THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

CASE NO. 2011-CP-10-1528

Cynthia McNaughton .... Respondent,

v.

Charleston Charter School For Math And Science, Inc. .... Appellant.

BRIEF OF APPELLANT

FEB 20 2013

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DENYING DIRECTED VERDICT AND JNOV ON THE CONTRACT CAUSE OF ACTION?

2. DID THE TRIAL COURT ERR IN DENYING DIRECTED VERDICT, JNOV AND MOTION FOR REMITTITUR/REDUCTION/NEW TRIAL ON THE SPECIAL DAMAGES AWARD?

3. DID THE TRIAL COURT ERR IN GRANTING ATTORNEY FEES UNDER S.C. CODE SECTION 15-77-300?

STATEMENT OF THE CASE

On February 28, 2011, Respondent brought this action alleging that her former employer, Charleston Charter School for Math and Science, Inc. ("Appellant"), wrongfully discharged her from employment in breach of her written employment contract, in breach of Appellant's Charter with the Charleston County School District and negligently supervised her. Appellant filed its Answer and then its First Amended Answer denying these allegations.

The case was tried by a jury on June 4, and 5, 2012. The Trial Court granted Appellant's motion for a directed verdict as to all causes of action except for the cause of action for breach of written Employment Agreement. On June 5, 2012, the jury returned a verdict in favor of Respondent for $20,623.00 in actual damages and $74,112 in special damages. On June 22, 2012, the Trial court entered judgment in favor of Respondent for these amounts and granted Respondent's motion for attorney fees in the sum of $37,894.00. On July 3, 2012, Appellant served its Notice of Appeal on Respondent.

FACTS

Appellant hired Respondent as a teacher beginning in August 2010. (R. p. 99, lines 2-6) The Parties signed an Employment Agreement (R. p. 99 lines 4-6; R. p. 22; R. p. 405) which states:

> **Cynthia McNaughton** agrees to be a full-time teacher at Charleston Charter School for Math and Science for the school year 2010-2011.
>
> . . .
>
> This employment agreement is contingent on funding and enrollment as well as said teacher meeting certification and other requirements to teach designated courses.

During trial, Respondent testified that:

1. She signed the Employment Agreement on August 5, 2010, and it is the only contract that she signed with Appellant (R. p. 144 lines 9-22; R. p. 423);

2. She was hired only for one year (R. p. 145 lines 17-18; R. p. 164 lines 17-19), she did not have an employment contract with the Appellant for the following or any other school years (R. p. 161 lines 18-25; R. p. 129 lines 1-9) and the Appellant agreed only to pay her a salary and nothing more for the 2010/2011 school year (R. p. 163 lines 4-25; R. p. 164 lines 1-10);

3. Before she signed the Employment Agreement, she read the contract's contingency clause, "This employment agreement is contingent on funding and enrollment, as well as said teacher meeting certification and other requirements to teach designated courses," and she was aware of this contingency

(R. p. 104 lines 5-16; R. pp. 144-146; R. p. 148 lines 8-19);

4. She was not the person who made the decision whether or not there was ongoing funding for her position (R. p. 146 lines 19-23);

5. Nobody told her when she signed the Employment Agreement that there was funding for her position available for the entire year (R. p. 148 lines 8-15);

6. Appellant did not promise to hire her through PACE/teacher certification completion (R. p. 164 lines 20-23); and

7. Her breach of contract claim is only for her one-year Employment Contract (R. p. 136 lines 3-7).

Appellant's Charter requires the Appellant's focus to be, "student achievement, insure compliance and sound fiscal management." (R. p. 209 lines 18-25; R. p. 210 lines 1-12; R. p. 259 4-15) During the school year preceding Respondent's hiring, Appellant was forced to layoff three employees and reduce all employees' salaries by 5% because of state budget cuts. (R. p. 256 lines 2-12)

Appellant prepared its budget for the 2010/2011 school year, ultimately approving a line-by-line item budget. (R. p. 260 lines 13-16) When Appellant approved this budget, a limited amount of money was budgeted for teachers' salaries (R. p. lines 18-23). Although Appellant sets an annual budget, it reconciles the budget on a monthly basis and then funds the budget based upon its changing needs. (R. p. 282 lines 17-20)

In mid-October 2010, Appellant gave its students a math achievement test to determine how its students would perform in relation to students at other schools. (R. p. 276 lines 22-25; R. p. 277 lines 1-6; R. p. 323 lines 3-14) Because the students scored very poorly with some showing that they did not have even the most basic of math skills (R. p. 323 lines 18-25; R. p. 324 lines 1-4; R. p. 326 lines 5-18; R. pp. 433-434, Appellant formed a plan to help its students with math - it decided to hire an additional math teacher to provide the students "double" instruction and more classes in math in order to catch-up to their peers. (R. p. 207 lines 21-25; R. p. 208 lines 1-4; R. p. 279 lines 1-6, 23-25; R. p. 280 lines 1-2)

Because there was no room in its budget to fund an additional math teacher position and still employ all of its current teachers (R. p. 284 lines 17-19; R. p. 427), Appellant selected its art teacher, Respondent, to be laid off because it was more important for the students to have an additional math teacher than it was another art teacher. (R. p. 284 lines 17-25; R. p. 285 lines 1-6; R. p. 432) Appellant believed that it was in the best interests of their students that more math classes be offered and that the number of art classes offered be reduced. (R. p. 286 lines 24-25; R. p. 287 lines 1-7) Therefore, Appellant chose to fund a position for an extra math teacher and no longer fund Respondent's employment contract as spelled out in Respondent's Employment Agreement. (R. p. 186 lines 11-24; R. p. 191 lines 13-25; R. p. 192 lines 1-4; R. p. 287 lines 24-25; R. p. 288 lines 1-2)

On December 1, 2010, Appellant informed Respondent that her employment was

ending and that she was being "laid off" because there was no funding to continue her position because the School was hiring an additional math teacher (R. p. 116.lines 19-25; R. p. 117 line 1; R. pp. 409-410; R. p. 151 lines 4-18; R. p. 424). There was simply no money budgeted for the extra math position and also Respondent's position, and all of Appellant's other expected income was already committed. (R. p. lines 14-22)

As a result of hiring the additional math teacher and "doubling" on math classes taught, the students' math scores rose. (R. p. 296 lines 1-13; R. p. 331 lines 1-20)

When Respondent grieved her contract termination, Appellant informed her that she had not been fired but had been laid-off and that Appellant had the right to move around funding to meet its needs. (R. p. 121 lines 11-25; R. p. 122 lines 1-7) Respondent's own grievance document states that she was laid off due to changing program needs. (R. p. 160 lines 6-25, R p. 161 lines 1-11; R. p. 426)

ARGUMENTS

"In ruling on a directed verdict or JNOV motions, the trial court is required to view the evidence and the inferences that reasonably can be drawn there from in the light most favorable to the party opposing the motions." Sabb v. South Carolina State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). The trial court is only concerned with the "existence or nonexistence of evidence, and when the evidence yields only one inference, a direct verdict in favor of the moving party is proper. Long v. Norris & Assocs., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct.App. 2000). On appeal from a denial of a motion for a directed verdict or JNOV, this court will reverse the trial court only when there is no evidence to support the ruling. Creech v. South Carolina Wildlife & Marine Res. Dep't, 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997).

1. The Trial Judge Erred In Failing To Direct A Verdict And To Grant JNOV On The Contract Claim.

Respondent and Appellant had only one contract, a one-page Employment Agreement with two relevant provisions: employment as a teacher for one year with such employment being "contingent on funding . . ." In other words, unless there was ongoing funding for Respondent's position then the contract entitled Appellant to end her employment without notice and before the school year ended.

Pursuant to S.C. Code Section 59-40-40 (1) (as amended), Appellant is a nonprofit corporation. Its Charter application constitutes a contract between Appellant and its sponsor, S.C. Code Section 59-40-60(A) (as amended), and requires Appellant to "develop policies regarding operations of the school, budgeting curriculum and operating

procedures." (Def. Tr. Ex. 40, p. 108 of 151). The Charter also requires Appellant to employ and contract with teachers. (Def. Tr. Ex. 40, page 107 of 151).

There is no evidence in this case that any entity has control over Appellant's School's finances or its hiring decisions; rather, all of the evidence shows that the Appellant, alone, has discretion to make its financial, business and other decisions and to employ or layoff teachers and other employees as long as Appellant complies with the Charter.

A court will not review the business judgment of a corporation when the corporation acts within its authority and it acts without corrupt motives and in good faith. Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App. 2000) This general law, also known as the Business Judgment Rule, allows a court to question a corporation's actions or business judgment only when such actions are not within the corporation's authority, Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App. 1993), or when the corporation is acting in bad faith. Kuznik, Id.

In this case, the evidence is undisputed that Appellant prepared a budget for the 2010/2011 school-year and that, month-by-month, Appellant funded the budget and hired and fired teachers and other employees based upon its changing needs. Because Appellant acted only within its authority when it decided to terminate Respondent's contract due to a lack of ongoing funding, it is entitled to the protection of the Business Judgment Rule. Further, because Respondent failed to offer at trial any evidence of bad faith regarding Appellant's decision not to continue to fund her position after December 2010, the trial

court improperly sent the case to the jury on the factual question of whether or not Appellant had continued funding for Respondent's position. In other words, because the terms of the Employment Agreement were clear and not ambiguous and because there was no evidence that Appellant acted outside of its authority or in bad faith, Appellant alone was entitled to decide whether it had sufficient monies to continue Respondent's position after December 2010. Because the Business Judgment Rule left only a question of law, the trial court erred in denying Appellant's directed verdict and JNOV motions.

Further, because Respondent testified in trial that it was the Appellant's duty to make the decision as to whether there was sufficient ongoing funding for her position and that it was not her role to make funding decisions, there can be no question but that Appellant did not breach the Employment Agreement and that awarding Respondent actual contract damages in the sum of $20,623 was error.

2. The Trial Court Erred In Denying Directed Verdict, JNOV and Motion for Remittitur/New Trial For The Special Damages Award, And Erred In Failing To Charge The Jury That Contract Damages In This Case Were Limited To The Term Of The Contract.

In addition to awarding actual damages, the jury awarded Respondent $74,112 in special damages.

i. Respondent's Recovery Is Limited To Wages For The Remainder Of The Contract Term.

In Shivers v. John H. Harland Co., Inc., 310 S.C. 217, 220, 423 S.E.2d 105 (1992), the sole question before the Supreme Court of South Carolina was the "correct measure of damages" for breach of employment contract. Shivers had a written employment contract containing a notice provision - once notice of job termination was

given, the employment contract assumed a definite term - the last day of the notice period. The Shivers Court discussed the difference between an employment contract with a definite term and an employment contract with no term:

> A person hired under an employment contract for a definite term may not be discharged before the completion of the term without just cause. When an employee is wrongfully discharged under a contract for a definite term, the measure of damages generally is the wages for the unexpired portion of the term.
>
> . . .
>
> [In contrast, where] the contract between . . . the employee and . . . the employer was for an indefinite duration . . . for the purposes of establishing damages, it appropriately was left to the jury to determine how long [the employee] would have continued to be employed but for the wrongful discharge.

Id. at 220-221.

In this case, Respondent had an employment contract for exactly one school-year and, under the reasoning and the holding in Shivers, was limited to damages for one year. Therefore, Appellant was entitled to a directed verdict, JNOV and grant of its motion for a remittitur on the special damages award of $74,112.00. Further, the trial court erred by failing to instruct the jury that the available damages for breach of contract was limited to the term of the contract.

ii. There Is No Evidence To Support An Award Of Special Damages Of $74,112.

Respondent testified that she was hired only for one year, she was not hired for any period longer than one year, Appellant did not promise her employment for more than one year, Appellant did not promise that she would be a certified teacher and that Appellant did not promise her anything other than a salary for one year per the terms of

the Employment Agreement. Therefore, there is no evidence to support an award for special damages.

iii. The Statute of Frauds Precludes Special Damages as Claimed By Respondent.

Respondent's claim for special damages appeared to be for the wages she would earn in the future had she been able to continue as Appellant's employee based on her testimony of the wages she expected for 12 twelve years - until she reached 65. However, unless such future damages or future status based upon an employment contract (which was the only claim that survived directed verdict) is in writing and signed by the promisor (i.e. the School), then such damages that extend more than one year after her date of hiring are precluded under the Statute of Frauds. S.C. Code Section 32-3-10(5).

iv. Because The Parties Never Contemplated The Special Damages Claimed By Respondent, They Cannot Be Awarded.

Special damages are also precluded in this case because there is absolutely no evidence that the Parties intended Respondent to be hired for more than one year and if Respondent is claiming that some part of her employment had value over and above her wage then there is no evidence that at the time of contracting the Parties contemplated the same:

> Special damages cannot be recovered in an action ex contractu unless the defendant had notice of the circumstances from which they might reasonably be expected to result at the time the parties entered into the contract, as the effect of allowing such damages would be to add to the terms of the contract another element of damages, not contemplated by the parties.

Moore v. Atlantic Coast Line R. Co., 85 S.C. 19, 22, 67 S.E.11 (S.C. 1910) (Note: The first time Respondent mentioned anything about special damages or her claim for special

damages was in her closing argument, at which time Appellant immediately objected because there was no evidence of the special damages awarded in Plaintiff's case-in-chief.)

Further, because Shivers limits damages to wages that would have been earned during the contract term and because Respondent offered no evidence that the her employment contract extended beyond one school-year, the trial court erred by denying Appellant's motions for a directed verdict, for JNOV and for a remittur or reduction/new trial to set aside or eliminate the special damages award.

Respondent also failed to offer any evidence that she would not find a job before reaching 65 years of age, 12 years in the future. Thus the award of special damages was speculative and cannot be supported by the evidence offered at trial, and there is no evidence to support an award that extends 12 years in the future.

3. The Trial Court Erred By Awarding Attorney Fees To Respondent Under S.C. Code Section 15-77-300.

A charter school is governed by parents, teachers and its elected board of directors. (R. p. 264 lines 9-18) It is an independent entity and is not supervised by anyone - including the state or the school district. (R. p. 263 lines 14-25; R. p. 264 lines 1-8; R. p. 436) It is formed by law as a nonprofit corporation and although it is not formed as a political subdivision of the State it is part of the public school system. S.C. Code Section 59-40-40(1).

i. Appellant Is Not A Political Subdivision Or A State Actor.

S.C. Code Section 15-77-300 requires state action before a plaintiff can recover attorney fees:

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action . . .

McNaughton claimed that she can recover attorney fees from because Appellant is a "state entity." (R. p. 586) The facts, however, show that Appellant is not a state entity:

-Respondent admits that Appellant was established pursuant to S.C. Code 59-40-40 et seq. (as amended) ("the Act") (R. p. 13 Para. 2);

-The Act defines a "charter school" as "a public, nonsectarian, nonreligious, non home-based, nonprofit corporation forming a school which operates within a public school district," S.C. Code Section 59-40-40(1); it does not define a charter school as a political subdivision or as an agency of the State, there is no state law which defines a charter school as an arm of the State and, although a charter school is open to the public, there is no evidence that it is a state entity; in other words, there is a world of difference between an entity that is operated for a public benefit and open to the public as opposed to an entity that is a political subdivision of the State;

-Appellant is incorporated as a "nonprofit corporation" for a public benefit; it is not incorporated as a state agency or a political subdivision of the State; (Def. Mem. Attach.)

-Appellant does not "answer" to any entity such as the State or the Charleston County School District; rather, Appellant "stands alone" and is

governed only by its Board of Directors - comprised of the students' parents and a few community members; (R. p. 618 Para. 3)

-Appellant does not receive money from the State, Appellants employees are not employees of the State and Appellant is not eligible to participate in the State Insurance Reserve Fund or other risk-bearing pool to indemnify it for legal or other claims as are "state supported" public schools; (R. p. 618 Para. 3); and

-Unlike traditional public schools, Appellant does not have the authority to perform governmental functions such as taxing citizens to raise revenue or exercising the power of eminent domain - it is simply a non-profit corporation formed for the benefit of the public. (R. p. 618 Para. 3)

This same issue, whether or not the defendant was a state actor for purposes of the attorney fee statute, arose in the case of Willis Const. Co., Inc. v. Sumter Airport Com'n, 308 S.C. 505, 509, 419 S.E.2d 240 (Ct.App. 1992). In Willis the plaintiff argued that the Sumter Airport Commission was a political subdivision of the State for purposes of S.C. Code Section 15-77-300. Affirming the Special Referee's decision to deny attorney fees, the Court of Appeals stated:

> A political subdivision is a division or subdivision of the State invested with governmental functions. Jackson v. Breeland, 103 S.C. 184, 88 S.E. 128 (1916). The Act creating the Sumter Airport Commission does not invest it with governmental functions, such as the ability to raise revenue or the power of eminent domain. We conclude that the phrase "political subdivision of the State" as used in Section 15-77-300 as well as in its ordinary sense does not include within its meaning any entity such as the Sumter Airport Commission.

In the present case, the Charter School Act does not invest in Appellant any governmental functions that are peculiar to the State or that are peculiar to regular public

schools - unlike a regular public school, Appellant cannot even tax citizens to raise revenue. Therefore, Appellant is clearly nothing more that a non-profit corporation that is open to the public, it is not a "state" actor and cannot be held liable for attorney fees under S.C. Code Section 15-77-300, thus the trial court erred in finding that it engaged in state action.

Additionally, Respondent claims that because Section 59-40-40(2)(a) states a "charter school" is to be "considered a public school and part of the school district in which it is located for the purposes of state law and the state constitution," Appellant is somehow a state actor. If that were true, then wouldn't Appellant be able to participate in the State Insurance Reserve Fund? Wouldn't it be able to tax citizens in order to raise revenue? Or exercise the power of eminent domain in order to "take" private property for a public use? Because there is no state statute or state law concluding that a non-profit corporation formed for the public benefit is a political subdivision of the State and because a specific statute such as S.C. Code Section 15-77-300 (which requires state action) overrules a general statute such as S.C.Code Section 59-40-40 (2)(b) (S.C. Dep't Soc. Svcs. v. Tharp, 439 S.E.2d 854, 312 S.C. 243 (1994), the Appellant simply is not a political subdivision of the State or otherwise a State actor and it cannot be found liable for attorney fees under S.C. Code Section 15-77-300.

ii. Appellant Acted With Substantial Justification.

Assuming, arguendo, that Appellants decision to layoff Respondent was state action, Respondent still cannot recover attorney fees if the facts show that Appellant acted with "substantial justification." S.C. Code Section 15-77-300(A)(1). "Substantial

justification" means "justified to a degree that could satisfy a reasonable person. An agency action supported by substantial justification is one which has a reasonable basis in law and fact." McDowell V. S.C. Dept. of Soc. Svcs., 304 S.C. 539, 542, 405 S.E.2d 830 (1991).

In the present case, Appellant "switched" the funding from Respondent's employment contract to the employment contract for a new math teacher because two groups of its students performed terribly on a county-wide math test. Importantly, Respondent's employment contract is specifically contingent on ongoing "funding" and Respondent testified admitted on the stand that it was the Principal, and not her, who made all decisions regarding whether or not her position would continue to be funded. Appellant's contract with the school district, i.e., the Charter, requires the School to "focus" on student achievement, ensure compliance and sound fiscal management. (R. p. 542). Thus, as a legal matter Respondent's employment contract entitled Appellant not to continue to fund her position and to "reallocate" funding to meet the requirements of its Charter - "focusing" on student achievement by reallocating funding to a position for anew math teacher in order to meet the Charter's requirements (which decision substantially benefited the math students). Therefore, because Appellant School had the authority and the substantial justification for "reallocating" funds to hire a new math teacher, the trial judge erred in failing to find that "substantial allocation" existed and Respondent is therefore not entitled to an award of attorney fees. Accord Simpkins v. City of Gaffney,

315 S.C. 26, 431 S.E.2d 592 (Ct.App. 1993) (attorney fee award affirmed only because the City did not have the authority to deny the plaintiff's permit).

iii. Special Circumstances Existed That Would Make An Award Of Attorney Fees Unjust.

Assuming, arguendo, that Appellant's decision not to continue funding Respondent's position constituted state action, then special circumstances exist that preclude an award of attorney fees in this case.

When the issue arose regarding whether Appellant could legally "switch" the funding from one teacher's position to add a math teacher, Dr. Tammy Kirshtein, Appellant's Principal, contacted one of Appellant's Board Members for legal advice - Attorney Bea Whitten - who advised Dr. Kirshtein that based upon the contingency in Respondent's employment contract there were no legal problems with reallocating funding to the math teacher position. Thus, in light of:

-the students' math scores;

-the contingency in Respondent's employment contract;

-the two separate glowing letters of recommendation that Appellant provided to the Plaintiff (R. p. 411); and

- the fact that Dr. Kirshtein solicited legal advice before laying-off Respondent; there can be no question but that that Appellant's actions were performed in good faith and in the best interest of the educational achievements of its students. In such special circumstances it would be manifestly unjust to award attorney fees. See, e.g., Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989) (where the plaintiff relied upon her attorney's

advice which was offered in good faith, it would be "clearly unjust" to award sanctions.)

iv. S.C. Code Section 59-40-50 (as amended) Exempts Appellant From The Attorney Fee Statute.

In pertinent part, the Charter School Act ("Act") exempts charter schools from liability under the attorney fee statute:

Section 59-40-50. Exemption; powers and duties; admission to charter school.

> (A) Except as otherwise provided in this chapter, a charter school is exempt from all provision of law and regulations applicable to a public school, a school board, or a district, although a charter school may elect to comply with one or more of these provisions of law or regulations.

By its clear terms, the Act exempts Appellant from an award of attorney fees because the attorney fee statute is not listed in "this chapter" as one of the laws or regulations that apply to charter schools and Appellant has not consent and has denied that it is liable for attorney fees in its pleadings.

CONCLUSION

For these reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

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February 15, 2013
North Charleston, SC

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CERTIFICATE OF COUNSEL

The undersigned certifies that the final Brief of Appellant complies with Rule 211(b), SCACR.

February 19, 2013

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PROOF OF SERVICE

I certify that I have this 19th day of February, 2013, served the Appellant's final Brief of Appellant and its final Reply Brief of Appellant on the Respondent's counsel via regular U.S. first class mail, properly addressed and proper postage prepaid to the following: Nancy Bloodgood and Lucy Sanders, 895 Island Park Drive, Suite 202, Daniel Island, South Carolina 29492.

February 19, 2013

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