Superintendent. (R. p. 7 ¶ 33). Bain also pled that Lawson and Childs were meeting, planning and conspiring to find ways to remove Appellant from her position so that they could replace her with someone more easily manipulated. (R. p. 7 ¶ 35). In the Spring of 2017, Bain continued to receive reports of meetings and plans by Lawson to remove Bain. (R. p. 7 ¶ 37). Such plans escalated in June of 2018 when it was reported that Bain was making excessive amounts of money by consulting with other school districts, was personally involved in an organization to promote her outside consultations and other income producing activities with school districts, and was a partner or part owner of that organization. (R. p. 8 ¶ 38). Thus, the pleadings describe acts by Lawson that are, in combination with others, in addition to acts in combination with Childs. Therefore, even if this Court upheld the Circuit Court’s decision

to disallow all claims against Childs, Bain should be given leave to amend the pleadings to name the individuals with whom Lawson also conspired.

CONCLUSION

Appellant Dr. Angela Bain respectfully asks this Honorable Court to Reverse the holding of the Circuit Court issued in the October 16, 2018 Order and to Remand this case for the reasons discussed above.

Respectfully Submitted,

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