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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2021-001299
Unpublished Opinion No. 2021-UP-272 (S.C. Ct. App. Filed July 14, 2021)

Case No. 2018-CP-12-0334
S.C. Court of Appeals Case No. 2018-001991

Angela H. Bain ..... Appellant,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

Petitioners have presented the following questions for review:

I. Did the Court of Appeals err when it reversed the Circuit Court and found that there are questions of fact about Mr. Childs' attorney-client relationship with Ms. Lawson and the Chester County School District.

II. Whether this Court should abolish the tort of civil conspiracy.

STATEMENT OF THE CASE

Dr. Angela Bain ("Appellant" and "Dr. Bain"), filed an action alleging defamation and civil conspiracy against Petitioners Kenneth Childs ("Childs") and Denise Lawson ("Lawson") on July 23, 2018. (R. pp. 1-18). Lawson filed a Rule 12(b)(6), SCRCP Motion to Dismiss on August 9, 2018. (R. pp. 19-24). On August 17, 2018, Childs filed a Rule 12(b)(6), SCRCP Motion to Dismiss and in the alternative a Rule 12(c), SCRCP 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, Dr. Bain filed three memoranda in opposition to each of the three motions filed by the Petitioners. (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. The parties thereafter filed supplemental memorandum with exhibits attached touching upon the privilege issue. (R. pp. 140-167).

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 thereafter entered orders consistent with such findings. (R. pp. 199-242). Thereby, both claims against Childs were dismissed and the civil conspiracy claim against Lawson was also dismissed. Dr. Bain filed a Motion for Reconsideration on November 2, 2018. (R. pp. 243-251). The Motion for Reconsideration was denied on November 5, 2018. (R. p. 252).

Dr. Bain timely filed her Notice of Appeal to the South Carolina Court of Appeals on November 8, 2018. The parties briefed the issues. Oral arguments before the Court of Appeals occurred on May 4, 2021. On July 14, 2021, the Court of Appeals entered an order Reversing the decision of Judge Gibbons and Remanding the case to proceed with discovery. On the issue of attorney-client privilege, the Court of Appeals specifically found:

> Appellant maintains that Childs was not authorized to act for the District in a representative capacity during the time at issue, and therefore, this immunity does not apply. We find that a genuine issue of fact exists as to whether Childs acted outside his role as the District's or Lawson's attorney. *See Stiles,* 318 S.C. at 300, 457 S.E.2d at 602.
>
> Reviewing the evidence in the light most favorable to Appellant, we find her August 22, 2017 letter provides enough ambiguity regarding the attorney-client relationship between the District and Childs (and his firm) that judgment as a matter of law on this issue is inappropriate. In the letter, Appellant explicitly states that the firm was not authorized to do legal work on behalf of the District without her prior approval. This raises a question as to whether Childs's alleged unauthorized actions that occurred after August 22, 2017 – including investigation Appellant's consulting work and presenting the Board with allegations that she violated her contract and state law at the June 16, 2018 special Board meeting – were within the scope of his representation of the District. Although Appellant acknowledged Childs was one of the District's attorneys in the June 6, 2017 email, this information does not definitively establish that Childs's actions after August 22, 2017, were within the scope of his professional relationship with the District. These facts, coupled with the fact that Attorney White was voted as the Board's official attorney and entrusted with all of the District's electronic and hard copy files, raises a genuine issue of material fact as to the scope of Childs's representation of the District and whether his actions were outside this representation.

Both Petitioners filed Motions for Reconsideration, which were each denied by the Court of Appeals on October 7, 2021. Petitioners filed the instant Petition for Writ of Certiorari on November 8, 2021. Dr. Bain responds herein.

RELEVANT FACTS

Dr. Bain 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 Chair[1] 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 District in 2015 and 2016. (R. p. 3 ¶¶ 8, 9). During Childs' representation of the District, the previous Superintendent resigned, and Childs provided legal advice to the Board, while Lawson was a Board member, concerning those 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 Dr. 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

[1] Lawson is no longer on the Board and she is no longer the Board Chair.

which Dr. 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 was necessary for Childs to render legal services and receive payment from the District. (R. p. 6 ¶ 27).

Around December of 2017, it became obvious to Dr. Bain that Lawson was becoming hostile and contentious. (R. p. 6 ¶ 28). Lawson continued to interfere with Dr. Bain's duties as Superintendent by bypassing the chain of supervision, directly contacting Dr. Bain's subordinates and employees, and making direct requests of them, some without prior consultation with the Board members and without Dr. Bain's knowledge or permission. (R. p. 6 ¶ 30). Lawson met with others, including public officials of Chester County, without the consent of the Board and without them present, to plan and conspire to remove Dr. 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 Dr. Bain's contract and suggested that Dr. 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, Dr. Bain continued to receive reports of meetings and plans by Lawson to remove Dr. Bain. (R. p. 7 ¶ 37). Such plans escalated in June of 2018 when it was reported that Dr. 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 Dr. Bain 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 Dr. Bain was hired as Superintendent. (R. p. 8 ¶¶ 39-42). These facts were confirmed by the Board Chairman in an affidavit filed contemporaneously with the lawsuit. (R. p. 18, Exhibit D).

The timing of such allegations was convenient, given that Dr. Bain had recently consulted with the Interim Superintendent of Marlboro County School District, on Dr. Bain's 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 Dr. 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 Dr. 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 Dr. 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 Dr. 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 Dr. 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 Dr. 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 Dr. Bain and are the result of a conscious and continuing agenda by the Petitioners to remove Dr. Bain as Superintendent and to interfere with her contract. (R. p. 10 ¶ 53).

Petitioners defamed Dr. Bain 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

An appellate court reviews dismissal from a Rule 12(b)(6), SCRCP motion under the same standard employed by the trial court. *Delaney v. First Fin. of Charleston, Inc.*, 426 S.C. 607, 611, 829 S.E.2d 249, 250 (2019), reh'g denied (July 15, 2019)(citing *Fabian v. Lindsay*, 410 S.C. 475, 482, 765 S.E.2d 132, 136 (2014)). The facts are construed in the light most favorable to the nonmoving party, and all well-pled allegations are considered true. *Delaney,* 426 S.C. at 611, 829 S.E.2d at 250 (citing *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)). At the Rule 12 stage, the first decision for the trial court is to decide only whether the pleading states a claim. *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (2019).

The Court of Appeals found that the Circuit Court weighed Dr. Bain's letter and Childs' emails in considering the Rule 12(b)(6) motions, thus converting the Rule 12(b)(6) motion to dismiss into a Rule 56, SCRCP motion for summary judgment. (COA Opinion citing *Gilbert v. Miller*, 356 S.C. 25, 27, 586 S.E.2d 861, 862–63 (Ct. App. 2003) (finding a 12(b)(6) motion converted to a summary judgment motion because the plaintiff submitted outside documents in response to the motion, the defendant did not object to the documents, and the circuit court reviewed the documents in considering the motion)). A Rule 12(b)(6) motion converts to a Rule

56, SCRCP motion for summary judgment if the court considers matters outside the pleadings. See Rule 12(b), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Ray v. City of Rock Hill*, 434 S.C. 39, 44–45, 862 S.E.2d 259, 262 (2021)(quoting *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361-62, 563 S.E.2d 331, 333 (2002)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.*

ARGUMENT

The Court of Appeals found that Dr. Bain properly pled each cause of action stated in her Complaint. The Court of Appeals found that summary judgement is not appropriate at this juncture, and issues related to attorney-client privilege cannot be resolved as discovery has not been conducted. Accordingly, the Court of Appeals reversed the Circuit Court's partial dismissal and remanded the case for discovery to proceed. Petitioners' have filed a Petition for Writ of Certiorari on the issue of attorney-client privilege, and to argue, against precedent, for the elimination of civil conspiracy as a cause of action in South Carolina. Dr. Bain responds in opposition.

I. CHILDS DID NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP WITH THE SCHOOL DISTRICT DURING THE RELEVANT TIME PERIODS.

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 Dr. 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 District of South Carolina 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.

Key pleadings relevant to the analysis of whether the attorney-client privilege should be the basis for dismissal are:

- 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 Dr. Bain, 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), this 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.

"[T]o 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, Dr. Bain properly pled that when defaming Dr. Bain and purposefully taking action to ruin Dr. 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. Dr. Bain pled allegations, which taken as true, clearly fall outside any purported attorney-client privilege either Petitioner can raise.

In further support of Dr. Bain's position that the attorney-client privilege is not a proper basis for dismissal is the decision in *Ross* in which this 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.* This 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, Dr. 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 the 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).

Petitioners' argument that this letter was "ultra vires" is misplaced. Dr. Bain's position is not that she had the unilateral authority to hire and fire counsel for the District. District policy makes clear that power is reserved to the majority vote of the Board. (R. pp. 15-17, Exhibits A, B, and C). Rather, Dr. Bain's letter, with no evidence standing in contradiction, demonstrates that Dr. Bain, as a person with knowledge at the time, was aware that Childs was not employed *by the Board* as the District's counsel at that time.

Critically, Petitioners' argument on this issue overlooks key factual pleadings, to which no evidence to the contrary has been produced, and Petitioners' arguments cannot overcome.

Petitioners' continually assert that Lawson was permitted to consult with the District's counsel without approval from the full Board or Dr. Bain. (Pet. Cert. Pgs. 7-11). The fundamental flaw in this position is that Childs was not serving as the District's counsel during the relevant time periods in which Lawson and Childs conspired against Dr. Bain. While Lawson was free to consult with the District's counsel, that counsel was Andrea White, not Childs. Only the full Board can vote to install or change the District's counsel. (R. p. 4 ¶ 11; R. p. 15 Exhibit A) ("All powers of the board lie in its action as a body. Board members acting as individuals have no authority over personnel") (R. p. 4 ¶ 12; R. p. 16 Exhibit B) (, "...the board, by majority vote, may designate an attorney to counsel the board and administration on legal matters involving the district's welfare."). No such vote had taken place to implement Childs as the District's counsel. (R. p. 9 ¶¶ 48, 49).

To the contrary, on January 25, 2016, the Board voted to terminate the District's attorney-client relationship with Childs' firm, and to exclusively employ Andrea White, of White & Story, for all legal advice and counsel. (R. p. 4 ¶¶ 15-17). While Childs continued to attempt to improperly issue bills to the District for unauthorized legal services (as evidenced by Dr. Bain's August 22, 2017 letter in which Dr. Bain informed Childs that his bills were not authorized), Childs was not approved by the Board to serve in an attorney capacity for the District. (R. p. 148). It is impossible for Childs to have served as counsel to the Board after the January 25, 2016 vote to end the attorney-client relationship. A majority vote of the Board would be required to reinitiate the attorney-client relationship between the District and Childs. (R. p. 4 ¶ 11; R. p. 15 Exhibit A); (R. p. 4 ¶ 12; R. p. 16 Exhibit B). No such vote ever occurred. (R. p. 9 ¶¶ 48, 49).

Accordingly, there can be no question that Childs knew that he was not authorized to take any such action, and he knew that the Board had not voted to take the actions alleged in the Complaint. Based on the pleadings, it is clear that Dr. 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 Dr. Bain's claims, as the pleadings clearly identify that the Petitioners 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.

The Court of Appeals found that "a genuine issue of fact exists as to whether Childs acted outside his role as the District's or Lawson's attorney." The Court's finding is well supported by the record on appeal, and the law surrounding these issues. Petitioners' position is not. As such, the Appellate Court's decision should not be disturbed.

II. CHILDS DID NOT HAVE AN ATTORNEY-CLIENT RELATIONSHIP WITH THE DEFENDANT LAWSON DURING THE RELEVANT TIME PERIODS.

As described above, the classic test for application of the attorney-client privilege is set forth in *United States v. United Shoe Machinery Corp.* Petitioners have alleged that Dr. Bain failed to deny the existence of an attorney-client relationship between Childs and Lawson in her Complaint; this allegation is incorrect. (Pet. Cert. Pgs. 11-14). Dr. Bain pled the following:

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

(R. pp 15-16 ¶¶ 49, 55, 57). The pleadings thus clearly assert that (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.

While Dr. Bain has previously briefed in opposition to the application of a summary judgement standard to this motion, Petitioners cannot have it both ways. If Petitioners are to make sweeping allegations that all communications between Lawson and Childs existed in an attorney-client privilege, under the Rule 56 standard, Petitioners bear the burden of proof to show that no dispute of material fact exists as to that allegation. "In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). Dr. Bain is entitled to all justifiable inferences as the non-moving party.

Notably, despite submitting evidence which Petitioners allege support their position of an attorney-client relationship between Childs and the District, Petitioners cannot cite to even a single portion of the facts in the record of this case that demonstrate an attorney-client relationship between Childs and Lawson in her personal capacity. The only citation to the record is to paragraph 70 of the Complaint, which Petitioners alleges states that "[Lawson] often met with [Childs] to seek his counsel." (Pet. Cert. Pg. 12). This is a mischaracterization of the Complaint. Paragraph 70 states, "[t]he 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." (R. pp 18 ¶¶ 70). Those pleading clearly do not state that Petitioners met for the purpose of legal counsel, but rather, for the purpose of executing a tortious conspiracy to end Dr. Bain's employment.

Petitioners' citation to Justice Toal's decision in *Kovach v. Whitley,* 2015-CP-08-2380, has no bearing on the issues in this case. Justice Toal made clear that *when actions are privileged*, they cannot form a basis for a civil conspiracy claim. *Id.* There is no argument in this case about whether actions that actually are attorney-client privileged can constitute a civil conspiracy. The issue in this case is that there is no basis to support Petitioners' repeated claim that an attorney-client privilege existed that is a total bar to the claims.

Petitioners cannot cite to anything in the record on this issue. There is no retainer agreement in this case. No affidavit of others in Childs' firm. No receipts for payments from Lawson to Childs as her personal attorney. If such items exist,[2] then they have not been produced as discovery has not commenced. Such is the nature of Petitioners' premature, pre-discovery motions. Given the absolute lack of any evidence to support Petitioners' position of an attorney-client relationship between Childs and Lawson in her personal capacity, as the non-moving party, Dr. Bain is entitled to the favorable inference. *Stevens & Wilkinson of S.C., Inc.,* 409 S.C. at 576, 762 S.E.2d at 700. In this case, that means, at worst, a finding of an unresolved dispute of material fact as to whether such an attorney-client relationship existed. This is what the Court of Appeals properly found. The Appellate Court found that "a genuine issue of fact exists as to whether Childs acted outside his role as the District's or Lawson's attorney." The Court's finding is well supported by the record of this case, and the law surrounding these issues. Petitioners' position is not. As such, the Court's decision should not be disturbed.

[2] No such evidence is known to exist to support that any such attorney-client relationship existed between Childs and Lason.

III. 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. Dr. 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. 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.

Petitioners assert that the attorney-client privileged could be all but wholly eliminated. Appellant responds that such an alarmist view of the pleadings and impact therefrom is overstated. The scope of the attorney-client privilege is pertinent to consider in this case, but a determination that the privilege is a one hundred percent shield to liability for Childs, and thereby also dismissing the civil conspiracy claim against Lawson, is too overbroad at this initial pleading stage. At minimum, discovery is necessary. The motions filed by Childs and Lawson are initial motions that precede discovery in the case. Discovery is necessary to accurately delineate the bounds of the attorney-client privilege.

In practicality and in her pleadings, Dr. Bain recognizes that the attorney-client privilege might be raised during the litigation of this case, but it is not a total bar 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, this Court can look to the Michael Cohen matter. *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

[3] It is important to note that the record in Case No. 1:18-mj-03161-KMW is far larger than this case. One consistency has been that the attorney-client privilege does not shield Cohen from culpability for his actions.

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. Therefore, the Circuit Court's decision was properly reversed.

It is also important to consider this Court's recent decision in *Sentry Select Ins. Co. v. Maybank L. Firm, LLC*, 426 S.C. 154, 826 S.E.2d 270 (2019). In *Sentry Select*, the automobile insurer brought an action against the former counsel for legal malpractice in connection with the attorney's representation of its insured in an automobile accident case. *Id.* On rehearing from a certified question from the United States District Court, the Court held that the insurer could bring a direct malpractice action against the attorney hired to represent its insured. *Id.* Though the facts of *Sentry Select* and this case are different, the Court's legal analysis of the attorney-client privilege are pertinent here. *Id.* The Court held that the attorney owes no separate duty to the insurer, the client is the insured, and South Carolina does not allow a "dual attorney-client relationship" to both the insured and insurer. *Id.*

Now, we apply those legal principles to this case. Childs and Lawson assert a dual attorney-client relationship in a different context. Childs and Lawson would have the Court believe that everything they did was within the attorney-client privilege and they assert the privilege attaches to all of Childs' communications and actions with Lawson. Yet, as pled throughout the Complaint, there was no attorney-client relationship between Childs and Lawson *ever* in existence. Childs never represented Lawson. Childs represented the Chester County School District and only for a portion of time. During the time at issue in Dr. Bain's Complaint, Childs was expressly *not* the District's counsel. The District's counsel was Andrea White throughout the time at issue. If any

attorney-client privilege existed, the privilege belonged to the District and Andrea White, not to Childs, who was not serving in a representative capacity.

Dr. Bain and her counsel fully anticipate that attorney-client privilege will continue to be an issue in the case. However, even if the Court were to be wary of the bounds of the attorney-client privilege in this case, discovery is necessary to determine if any of Lawson's and Childs' actions and statements are protected by the privilege. The proper way to deal with such concerns is during discovery and only if particular documents or specific testimony are purported by either Petitioner 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 Petitioners have argued that attorney-client privilege protects them from all liability. The purpose of the attorney-client privilege was never so intended to protect either Petitioner from engaging in tortious conduct toward Dr. Bain.

IV. CIVIL CONSPIRACY IS ACTIONABLE IN ALL FIFTY STATES AND SHOULD NOT BE ABOLISHED IN SOUTH CAROLINA.

Petitioners close by arguing, for the first time,[4] that this Court should also eliminate the tort of civil conspiracy altogether. Petitioners' suggestion to "call the whole thing off" is an alarmist overreaction to a proper application of a civil conspiracy cause of action.

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[4] A well-established appellate doctrine in South Carolina (and in courts throughout the United States) is that an issue that is not preserved in the trial court will not be considered on appeal. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review."). A litigant must preserve an issue for appellate review by raising it in the trial court. *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) (providing that a party may not raise one argument below and an alternate argument on appeal). Failure to timely raise an issue waives review of that issue on appeal. *Id.* Here, Petitioners did not raise this issue, seeking to abolish the tort of civil conspiracy, before the District Court or the Court of Appeals. Thus, Petitioners have failed to preserve this issue for appellate review.

This Court, in *Charles v. Texas Company*, stated the law of conspiracy as follows: "conspiring together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Charles*, 192 S.C. 82, 5 S.E.2d 464, 472 (1939). Every single State and the District of Columbia recognizes civil conspiracy as an actionable tort in the same or similar form as South Carolina.[5] Notably, Petitioners cannot cite to even a single case which supports the elimination of civil conspiracy as an actionable tort.

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[5] *See e.g.*, *Hooper v. Columbus Reg'l Healthcare Sys., Inc.*, 956 So. 2d 1135, 1141 (Ala. 2006); *Davis v. King Craig Trust*, No. S-15962, 2017 WL 2209879, at *3 (Alaska May 17, 2017); *Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, 38 P.3d 12, 20 (Ariz. 2002), as corrected (Apr. 9, 2002); *Stauffer v. Stegemann*, 165 P.3d 713 (Colo. App. 2006) as modified on denial of reh'g (Nov. 2, 2006); *Faulkner v. Arkansas Children's Hosp.*, 347 Ark. 941, 961, 69 S.W.3d 393, 406 (2002); *Schaden v. DIA Brewing Co., LLC*, 2021 CO 4M, ¶ 8, 478 P.3d 1264, 1268, as modified on denial of reh'g (Col. Sup. Ct. Feb. 1, 2021); *Charter Oak Lending Group, LLC v. August*, 14 A.3d 449, 460–61, 127 Conn. App. 428, 446 (Conn. App. 2011); *AeroGlobal Capital Management, LLC v. Cirrus Industries*, Inc., 871 A.2d 428 (Del. 2005); *Griva v. Davison*, 637 A.2d 830, 848 (D.C. 1994); *Walters v. Blankenship*, 931 So.2d 137, 140 (Fla. App. Ct. Dist. 2006); *Rubenstein v. Palatchi*, 359 Ga. App. 139, 146, 857 S.E.2d 81, 88 (2021); *Miyashiro v. Roehrig, Roehrig, Wilson & Hara*, 228 P.3d 341, 362, 122 Haw. 461, 482 (Hawaii Ct. App. 2010); *Taylor v. McNichols*, 243 P.3d 642, 660, 149 Idaho 826, 844 (Idaho 2010); *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 923, 874 N.E.2d 230, 240 (Ill. App. 1 Dist. 2007); *Birge v. Town of Linden*, 57 N.E.3d 839, 845 (Ind. Ct. App. 2016); *Basic Chemicals, Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977); *State ex rel. Mays v. Ridenhour*, 811 P.2d 1220, 1224, 248 Kan. 919, 923 (Kan. 1991); *Mosley v. Arch Specialty Ins. Co.*, 626 S.W.3d 579, 594 (Ky. 2021); *Payne v. Stanley*, 53,773 (La. App. 2 Cir. 3/3/21), 316 So. 3d 104, 112, writ denied, 2021-00480 (La. 5/25/21); *Smith v. Coyne*, 2004 WL 1433638, at *4 (Me. Super. Apr. 12, 2004); *Mackey v. Compass Marketing, Inc.*, 892 A.2d 479, 485, 391 Md. 117, 128 (Md. 2006); *Governo L. Firm LLC v. Bergeron*, 487 Mass. 188, 166 N.E.3d 416 (2021); *Mays v. Three Rivers Rubber Corp.*, 352 N.W.2d 339, 341, 135 Mich. App. 42, 48 (Mich. App. 1984); *Robert Allen Taylor Co. v. United Credit Recovery, LLC*, 2016 WL 5640670, at *11 (Minn. Ct. App. Oct. 3, 2016); *Gallagher Bassett Services, Inc. v. Jeffcoat*, 887 So.2d 777, 786 (Miss. 2004); *Higgins v. Ferrari*, 474 S.W.3d 630, 642 (Mo. App. W.D. 2015); *Schumacker v. Meridian Oil Co.*, 956 P.2d 1370, 1373, 288 Mont. 217, 221, 1998 MT 79, ¶ 18 (Mont. 1998); *George Clift Enterprises, Inc. v. Oshkosh Feedyard Corp.*, 306 Neb. 775, 813, 947 N.W.2d 510, 537 (2020); *Abrams v. Sanson*, 136 Nev. 83, 92, 458 P.3d 1062, 1070 (2020); *In re Appeal of Armaganian*, 784 A.2d 1185, 1189, 147 N.H. 158, 163 (N.H. 2001); *Banco Popular North America v. Gandi*, 876 A.2d 253, 263, 184 N.J. 161, 177 (N.J. 2005); *Gonzagowski v. Steamatic of Albuquerque, Inc.*, 2021-NMCA-056, ¶ 12, 497 P.3d 1202, 1206, cert. denied (Ct. App. N.M. Oct. 20, 2021); *Knopf v. Esposito*, 71 Misc. 3d 1201(A), 142 N.Y.S.3d 341 (N.Y. Sup. Ct. 2021); *Mace v. Pyatt*, 203 N.C. App. 245 (N.C. App. 2010); *Hurt v. Freeland*, 589 N.W.2d

Instead, Petitioners rely on the dissenting opinion of Justice Few in *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021), reh'g denied (Aug. 18, 2021). Petitioners argue that "Appellant seeks to do exactly what Justice Few warned against – using a civil conspiracy claim as an 'end around' of (1) the defenses of a defamation claim and (2) the attorney-client privilege by permitting her to sue the Petitioners because they conferred with each other." (Pet. Cert. Pg. 15). Petitioners' concerns are misguided and overblown. Dr. Bain's civil conspiracy claims are not an "end around," as evidenced by the mere fact that her claims of defamation persist in this case. Dr. Bain's civil conspiracy claim is in addition to her defamation claim, not a substitute-vehicle for a non-viable defamation case. Further, as discussed above, the claim of civil conspiracy cannot be an "end around" for the attorney-client privilege, because the privilege does not apply, or at minimum, does not apply in the broad-sweeping pre-discovery manner that Petitioners wish.

As the United States Supreme Court has often noted, "[the] slippery-slope projection is both familiar and false." *Shady Grove Orthopedic Associates, P.A., v. Allstate Insurance Co.*, 559

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551 (N.D. 1999); *Skycasters, LLC v. Michael Kister*, 2021-Ohio-4154, 2021 WL 5505262 (Ohio Ct. App. 9th Dist. Nov. 24, 2021); *Edwards v. Urice*, 220 P.3d 1145, 1152, 2009 OK CIV APP 20, ¶ 20 (Okla. Civ. App. Div. 1 2008); *Morasch v. Hood*, 222 P.3d 1125, 1131–32, 232 Or. App. 392, 402 (Or. App. 2009); *Skipworth by Williams v. Lead Industries Ass'n, Inc.*, 690 A.2d 169, 174, 547 Pa. 224, 235 (Pa. 1997); *Ims v. Town of Portsmouth*, 32 A.3d 914 (R.I. 2011); *Paradis v. Charleston Cty. Sch. Dist.*, 433 S.C. 562, 565, 861 S.E.2d 774, 775 (2021), reh'g denied (Aug. 18, 2021); *Kirlin v. Halverson*, 758 N.W.2d 436, 455, 2008 S.D. 107, ¶ 59 (S.D. 2008); *PNC Multifamily Capital Institutional Fund XXVI Ltd. Partnership v. Bluff City Community Development Corp.*, 387 S.W.3d 525 (Tenn. Ct. App. 2012); *MVS International Corporation v. International Advertising Solutions, LLC*, 545 S.W.3d 180 (Tex. App. El Paso 2017); *Harvey v. Ute Indian Tribe of Uintah and Ouray Reservation*, 416 P.3d 401 (Utah 2017); *State v. VanBuren*, 2018 VT 95, ¶ 51, 210 Vt. 293, 319, 214 A.3d 791, 809 (2019), as supplemented (June 7, 2019); *Commercial Business Systems, Inc. v. Bellsouth Services, Inc.*, 453 S.E.2d 261, 267, 249 Va. 39, 48 (Va. 1995); *Woody v. Stapp*, 146 Wash.App. 16 (Wash. App. Div. 3 2008); *Dunn v. Rockwell*, 689 S.E.2d 255, 268, 225 W.Va. 43, 56 (W.Va. 2009); *Hansen v. Klein*, No. 2020AP1265, 2021 WL 3160495, at *4 (Wis. Ct. App. July 27, 2021); *White v. Shane Edeburn Const., LLC*, 285 P.3d 949, 958, 2012 WY 118, ¶ 29 (Wyo. 2012).

U.S. 393, n. 5, 130 S.Ct. 1431 (2010) citing Cf. R. Bork, The Tempting of America 169 (1990) ("Judges and lawyers live on the slippery slope of analogies, they are not supposed to ski it to the bottom."). Petitioners' arguments to eliminate a cause of action, which citizens of every state across the nation enjoy the right to bring, amounts to an alarmist slippery-slope ploy. This case is not an opening of the floodgates. It is rather a confirmation of the current reality: that simply because an individual possesses a license to practice law, does not mean the individual enjoys a blanket privilege from suit for all of their actions and words. The current state of civil conspiracy claims in South Carolina does not expose every attorney and client to liability. Rather, it follows a logical conclusion that when individuals conspire outside of an attorney-client relationship to injure a party, that party, such as Dr. Bain, has an actionable claim of civil conspiracy.

Petitioners' fears are unwarranted and unsupported by the law of this State, the litigation history of civil conspiracy claims, and the facts of this case. This Court should not buck the century-old unanimous trend of permitting civil conspiracy claims, which is followed by every State in the country. This cause of action should not be abolished.

CONCLUSION

The decision of the Court Appeals should remain unchanged. This Court should deny Petitioners' Petition for Writ of Certiorari.

Respectfully Submitted,

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No.: 2021-001299
Unpublished Opinion No. 2021-UP-272 (S.C. Ct. App. Filed July 14, 2021)

Case No. 2018-CP-12-0334
S.C. Court of Appeals Case No. 2018-001991

Angela H. Bain ..... Appellant,

v.

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

CERTIFICATE OF COUNSEL

I, the undersigned attorney certifies that Appellant's Return To Petition For Writ of Certiorari complies with Rule 242, SCACR.

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