

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

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

Angela BainAppellant

v.

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

FINAL BRIEF OF RESPONDENT KENNETH L. CHILDS

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SC Court of Appeals

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KENNETH L. CHILDS

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- A. THE COURT COULD HAVE PROPERLY GRANTED DEFENDANTS RULE 12 (C) MOTION.
- B. PLAINTIFF'S COMPLAINT FAILS TO ALLEGE THE PUBLICATION OF ANY SPECIFIC COMMUNICATION TO ANY PARTY WHICH MIGHT BE DEEMED TO BE DEFAMATORY.
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- F. 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.
- G. PLAINTIFF'S COMPLAINT FAILS TO ALLEGE ACTS IN FURTHERANCE OF A CONSPIRACY DIFFERENT AND APART FROM THE ALLEGED DEFAMATION.

H. 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 OUTLINED IN HER COMPLAINT.

STATEMENT OF THE CASE

Appellant, Angela Bain ("Bain"), the Superintendent of Schools of Chester County, filed a civil complaint against Respondents Kenneth Childs ("Childs"), an outside attorney representing the Chester County School District, and Denise Lawson ("Lawson") then the Chair of the Chester County School Board, on July 23, 2018, alleging defamation and civil conspiracy against both defendants. Childs is a member of the Duff & Childs law firm. Lawson filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCF on August 8, 2018. Childs filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCF and in the alternative a motion for Judgment on the Pleadings under Rule 12(c), SCRCF on August 17, 2018. On that same date, Childs also filed a separate Motion to Strike and Memorandum in support of his Motions. On September 18, 2018, Bain filed three memoranda in opposition to each of the motions filed by Respondents.

The Honorable Brian M. Gibbons held a motion hearing and heard argument on the motions in the Chester County Courthouse on September 26, 2018. After Oral Arguments, Judge Gibbons asked the parties for additional briefing on the Attorney-Client privilege issues raised in the hearing. Each of the parties submitted supplemental memoranda in support of their positions.

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

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

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCF, a party may move to dismiss a complaint against him 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). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). The trial court and this 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). Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would not entitle the plaintiff to any relief on any theory of the case. *Doe v. Marion, supra*. The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Id.* In reviewing the dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard as the circuit court. *Id.* In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999). 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. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

FACTS

A. INTRODUCTION

A School Superintendent believes that several members of her board are unhappy with her performance. She knows that her Board Chair has consulted with one of the District's attorneys regarding whether or not she has breached her contract. She is concerned about her job. She decides that the best defense is a good offense and retains counsel to bring suit against the Chair of her School Board and the attorney with whom the Board Chair is consulting about her contract. That attorney is a member of a firm approved by the school board to represent the district according to district policy. She believes that her offensive actions will stop the examination of her record. She files and serves a summons and complaint. She alleges items in the complaint that are contradicted by the attachments to her complaint, her correspondence, and district policy. She fails to plead the necessary elements of the causes of action alleged in her complaint. She fails to plead with the specificity required by the law. Naturally, the court dismisses her case. She appeals and asks the appellate Court to overturn the lower court based solely on the improper and insufficient allegations contained in her case. She also asks for leave to amend – something that she had as a matter of right before she filed her appeal but forfeited as a matter of law when she filed the appeal.

B. THE RECORD

Bain offers the Court a Complaint consisting not of “a short and plain statement of the facts showing that a pleader is entitled to relief¹” but rather a set of prejudicial conclusions and dramatic

¹ Rule 8(a)(2) SCRC.P.

defamatory allegations shrouded in the protection of the judicial process. An examination of the four corners of the complaint is significant not for what it includes, but for what it does not. The Complaint asserts two causes of action. She alleges that the defendants engaged in a civil conspiracy to defame her. In doing so she asserts a cause of action claiming defamation and a second asserting a civil conspiracy. Bain's pleadings fail to allege elements necessary for the Court to proceed with this case.

Bain's defamation claim fails to recognize her status as a public figure. She does not identify the publication of any statement attributable to Childs in her complaint. Not one. That fatal deficiency alone was enough for the lower Court to dismiss the action. Reviewing the Complaint in a light most favorable to the Plaintiff, the best that Bain avers is that she does not like Childs and prefers that another attorney represent the District regardless of what the Board desires, (Complaint ¶¶ 10, 17, 19, 21, 23, 26, 27, 44). She also alleges that Lawson asked Childs to represent her or to assist her as Board chair by representing the school board in addressing questions about the superintendent's employment and contract. (Compl ¶¶ 46,47,48,52) The Plaintiff did not appreciate or like Childs and Lawson reviewing her activities for possible violations of her contract. (Compl. ¶¶ 40, 41, 45, 46, 47, 48, 50). She fails to allege a specific statement, publication or false statement being made other than in a conclusory fashion. The "noise" she alleges does not rise to a complaint that can survive scrutiny under the applicable rules.

Bain's conspiracy claim is weaker still. She endeavors to allege that Childs was not representing the District², (Compl. ¶¶13) She notes that Bain preferred not to use Duff & Childs;

² Bain conflates the Law Firms of Childs and Halligan and Duff and Childs (presumably not in an intentional attempt to mislead the Court). It is true that Childs and Halligan ceased representing the district in January 2016 (Compl. ¶¶13) However, Childs later became a member of the firm that became Duff& Childs, the identical entity that was retained by the District in 2016 ((Compl. ¶¶14) and both successor firms (Duff & Childs and White & Story) continued representing the District after Duff and White separated. (Email of Angela Bain ROA at p.160) So the idea that

(Compl. ¶17) but, does not allege that the Board Chair was not able to consult with the Superintendent's non-preferred law firm about her contract. She also confirms that Lawson preferred using the Duff & Childs firm (Compl. ¶18). Nowhere does she allege that Childs was not acting as either the District's attorney or Lawson's during all times of the Complaint. Likewise, she fails to allege the separate damages from the conspiracy necessary to posit a justiciable claim for civil conspiracy. In ¶68 of the Complaint, she alleges "the Plaintiff has been embarrassed humiliated, and has sustained mental anguish, reputational loss, diminished further earning capacity, and lost reputation as well as embarrassment, humiliation and mental suffering. . . ." Her damages allegations in ¶¶75 and 76 of the Complaint merely restate these damages claims using different words. As a matter of law, she alleges no separate special damages for the conspiracy cause of action.

ARGUMENT

A. INTRODUCTION

Bain's primary argument is that the Court erred in considering evidence supporting the fact that Childs was legal counsel for both the District and potentially Lawson. While Childs, for the reasons set forth herein believes that this Court should affirm the lower court's Order on that basis; he also submits that Dismissal here was appropriate without the need to consider the additional material offered by the parties in their supplemental memoranda. Even if the admission was not

Duff and Childs were not approved attorneys whom the Board chair could engage pursuant to Policy BDG and Administrative Regulation BDG-R is a false flag. This effort to mislead is further demonstrated in ¶¶19 of the complaint where she again conflates Childs & Halligan with Duff & Childs.

proper, it was harmless error inasmuch as dismissal was justified pursuant to Rule 12(b)(6)³, without reference to the matters Bain believes were extrinsic to the pleadings. Bain's complaint fails to meet minimum standards to set out causes of action against Childs for either Defamation or Civil Conspiracy as discussed herein.

B. PLAINTIFFS COMPLAINT AGAINST CHILDS WAS FATALLY DEFICIENT AND PROPERLY DISMISSED AS A MATTER OF LAW.

1. Plaintiff failed to meet the burden of Pleading a cause of action for Defamation as a Public Official.

The Supreme Court has held that the "public official" designation applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) (citations omitted); *see also* Robert D. Sack, *Sack on Defamation* § 5:2.1, at 5-7 (5th ed. 2017) ("The public official category is by no means limited to upper echelons of government. All important government employees are subject to discussion by the people who employ them and by others who would comment on their behavior." (citations omitted)). Thus, a plaintiff with either actual or apparent substantial responsibility can be deemed a public official for purposes of a defamation claim. *See Rosenblatt*, 383 U.S. at 85. 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, supra* at 383 U.S. 75, 86,

³ Bain is unable, as a matter of law to plead that Duff & Childs was not an approved law firm for the C Chest School District – as is reflected in the materials provided with her supplemental memorandum, as well as the public records of the School Board..

86 S.Ct. 669, 15 L.Ed.2d 597 (1966). As a School Superintendent, Bain is a Public Official. In *Kelley-Moser Consulting, LLC v. Daniels*, 2012 U.S Dist. LEXIS 21140, 2012 WL 554643, The Honorable Cameron M. Currie, held that the Superintendent for a statewide public school district had “substantial responsibility for and control over the conduct of governmental affairs and was a public official. See e.g. *Goodwin v. Kennedy*, 347 S.C. 30, 552 SE2d 319,327 (Ct. App. 2001)⁴ “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 the Plaintiff is complying with her contractual obligations, touches on her fitness for office. A school superintendent’s fitness is a matter of significant public 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 allegedly defamatory 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 (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)).

⁴ See e.g. *Higgins v. Medical Univ.*, 326 S.C. 592, 602, 486 S.E.2d 269, 274 (Ct. App. 1997) finding that an error in conversion to a motion for summary judgment and considering extrinsic evidence was harmless “if the dismissal can be justified under Rule 12(b)(6) without reference to matters outside of the Plaintiff’s complaint.

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. In this case, the record is bereft of any allegation from which the Court might infer or Bain may assert that she has alleged any basis for finding legal malice. She has not alleged that Childs made any particular defamatory statement, much less that he published a statement that he knew was false or entertained serious doubts about the statement’s truth. Her complaint contains only general, conclusory statements where she alleges that such statements⁵ “have been published and disseminated widely to third persons and were done so maliciously and in bad faith.”

⁵ In the Opinion, Judge Currie notes: While the South Carolina courts have not addressed whether a superintendent of a school district satisfies this standard, a number of other states' courts have held that a school superintendent does. *See, e.g., Purvis v. Ballantine*, 226 Ga. App. 246, 487 S.E.2d 14 (1997); Dkt. No. 41-1 at 17 (summarizing multiple cases so holding). South Carolina cases addressing other positions of similar authority also suggest that South Carolina courts would hold that a District Superintendent is a public official. *See Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 643 (1991) (requiring trial court to charge the constitutional actual malice standard in a defamation case brought by two members of a school board because that standard applied “[i]n cases involving the defamation of a public official”); *see also Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996) (treating assistant chief of police as public official in defamation action against his employer); *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408

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 legal malice. This fundamental deficiency alone is enough for the Court to affirm the Lower Court's decision.

2. Plaintiff's Complaint generally fails to Plead the Elements necessary for avoiding dismissal of a Defamation Action

In South Carolina, the elements for a defamation claim are: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743, 748 (Ct.App. 2001).

The Plaintiff's complaint fails even arguably to reference any statement attributable to Childs about Bain. It also does not include any factual statement that purports to be false, or unprivileged⁶. Moreover, even taking all of Plaintiff's bald assertions of fact and conclusions of law about Childs, there is an allegation that Childs did not act and was not acting as attorney for either Lawson or the District or Both at all times. The fact that he submitted the invoices about which Plaintiff rants demonstrates that fact.

3. The Court correctly dismissed Plaintiff's claims because they relied only on bald assertions of fact and conclusions of law.

(App.1994) (treating police officer as public official in defamation action relating to performance of his duties and citing multiple similar South Carolina cases).

⁶ Which are ambiguous, unidentified and do not meet required standards for pleading defamation.

⁷ This is particularly evident where it seems that she complains that Childs' communications were with school board members – clients of Duff & Childs

The Court is not required, even on a Rule 12 motion to dismiss, to accept bald assertions and conclusions of law that fail to set forth a "plausible" claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) [Complaint must state a plausible claim for relief on its face]; *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ["While the pleading standard is a liberal one, bald assertions and conclusions of law" are not sufficient to avoid dismissal of a complaint for failure to state a proper claim.]; *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996) [When considering Rule 12 motion to dismiss, Court need not accept "unwarranted deductions" or "sweeping legal conclusions cast in the form of factual allegations"]; *see Frey v. City of Herculanum*, 44 F.3d at 671 ["Complaint must contain facts which state a claim as a matter of law and must not be conclusory"].

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S.544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* The plausibility standard reflects the threshold requirement of Rule 8(a)(2) the pleader must plead sufficient facts to show he is entitled to relief, not merely facts consistent with the defendant's liability. *Twombly*, 550 U.S. at 557 (quoting Fed. R. Civ. P. 8(a)(2)⁷); *see also Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"" (quoting *Twombly*, 550 U.S. at 557)). Accordingly, the plausibility standard requires a plaintiff to articulate facts that, when accepted as true, demonstrate that the

⁸ The language in Rule 8(a)(2) is identical in both State and Federal Rules

plaintiff has stated a claim that makes it plausible the plaintiff is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009)

Here, Bain has failed to provide any facts to support her claims. She never indicates who made defamatory statements about her, what they said, or to whom those statements were published. While pleadings must be liberally construed, *see, e.g., Gaskins v. S. Farm Bureau Cas. Ins.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000), Rule 12(b)(6) requires the plaintiff to allege facts. "In deciding whether a dismissal under Rule 12(b)(6), is proper, the adequacy of a plaintiff's complaint must be determined through application of the pleading rules of Rule 8, SCRPC." *Justice v. The Pantry* 330 S.C. 37, 42, 496 S.E.2d 871, 873 (Ct. App. 1998). Bain failed to allege facts required by Rule 8 so as to survive the Rule 12(b)(6) motion.⁸ The Court properly dismissed her claims against Childs.

4. Whether or not Childs is representing a party is an attorney is a legal conclusion. That determination is in the exclusive province of the Court.

Bain spends considerable time in her brief arguing that her conclusions that there was no attorney-client relationship create a question of fact. Bain also asks this Court to conclude that the

⁹ See. *e.g. Paradis v. Charleston Cty. Sch. Dist.*, 424 S.C. 603,613, 819 S.E. 2d 147, 153 (Ct. App. 2018) for an on-point analysis applicable to the pleadings in this case.

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 JICHS" 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.

Lower Court erroneously considered materials outside of the four corners of the Complaint where she opened the door and introduced materials first. Her efforts are misplaced. Our Supreme Court recognizes that “the determination of whether or not a communication is privileged and confidential is a matter for the trial judge to decide after a preliminary inquiry into all the facts and circumstances. *State v. Love*, 275 S.C. 55, 59, 271 S.E. 2d. 110,112 (1980). The trial judge’s decision will not be overturned absent an abuse of discretion, *Id.* See also, *State v. Doster*, 276 S.C. 647 652, 284 S.E. 2d 218, 220 (1981)⁹ Here, Bain cannot establish that the trial judge abused his discretion when he dismissed her case.

The Court should not allow Bain to establish the relationship between the parties based upon her conclusory allegations. The Court made this decision based upon her pleadings and the documents she incorporated therein, and Bain does not argue that it was an abuse of discretion but rather that her bald assertions of fact and legal conclusions should control. In his supplemental memorandum, Childs noted this. He stated:

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 r Motion to Dismiss and properly consider them in making that determination.

¹⁰ "Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion. 81 Am. Jur. (2d) *Witnesses*, Section 222."

The court must determine the question of privilege without first requiring disclosure of the substance of the communication. *Steiner v. United States*, 134 F. (2d) 931 (5th Cir.), cert. denied, 319 U.S. 774, 63 S. Ct. 1439, 87 L. Ed. 1721 (1943); *Miller v. Anderson*, 30 Conn. Sup. 501, 294 A. (2d) 344 (1972); *Harrison v. State*, 276 Md. 122, 345 A. (2d) 830 (1975); 97 C.J.S., *Witnesses* § 305, at 848.

Defendant Childs' Supplemental Memorandum in Support of Motion to Dismiss p.4. (R.O.A. p.152). After this information was submitted, the Court properly considered these documents as attachments to the Complaint. Moreover, those and the District's Board Policies contradict Bain's allegations. The Court rightly considered that fact.

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

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

Moreover, "when a defendant attaches a document to its motion to dismiss, 'a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.'" *Id.* (quoting *Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.*, 367 F.3d 212, 234 (4th Cir. 2004).

Plaintiff incorporated the Board Policies in her complaint. Those policies show the folly of her argument that she decides who represents the District. Policy BDG (ROA 15-16) provides that "The attorney will serve at the pleasure of the board and will be paid for services rendered." That Policy also states "**the board will make all communications to the school attorney through the superintendent or board chairman.**" [Emphasis added] The administrative regulation to the policy

BDG-R (ROA pg. 17) further demonstrates the propriety of Lawson's necessary communications with Childs. It provides, *inter alia*, "A decision to seek legal advice and assistance on behalf of the district may be made by the board (individually or collectively) . . ." The Board Policies and Administrative Regulations, the letter exhibit to Bain's supplemental brief and the attachments to Childs' memo are authentic, incorporated and dispositive. The Plaintiff cannot question the veracity or authenticity of her letters and electronic mails.

The Lower Court's finding of the Attorney-Client relationship was not an abuse of discretion and should be affirmed by this Court.

C. BEFORE THE PLAINTIFF CAN "GO FISHING" SHE HAS TO POSIT A COMPLAINT THAT BUYS HER A LICENSE.

Bain argues that she should be afforded a right to discovery to explore further whether or not there was an attorney-client relationship between Childs and Lawson or Childs and the School District. To earn that right, she must first posit a claim that survives scrutiny under Rule 12. She has not done so. This Court should recognize that her complaint abjectly fails to state a claim against Childs whether or not the privilege issue is applicable. As addressed elsewhere in this Brief, her causes of action are fatally deficient and were properly dismissed on the other grounds articulated in Childs' original motion to dismiss as well as on the grounds utilized by the Lower Court.

The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Williams v. Preiss-Wal Pat III, LLC*, 17 F. Supp. 3d 528, 531 (D.S.C. 2014) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). Rule 8(a) sets forth a liberal pleading standard, which requires only a "short and plain statement of the claim showing the pleader is entitled to

relief,' in order to 'give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)). "[T]he facts alleged 'must be enough to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Robinson v. American Honda Motor Co., Inc.*, 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555, 570).

Here, as a matter of law, Bain's complaint is insufficient. After that determination, she is not entitled to go fishing for facts that she might allege to bolster her claims. She is charged with having a case before she is entitled to discovery. Rule 26, SCRCR only entitles parties to engage in discovery regarding "relevant" matters in a "pending" action. Bain must posit a legitimate complaint that survives a motion to dismiss before she can "go fishing" and engage in discovery in an effort to find some wrong to bolster her claim. If she cannot allege the wrong in her complaint, she is not entitled to try to create it discovery.

D. THE COURT PROPERLY DISMISSED BAIN'S COMPLAINT AS SHE FAILED TO PLEAD A PRIMA FACIE CLAIM FOR CIVIL CONSPIRACY.

Bain's complaint for Civil Conspiracy fails to include allegations sufficient to survive Childs' 12(b)(6) motion. Her complaint lacks any factual allegations that Mr. Childs acted in an unprivileged manner to injure her. Likewise, she failed to plead damages separate and apart from those alleged in her defamation claim. The gravamen of her complaint appears to be that Childs and Lawson conspired to "defame her.

Last year, the Court decided the case of *Paradis v. Charleston Cty. Sch. Dist.* 424 S.C. 603, 819 S.E.2d 147 (Ct.App. 2018). That case is on all fours with the allegations made by Bain in this case. There, the Court affirmed the Circuit Court’s dismissal of Paradis’ claims on Rule12(b)(6) motions. The pleadings in that case remarkably displayed deficiencies identical to those submitted by Bain.

In *Paradis*, the court noted that the Plaintiff alleged that defendant “met, conspired, schemed and planned with others to rebuke [her] and cause her special damages in an evil and personal agenda motivated by a personal dislike of Plaintiff and her valid complaints about discipline issues” *Paradis*, at 424 S.C. 612. Here, Bain alleges (about Childs and Lawson) that “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)¹⁰

Paramount, is that as a matter of law, the Board Chair has a legal and professional obligation to evaluate the district superintendent and ensure that the Superintendent abides by her employment agreement. Board policy affords the Chair the freedom to engage counsel to assist the Chair in that endeavor. Bain’s complaint fails to allege any facts to survive a Childs’ 12(b)(6) motion.

The Court’s analysis in *Paradis* applies equally to the facts here. Mainly, Bain has failed to allege facts supporting any of the elements required to establish her civil conspiracy claim

¹¹ Of Particular interest, unlike the circumstances in *Paradis*, none of the alleged goals of the conspiracy were met. To this day, Plaintiff remains the Superintendent of the Chester County School District.

beyond her bare allegations and conclusions. Moreover, her special damages claim fails under the analysis articulated by the Court in *Paradis*, where the court commented:

Additionally, Paradis asserts the circuit court erred because she sufficiently alleged 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. Accordingly, we affirm the circuit court's decision that Paradis has failed to plead any damages other than the general damages which arise from alleged defamatory acts. See 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.).

Paradis, supra at 424 S.C. 616.

The damages alleged in her claim for civil conspiracy (Complaint ¶¶ 75 and 76) are the same reputational damages one would expect from the claims Bain articulated in her claim for defamation. Thus, her claim for civil conspiracy should not have survived the motion to dismiss whether or not there was an attorney-client relationship between Childs and either Lawson or the District, which the Court found.

E. PLAINTIFF ABANDONED HER RIGHT TO RE-FILE OR AMEND WHEN SHE APPEALED THE LOWER COURT'S DECISION AND IS NOT ENTITLED TO A DO-OVER FROM THIS COURT.

The Court dismissed Bain's complaints against Childs without prejudice. Bain had the opportunity to Amend her Complaint before the hearing as a matter of right under Rule 15(a), SCRPC because the 12(b)(6) motion is not a responsive pleading. She failed to do so. Since her pleading was dismissed without prejudice because it does not include the words "with prejudice," she had leave to refile the action. "Dismissal . . . does not bar a subsequent action brought before

expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint."); *Owens v. Atlantic Coast Lumber Corp.*, 108 S.C. 58, 94 S.E. 15 (1917).. However, once she filed her appeal, she lost that right. As the Court held in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006):

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint (cite omitted) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal).

Here, Bain elected to appeal and in doing so waived her opportunity to amend her complaint.

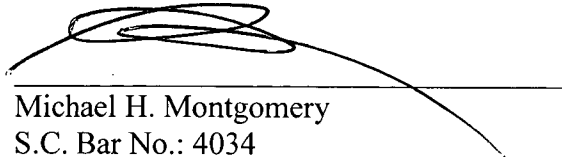
CONCLUSION

The Circuit Court properly dismissed Bains claims against Childs under Rule 12(b)(6). That decision is further bolstered by the other evidence in the record that conclusively demonstrates that Bain's complaint is defective in failing to allege facts sufficient to meet her burden to plead facts sufficient to set forth the causes of action that she alleges for Defamation where she fails to plead a single publication by Childs, failed to allege malice sufficient to overcome the additional burdens placed upon her as a public figure alleging defamation and failed to allege what was said, who said it and to whom any alleged defamatory statement was published.

Likewise, her claim for civil conspiracy is fatally deficient where it fails to allege facts upon which the critical elements of the claim can be established and alleges damages no different from those, she attributes to her defamation claim. Finally, she forfeited her right to file a new or amended complaint when she elected to appeal the Circuit Court's decision.

This Court should affirm the lower court's decision.

Respectfully submitted,



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Columbia, South Carolina
May 30, 2019

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

**APPEAL FROM CHESTER COUNTY
Court of Common Pleas**

RECEIVED
MAY 30 2019
SC Court of Appeals

The Honorable Brian M. Gibbons, Circuit Court Judge

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

Angela BainAppellant

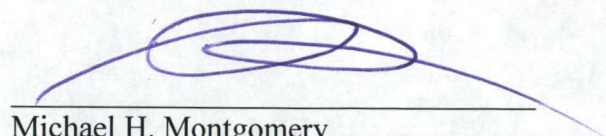
v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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