IN THE SUPREME COURT
OF THE STATE OF DELAWARE

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| JEFFREY A. CLOUSER, | § | No. 175, 2019 |
| Plaintiff Below, Appellant, | § | Court Below– Superior Court of the State of Delaware |
| v. | § | |
| KIM DOHERTY, et al., | § | C.A. No. N15C-07-240 |
| Defendants Below, Appellees. | § | |

Submitted: August 23, 2019
Decided: November 14, 2019

Before **SEITZ**, Chief Justice; **VALIHURA**, and **TRAYNOR**, Justices.

**ORDER**

(Filed Nov. 14, 2019)

After careful consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Jeffrey A. Clouser, appeals from a March 25, 2019 Superior Court order granting summary judgment in favor of the defendants, Wayne Barton and the Delaware Department of Education ("the DDOE"). We conclude that the Superior Court did not err in granting summary judgment. Accordingly, we affirm.

(2) Clouser, a former teacher employed by the Brandywine School District, filed suit against two groups of defendants—one comprised of certain school employees; the Brandywine School District; and current and former members of the Brandywine School District Board of Education (collectively, "the School Defendants") and the other comprised of the DDOE; Wayne Barton, then Director of Professional Accountability for the DDOE; and Lillian Lowery, then Secretary of Education (collectively, "the State Defendants"). The gist of Clouser's complaint alleged that the State Defendants and the School Defendants acted improperly in investigating his reputed improper use of a school computer and then disseminated inaccurate information about the investigation. The investigation led to Clouser's resignation from his position with the Brandywine School District. Clouser alleged that the dissemination of inaccurate information concerning the investigation left Clouser unable to secure employment in the teaching profession.

(3) The Superior Court dismissed all of Clouser's claims against both the School Defendants and the State Defendants. Clouser appealed. We affirmed the Superior Court's dismissal of the complaint against the School Defendants and Lowery.[1] But, we determined that the Superior Court erred in ruling on the State Defendants' claim of sovereign immunity on a motion to dismiss. Under 18 *Del. C.* § 6511, "[t]he defense of

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[1] *Clouser v. Doherty*, 2017 WL 3947404 (Del. Sept. 7, 2017). The factual background of the dispute between the parties is set forth in more detail in this earlier decision.

sovereign immunity is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance." When the State's insurance coverage program does not cover the loss, however, the State typically files, and relies upon, an affidavit of no insurance coverage. Although the State had filed an affidavit of no insurance coverage in the Superior Court, the court did not rely on it. Instead, the Superior Court required Clouser to proffer that the State had expressly waived sovereign immunity under § 6511. We held that the Superior Court erred by requiring Clouser to plead insurance coverage under § 6511.

(4) Because Clouser had stated claims for defamation and tortious interference with prospective business relations against the DDOE and Barton under the lenient standard for sufficiency of a claim applicable to a motion to dismiss, we determined that the Superior Court's error was not harmless. Accordingly, we remanded the case and directed the Superior Court to permit the remaining parties Clouser, the DDOE, and Barton to engage in limited discovery related to (i) the State's affidavit of no insurance coverage and (ii) Clouser's defamation and tortious interference with prospective business relations claims against the DDOE and Barton.

(5) On remand, Clouser requested and received information from the State Insurance Coverage Office

regarding the State's insurance policies.[2] Clouser also filed, and subsequently withdrew, several motions to compel discovery. After the State Insurance Coverage Office responded to Clouser's document request, Clouser filed a motion to compel "full disclosure of discovery" from the office. Clouser next asked the court to extend the discovery deadline. Lastly, Clouser moved to amend his complaint to (i) add an additional defendant, (ii) assert new claims against previously dismissed defendants Doherty and Lowery, and (iii) raise seven additional claims arising out of the same events that led to Clouser's initial complaint. On July 6, 2018, the Superior Court held a hearing on the outstanding motions. At the hearing's outset, the Superior Court heard from the parties about the pending discovery matters and concluded that the only matters that remained pending were two depositions that had not yet been scheduled.[3] The Superior Court then denied Clouser's

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[2] App. to Answering Br. at B154-59; B808-1010.

[3] At the hearing, the Superior Court asked the parties, "Which gets me to the next question, because there were motions to compel discovery, then there were motions to withdraw motions to compel. Is there anything that has not been completed at this point, what is still open on discovery?" In answer to this question, counsel for the State Defendants replied that there were two depositions that had yet to be taken and additional discovery would be needed if the Superior Court granted Clouser's motion to amend his complaint. The trial judge then asked Clouser if the State Defendants' counsel's representation was accurate. Clouser stated, "That's correct, I do agree. That's fine." App. to Answering Br. at B376.

motion for leave to amend his complaint, stating its reasons on the record.[4]

(6) In October 2018, the DDOE and Barton moved for summary judgment. DDOE and Barton argued: (i) Clouser's claims were barred by sovereign immunity, (ii) Clouser's defamation claim failed as a matter of law, (iii) Barton was entitled to conditional privilege for his communications regarding the investigation, and (iv) Clouser's claim of tortious interference with business relationships failed as a matter of law. In November 2018, counsel for the State Defendants realized they had inadvertently failed to file an answer to Clouser's original complaint and docketed an answer. Clouser then moved to strike the State Defendants' answer and moved for default judgment.

(7) On March 25, 2019, the Superior Court issued two orders. The first order granted the DDOE and Barton's motion for summary judgment, finding that Clouser's claims were barred by sovereign immunity. In so doing, the Superior Court noted that it was not required to conduct a new inquiry into the State's efforts to meet its responsibilities under 18 *Del. C.* §§ 6501-6503 every time the State asserted the defense of sovereign immunity. The second order denied Clouser's motion to strike the State Defendants' answer as well as Clouser's motion for default judgment. This appeal followed.

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[4] App. to Answering Br. at B386-87. The court issued a brief written order memorializing its decision and setting scheduling deadlines on July 11, 2018. *Id.* at B388.

(8) On appeal, Clouser argues that (i) the Superior Court committed procedural error by failing to consider his motion to compel discovery from the State Insurance Coverage Office and for failing to permit Clouser to amend his complaint, (ii) Clouser was prejudiced by the State Defendants' late-filed answer, (iii) there are material facts in dispute, and (iv) the Superior Court committed error in its application of the law to the facts of the case. We conclude Clouser's arguments are without merit and, accordingly, affirm the Superior Court's judgment.

(9) This Court reviews the grant of a motion for summary judgment *de novo* to determine whether the undisputed facts entitled the movant to judgment as a matter of law, viewing the facts in the light most favorable to the nonmoving party.[5] A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists.[6] If the movant makes such a showing, the burden then shifts to the nonmoving party to submit evidence sufficient to show that a genuine factual issue, material to the outcome of the case, precludes summary judgment.[7]

(10) After careful consideration, we conclude the judgment below should be affirmed on the basis of and for the reasons assigned by the Superior Court in its March 25, 2019 order granting summary judgment to

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[5] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[6] *Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

[7] *Id.*

the DDOE and Barton. In light of Clouser's numerous filings below, Clouser's representation to the court at its July 6, 2018 hearing, and this Court's decision in *Doe v. Cates*,[8] the Superior Court did not err in failing to rule specifically on Clouser's motion to compel directed at the State Insurance Coverage Office. Nor did the Superior Court err in declining to grant Clouser leave to amend his complaint following remand. A motion for leave to amend is left to the sound discretion of the trial court.[9] The Superior Court did not abuse its discretion in denying Clouser's motion to amend where the proposed amendments were an obvious attempt to reframe his defamation and tortious interference with prospective business relations claims. Finally, we agree with the Superior Court's conclusion that there is no evidence that Clouser was prejudiced by the State Defendants' inadvertent failure to file a timely answer in this vigorously litigated case.

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[8] 499 A.2d 1175, 1179 n. 4 (Del. 1985) ("Apparently, [precedent] has been interpreted as requiring the trial courts to conduct a new inquiry into the [Insurance Coverage Determination] Committee's efforts to meet its responsibilities under 18 *Del. C.* ch. 65 each time the State asserts the defense of sovereign immunity. In view of our holding today, such inquiry is no longer necessary.").

[9] *Eastern Commercial Realty Corp. v. Fusco*, 654 A.2d 833, 837 (Del. 1995). To the extent that Clouser argues that he was entitled to amendment as a matter of right because he filed his motion to amend before the State Defendants filed a responsive pleading, he did not raise that argument to the trial court in the first instance and we will not entertain it on appeal. Del. Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice

**IN THE SUPERIOR COURT**
**OF THE STATE OF DELAWARE**

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|---|---|---|
| **JEFFREY A. CLOUSER,** | ) | **CA NO.:** |
| **Plaintiff** | ) | **N 15C-07-240 RBC** |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **KIM DOHERTY, et al.** | ) | |
| **Defendants** | ) | |

**ORDER GRANTING MOTION**
**FOR SUMMARY JUDGMENT**

(Filed Mar. 25, 2019)

Before the Court is a motion for Summary Judgment filed by Defendants Wayne A. Barton ("Barton") and the Delaware Department of Education ("DDOE") with regard to the Complaint alleging defamation and tortious interference with prospective business relations. The 116-page Complaint, as originally filed, presented multiple claims against a total of 16 Defendants, affiliated in various capacities with the DDOE and the Brandywine School District ("BSD").[1]

This Court previously granted Defendants' Motion to Dismiss as to each named Defendant and all claims. Following an appeal of that decision, the Delaware Supreme Court in *Clouser v. Doherty*, 175 A.3d 86, 2017 WL 3947404 (Del. 2017), affirmed the dismissal of all claims against the BSD defendants, as well as

[1] The specific allegations in this case are set out in this Court's decision of December 28, 2016 granting the Motion to Dismiss.

certain claims against the State defendants, but reversed and remanded for further proceedings with regard to the claims for defamation and tortious interference against defendants Barton and DDOE. In the remand, the Delaware Supreme Court stated:

> Clouser may pursue limited discovery related to the affidavit of no insurance. Clouser, Barton, and the DDOE may pursue limited discovery related to the affidavit of no insurance. Clouser, Barton and the DDOE may pursue targeted discovery relating to Clouser's defamation and tortious interference with prospective business relations for the Barton Letter and NASDTEC's website disclosures. Barton and the DDOE can renew their arguments for dismissal of the remaining claims on summary judgment if warranted. *Clouser* at 31.

Delaware Superior Court Civil Rule 56(c) provides that defendants are entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists. If the movant makes such a showing, the burden then shifts to the non-moving party to submit sufficient evidence to show that a genuine factual issue, material to the outcome of the case, precludes judgment before trial." *Khan v. Delaware State Univ.*, 2016 WL 3575524 at *8

(Del. Super. 2016). Reliance on allegations in the Complaint do not serve as an evidentiary basis for purposes of opposition to summary judgment. *Martin v. Nealis Motors Inc.*, 247 A. 2d 831, 833 (Del. 1968).

Defendants raise several legal defenses in support of dismissal. First defendants assert plaintiffs remaining two claims are barred by the doctrine of sovereign immunity. Sovereign immunity is an absolute bar to a claim against the state and any agent acting with in his official duties or official capacity except where there has been a clear waiver of such immunity by the General Assembly. *Wilmington Housing Authority v. Williamson*, 228 A. 2d 782, 786 (Del. 1967); *Raughley v. Dept. of Health and Social Services*, 274 A. 2d 702, 786 (Del. Super. 1971).

A waiver of sovereign immunity will be implied in cases where the General Assembly has provided for insurance for certain risks of losses through the State Insurance Coverage Program, 18 *Del.C.* § 6511. Any waiver is limited to the amount of the insurance coverage. *Turnbull Fink*, Del. Super., 668 A. 2d 1175, 1176 (1985). The State, in fact, does have insurance coverage for certain losses. When the State's insurance coverage program does not cover the loss, however, the State typically files an affidavit of no insurance coverage to show it has not waived sovereign immunity under § 6511, as has occurred here. In reversing the prior dismissal of Plaintiffs remaining claims, the Delaware Supreme Court held that the Superior Court must give notice of its intent to dismiss in a summary judgment

motion. *Furman v. Del. Dep't of Transp*. 30 A. 3d 771, 774 (Del. 2011).

Once the Director of the State Insurance Coverage Office has submitted an affidavit of no insurance, Plaintiff may assert his challenge on that issue. The State Defendants contend that they have provided extensive documents relating to the insurance question through discovery. Plaintiff has not taken the deposition of the Director of the Insurance Coverage Office, which he could do, as other depositions have been taken in this case, nor has Plaintiff asserted a challenge to any of the specific facts stated in the affidavit of no insurance. Contrary to Plaintiff's assertion that summary judgment should be denied because the information provided in discovery does not sufficiently establish that the Insurance Coverage Office adequately discharged its statutory responsibility to seek commercial coverage that might be available to cover these types of claims, this Court is not required to conduct a new inquiry into the Insurance Coverage Committee's efforts to meet its responsibilities under 18 *Del. C.* § 6501-6503 each time the State asserts the defense of sovereign immunity. *Doe v Cates*, 499 A. 2d 1175, 1179, n.4 (Del. 1985). In the absence of evidence that the State is expressly waiving the defense of sovereign immunity, such a defense applies to both the claims against DDOE as well as Barton, to the extent he acted within the scope of his official capacity.

Clouser was a teacher at Concord High School in the Brandywine School District for many years until he resigned from his position in 2009 following

allegations that he attempted to access inappropriate materials on his school computer. Barton was the Director of Professional Accountability for DDOE until 2012. Following the allegations against Clouser, the school principal placed him on immediate leave, followed shortly thereafter by a request from the school district that he submit his resignation. A forensic examination of Plaintiff's computer by the Delaware State police did not find any evidence of pornography as the school district's Lightspeed computer monitoring system prevented access to certain designated types of websites. On March 5, 2009, the BSD superintendent wrote to Plaintiff and alleged that he had used the school computer to search for, access, and view child pornography. Because of the Lightspeed program, there is no evidence that Plaintiff, in fact, was able to access any type of pornography on the computer. However, the Lightspeed program log did disclose attempts to access other sexually suggestive websites to which Plaintiff admitted that he was looking for mature women and conceded his use of the school computer for such purposes was inappropriate.

As part of his responsibility as Director of Professional Accountability at DDOE, on March 11, 2009, Barton wrote a letter to Clouser advising him of the DOE investigation of the action taken by the school board in terminating Clouser's employment. On August 12, 2009, Barton wrote an internal confidential memorandum to the Delaware State Secretary of Education about Barton's meeting with Clouser and the investigation conducted by the school district which. In

this memorandum, Barton expressed his opinion that Clouser's teaching license should be suspended. On September 21, 2009, a letter was sent by DDOE to Clouser that a recommendation was being made that his teaching license should be revoked. A hearing was held on November 4, 2010 for the Delaware Professional Standards Board.

With regard to the defamation claim, Barton's presentation of materials, which were received from the school board, presented to the professional standards Board and contained specific quotes from conclusions reached at the BSD level, were not acts of defamation by Barton and clearly fell within the scope of his authority. The fact that Barton questioned the veracity of Clouser's assertion that he was only looking for adult women on the Internet was presented within the scope of Barton's authority, and merely expressed an opinion he had the right to render based upon the materials provided to him regarding the details of the BSD investigation. As such, these statements are constitutionally protected free speech made by one acting within the scope of his official capacity. *Riley v Moyed* 529 A. 2d 248, 251 (1987). Furthermore, Barton's August 12, 2019 memorandum is entitled to a qualified privilege as it arose out of an investigation of claimed improper teacher conduct. *Gautschi v Maisel*, 565 A2d 1009, 1011(Me. 1989), *Ikani v. Bennett*, 682 S.W.2d 747, 748-49 (Ark. 1985). Notwithstanding Plaintiff's belief to the contrary, there is no evidence to suggest that Barton's actions were performed in anything other than good faith, without malice, and without any

knowledge of false facts or desire to cause harm. *see Meades v Wilmington Hous. Auth*, 2005 WL 1131112. Barton's speech is entitled to conditional privilege in this case. *2 (Del. May 12, 2003).

The tortious interference claims against these defendants arise out of information sent by DDOE in 2010 to The National Association of State Directors for Teacher Education and Certification ("NASDTEC") which initially contained concededly incorrect information that Clouser had been terminated for a criminal conviction. While the suspension of Clouser's teaching license was required to be reported, there was an expectation that the information transmitted was factually correct, which was not the case. This incorrect information, was transmitted to NASDTEC, not by Barton himself but by someone in Barton's office whose identity has not been disclosed in the record. Barton retired in 2012. In 2014 the error in the NASDTEC database was corrected. While Clouser asks that the Court find that the Barton be held vicariously liable for some malicious intent or improper motive on the part of the unidentified individual who initially transmitted the incorrect information to NASDTEC, there is no legal basis to support of this assertion.

Clouser asserts that damaging information placed on the NASDTEC website damaged his ability to be hired in an educational position following the restoration of his license. The NASDTEC allows one state to ascertain whether an applicant for a school position has had their teaching certificate suspended or terminated in another state. The information contained in

the NASDTEC database is available only to a limited number of administrators in each state, and, school districts did not have access to any of this disciplinary information until 2017, two years after the filing of Plaintiff's Complaint, and three years after the incorrect information in the NASDTEC database was removed. In his answer to interrogatory Number 12, Plaintiff lists 46 individual schools to which he has applied for a position, without success. Each of the enumerated schools is located in Delaware and none of the applications listed occurred later than June, 2015. It is therefore undisputed that placement of the tainted information in the NASDTEC database by someone in Barton's office at DDOE in 2009 and subsequently removed in 2014 could not have been relied upon by a prospective employer in denying Plaintiff's employment as disciplinary data contained therein was not available until 2017. As there is no dispute as to material fact in this regard, summary judgement is appropriate.

For these reasons, the Court finds that the remaining claims against DDOE and Barton in his personal as well as his scope of authority as an employee of DDOE are barred by the doctrine of sovereign immunity. The Motion for Summary Judgment is GRANTED.

DATED: March 25, 2019

/s/ Robert Burton Coonin
**ROBERT BURTON COONIN, JUDGE**

cc: via EfilinG

**IN THE SUPERIOR COURT**
**OF THE STATE OF DELAWARE**

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| **JEFFREY A. CLOUSER,** | ) | **CA NO.:** |
| **Plaintiff** | ) | **N 15C-07-240 RBC** |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **KIM DOHERTY, et al.** | ) | |
| **Defendants** | ) | |

**ORDER DENYING STRIKING ANSWER AND DENYING JUDGMENT**

(Filed Mar. 25, 2019)

Before the Court are two Motions by filed Plaintiff. Jeffrey A. Clouser, one to strike the Answer filed on behalf of Defendants Wayne A. Barton. and Delaware Department of Education ("DDOE") and the second to grant judgment by default based upon the untimely filing of an Answer by Defendants. This matter arises out of a Complaint alleging defamation and tortious interference with prospective business relations. The Complaint, as originally filed, presented multiple claims against a total of 16 Defendants, affiliated in various capacities with the DDOE and the Brandywine School District. This Court previously granted Defendants' Motion to Dismiss as to each named Defendant and all claims. Following an appeal of that decision, the Delaware Supreme Court in *Clouser v. Doherty*, 175 A.3d 86, 2017 WL 3947404 (Del. 2017), affirmed the dismissal of all claims against the BSD Defendants as well as certain claims against the State defendants, and reversed and remanded for further proceedings with

regard to the claims for defamation and tortious interference against defendants Barton and DDOE.

In the remand, the Delaware Supreme Court stated:

> Clouser may pursue limited discovery related to the affidavit of no insurance. Clouser, Barton, and the DDOE may pursue limited discovery related to the affidavit of no insurance. Clouser, Barton and the DDOE may pursue targeted discovery relating to Clouser's defamation and tortious interference with prospective business relations for the Barton Letter and NASDTEC's website disclosures. Barton and the DDOE can renew their arguments for dismissal of the remaining claims on summary judgment if warranted.

Discovery was thereafter initiated and completed. Plaintiff thereupon sought leave to file an Amended Complaint adding new claims and additional defendants, as well as resurrecting previously dismissed Defendants. This Court denied that Motion. The two remaining Defendants, Barton and DDOE then filed Motions for Summary Judgment. During the pendency of Defendants' Motion for Summary Judgment, their counsel filed an Answer to the Complaint on their behalf. Plaintiff now seeks to strike that Answer as untimely and grant him judgment by default.

The Answer filed by Defendants was no doubt untimely filed. However, in this case, Defendants filed a Motion to Dismiss, litigated the matter on appeal to the Delaware Supreme Court and engaged in discovery

following remand. Defendants have also filed a Motion for Summary Judgment. This case has been, and continues to be, vigorously litigated by all parties. Nothing contained in Defendants' Answer raises issues which are not already the subject of their pending Summary Judgment Motion. Plaintiff has failed to establish how he is prejudiced by anything contained in Defendants' Answer. The Motion to Strike the Answer is, therefore, denied.

DEL. SUPER CT. CIVIL RULE 55(b) allows for the filing for default judgment when the party against whom the judgment is sought "has failed to appear, plead or otherwise defend as provided by these Rules . . . " Defendants through counsel have appeared in this action, they have filed a Motion to Dismiss, defended an appeal to the Delaware Supreme Court, engaged in discovery, filed an Answer (albeit only recently), and filed a Motion for Summary Judgment. The Motion for Default Judgment is not appropriate at this stage.

For the reasons stated herein, the Motions to Strike Defendants' Answer and for Default Judgment are DENIED.

DATED: March 25, 2019

/s/ Robert Burton Coonin
**ROBERT BURTON COONIN, JUDGE**

cc: via efiling

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

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|---|---|---|
| JEFFREY A. CLOUSER, | § | No. 405, 2018 |
| Plaintiff Below-Appellant, | § | |
| | § | Court Below– Superior Court of the State of Delaware |
| v. | § | |
| KIM DOHERTY, *et al.*, | § | C.A. No. N15C-07-240 |
| Defendants Below-Appellees. | § | |

Submitted: August 22, 2018
Decided: September 4, 2018

Before **STRINE**, Chief Justice; **VALIHURA** and **VAUGHN**, Justices.

**ORDER**

(Filed Nov. 14, 2019)

Upon consideration of the notice of interlocutory appeal and amended notice of interlocutory appeal, it appears to the Court that:

(1) The plaintiff-appellant, Jeffrey Clouser, has petitioned this Court under Supreme Court Rule 42 to accept an appeal from an interlocutory order of the Superior Court, dated July 11, 2018, denying his motions to amend his complaint and for sanctions against defense counsel.

(2) Clouser filed an untimely application for certification to take an interlocutory appeal in the Superior Court on August 2, 2018. The Superior Court denied the certification application as untimely on August 10, 2018.

(3) Supreme Court Rule 42(c)(i) provides that an application for certification of an interlocutory appeal "shall be served and filed within 10 days of the entry of the order from which the appeal is sought or such longer time as the trial court, in its discretion, may order for good cause shown." The Superior Court concluded that Clouser had not shown good cause for his untimely application for certification. We find no abuse of the Superior Court's discretion in so ruling.

NOW, THEREFORE, IT IS HEREBY ORDERED that the within interlocutory appeal is REFUSED.

BY THE COURT:

*/s/ Karen L. Valihura*
Justice

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

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| JEFFREY A. CLOUSER,<br><br>Plaintiff Below,<br>Appellant,<br><br>v.<br><br>KIM DOHERTY, WAYNE A BARTON, LILLIAN LOWERY, MARK HOLODICK, PATRICK BUSH, JAMES SCANLON, BRANDYWINE SCHOOL DISTRICT, DELAWARE DEPARTMENT OF EDUCATION, CURRENT AND FORMER MEMBERS OF THE BRANDYWINE SCHOOL DISTRICT BOARD OF EDUCATION: DEBRA HEFFERNAN, OLIVIA JOHNSON-HARRIS, MARK HUXSOLL, PATRICIA HEARN, CHERYL SISKIN, RALPH ACKERMAN, JOSEPH BRUMSKILL, and DANE BRANDENBERGER,<br><br>Defendants Below,<br>Appellees. | § | No. 57, 2017<br><br>Court Below—<br>Superior Court<br>of the State of<br>Delaware<br>C.A. No.<br>N15C-07-240 |

Submitted: June 9, 2017
Decided: September 7, 2017

Before **VALIHURA**, **SEITZ**, and **TRAYNOR**, Justices.

**ORDER**

This 7th day of August 2017, upon consideration of the parties' briefs and record below,[1] it appears to the Court that:

(1) The appellant, Jeffrey A. Clouser, filed this appeal from a Superior Court decision granting two motions to dismiss by separate groups of defendants—the first filed by Kim Doherty, Mark Holodick, Patrick Bush, James Scanlon, Brandywine School District, and current and former members of the Brandywine School District Board of Education: Debra Heffernan, Olivia Johnson-Harris, Mark Huxsoll, Patricia Hearn, Cheryl Siskin, Ralph Ackerman, Joseph Brumskill, and Dane Brandenberger (collectively, "the School Defendants"), and the second motion to dismiss filed by Wayne Barton, Lillian Lowery, and the Delaware Department of Education ("DDOE") (collectively, "the State Defendants"). We conclude that the Superior Court erred in dismissing the defamation and tortious interference claims against two of the State Defendants, but did not err in dismissing the remaining claims against the State Defendants nor all of the claims against the School Defendants. Accordingly, we affirm in part and reverse in part.

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[1] We do not consider the June 15, 2017 letter Clouser filed after his reply brief and the submission of this matter for decision. Supr. Ct. R. 15(a)(vi) (providing that other than the opening brief and reply brief, the appellant shall not file any other writing with argument without leave of the Court).

(2) According to the allegations of the complaint, Clouser began teaching in the Brandywine School District in 1991.[2] On February 9, 2009, while teaching at Concord High School, Clouser was placed on administrative leave after a computer monitoring system report showed his inappropriate use of a school computer. School officials alerted the Delaware State Police who conducted a forensics investigation of Clouser's school computer. According to a police report dated February 18, 2009 and approved by a supervisor on March 4, 2009 that summarized the results of their investigation, the police did not find any illegal images on Clouser's school computer. This information was provided to Concord High School's School Resource Officer on February 23, 2009. A supplemental police report dated April 16, 2009 reflected that no illegal images were found on Doherty's personal computer. Doherty, who was the Director of Human Resources for the Brandywine School District, had used her personal computer to investigate the searches run on Clouser's school computer.

(3) Clouser submitted a letter of resignation to Doherty on February 20, 2009. Doherty received and time-stamped the letter.

(4) In a letter dated March 5, 2009 sent to Clouser, ("the Doherty Letter") Doherty summarized

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[2] The facts stated in this Order are drawn from the complaint's allegations and are assumed to be true only for purposes of this appeal from a motion to dismiss. *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

the events leading to Clouser's placement on administrative leave.[3] Doherty copied Holodick, then principal of Concord High School, and Ron Mendenhall, then principal of Hanby Middle School. Clouser alleges that Doherty, contrary to the police report that she knew or should have known about by March 5, 2009, falsely accused him of searching for, accessing, and viewing child pornography.

(5) Doherty also informed Clouser that if he did not agree to waive all claims concerning his employment, termination would be recommended at the Brandywine School District Board of Education's March 23, 2009 meeting. Clouser was unwilling to agree to this condition, because he believed the School Defendants had wronged him. According to Clouser, in another March 5, 2009 letter, Scanlon, then Superintendent of the Brandywine School District, stated the Brandywine School Board of Education accepted his resignation.

(6) In a letter dated March 11, 2009, Barton, then Director of Professional Accountability for the DDOE, informed Clouser that the DDOE had received notice he was terminated by the Brandywine School District

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[3] Throughout the complaint, Clouser quotes from and references letters and other materials that were not included with the complaint. The defendants included copies of the letters and other materials with their motion to dismiss. Because Clouser liberally relied on these letters and materials in his complaint, it is appropriate for the court to consider them on a motion to dismiss. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

for misconduct and immorality. Clouser was also notified that the DDOE had initiated a license disciplinary investigation under 14 *Del. C.* § 1218(g). At their March 23, 2009 meeting, the Brandywine School Board of Education voted to terminate Clouser because he did not accept the conditions for his resignation. In a letter dated April 8, 2009, Clouser's counsel informed Doherty that Clouser had resigned on February 20, 2009, and therefore could not be terminated.

(7) While these events were unfolding, it appears that Doherty suggested to Clouser that he get counseling for his "self-sabotaging behavior."[4] Clouser went to a treatment center for counseling. Clouser was in treatment at Caron/Renaissance Center from February 28, 2009 to June 1, 2009. On July 31, 2009, Clouser met with Barton. Following the meeting, Barton sent an August 12, 2009 letter ("Barton Letter") to Lowery, who was then Secretary of Education. In the letter, Barton summarized his investigation of Clouser's termination.

(8) According to Clouser, Barton made many false statements in the letter: (i) Barton inaccurately recounted that some students said Clouser must have been searching for pornography again; (ii) he falsely stated that the school district never heard the results of the police investigation; (iii) he falsely stated that Clouser attempted on more than one occasion to access pornography on the school's computer, and his claim

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[4] App. to State Defendants' Answering Br. at B42 (Compl. ¶ 144).

that he was only looking for adult women was not credible; (iv) the letter from Clouser's in-patient counselor was not an endorsement of Clouser's fitness to teach; and (v) the letter and Clouser's demeanor during the interview left Barton concerned about Clouser being around children.[5] According to Clouser, the evidence shows he only used school computers on one occasion, he was only looking for adult women, the school district was aware of the police report and its conclusions, and the students' statements and Barton's opinion on the Caron/Renaissance Center counselor's letter and Clouser's demeanor were unsupported or untrue.

(9) Lowery sent a letter, dated September 21, 2009 ("Lowery Letter"), to Clouser and copied Barton, a Deputy Attorney General, and the executive director of the Delaware Professional Standards Board. According to Clouser, the letter falsely stated he attempted numerous times to access pornography websites, the websites were verified as child pornography sites, and he was unfit to teach. After receiving the Doherty Letter and Lowery Letter, Clouser requested a hearing before the Delaware Professional Standards Board because "he knew the defamatory accusations against him were not true and were based on false, exaggerated, and manipulated evidence."[6]

(10) The hearing occurred on November 4, 2010. According to Clouser, Doherty, Barton, and Bush, then Brandywine School District Director of Technology,

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[5] *Id.* at B100-01 (Compl. ¶ 332).

[6] *Id.* at B56-57 (Compl. ¶ 192).

lied at the hearing. After the hearing, Clouser consented to a three-year suspension of his teaching license.

(11) On August 26, 2013, in connection with the Pennsylvania Department of Education's ("PDOE") case against Clouser for reciprocal consequences from his license suspension in Delaware, Clouser received his personnel file from the PDOE. The PDOE had subpoenaed the file from the DDOE. Upon receiving the personnel file, Clouser learned of the Barton Letter for the first time. He also learned the National Association of State Directors for Teacher Education and Certification ("NASDTEC") website incorrectly stated his Delaware teaching license was suspended due to a criminal conviction. After Clouser submitted Freedom of Information Act[7] requests to the DDOE regarding the wording on the NASDTEC website, the website changed the language to state Clouser's suspension was based on sexual misconduct that did not result in a criminal conviction. Clouser alleges this information is still false because sexual misconduct is the abuse of another person, not the viewing of websites.

(12) Since reinstatement of his teaching license, Clouser has unsuccessfully applied for multiple teaching and coaching positions. Clouser alleges he was well-qualified for the positions. Even after interviews that he alleges went well, Clouser has not obtained

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[7] Under the Delaware Freedom of Information Act, any person may request access to public records unless the records are protected from disclosure by an exemption. 29 *Del. C.* § 10001.

permanent employment because he has been forced to disclose the 2009 events. Clouser has worked as a substitute teacher in the New Castle County public school districts since 2012. In October 2012, Doherty asked Clouser's staffing agency to remove him from the Brandywine School District's substitute teaching list.

(13) On July 30, 2015, Clouser filed a 116-page complaint alleging defamation, conspiracy, and tortious interference with prospective business relations. The defamation count was based on false statements in the Doherty Letter, the Barton Letter, the Lowery Letter, and the NASDTEC website. According to Clouser, Doherty, Barton, Lowery, and the DDOE made these false statements despite the contrary findings of the police, which they knew or should have known about. Clouser claimed the other defendants were liable for defamation because they supported the defendants who defamed him.

(14) Clouser further alleged the defendants conspired to terminate him in 2009, defame him at the November 4, 2010 Professional Standards Board Hearing, and prevent him from finding employment after reinstatement of his license. Finally, Clouser alleged the defendants tortiously interfered with his prospective business relationships when: (i) he was terminated in 2009; (ii) Doherty asked Clouser's staffing agency not to assign Clouser to substitute teaching assignments in the Brandywine School District; (iii) Barton and the DDOE submitted false information to the NASDTEC website; and (iv) a principal's offer of a teaching position was withdrawn and other schools

failed to offer Clouser a teaching position. Clouser contended the statute of limitations did not begin to run on these claims until August 26, 2013, when he received his personnel file from the PDOE and learned of the Barton Letter and incorrect information on the NASDTEC website.

(15) The School Defendants and the State Defendants moved to dismiss the complaint. The School Defendants argued: (i) the defamation claim was barred by the statute of limitations and failed to state a claim; (ii) the conspiracy claim was barred by the statute of limitations and privilege; and (iii) the tortious interference claim was barred by the statute of limitations and failed to state a claim.

(16) The State Defendants argued: (i) all of the claims were barred by sovereign immunity; (ii) the defamation claim was barred by the statute of limitations, the Barton Letter was protected by privilege, Clouser failed to state a claim, and Barton's conduct was protected by the State Tort Claims Act;[8] (iii) the conspiracy claim was barred by collateral estoppel and privilege; and (iv) the tortious interference claim was barred by the statute of limitations and failed to state a claim.

(17) In support of their sovereign immunity argument, the State Defendants filed an affidavit of Debra Lawhead, the Insurance Coverage Administrator of Delaware, stating the State and the DDOE had

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[8] 10 *Del. C.* § 4001.

not purchased any insurance or established any self-insurance program that would apply to the events described in Clouser's complaint.[9] The Superior Court judge then-assigned to the case informed the parties that if the affidavit were considered, the motion to dismiss would have to be converted to a motion for summary judgment.[10] At the hearing on the motions to dismiss before a different judge, Clouser said he was not suggesting there was insurance when the Superior Court inquired about the affidavit.[11] The State Defendants argued the Superior Court could find sovereign immunity without the affidavit of no insurance, because Clouser identified no statutory or constitutional waiver of sovereign immunity by the State.[12]

(18) In an opinion dated December 28, 2016 and docketed on January 4, 2017, the Superior Court granted the motions to dismiss. As to the State Defendants, the Superior Court held Clouser's claims were barred by the doctrine of sovereign immunity, the defamation claim was barred by privilege, and Clouser failed to state a claim for conspiracy or tortious interference. As to the School Defendants, the Superior Court held Clouser's claims were barred by the statute of limitations and Clouser failed to plead a claim. This appeal followed.

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[9] App. to State Defendants' Answering Br. at B159-60.

[10] *Clouser v. Doherty*, C.A. No. N15C-07-240, Filing ID 58219953 (Letter dated Nov. 25, 2015).

[11] App. to State Defendants' Answering Br. at B154.

[12] *Id.* at B156-57.

(19) We review a trial court's grant of a motion to dismiss *de novo.*[13] In deciding a motion to dismiss under Rule 12(b)(6), the trial court must accept as true all well-pled allegations of facts and draw reasonable inferences in the plaintiff's favor.[14] A court is not, however, required to accept as true conclusory allegations "without specific supporting factual allegations"[15] or "every strained interpretation of the allegations proposed by the plaintiff."[16]

(20) On appeal, Clouser's arguments are summarized as follows: (i) the Superior Court erred in finding his claims against the State Defendants were barred by sovereign immunity; (ii) the Superior Court erred in finding his defamation claim against the State Defendants was barred by a conditional privilege; (iii) the Superior Court's separate treatment of the State Defendants and School Defendants caused the Superior Court to conclude erroneously that the statute of limitations barred his claims against the School Defendants; (iv) he stated a claim for conspiracy based on the defendants' collective conduct, his termination, and the November 4, 2010 hearing; and (v) he stated a claim for tortious interference based on the collective conduct of the defendants and his inability to obtain full time employment after employers checked his

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[13] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).

[14] *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001).

[15] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 65-66 (Del. 1995).

[16] *Malpiede*, 780 A.2d at 1083.

background. We first address the State Defendants' assertion of sovereign immunity.

**Claims Against the State Defendants**

**Sovereign Immunity**

(21) "Sovereign immunity . . . is an absolute bar to liability claims against this State unless it is waived by the General Assembly."[17] The Superior Court held sovereign immunity barred Clouser's claims against the State Defendants because Clouser failed to identify an express waiver of sovereign immunity by the State.

(22) Clouser first argues the Superior Court erred because the State Defendants waived sovereign immunity. According to Clouser, the State Defendants violated Clouser's rights under 42 U.S.C. § 1983, DDOE rules and regulations regarding the maintenance and disclosure of employee records,[18] the Federal Privacy Act Regulations,[19] the State Employees', Officers', and Officials' Code of Conduct,[20] the Delaware Administrator Standards,[21] and the statute protecting public employees reporting suspected violations of law,[22] which prohibits the discharge of a public employee who reports a violation of law to an elected official. Clouser

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[17] *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995).

[18] 14 *Del C.* § 122(b)(13), (25).

[19] 34 C.F.R. § 5(b).

[20] 29 *Del. C.* §§ 5801-5810a.

[21] 14 *Del. Admin. Code* § 1590.

[22] 29 *Del. C.* § 5115.

did not allege violations of these statutes or regulations in his lengthy complaint or response to the States Defendants' motion to dismiss. The Superior Court never passed on any of these arguments because they were not raised below. His reference to 42 U.S.C. § 1983 in a footnote of his opposition to the State Defendants' Motion to Dismiss does not validly raise a § 1983 claim, which he asserts for the first time in his opening brief.[23] Clouser also argues for the first time on appeal that DDOE's participation in NASDTEC waives sovereign immunity. Because Clouser did not raise any of these arguments before the Superior Court, we will not consider them for the first time on appeal.[24]

(23) Clouser next argues that the Superior Court erred by ruling on sovereign immunity for the State Defendants on a motion to dismiss. According to Clouser, when the State Defendants raised the sovereign immunity defense on a motion to dismiss and filed an affidavit of no insurance with their motion, the State Defendants' motion should have been converted into a motion for summary judgment. Relying on *Pajewski v. Perry*,[25] Clouser argues that, before the

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[23] *Sabree Envtl. & Constr., Inc. v. Summit Dredging, LLC*, 2016 WL 5930270, at *1 (Del. Oct. 12, 2016) ("[S]tandalone arguments in footnotes are usually not considered fairly raised in any court.").

[24] Supr. Ct. R. 8.

[25] 363 A.2d 429, 436 (Del. 1976) (holding State was not entitled to dismissal of a complaint just by showing there was no insurance coverage, but also had to provide all facts regarding how the insurance coverage committee met its obligations under 18 *Del. C.* §§ 6501-6543 *et seq.*).

court decided the summary judgment motion, he was entitled to explore the details of the State's purchase of insurance. Although Clouser's reliance on *Pajewski* for broad discovery concerning the State's insurance program is misplaced,[26] we conclude the Superior Court erred in dismissing the claims against the State Defendants on the grounds of sovereign immunity.

(24) In Delaware, the defense of sovereign immunity "was established initially by our first Constitution and has been continued thereafter by successive Constitutions."[27] Under Article I § 9 of the Delaware Constitution, the State cannot be sued without its consent.[28] Thus, "the only way to limit or waive the State's sovereign immunity is by act of the General Assembly."[29]

(25) Under 18 *Del. C.* § 6511, "[t]he defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance." The State has an insurance coverage program in place

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[26] In *Doe v. Cates*, this Court held trial courts did not have to conduct a new inquiry into the insurance coverage committee's efforts to meet its responsibilities under 18 *Del. C.* §§ 6501-6543 each time the State asserted the defense of sovereign immunity. 499 A.2d 1175, 1179 n.4 (Del. 1985).

[27] *Shellhorn & Hill, Inc., v. State*, 187 A.2d 71, 73 (Del. 1962).

[28] *Sherman v. State*, 133 A.3d 971, 975 (Del. 2016); *Cates*, 499 A.2d at 1176.

[29] *Cates*, 499 A.2d at 1176 (citing *Shellhorn & Hill, Inc.*, 187 A.2d at 74-75).

to cover some losses.[30] When the State's insurance coverage program does not cover the loss, however, the State typically files an affidavit of no insurance coverage—as it did here—to show it has not waived sovereign immunity under § 6511.[31] Before it can consider the affidavit of no insurance, which is outside of the complaint, the Superior Court must give notice of its intent to convert the motion to dismiss into a summary judgment motion.[32] If the plaintiff asserts a sufficient basis in a Rule 56(f) affidavit to contest the affidavit of

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[30] 18 Del. C. §§ 6501-6543; App. to State Defendants' Answering Br. at 159 (Lawhead Aff. ¶ 2).

[31] *See*, *e.g.*, *Kesting v. River Rd. Swimming Club*, 2014 WL 7149728, at *2 (Del. Super. Ct. Dec. 15, 2014) (holding State was entitled to summary judgment based on lack of waiver of sovereign immunity under § 6511 due to affidavit demonstrating lack of insurance coverage); *Estate of Williams v. Corr. Med. Servs., Inc.*, 2010 WL 2991589, at *4 (Del. Super. Ct. July 23, 2010) ("Generally, defendants asserting sovereign immunity often submit affidavits from state officials indicating that the State has not obtained insurance to cover the litigated loss. While such documentation had not been provided to the Court prior to the hearing on these motions, it was provided during the hearing to counsel and there appears to be no dispute that the State has not contracted for insurance to cover these risks. As such, sovereign immunity will prevent this action from proceeding against DOC and the motion for judgment on the pleadings as to DOC is granted.") (internal citations omitted); *Tomei v. Sharp*, 902 A.2d 757, 770 (Del. Super. Ct. 2006) (dismissing breach of implied covenant claim based upon affidavit of no insurance coverage); *Deputy v. Roy*, 2003 WL 367827, at *3 n.24 (Del. Super. Ct. Feb. 20, 2003) (declining to address whether warden was entitled to sovereign immunity because he did not produce an affidavit in compliance with § 6511).

[32] *Furman v. Del. Dep't of Transp.*, 30 A.3d 771, 774 (Del. 2011).

no insurance, she can pursue narrow and limited discovery into the statements in the affidavit of no insurance.[33]

(26) Here, the State Defendants filed an affidavit of no insurance. The Superior Court, however, did not consider the affidavit. Instead, the Superior Court required Clouser on a motion to dismiss to "proffer[] an express waiver of sovereign immunity."[34] Because he failed to point to an express waiver, such as insurance coverage for his claims under § 6511, the court upheld the State Defendants' assertion of sovereign immunity and dismissed his claims.

(27) We find that the Superior Court erred by requiring Clouser to plead insurance coverage under § 6511 for his claims. When the State asserts on a motion to dismiss that sovereign immunity has not been waived under § 6511, it must rely on a review of its insurance program and the coverages available. The plaintiff cannot reasonably be expected to know what is and is not covered by the State's insurance program. Instead, as is typically done, and as was done here, when the State claims that its insurance program does not cover potential claims, it must back up the defense with an affidavit from the Insurance Administrator confirming the absence of insurance coverage under the insurance program for the potential loss. Then, on notice and after converting the motion to dismiss into

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[33] *Id.* at 775.

[34] *Clouser v. Doherty*, C.A. No. N15C-07-240, op. at 6 (Del. Super. Ct. Jan. 4, 2017).

a summary judgment motion, the Superior Court can consider the affidavit and any challenge the plaintiff might make to its assertions.[35]

(28) Given the affidavit the State Defendants filed with the court, they may be able to demonstrate that the defense of sovereign immunity can be asserted due to the lack of insurance covering Clouser's claims. The Superior Court must also evaluate whether the individual State Defendants were acting in their official as opposed to their individual capacity.[36] But, at this stage of the proceedings—namely, a motion to dismiss—it was error to require Clouser to demonstrate insurance coverage under § 6511 when the State has the unique knowledge about the coverage of its insurance programs. The Superior Court's error was not

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[35] We reiterate that any discovery the Superior Court might grant under Superior Court Civil Rule 56(f) relating to insurance coverage is extremely narrow and limited to the statements made in the State's affidavit of no insurance. After limited discovery, the Superior Court would be acting within its discretion to permit the State Defendants to file a motion for summary judgment on the sovereign immunity issue.

[36] Sovereign immunity only protects individual state actors who take actions in their official capacities. *See*, *e.g.*, *Haskins v. Kay*, 2008 WL 5227187, at *2 (Del. Dec. 16, 2008) (reversing Superior Court's dismissal of claim against defendant in his individual capacity, but affirming Superior Court's dismissal of claim against defendant in his official capacity based on lack of insurance coverage and lack of waiver of sovereign immunity); *Walls v. Dep't of Corr.*, 1989 WL 25927, at *1 (Del. Super. Ct. Mar. 2, 1989) (finding sovereign immunity was not waived based on no insurance affidavit and dismissing claims against the Warden and the Commissioner in their official capacities), *aff'd*, 567 A.2d 424 (Del. 1989).

harmless because, as discussed below, we conclude Clouser stated claims for defamation and tortious interference with prospective business relations against Barton and the DDOE.

**Defamation**

(29) We next turn to Clouser's defamation claim against the State Defendants. The elements of a defamation claim are: (i) a defamatory communication; (ii) publication; (iii) the communication refers to the plaintiff; (iv) a third party's understanding of the communication's defamatory character; and (v) injury.[37] The Superior Court ruled that Clouser's lengthy complaint pleads the necessary elements of a defamation claim relating to the Barton Letter and the NASDTEC website information.[38] But, the court accepted the State Defendants' defense of privilege.[39]

(30) The Superior Court held it could not conclude, on a motion to dismiss, that the defamation claims based on the Barton Letter and NASDTEC website were time-barred. The Superior Court found that, based on the complaint's allegations, Clouser could not be held to have known about the Barton Letter, that the Barton Letter was sent to PDOE, or that there was false information on the NASDTEC website before he

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[37] *Bloss v. Kershner*, 2000 WL 303342, at *6 (Del. Super. Ct. Mar. 9, 2000), *aff'd*, 2001 WL 1692160 (Del. Dec. 21, 2001).

[38] *Clouser*, C.A. No. N15C-07-240, op. at 8-9.

[39] 10 *Del. C.* § 8119; *DeMoss v. News Journal Co.*, 408 A.2d 944, 945 (Del. 1979).

received this information from the PDOE on August 26, 2013.

(31) Clouser filed his complaint on July 30, 2015. Under the discovery rule, the statute of limitations does not begin to run until "the discovery of facts 'constituting the basis of the cause of action *or* the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery' of such facts."[40] Clouser alleged he was unaware of the Barton Letter and NASDTEC website information until August 26, 2013. At this stage of the proceedings, Clouser's allegations about the time of discovery support his claim that the statute should be tolled, and thus the Superior Court did not err in concluding Clouser's defamation claim based on the Barton Letter and NASDTEC website were not time barred. We also note that the Superior Court did not err in dismissing this claim as to Lowery because, other than receiving the Barton Letter, Clouser did not allege that she had any involvement in that letter or the incorrect information on the NASDTEC website.

(32) The Superior Court did not expressly address Clouser's defamation claim based on the Lowery Letter, but that claim was barred by the two-year statute of limitations. Clouser alleges that he requested the November 4, 2010 hearing because "he knew the

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[40] *Coleman v. PricewaterhouseCoopers, LLC*, 854 A.2d 838, 842-43 (Del. 2004) (quoting *Becker v. Hamada, Inc.*, 455 A.2d 353, 356 (Del. 1982)).

defamatory accusations against him [in the Doherty Letter and the Lowery Letter] were not true and were based on false, exaggerated, and manipulated evidence."[41] He was thus on notice of any defamation claim based on the Lowery Letter long before his receipt of the NASDTEC website information and the Barton Letter on August 26, 2013.

(33) The Superior Court further held the defamation claim as to the Barton Letter was subject to dismissal because it was conditionally privileged as part of an investigation under 14 *Del. C.* § 1218 and also part of a mandatory disclosure to the PDOE. Clouser appears to argue this was error because the State Defendants knowingly provided false information in violation of various statutes. A conditional privilege does exist to protect individuals from defamation claims when involved in official investigations.[42] But, "[a] conditional privilege must be exercised 'with good faith, without malice and absent any knowledge of falsity or desire to cause harm.'"[43] "Whether a conditional privilege has been abused is ordinarily a question of fact."[44] This Court has held that conditional

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[41] App. to State Defendants' Answering Br. at B56-57 (Compl. ¶ 192).

[42] *Meades v. Wilmington Hous. Auth.*, 2005 WL 1131112, at *2 (Del. May 12, 2005).

[43] *Id.* (quoting *Burr v. Atl. Aviation Corp.*, 348 A.2d 179, 181 (Del. 1975)).

[44] *Id.*

privilege is an affirmative defense that ordinarily should not be considered on a motion to dismiss.[45]

(34) Clouser alleges that Barton prepared the Barton Letter with malice and reckless disregard for the truth. To support this conclusion, Clouser alleges that Barton was aware or should have been aware of: (i) the findings in the 2009 police report that illegal images were not present; (ii) the actual information in the school computer logs showing only a limited number of adult internet searches; (iii) the unreliability of the anonymous student statements about his propensity to look at pornographic material; (iv) the falsity of statements about the school district's lack of knowledge of the results of the police investigation; and (v) the lack of any basis to express concern about Clouser being around children.[46] Further, Clouser alleges that the DDOE and Barton intentionally sent false information to NASDTEC that was published on the NASDTEC website.[47] While we are skeptical of the reliability of these allegations, we must accept them as true when reviewing a motion to dismiss. Clouser has raised disputed issues of fact about the good faith exercise of the privilege. Thus, we conclude the Superior Court erred in dismissing the defamation claim on the grounds of conditional privilege.[48]

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[45] *Id.*; *Klein v. Sunbeam*, 94 A.2d 385, 392 (Del. 1952).

[46] App. to State Defendants' Answering Br. at B39-44 (Compl. ¶¶ 134-49).

[47] *Id.* at B11, B30-31, B111 (Compl. ¶¶ 31, 107-08, 407).

[48] It may be that, after the record is developed, Clouser is unable to support the facts in the complaint underlying his claim

(35) For similar reasons, at the motion to dismiss stage, the same conduct would not be protected by the State Tort Claims Act.[49] Under the State Tort Claims Act, a state employee has qualified immunity from liability when: (i) the alleged act or failure to act arose out of and in connection with the performance of official duties involving the exercise of discretion; (ii) the act or failure to act was done (or not done) in good faith; and (iii) the act or failure to act was done without gross negligence.[50] Under the statute, the burden rests with the plaintiff to prove the absence of any of the three elements.[51]

(36) As noted above, Clouser alleges that Barton prepared the Barton Letter with malice and reckless disregard for the truth, and intentionally sent false information to the PDOE. Although these allegations are tenuous, we, like the Superior Court, cannot dispute their accuracy right now. Under the plaintiff-friendly standards applied on a motion to dismiss,[52] they are sufficient to raise reasonably conceivable claims of a lack of good faith and possible gross negligence to survive a motion to dismiss. After further development of the record, these allegations may prove unsupported, and Barton might be entitled on summary judgment to qualified immunity. But, the Superior Court erred in

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of bad faith by the State Defendants. If so, the conditional privilege could be decided on summary judgment.

[49] 10 *Del. C.* § 4001.

[50] *Id.*

[51] *Id.*

[52] *Malpiede*, 780 A.2d at 1082.

dismissing these claims at this stage of the proceedings.

**Conspiracy**

(37) We next address Clouser's conspiracy claim. The elements of a civil conspiracy claim are: (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) actual damage.[53] In the absence of an actionable wrong, a civil conspiracy claim will fail.[54] The Superior Court dismissed Clouser's conspiracy claim because he failed to allege specific facts showing a conspiracy, and his defamation claim was barred by sovereign immunity and privilege. On appeal, Clouser argues he stated a claim for conspiracy based on the collective grouping of the defendants, the defendants' wrongful actions against him in the process leading to his termination, the defendants' wrongful conduct at the November 4, 2010 hearing, and his defamation claim.[55]

(38) Although we find Clouser stated a defamation claim against the DDOE and Barton, his conspiracy

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[53] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987).

[54] *Connolly v. Labowitz*, 519 A.2d 138, 143 (Del. 1986).

[55] In his complaint, Clouser also alleged the defendants engaged in a conspiracy to tortiously interfere with his employment opportunities. Clouser does not make this argument in his opening brief and has therefore waived this claim. Supr. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

claims are primarily based on his termination in 2009 and the November 4, 2010 hearing. Those claims are time-barred regardless of whether a two-year or three-year statute of limitations applies.[56] Clouser's complaint shows he was on notice of the defendants' wrongdoing relating to his termination in 2009 and wrongdoing relating to his license suspension in 2010.

(39) As to his termination, Clouser alleged that his counsel challenged his termination in April 2009 on the grounds that Clouser could not be terminated because he had already resigned.[57] Clouser also alleged that he would not waive claims relating to his employment as demanded by the School Defendants because he believed they had engaged in wrongdoing.[58] As to the November 4, 2010 hearing, Clouser alleged that he requested the hearing because "he knew the defamatory accusations against him [in the Doherty Letter

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[56] *Compare* 10 *Del. C.* § 8106(a) (providing "no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action") *and Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989) (applying analogous statute of limitations period under 10 *Del. C.* § 8106 to conspiracy claim) *with* 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained. . . .") *and Jensen v. Wharton*, 1994 WL 649303, at *1 (Del. Super. Ct. 1994) (applying § 8119 to conspiracy claim).

[57] App. to State Defendants' Answering Br. at B84 (Compl. ¶ 282).

[58] *Id.* at B80 (Compl. ¶ 270).

and Lowery Letter] were not true and were based on false, exaggerated, and manipulated evidence."[59] Clouser's receipt of the Barton Letter and false information on NASDTEC website does not revive conspiracy claims he knew about in 2009 and 2010. Clouser's remaining allegations of conspiracy are conclusory and fail to state a claim. Thus, the Superior Court did not err in dismissing the conspiracy claim against the State Defendants.

**Tortious Interference with Prospective Business Relations**

(40) We now turn to Clouser's tortious interference with prospective business relations claim against the State Defendants. The elements of a claim for tortious interference with prospective business relations are: (i) the reasonable probability of a business opportunity; (ii) intentional interference by a defendant with that opportunity; (iii) proximate causation; and (iv) damages.[60] Tortious interference with prospective business relations is subject to a three-year statute of limitations.[61] The Superior Court held Clouser failed to state a claim for tortious interference against the State Defendants because: (i) he failed to allege specifically the reasonable probability of a business opportunity

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[59] *Id.* at B56-57 (Compl. ¶ 192).

[60] *DeBonaventura v. Nationwide Mut. Ins. Co.*, 428 A.2d 1151, 1153 (Del. 1981).

[61] 10 *Del. C.* § 8106; *SmithKline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 450 (Del. 2000).

that ended because of the actions of the State Defendants; (ii) failed to allege specifically their knowledge of this career prospects; and (iii) failed to allege how they intentionally interfered with his career prospects.

(41) On appeal, Clouser argues the Superior Court erred in dismissing his tortious interference claim because the defendants should have been viewed as one entity instead of split into groups. Clouser does not cite any relevant authority in support of this proposition and fails to explain why the actions of one defendant should be attributed to all sixteen defendants. He also argues that he included factual information about job prospects he lost after potential employers checked his background.

(42) Viewing the facts in the light most favorable to Clouser, the complaint states a claim for tortious interference with prospective business relations against the DDOE and Barton based on the information on the NASDTEC website that Clouser learned of in August 2013. In the complaint, which we must accept as true at this stage of the proceedings, Clouser alleged that DDOE and Barton provided false information (that Clouser engaged in sexual misconduct and had a criminal conviction) to the NASDTEC website, which prospective employers, including school district authorities, use to guide hiring decisions. According to Clouser, after his suspension ended, he was denied full-time employment opportunities—one of which was denied after an offer from a school principal—as a result

of the NASDTEC website information.[62] Thus, Clouser sufficiently stated a claim for interference with prospective business relations. The Superior Court did not err, however, in finding that Clouser failed to state a claim for tortious interference against Lowery. Clouser did not allege any wrongful interference by Lowery within the statutory time period for this claim.

**School Defendants**

**Defamation and Conspiracy**

(43) We now turn to Clouser's claims against the School Defendants. The Superior Court concluded that Clouser's defamation claim against the School Defendants, which was based on the Doherty Letter, was barred by the two-year statute of limitations because Clouser and others received the letter in March 2009. Clouser did not file his complaint until July 30, 2015. Clouser acknowledges that he was well-aware of the School Defendants' alleged defamation more than five years before he filed his complaint. In his complaint, he alleges that he requested the November 4, 2010 hearing because "he knew the defamatory accusations against him [in the Doherty Letter and Lowery Letter] were not true and were based on false, exaggerated, and manipulated evidence."[63] He was thus on notice of the School Defendants' alleged defamation well before

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[62] App. to State Defendants' Answering Br. at B11, B15, B17, B88-90, B111 (Compl. ¶¶ 31, 51, 59, 294-300, 407).

[63] *Id.* at B56-57 (Compl. ¶ 192).

the two-year statute of limitations expired in March 2011.

(44) On appeal, Clouser argues that all of the defendants should be considered as one group and the statute of limitations should be tolled for all of the defendants due to continuing wrongs by individual defendants within the group. None of the cases cited by Clouser support his argument. In *Havens Realty Corp. v. Coleman*,[64] the United States Supreme Court held "that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." In *Henlopen Landing Homeowners Ass'n v. Vester*,[65] the Court of Chancery held the maintenance of an allegedly retaliatory lawsuit under the Fair Housing Act did not constitute a continuing violation under *Havens.* In *Ewing v. Beck*,[66] this Court recognized that under the doctrine of continuing negligent medical treatment ("a continuum of negligent medical care related to a single condition occasioned by negligence"), the statute of limitations runs from the last date of the interrelated negligent medical treatment. In *Desimone v. Barrows*,[67] the Court of Chancery

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[64] 455 U.S. 363, 380-81 (1982) (citations omitted).

[65] 2015 WL 5316864, at *3 (Del. Ch. Sept. 14, 2015).

[66] 520 A.2d 653, 662 (Del. 1987) (emphasis omitted).

[67] 924 A.2d 908, 926 (Del. Ch. 2007) (rejecting application of continuing wrong doctrine to allow plaintiff to challenge wrongs

declined to apply the continuing wrongs doctrine to allow the plaintiff to challenge wrongs predating his stock ownership, finding that each of the alleged wrongs could be easily segmented.

(45) Nor do any of these cases support application of the continuing wrong doctrine. The alleged wrongs here are dissimilar to discriminatory housing practices under the Fair Housing Act or a continuing course of medical treatment. The alleged wrongs in this case are also easily segmented—false statements by different defendants, in different documents. Even if Clouser was not aware of the Barton Letter and incorrect information on the NASDTEC site until August 2013, he does not identify defamatory statements by any of the School Defendants after 2010. Thus, the Superior Court did not err in finding the statute of limitations barred Clouser's defamation claim against the School Defendants. Clouser's conspiracy claim against the School Defendants fails for the same reasons as the conspiracy claims against the State Defendants.[68]

**Tortious Interference with Prospective Business Relations**

(46) Finally, we address Clouser's tortious interference with prospective business relations claim against the School Defendants. The Superior Court found that

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predating his stock ownership and stating that each of the alleged wrongs could be easily segmented).

[68] *See supra* ¶¶ 38-39.

to the extent this claim was based on Clouser's wrongful termination in 2009, it was barred by the three-year statute of limitations. To the extent this claim was based on Doherty's request that Clouser's staffing agency remove him from the substitute teacher list for the Brandywine School District, the Superior Court held that Delaware does not recognize a claim for tortious interference with an at-will employment relationship,[69] and Clouser failed to plead a claim for tortious interference with a third party prospective employer. As to Clouser's allegations that his failure to find full time employment was a result of the School Defendants' tortious interference, the Superior Court held Clouser failed to allege specifically the reasonable probability of a business opportunity that ended because of the actions of the School Defendants, failed to allege specifically their knowledge of his career prospects, and failed to allege how they intentionally interfered with his career prospects.

(47) On appeal, Clouser argues the Superior Court erred in dismissing his tortious interference claim because the defendants should have been viewed as one entity instead of split into groups. We have already rejected this argument. Thus, Clouser's claims

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[69] *Triton Constr. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *17 (Del. Ch. May 18, 2009), *aff'd*, 988 A.2d 938 (Del. 2010). *But see ASDI, Inc. v. Beard Research, Inc.*, 11 A.3d 749, 751-52 (Del. 2010) (recognizing courts have found tortious conduct inducing the termination of an at-will employment contract actionable).

relating to the November 4, 2010 hearing are barred by the statute of limitations.

(48) Clouser also argues that he included factual information about job prospects he lost after potential employers checked his background. With the exception of his allegation concerning Doherty's contact with his staffing agency, however, Clouser fails to allege how the School Defendants interfered with his employment prospects since the November 4, 2010 hearing. As to his allegation regarding Doherty's contact with the staffing agency, we conclude that the Superior Court did not err in finding Clouser failed to allege interference with Clouser's prospective relationship with a third party prospective employer. Clouser alleged that Doherty asked his staffing agency not to place him with his previous employer, the Brandywine School District. He did not allege that Doherty's request interfered with his ability to work in another school district or caused his staffing agency to stop placing him in other school districts. Thus, his tortious interference claim was properly dismissed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court dismissing Clouser's conspiracy claim against the State Defendants, the defamation and tortious interference claims against Lowery, and all of the claims against the School Defendants is AFFIRMED; the judgment of the Superior Court dismissing Clouser's defamation and tortious interference claims against Barton and DDOE is REVERSED, and the matter is REMANDED for further proceedings consistent with this order. Clouser may

pursue limited discovery related to the affidavit of no insurance. Clouser, Barton, and the DDOE may pursue targeted discovery related to Clouser's defamation and tortious interference with prospective business relations for the Barton Letter and NASDTEC website disclosures. Barton and the DDOE can renew their arguments for dismissal of the remaining claims on summary judgment if warranted. Jurisdiction is not retained.

BY THE COURT:

*/s/ Collins J. Seitz, Jr.*
Justice

**THE SUPERIOR COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **JEFFREY A. CLOUSER,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **C.A. No. N15C-07-240-RBC** |
| **KIM DOHERTY, WAYNE A. BARTON, LILLIAN LOWERY, MARK HOLODICK, PATRICK BUSH, JAMES SCANLON, BRANDYWINE SCHOOL DISTRICT, DELAWARE DEPARTMENT OF ED., CURRENT AND FORMER MEMBERS OF THE BRANDYWINE SCHOOL DISTRICT BOARD OF ED., DEBRA HEFFERNAN, OLIVIA JOHNSON-HARRIS, MARK HUXSOLL, PATRICIA HEARN, CHERYL SISKIN, RALPH ACKERMAN, JOSEPH BRUMSKILL, DANE BRANDENBERGER,** | ) | |
| **Defendants.** | ) | |

**DECISION ON DEFENDANTS' MOTION TO DISMISS**

(Filed Jan. 4, 2017)

Before the Court are two (2) separate Motions to Dismiss, on behalf of the Brandywine School District

Defendants (Kim Doherty, Mark Holodick, Patrick Bush, James Scanlon, Brandywine School District, current and former members of the Brandywine School District Board of Education, Debra Heffernan, Olivia Johnson-Harris, Mark Huxsoll, Patricia Hearn, Cheryl Siskin, Ralph Ackerman, Joseph Brumskill, and Dane Brandenberger, hereinafter "School Defendants") and the other on behalf of the Delaware Department of Education Defendants (Wayne Barton, Lillian Lowery, and the Delaware Department of Education, hereinafter "State Defendants"). The Motions to Dismiss seek to dismiss the Plaintiff's Complaint as to all Counts. For the following reasons, the Court finds that Defendants' Motions to Dismiss as to each Defendant and all claims are appropriate and the Motions to Dismiss are hereby ***GRANTED***.

## I. FACTS AND PROCEDURES

Plaintiff, who is self-represented, filed a 427 paragraph complaint on July 30, 2015, claiming defamation, conspiracy, and tortious interference with potential business relations against the Delaware Department of Education, the Brandywine School District, and individual defendants employed by or affiliated with both for the incidents surrounding his termination of employment with the Brandywine School District in 2009 and the events alleged to have flowed from that termination.

Plaintiff was a teacher in the Brandywine School District from 1991-2009.[1] On February 9, 2009, the Plaintiff was investigated by the Delaware State Police following an allegation he used a school computer for inappropriate sexual misconduct and was placed on immediate leave by the school district.[2] A forensic examination of the Plaintiff's computer by the State Police did not locate any evidence of sexual misconduct.[3] Subsequently, Plaintiff attempted to resign and was terminated.[4] After Plaintiff's attempt to resign and subsequent termination, the School District's then Superintendant wrote the Delaware Department of Education and requested action be pursued against Plaintiff's teaching license, as required by 14 *Del. C.* § 1218(g).[5]

On March 5, 2009, Kim Doherty, Director of Human Resources of the Brandywine School District, wrote to the Plaintiff alleging that Plaintiff had used the computer to access child pornography.[6] On July 31, 2009, Plaintiff met with Dr. Wayne Barton, then Director of Professional Accountability for the Delaware Department of Education, to present his version of the events surrounding Plaintiff's termination.[7] After this

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[1] Compl. ¶ 29.

[2] Compl., Ex. A.

[3] *Id.*

[4] *Id.*

[5] Delaware Department of Education Mot. to Dismiss, Ex. 3. [hereinafter State Defendants' Mot. to Dismiss].

[6] School Defendants' Mot. to Dismiss, Ex. A.

[7] Compl. ¶ 121.

meeting, Dr. Barton wrote an internal memorandum to Dr. Lillian Lowery, then Secretary of the Delaware Department of Education, stating that, in Dr. Barton's opinion, the Plaintiff's teaching license should be revoked.[8]

Plaintiff attended a licensure revocation/suspension hearing on November 4, 2010 before the Delaware Professional Standards Board.[9] As a consequence of the licensure action, Plaintiff accepted an agreement resulting in a three year suspension of his license to teach in Delaware.[10]

According to Plaintiff, on August 26, 2013, he received documents of the National Association of State Directors of Teacher Education and Certification (NASDTEC) Clearinghouse containing information which erroneously stated that Plaintiff's teaching license had been suspended due to a criminal conviction for sexual misconduct.[11] The information received by Plaintiff had been sent by the Pennsylvania Department of Education after Plaintiff applied for a teaching job in Pennsylvania.[12] Among the documents received by Plaintiff from the Pennsylvania Department of Education was a copy of an internal DDOE memorandum sent from Dr. Barton to Dr. Lowery on August 12, 2009 regarding Dr. Barton's investigation of Plaintiff's

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[8] State Defendants' Mot. to Dismiss, Ex. 2.

[9] Comp. ¶ 193.

[10] State Defendants' Mot. to Dismiss, Ex. 4.

[11] Compl. ¶¶ 96-97; 178-81; Compl., Ex. C.

[12] Compl. ¶ 96.

licensure as required by 14 Del C. §1218.[13] According to Plaintiff, prior to his receiving the mailing from the Pennsylvania DOE in August of 2013, he had been unaware of both the publication on the Clearinghouse website and the memorandum from Dr. Barton to Dr. Lowery.[14]

Plaintiff alleges defamation, contained both within the NASDTEC Clearinghouse information and within the letter sent by Dr. Barton to Dr. Lowery. Plaintiff further asserts that a conspiracy exists against him, through a "whisper campaign" by the Defendants, which has precluded the Plaintiff from obtaining appropriate employment.[15] Finally, the Plaintiff claims tortious interference with business relations, alleging that Ms. Doherty called the substitute teaching service where Plaintiff was employed, Kelly Educational Staffing, asking that he not thereafter be assigned to teach at the Brandywine School District.[16]

Both the Brandywine School District and its named employees and board members and the Delaware Department of Education and its named employees have moved to dismiss the Plaintiff's case on all counts.

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[13] Compl. ¶¶ 96-97.

[14] Compl. ¶ 99.

[15] Compl. ¶ 293.

[16] Compl. ¶¶ 301-03.

## II. STANDARD OF REVIEW

Pursuant to Delaware Superior Court Civil Rule 12(b)(6), the Court may dismiss a plaintiff's claim for "failure to state a claim upon which relief can be granted."[17] When analyzing a motion to dismiss under Rule 12(b)(6), the Court must accept all well-pled, non-conclusory allegations as true.[18] Every reasonable factual inference will be drawn in favor of the non-moving party.[19] If the complaint and facts alleged are sufficient to support a claim on which relief may be granted, the motion is not proper and should be denied.[20]

## III. DISCUSSION

The Motions to Dismiss seek to dismiss the Plaintiff's Complaint as to all Counts. The Court will consider the Motions to Dismiss as they relate to each Count and set of Defendants in turn. The various claims and the defenses thereto are set forth in Exhibit A, set out as the Appendix to this decision.

In sum, the State Defendants' Motion to Dismiss shall be ***GRANTED*** as it relates to all counts regarding the Delaware Department of Education and Wayne Barton and Lillian Lowery. The School Defendants' Motion to Dismiss shall also be ***GRANTED*** as it

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[17] Super. Ct. Civ. R. 12(b)(6)

[18] *Spence v. Funk*, 396 A.2d 967, 968 (Del. Supr. 1978).

[19] *Doe v. Cahill*, 884 A.2d 451, 458 (Del.2005); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[20] *Spence v. Funk*, 396 A.2d at 968 (Del. Supr. 1978).

relates to all named individuals. The reasons for their dismissals are as follow below.

The Court will first analyze the Motion to Dismiss on behalf of the State Defendants with regard to all Plaintiff's claims, and then analyze the Motion to Dismiss on behalf of the School Defendants with regard to all Plaintiff's claims.

### A. State Defendants' Motion to Dismiss

The State Defendants' Motion to Dismiss seeks to dismiss all three claims submitted by the Plaintiff against the State: 1) defamation; 2) conspiracy; and, 3) tortious interference with business relations. The State Defendants claim that all counts are barred by the doctrine of sovereign immunity. The State Defendants further assert that, in addition to the bar of sovereign immunity, the defamation claim is barred by the statute of limitations and privilege, the conspiracy claim is barred by privilege, and the tortious interference claim is barred by the statute of limitations and failure of Plaintiff to state a claim upon which relief can be granted. The Court will address each defense and claim in turn.

#### *i. Sovereign Immunity*

The State Defendants seek to dismiss all Plaintiff's claims with regard to Wayne Barton, Lillian Lowery, and the Delaware Department of Education (DDOE) on the grounds of sovereign immunity. The

Motion to Dismiss alleges that sovereign immunity is an absolute bar to all of Plaintiff's claims against the State since there has been no clear waiver of such immunity by the General Assembly.[21] The Motion to Dismiss further asserts that the protection of the doctrine of sovereign immunity should extend to Dr. Barton and Dr. Lowery as Plaintiff's allegations stem from Dr. Barton's and Dr. Lowery's actions in their official capacities as employees of DDOE at the time of the alleged claims.

The Court finds that the Delaware Department of Education is entitled to sovereign immunity and therefore Plaintiff has no viable cause of action against DDOE. DDOE has not waived sovereign immunity and therefore the Court lacks jurisdiction to proceed against DDOE in this case.[22] Unless the State has expressly waived sovereign immunity, sovereign immunity bars Plaintiff's claims against the State.[23] There has been no express waiver of sovereign immunity in this case. Accordingly, the State is entitled to protection under the doctrine of sovereign immunity and all Plaintiff's claims against the Delaware Department of Education are barred.

Similarly, sovereign immunity also bars recovery against Dr. Barton and Dr. Lowery. The Plaintiff

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[21] State Defendants' Mot. to Dismiss ¶ 5 (citing *Wilmington Housing Auth. v. Williamson*, 228 A.2d 782, 786 (Del. 1967)).

[22] *See Smith v. Bunkley*, 2016 WL 4146449, at *4 (Del. Super. August 3, 2016)

[23] *Id.*

alleges that these Defendants exercised gross and wanton negligence, as well as malice, through the publication on NASDEC as well as through the memorandum sent by Dr. Barton to Dr. Lowery. The Plaintiff asserts that this exercise of malice and gross and wanton negligence is sufficient to overcome application of the doctrine of sovereign immunity. While it is true that the State Tort Claims Act provides an exception for actions within official duties done with either gross negligence or bad faith,[24] as noted by the Court in *Smith*,

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[24] *Del. Code Ann. tit.* 10, § 4001 provides:

> Except as otherwise provided by the Constitutions or laws of the United States or of the State of Delaware, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:
>
> (1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over

> "The Delaware Supreme Court has held that '[g]rossly negligent acts per se and the State Tort Claims Act come into play only **after** an express intent to waive sovereign immunity has been identified.' The State Tort Claims Act is an additional defense, not a waiver of sovereign immunity, and applies only where the General Assembly has waived sovereign immunity . . .

In this case, as in *Smith*, Plaintiff has not proffered an express waiver of sovereign immunity. Therefore, the State Tort Claims act is irrelevant to Plaintiff's claims at issue because the State Tort Claims Act only comes into play after an express waiver of sovereign immunity. Accordingly, there being no waiver of sovereign immunity, the State Tort Claims Act's exceptions based on malice and gross negligence have no application.

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whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence; provided that the immunity of judges, the Attorney General and Deputy Attorneys General, and members of the General Assembly shall, as to all civil claims or causes of action founded upon an act or omission arising out of the performance of an official duty, be absolute; provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

Plaintiff's complaint offered no factual allegations upon which the Court could find that Dr. Lowery and Dr. Barton were acting outside of their official capacities such that sovereign immunity would not apply. Dr. Barton was clearly acting in his official capacity in drafting a memorandum regarding the Plaintiff as part of DDOE's investigation under 14 *Del C.* §1218. Moreover, the act of submitting information for publication for the NASDEC Clearinghouse website also falls within the official capacities of employees at the DDOE.

Therefore, all claims as against Wayne Barton and Lillian Lowery are barred because they acted only in their official capacities in regard to Plaintiff. If there had been a waiver of sovereign immunity, and Plaintiff sufficiently pled gross negligence or malice, a claim against the State Defendants may have gone forward under the State Tort Claims Act. However, without such a waiver of sovereign immunity, exceptions for gross negligence and malice do not apply.[25]

Accordingly, even though the Plaintiff alleges that the actions of Wayne Barton and Lillian Lowery were committed with either bad faith or gross negligence, these Defendants cannot be held liable because there has been no waiver of sovereign immunity and the Plaintiff has offered no evidence that the Defendants were acting outside of their official capacities.

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[25] *See Smith v. Bunkley*, 2016 WL 4146449, at *4 (Del. Super. August 3, 2016).

Accordingly, all claims against Wayne Barton and Lillian Lowery must be dismissed.

Accordingly, the State Defendant's Motions to Dismiss shall be ***GRANTED*** as to all counts regarding DDOE, Wayne Barton, and Lillian Lowery.

*ii. Defamation Claim as to the Letter Between Dr. Barton and Dr. Lowery*

*a. Privilege*

Even without the protection of sovereign immunity, Plaintiff's claims arising out of the context of the memorandum sent between Dr. Barton and Dr. Lowery are barred by the privilege doctrine. Plaintiff claims that Dr. Barton defamed him in an internal memorandum sent to Dr. Lowery as part of DDOE's investigation under 14 *Del C.* §1218 regarding Plaintiff's licensure. Dr. Barton's letter was sent to the Plaintiff as part of a packet of files sent by the Pennsylvania Department of Education after Plaintiff applied for a teaching job in Pennsylvania. Plaintiff claims that this letter contains defamatory information and was essentially published when the letter was sent to the Pennsylvania DOE.[26]

In order to establish a defamation claim, Plaintiff must prove: 1) the defamatory character of the communication; 2) publication; 3) that the communication refers to the Plaintiff; 4) the third party's understanding of the communication's defamatory character; and,

[26] Compl. ¶ 96.

5) injury.[27] The Court finds that the Plaintiff's allegations of defamation regarding the letter and the NASDEC publication are well-pled.[28] Plaintiff need only aver defamation generally in order to survive a Motion to Dismiss.[29] The State Defendants do not contest that the information published on the NASDEC website was factually incorrect.

Additionally, the Court disagrees with the State Defendants' allegation that the letter from Dr. Barton to Dr. Lowery was not published because it was merely an internal memorandum. The State Defendants cite *Lynch v. Mellon Bank of Delaware*[30] in support of their contention that Dr. Barton's letter to Dr. Lowery did not constitute publication. However, in *Lynch*, the Plaintiff claimed she was defamed by her employer because she stated she would have to self-disclose the reasons for her wrongful dismissal to potential employees and that this self-disclosure would constitute publication. The Court acknowledged that although self-disclosure constituted publication in a minority of jurisdictions, it was not the law in Delaware. In this

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[27] *Lynch v. Mellon Bank of Delaware*, 1992 WL 51880, at *3 (Del. Super. 1992).

[28] Superior Court Rule 9(b) states that malice, intent, knowledge, and other condition of mind of a person may be averred generally.

[29] *See Cornell Glasgow, LLC v. La Grange Properties, LLC*, 2012 WL 2106945, at *10 (Del. Super. 2012); *Universal Capital Management, Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *5 (Del. Super. 2012).

[30] *Lynch v. Mellon Bank of Delaware*, 1992 WL 51880, at *3 (Del. Super. 1992).

case, however, the letter written by Dr. Barton was sent to another individual, Dr. Lowery. The law of publication in defamation is well-established: communication to one other than the person defamed, even merely one other person, may be enough to constitute publication under the law.[31] Accordingly, the Court finds the Plaintiff sufficiently pled the claim of defamation regarding the letter from Dr. Barton to Dr. Lowery.

Nonetheless, the publication of defamatory matter is not subject to tort liability if the matter is published upon an occasion that makes it privileged.[32] The DDOE provided Pennsylvania DOE with Plaintiff's file in response to Pennsylvania's civil investigative request and therefore was part of a mandatory disclosure.[33] Moreover, Dr. Barton originally wrote the letter as part of DDOE's investigation under 14 *Del C.* §1218 regarding Plaintiff's licensure.

Because Dr. Barton's letter to Dr. Lowery was part of a statutorily required investigation, and the subsequent disclosure of that letter was part of a mandatory disclosure in response to Pennsylvania's civil investigation, these actions are privileged as a matter of law.[34]

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[31] RESTATEMENT (SECOND) OF TORTS § 577 comment b (1977).

[32] *Id.*, § 593.

[33] Compl. ¶ 96.

[34] *Gautschi v. Maisel*, 565 A.2d 1009, 10011 (Me. 1989) (statements made by college employee reviewing another teacher's credentials for permanent employment were subject to conditional privilege) (citing RESTATEMENT (SECOND) OF TORTS § 596 comment d (1977); *Ikani v. Bennett*, 682 S.W.2d 747, 748-49 (Ark. 1985) (recognizing qualified privilege for employers who

Even though Plaintiff's defamation claims meet the standard of pleadings accepted in Delaware, because the disclosures alleged are privileged, they do not subject Defendants to liability for defamation. Accordingly, Plaintiff's claim of defamation by Dr. Barton, Dr. Lowery with regard to the letter must be ***DISMISSED*** for this additional reason.

*b. Statute of Limitations*

The State Defendants further claim that the statute of limitations bars Plaintiff's recovery on the defamation claim. There is a two year statute of limitations for defamation claims.[35] According to the State Defendants, Plaintiff was aware of the letter in 2009 and Plaintiff was or should have been aware of its contents which Plaintiff claims were defamatory. However, the Court finds that Plaintiff could not be held to have known at this stage of the proceedings that the letter was sent to the Pennsylvania DOE, nor about the publication on NASDEC, before being sent this information in August of 2013 by Pennsylvania. Discovery on this issue might prove otherwise, but perhaps not. Plaintiff filed these proceedings in July of 2015.

Even if the statute of limitations would have run beginning in 2009, a statute of limitations may be

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communicate on performance of lower ranking employee; citing PROSSER, LAW OF TORTS § 110 (3d ed.).

[35] 10 *Del. C.* § 8119; *See Clark v. Delaware Psychiatric Ctr*, 2011 WL 3762038, at *1 (Del. Super. 2011) (stating a two-year statute of limitations for defamation).

tolled in certain instances when the issue is "inherently unknowable." For example, in *Wal-Mart Stores, Inc., v. AIG Life Ins. Co.*,[36] the Delaware Supreme Court found that Wal-Mart could not have been on inquiry notice due to publication in certain newspaper articles. Essentially, the Court held that Wal-Mart could not have been expected to discover an issue from newspaper articles. Likewise, the Plaintiff could not have been expected to know that information regarding his suspension was published falsely on NASDEC, particularly when NASDEC is only accessible by state education administrators. Although the State Defendants claim that Plaintiff could have requested his personnel file, the Court finds that, without more, this assumption without the benefit of discovery is too tenuous to begin accrual on the statute of limitations. Accordingly, the Court finds at this stage that the information regarding the NASDEC publication and the letter was inherently unknowable.[37] Therefore, the statute of limitations may have been tolled until Plaintiff was sent this information through the Pennsylvania DOE on in August of 2013. Accordingly, Plaintiff's claims cannot be said to be barred by the statute of limitations as to State Defendants at this time.

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[36] *Wal-Mart Stores, Inc., v. AIG Life Ins. Co.*, 860 A.2d 312 (2004) (Del. Supr. Ct).

[37] *See Thomas v. Capano Homes, Inc.*, 2015 WL 1593618, at *2 (Del. Super. 2015) (finding that it was too early in the proceedings to determine that the statute of limitations had begun to accrue).

*iii. Conspiracy*

*a. Failure to state a claim*

Plaintiff alleges that Dr. Barton and Dr. Lowery, as well as the School Defendants, colluded against him at the hearing regarding his licensure before the Professional Standards Board. However, the facts alleged by the Plaintiff are not enough to state a viable claim for conspiracy, even under the low threshold required of pleadings in Delaware. To state a claim for civil conspiracy, Plaintiff must allege (i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties. As noted in *Aviation W. Charters, LLC v. Feer*, "[a] claim for civil conspiracy is not a separate cause of action; instead, the underlying claim must be an independent tort action such as fraudulent inducement. A claim for civil conspiracy cannot survive a motion to dismiss if there are not sufficient facts to establish the conspiratorial relationship and an overt act in furtherance of the conspiracy occurred."[38]

The Plaintiff here fails to allege a specific definitive act constituting any conspiracy as pled in the Complaint; his claims are merely conclusory. Plaintiff fails to allege any specific facts to support his conclusion that there must have been a conspiracy. Moreover, Plaintiff's claim fails because there is no underlying action constituting an unlawful act done

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[38] *Aviation W. Charters, LLC v. Freer*, 2015 WL 5138285, at *10-11 (Del. Super. Ct. 2015).

in furtherance of the conspiracy. Plaintiff's defamation claims are barred by sovereign immunity and his claim regarding defamation by Dr. Barton's letter to Dr. Lowery is further barred by privilege; if the claim based upon the underlying act is barred, any alleged conspiracy to commit the underlying act is similarly barred. Plaintiff therefore failed to sufficiently plead a claim for civil conspiracy.

*b. Privilege*

Plaintiff's contends that Dr. Barton and Dr. Lowery, as well as the State Defendants, conspired to defame him in the hearing before the Professional Standards Board. State Defendants allege that Plaintiff's conspiracy claim is also barred by the absolute privilege afforded to witnesses in judicial proceedings.[39] However, this hearing was not in a court of law, but rather was an administrative hearing before a licensing board.

American courts have held that matters presented at certain administrative hearings where the hearings afford substantive fairness through regular and orderly procedure are entitled to absolute immunity from civil liability.[40] The focus of the inquiry in such

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[39] *Nix v. Sawyer*, 466 A.2d 407, 410-411 (Del. Super. 1983).

[40] *Rainier's Dairies v. Rariton Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955); *Stafney v. Standard Oil Co.*, 71 N.D. 170, 299 N.W. 582, 136 A.L.R. 535 (1941); *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20 (1937); *White v. United Mills* Co., Inc., 240 Mo.App. 443, 208 S.W.2d 803 (K.C. Ct. of Ap.1948); *Tatro v. Esham*, 335 A.2d 623, 626 (Del. Super. Ct. 1975).

cases has been to determine whether the traditional safeguards attending the judicial process are afforded.[41] These safeguards include notice, authority to take testimony and punish perjury, and review through appeal procedures.

At this stage, the Court does not have before it sufficient facts regarding the hearing before the Professional Standards Board to determine whether appropriate due process safeguards were afforded the Plaintiff. Therefore, the Court is unable to determine whether the statements made by Dr. Barton and Dr. Lowery should be afforded the absolute privilege given to witnesses in judicial proceedings. The basis for dismissal of the conspiracy claim must therefore fail at this time.

*iv. Tortious Interference with Business Relations*

*a. Failure to State a Claim*

Plaintiff contends that the State Defendants tortuously interfered with his teaching career and job prospects by publishing the false information on NASDEC and by forwarding the internal memorandum to Pennsylvania. In order to state a claim for tortious interference with business relations, the Plaintiff must prove: 1) the existence of a valid business relation or expectancy; 2) the interferer's knowledge of the relationship or expectancy; and, 3) intentional interference; 4) that

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[41] *Tatro v. Esham*, 335 A.2d 623, 626 (Del. Super. Ct. 1975).

induces or causes a breach or termination of the relationship or expectancy; and, 5) that caused resulting damages to the party whose relationship or expectancy is disrupted.[42]

State Defendants claim that Plaintiff has failed to allege a valid claim upon which relief can be granted as to the tortious interference claim. The Court agrees. The Plaintiff fails to allege specifically the business opportunity as to which there was a reasonable probability of fruition which ended because of the actions of the State.[43] As the State Defendants' note, Plaintiff fails to allege with any degree of specificity facts going to the issue of Dr. Barton's or Dr. Lowery's knowledge of Plaintiff's career prospects or how their actions constituted international interference with those prospects. Accordingly, Plaintiff fails to valid claim for tortious interference with business relations.

*b. Statute of Limitations*

The State Defendants further claim that the statute of limitations bars Plaintiff's recovery as to the tortuous interference claim. There is a three year statute of limitations for claims for tortious interference with business relations.[44] However, as in the State

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[42] *Griffin Corp. Serv. v. Jacobs*, 2005 WL 20000775, at *5 (Del. Ch. 2005).

[43] *See Wyshock v. Malekzadeh*, 1992 WL 148002 (Del. Super. 1992).

[44] 10 *Del. C.* § 8106; *See Merck & Co., Inc. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354 (Del. Ch. 1999).

Defendants' statute of limitations defense to Plaintiff's defamation claim, the Court finds that Plaintiff could not be held to have known at this stage of the proceedings that the letter was sent to the Pennsylvania DOE, nor about the publication on NASDEC, before being sent this information in August of 2013 by Pennsylvania. As noted *supra*, Plaintiff could not have been expected to know that information regarding his suspension was published falsely on NASDEC. Accordingly, the Court finds at this stage that the information regarding the NASDEC publication and the letter was inherently unknowable.[45] Therefore, the statute of limitations may have been tolled until Plaintiff was sent this information through the Pennsylvania DOE on in August of 2013. Accordingly, Plaintiff's claims cannot be said to be barred by the statute of limitations as to State Defendants at this time.

*v. Conclusion*

Accordingly, the State Defendants' Motion to Dismiss is ***GRANTED***. Plaintiff's claims against the DDOE are barred by the doctrine of sovereign immunity. Plaintiff's claims against Dr. Barton and Dr. Lowery are also barred by the doctrine of sovereign immunity because there has been no waiver of sovereign immunity and they were acting in their official capacities in all actions complained of by the Plaintiff. Additionally,

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[45] *See Thomas v. Capano Homes, Inc.*, 2015 WL 1593618, at *2 (Del. Super. 2015) (finding that it was too early in the proceedings to determine that the statute of limitations had begun to accrue).

although Plaintiff's claims regarding defamation were sufficiently well-pled to surpass the Motion to Dismiss, and Plaintiff's claims are not barred by the statute of limitations, the Court nonetheless finds that the disclosures were privileged as well as barred by sovereign immunity. Finally, Plaintiff's allegations regarding conspiracy and tortious interference failed to establish a viable claim against the Defendants. For the aforementioned reasons, the State Defendants' Motion to Dismiss is hereby ***GRANTED***.

### B. School Defendants' Motion to Dismiss

The School Defendants' Motion to Dismiss seeks to dismiss all three claims submitted by the Plaintiff against them: 1) defamation; 2) conspiracy; and, 3) tortious interference with business relations. The School Defendants assert the defamation claim is barred by the statute of limitations and lack of publication, the conspiracy claim is barred by privilege and the statute of limitations, and the tortious interference claim is barred by the at-will employment doctrine, failure to state a claim upon which relief may be granted, and the statute of limitations. Similar to the State Defendant's defenses and claims, the Court will consider each defense and claim in turn.

#### *i. Defamation*

##### *a. Statute of Limitations*

Plaintiff claims that he was defamed in a March 5, 2009 letter and investigation by Kim Doherty, then

Director of Human Resources of the Brandywine School District. The School Defendants assert that this claim is barred by the two year statute of limitations.[46] Conversely, Plaintiff contends any statute of limitations would have been tolled because the letter was included in the personnel file he received from Pennsylvania DOE in August of 2013.

The Court finds that the statute of limitations has not been tolled in this instance. Although the Court found that the statute of limitations had been tolled with regard to the publication on NASDEC and the letter sent from Dr. Barton to Dr. Lowery, this tolling was due to the Plaintiff's lack of knowledge of these publications until August of 2013. Unlike those acts, Ms. Doherty's letter to Plaintiff was received by him in 2009. Therefore, Plaintiff knew of the contents of the letter arising out of Ms. Doherty's investigation of Plaintiff in 2009. The fact that the letter was not included in the NASDEC packet and produced to him in 2013 did not resurrect Plaintiff's claim. Accordingly, the statute of limitations is not tolled in this instance.

Plaintiff did not file this suit until July of 2015, more than two years after he knew of the contents of Ms. Doherty's letter and investigation. Therefore, Plaintiff's claim regarding the alleged defamation committed by Ms. Doherty is time-barred.

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[46] There is a two year state of limitations for defamation claims. 10 *Del. C.* § 8119; *See Clark v. Delaware Psychiatric Ctr*, 2011 WL 3762038, at *1 (Del. Super. 2011) (stating a two-year statute of limitations for defamation).

*b. Lack of Publication*

The School Defendants propose an additional defense similar to that proffered by the State Defendants regarding a lack of publication as to the defamation claim. The School Defendants assert that the letter written by Ms. Doherty and sent to administrators was not published because it was merely an internal memorandum. However, the Court disagrees. The School Defendants likewise cite *Lynch v. Mellon Bank of Delaware*[47] in support of their contention that Ms. Doherty's letter to other administrators did not constitute publication. However, as noted by the Court *supra*, the law of publication in defamation is well-established; communication to one other than the person defamed, even merely one other person, may be enough to constitute publication under the law.[48] Accordingly, the Court finds the Plaintiff sufficiently pled the claim of defamation regarding the letter from Ms. Doherty to other administrators.

*ii. Conspiracy*

*a. Privilege*

Plaintiff contends that Kim Doherty and Patrick Bush, as well as the State Defendants, conspired to defame him in the hearing before the Professional Standards Board. Like the State Defendants, the School Defendants assert that Plaintiff's conspiracy

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[47] *Lynch v. Mellon Bank of Delaware*, 1992 WL 51880, at *3 (Del. Super. 1992).

[48] RESTATEMENT (SECOND) OF TORTS § 577 comment b (1977).

claim is also barred by the absolute privilege afforded to witnesses in judicial proceedings.[49] However, as the Court noted *supra*, this hearing was not in a court of law, but rather was an administrative hearing before a licensing board. As found *supra*, the Court is unable to determine at this stage of the proceedings whether the statements made by Ms. Doherty and Mr. Bush should be afforded the absolute privilege given to witnesses in judicial proceedings.

*b. Statute of Limitations*

Defendants further claim that Plaintiff's contentions of civil conspiracy are time-barred. Plaintiff contends that he was conspired against by the School Defendants, specifically Kim Doherty and Patrick Bush, at the hearing at the Professional Standards Board on November 4, 2010. There is a two-year statute of limitations for conspiracy.[50] Unlike the issue regarding the NASDEC publication, *supra*, Plaintiff was aware of the events of the hearing and was present. Plaintiff did not file this action until July of 2015, nearly five (5) years after the hearing before the Delaware Professional Standards Board. Accordingly, the statute of limitations bars Plaintiff's claim.

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[49] *Nix v. Sawyer*, 466 A.2d 407, 410-411 (Del. Super. 1983).

[50] 10 *Del. C.* § 8119; *See Anderson v. Anderson-Harrison*, 2013 WL 4492797, at *4 (Del. Super. 2013).

*iii. Tortious Interference with Business Relations*

*a. At-Will Employment*

Plaintiff claims Defendants tortuously interfered with his prospective business relations by requesting to remove him from the list of potential substitute teachers for Brandywine School District. In order to establish a claim for tortious interference with prospective business relations, a Plaintiff must show: (1) a reasonable probability of a business opportunity, (2) intentional interference by a defendant with that opportunity, (3) proximate causation, and (4) damages.[51]

The School Defendants claim that this allegation is barred because Plaintiff's job with Kelly's Educational Staffing constitutes at-will employment. Delaware does not recognize an action for tortious interference with an at-will employment relationship.[52] A "heavy presumption" exists that "a contract for employment, unless otherwise expressly stated, is at-will in nature, with duration indefinite."[53]

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[51] *Triton Const. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *17 (Del. Ch. May 18, 2009), aff'd, 988 A.2d 938 (Del. 2010); *see also Griffin Corp. Servs., LLC v. Jacobs*, 2005 WL 2000775, at *5 (Del. Ch. Aug. 11, 2005).

[52] *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at 17.

[53] *E.I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 440 (Del. 1996). *See Biliski v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 2008 WL 399660, at *1 (D. Del. Feb. 14, 2008), *aff'd*, 574 F.3d 214 (3d Cir. 2009) (finding a computer technician who

Plaintiff was a substitute teacher placed through Kelly Educational Staffing. School Defendants categorize substitute teachers as at-will employees. Plaintiff provides no evidence to overcome the "heavy presumption" he was an employee at-will; in fact, he acknowledges he had an implied contract, though terminable at-will. Thus, Plaintiff was an at-will employee and cannot assert a tortious interference against prospective business relations claim.

Further, Ms. Doherty's act does not qualify as tortious interference with a prospective business relationship because it did not affect Plaintiff's prospective relationship with a third-party. Delaware generally follows the RESTATEMENT OF TORTS with respect to tortious interference.[54] § 766(B) of the RESTATEMENT restricts claims to interference that prevents the individual from entering into or continuing a prospective business relationship with a third person. Here, Ms.

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worked at a school for five years was an employee at-will); *Heideck v. Kent Gen. Hosp., Inc.*, 446 A.2d 1095 (Del. 1982) (holding "[e]mployee who admitted she was not hired by employer on basis of a written contract which set out terms, conditions or duration of her employment, agreed that employer never orally promised her employment for a definite length of time, and conceded that she did not consider herself bound to work for employer for a fixed term of employment was an employee at will."). Under the employment at-will doctrine, either party has the right to end employment at any time and no cause for termination needs to be alleged or proved. *Rizzo v. E. I. du Pont de Nemours & Co.*, 1989 WL 135651, at *1 (Del. Super. Oct. 31, 1989) (citing *Greer v. Arlington Mills Mfg. Co.*, Del.Super., 43 A. 609 (1899)).

[54] *Allen Family Foods Inc. v. Capitol Carbonic Corp.*, 2011 WL 1205138, *3 (Del. Super. Mar. 31, 2011).

Doherty, acting as the Director of Human Resources for Brandywine School District, submitted a request to Kelly Educational Staffing that Plaintiff not be placed as a substitute teacher with Brandywine School District. Although Plaintiff claims this damages his business prospects and professional reputation, Ms. Doherty did not interfere with Plaintiff's ability to work for a different school district outside of her control nor to continue receiving opportunities to substitute teach through Kelly Educational Staffing; rather, merely that Plaintiff not be placed in the Brandywine School District. Therefore, on the facts pleaded by Plaintiff, Ms. Doherty did not interfere with Plaintiff's ability to enter into or continue a prospective working relationship with a third party and the claim of tortious interference must therefore fail.

Accordingly, Plaintiff cannot be entitled to recovery based on his allegation that Ms. Doherty interfered with his employment prospects as a substitute teacher because he was an at-will employee and because she did not affect his prospective business relationship with a third-party.

*b. Failure to State a Claim*

Plaintiff also alleges that School Defendants like DDOE tortuously interfered with his potential business relations by launching a "whisper campaign" against him to schools where he applied to work in Delaware. School Defendants and DDOE argue the claim is insufficient and should be dismissed because

Plaintiff fails to provide tangible facts in support of his allegation.

The Court agrees. As noted *supra*, the Plaintiff fails to allege specifically the business opportunity as to which there was a reasonable probability of fruition which ended because of the actions of the School Defendants.[55] Plaintiff fails to allege with specificity School Defendants' knowledge of Plaintiff's career prospects or how their actions constituted international interference with those prospects. Accordingly, Plaintiff fails to valid claim for tortious interference with business relations.

### *c. Statute of Limitations*

Defendants further claim that Plaintiff's contentions of tortious interference are time-barred. Plaintiff contends that the School Defendants tortiously interfered with his job prospects by conducting a "whisper campaign" against him and unjustly terminating his employment at Brandywine School District. There is a three year statute of limitations for claims for tortious interference with business relations.[56] Unlike the issue regarding the NASDEC publication, *supra*, Plaintiff was aware of the events surrounding his termination. Plaintiff did not file this action until July of 2015, nearly five (5) years after the events of his termination.

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[55] *See Wyshock v. Malekzadeh*, 1992 WL 148002 (Del. Super. 1992).

[56] 10 *Del. C.* § 8106; *See Merck & Co., Inc. v. SmithKline Beecham Pharmaceuticals Co.*, 1999 WL 669354 (Del. Ch. 1999).

Accordingly, the statute of limitations bars Plaintiff's claim.

*iv. Conclusion*

The School Defendants' Motion to Dismiss is ***GRANTED***. Plaintiff's claims against the School Defendants are barred. Although Plaintiff's claims regarding defamation were sufficiently well-pled to surpass the Motion to Dismiss, such claims by Plaintiff are barred by the statute of limitations. Plaintiff's claims regarding conspiracy are also barred by the statute of limitations. Finally, Plaintiff's allegations regarding tortious interference failed to establish a viable claim against the Defendants and are barred by the statute of limitations. For the aforementioned reasons, the School Defendants' Motion to Dismiss is hereby ***GRANTED***.

## IV. CONCLUSION

For the aforementioned reasons, the Motions to Dismiss by each Defendant are hereby ***GRANTED*** as to all claims.

**IT IS SO ORDERED.**

| 12/28/16 | /s/ Robert Burton Coonin |
|---|---|
| **Date Written Order Issued** | **ROBERT BURTON COONIN, JUDGE** |

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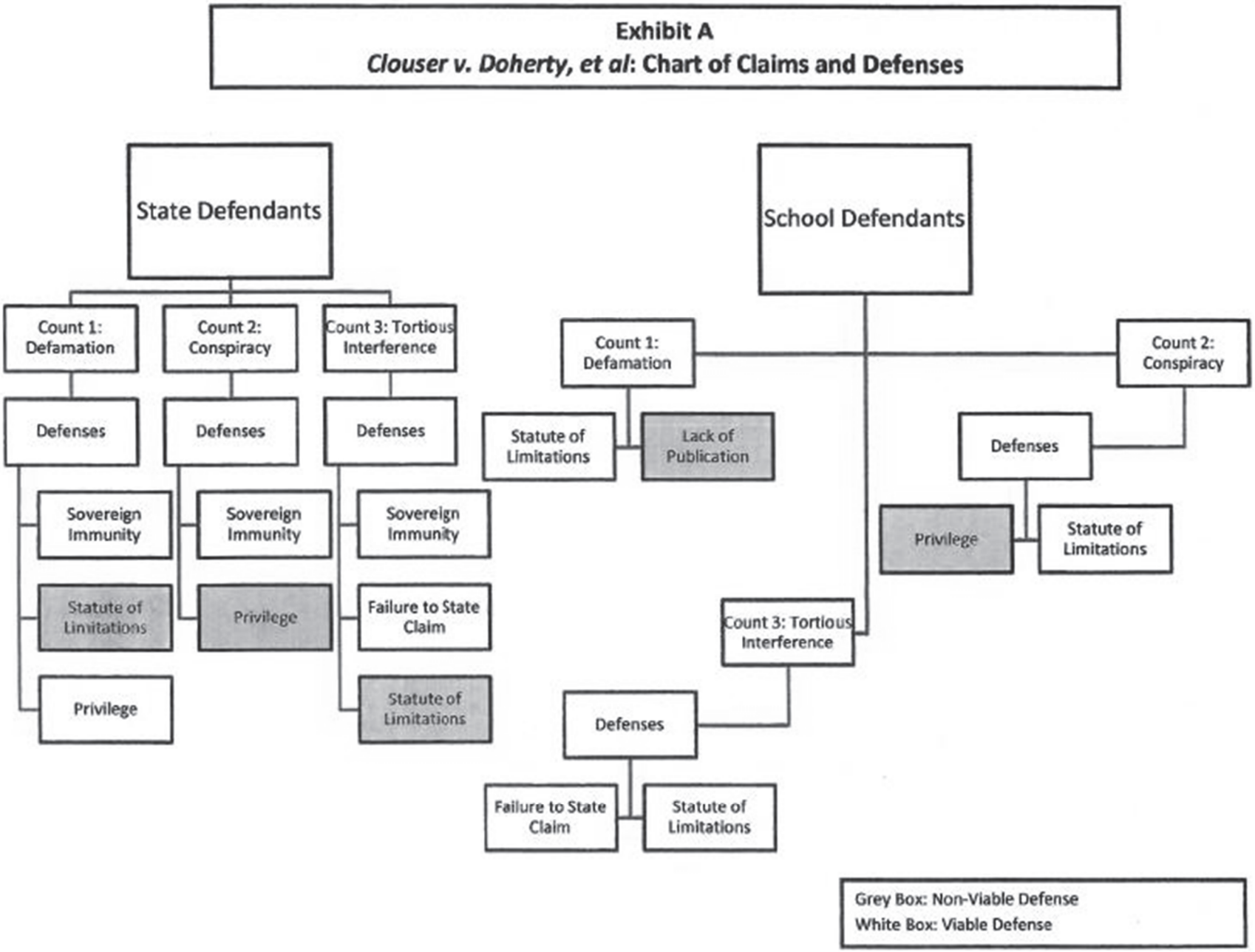
Exhibit A
Clouser v. Doherty, et al: Chart of Claims and Defenses
State Defendants
Count 1: Defamation
Count 2: Conspiracy
Count 3: Tortious Interference
Defenses
Defenses
Defenses
Sovereign Immunity
Sovereign Immunity
Sovereign Immunity
Statute of Limitations
Privilege
Failure to State Claim
Privilege
Statute of Limitations
School Defendants
Count 1: Defamation
Count 2: Conspiracy
Statute of Limitations
Lack of Publication
Defenses
Privilege
Statute of Limitations
Count 3: Tortious Interference
Defenses
Failure to State Claim
Statute of Limitations
Grey Box: Non-Viable Defense
White Box: Viable Defense

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| JEFFREY A. CLOUSER, | § | No. 175, 2019 |
| Plaintiff Below, Appellant, | § | Court Below: Superior Court of the State of Delaware |
| v. | § | |
| KIM DOHERTY, et al., | § | C.A. No. N15C-07-240 |
| Defendants Below, Appellees. | § | |

Submitted: December 2, 2019
Decided: December 3, 2019

Before **SEITZ**, Chief Justice; **VALIHURA**, and **TRAYNOR**, Justices, constituting the qualified and available members of the Court *en Banc*.[1]

**ORDER**

This 3rd day of December, 2019, the Court having carefully considered the motion for rehearing *en Banc* filed by Plaintiff Below, Appellant and it appears that the motion for rehearing *en Banc* is without merit and should be denied.

[1] Supreme Court Rule 4(f) and Internal Operating Procedure XVII(2).

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing *en Banc* is DENIED.

BY THE COURT:

/s/ Collins J. Seitz, Jr.
Chief Justice

# TITLE 10

## Courts and Judicial Procedure

## Procedure

## CHAPTER 40. Tort Claims Act

## Subchapter I. State Tort Claims

### § 4001 Limitation on civil liability.

Except as otherwise provided by the Constitutions or laws of the United States or of the State of Delaware as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom

the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence;

provided that the immunity of judges, the Attorney General and Deputy Attorneys General, and members of the General Assembly shall, as to all civil claims or causes of action founded upon an act or omission arising out of the performance of an official duty, be absolute; provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

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## Title 14

## Education

* * *

### § 1218 Limitation, suspension and revocation of licenses.

(a) The Secretary may suspend, revoke, or limit a license or certificate that has been issued to any person pursuant to this chapter, for the following causes:

(1) Obtaining or attempting to obtain a license or certificate by fraudulent means or through misrepresentation of material facts;

(2) Falsifying official school records, documents, statistics, or reports;

(3) Knowingly violating any of the provisions of the state assessment system set forth in § 172 of this title;

(4) Pleading guilty or nolo contendere with respect to, or is convicted of, any crime against a child constituting a misdemeanor, except for unlawful sexual contact in the third degree [§ 767 of Title 11];

(5) Pleading guilty or nolo contendere with respect to, or is convicted of, possession of a controlled substance or a counterfeit controlled substance classified as such in Schedule I, II, III, IV or V of Chapter 47 of Title 16;

(6) Immorality incompetence, misconduct in office, wilful neglect of duty, disloyalty, or misconduct involving any cause for suspension or revocation of a license provided for in this section; or

(7) [Repealed.]

(8) Having had a license or certificate suspended, revoked, or voluntarily surrendered in another jurisdiction for cause which would be grounds for suspension or revocation under this section.

(b) Notwithstanding the provisions of subsection (a) of this section, the Secretary shall revoke a license or

certificate if the license holder does any of the following:

(1) Pleads guilty or nolo contendere with respect to, or is convicted of any of the following:

a. Any crime constituting the manufacture, delivery, possession with intent to manufacture or deliver a controlled substance or a counterfeit controlled substance classified as such in Schedule I, II, III, IV or V of Chapter 47 of Title 16.

b. Any crime constituting a violent felony as defined in § 4201(c) of Title 11.

c. Any crime against a child constituting a felony, or unlawful sexual contact in the third degree (§ 767 of Title 11).

d. Any crime constituting a felony sexual offense.

e. Any crime constituting a felony offense against public administration involving bribery, improper influence or abuse of office.

(2) Commits a sexual offense against a child.

(3) [Repealed.]

(c) The Secretary may automatically suspend any license without a prior hearing if the license holder is arrested or indicted by a grand jury for a violent felony as defined in § 4201(c) of Title 11 or for any crime against a child constituting a felony. A suspension under this subsection is effective on the date of the arrest or grand jury indictment.

(1) For a suspension under this subsection, the Secretary shall issue a written temporary order of suspension to the license holder at that license holder's last known address.

(2) The chief school officer or head of school, on behalf of the local board of education or charter school board of directors, shall report to the Secretary the name and last known address of any license holder employed by the district or charter school who it knows to have been arrested or indicted by a grand jury for a violent felony as defined in § 4201(c) of Title 11 or for any crime against a child constituting a felony.

(3) A license holder whose license has been suspended pursuant to this subsection may request an expedited hearing before the Standards Board within 20 calendar days from the date the notice of the Secretary's decision to temporarily suspend the license holder's license was mailed. In the event that the license holder requests an expedited hearing in a timely manner, the Standards Board shall convene a hearing within 90 days of the receipt of such a request.

(4) If the license holder pleads guilty or nolo contendere with respect to, or is convicted of, a violent felony as defined in § 4201(c) of Title 11 or any crime against a child constituting a felony, the Secretary shall proceed with revocation under subsection (b) of this section.

(5) If the license holder is found not guilty of the underlying criminal charges, a nolle prosequi is entered on the record by the State, or the charges are otherwise dismissed by the court, the license

holder may file a written request for license reinstatement, including documentation of the final status of the judicial proceeding, and their license shall be reinstated If the license expired during the period of suspension, the holder of the former license may reapply for the same tier license that was suspended, but shall meet the license requirements that are in effect at the time of the application for license.

(6) An order of suspension under this subsection shall remain in effect until the final order of the Secretary or the Standards Board becomes effective.

(d) The Secretary may take an action under subsection (a), (b), or (c) of this section on the basis of substantially comparable conduct occurring in a jurisdiction outside this state or occurring before a person applies for or receives any license.

(e) Any license holder who has pled guilty or nolo contendere to, or has been convicted of, a crime in a court of law which would constitute grounds for revocation, suspension or limitation of license under subsection (a) or (b) of this section or has been arrested or indicted by a grand jury for a violent felony as defined in § 4201(c) of Title 11 or any crime against a child constituting a felony, shall notify the Secretary of such action in writing within 20 days of such conviction, arrest or indictment, whether or not a sentence has been imposed. Failure to do so shall be grounds on which the Secretary may limit, suspend, or revoke the holder's license.

(f) Any license holder who has surrendered an educator license or any professional license or certificate or who has had such a license or certificate revoked, suspended, or limited in any jurisdiction or by any agency shall notify the Secretary of such action in writing within 30 days of such action. Failure to do so shall be grounds on which the Secretary may limit, suspend or revoke the holder's license.

(g) The chief school officer or head of school, on behalf of the local board of education or charter school board of directors, shall report to the Secretary the name and last known address of any license holder who is dismissed, resigns, retires or is otherwise separated from employment with that district or charter school after the local board of education or charter school board of directors provides to the license holder notice of intent to terminate for misconduct that constitutes grounds for revocation or suspension under subsection (a), (b), or (c) of this section. Such report shall be made within 15 days of the dismissal, resignation, retirement or other separation from employment and is required notwithstanding any termination agreement to the contrary that the local board of education or charter school board of directors may enter into with the license holder. The reasons for the license holder's dismissal, resignation, retirement or other separation from employment with the district or charter school shall also be provided along with all evidence that was reviewed by or is in the possession of the district or charter school relating to the dismissal, resignation, retirement, or other separation from employment. The Department

shall give written notice to any license holder of any notification received under this subsection to the license holder's last known address. Such notification shall be made within 15 days of receipt of the district or charter school's report to the Department of misconduct under this subsection. The obligation to report also applies when a chief school officer or head of school acquires relevant information after a license holder's dismissal, resignation, retirement, or other separation from employment. Failure to make such reports shall be grounds on which the Secretary may limit, suspend, or revoke the chief school officer's or head of school's license. All information obtained from the chief school officer or head of school shall be confidential and shall not considered public records under Delaware's Freedom of Information Act (Chapter 100 of Title 29). If after having received notice of intent to terminate for misconduct in office or immorality, a license holder requests and prevails at a hearing, there is no required report to the Department.

(h) The Secretary may investigate any information received about a person that reasonably appears to be the basis for action under subsections (a) through (c) of this section. The Secretary shall not investigate anonymous complaints. The Department shall give written notice within a reasonable period of time to a license holder of any investigation initiated hereunder to the license holder's last known address. All information obtained during an investigation is confidential and shall not be considered public records under Delaware's Freedom of Information Act (Chapter 100 of Title 29).

The Secretary shall review the results of each investigation and shall determine whether the results warrant initiating action under subsection (a), (b), or (c) of this section. All final orders issued by either the Secretary or the Professional Standards Board under this section are public documents pursuant to § 10002 of Title 29.

(i) Whenever the basis of for action under subsection (a) or (b) of this section is a guilty plea, nolo contendere with respect to, or a conviction of a crime, a copy of the record of the plea, nolo contendere or conviction certified by the clerk of the court entering the plea, nolo contendere or conviction shall be conclusive evidence thereof.

(j) The Secretary may enter a consent agreement with a person against whom action is being taken under subsection (a), (b), or (c) of this section.

(k) No action shall be taken against a person under subsection (a) or (b) of this section without providing the person with written notice of the charges and with an opportunity for a full and fair hearing before the Standards Board. Notice shall be personally delivered or sent by certified mail to the person's last known address. The license holder shall have 30 calendar days from the date the notice of the charges was mailed to make a written request for a hearing. Unless otherwise provided for in this section, the burden of proof in a license disciplinary action shall be on the agency taking official action to establish by preponderance of the evidence that the license holder has engaged in

misconduct as defined by subsections (a) and (b) of this section or otherwise has failed to comply with the applicable laws and regulations relating to the retention of the license. At the conclusion of any such hearing, the Professional Standards Board shall issue a final order finding the facts as determined by the hearing and revoking, suspending, or limiting the license or certificate, if appropriate. If no written request for a hearing is received by the Standards Board, the license holder's license shall be deemed to be revoked, suspended, or limited in the manner set forth in the notice, and the holder shall be so notified.

(l) A license may be suspended for a period of time not to exceed 5 years. The license may be reinstated by the Secretary, upon written request, with verification that all requirements for license renewal have been satisfied. If the license expired during the period of suspension, the holder of the former license may reapply for the same tier license that was suspended but shall meet the license requirements that are in effect at the time of the application for the license.

(m) If any of the causes listed in subsection (a) or (b) of this section are determined, the Secretary or the Standards Board after a hearing, may put limitations on a license that may include but is not limited to:

(1) Restrictions on the ages of students with whom the license holder may work;

(2) Additional supervision requirements; or

(3) Education, counseling, or psychiatric examination requirements.

(n) If a decision of license limitation, suspension or revocation is based on paragraph (a)(4), (a)(5), or (b)(1) of this section, and if the plea or conviction is overturned and there is no subsequent proceeding leading to a plea or conviction, the individual whose license is limited, suspended or revoked may file a written request for reinstatement, including documentation of the final status of the judicial proceeding, and the license shall be reinstated.

(o) An individual whose license has been revoked under subsection (a) of this section may petition the Secretary for reinstatement of the license not sooner than 5 years from the date of revocation. The individual shall submit to the Secretary a written petition showing credible evidence, by affidavit or otherwise, of the factors set forth in paragraph (o)(1) of this section.

(1) The Secretary shall consider all of the following criteria in evaluating a petition for reinstatement and shall only grant such a petition if it is in the best interest of the public schools of the State:

a. The nature and circumstances of the individual's original misconduct;

b. The individual's subsequent conduct and rehabilitation;

c. The individual's present character; and

d. The individual's present qualifications and competence to engage in the practice of instruction, administration or other related professional support services.

(2) A former license holder is entitled to a full and fair hearing before the Standards Board to challenge a denial of reinstatement pursuant to this subsection.

(3) A license revoked under subsection (b) of this section or suspended under subsection (c) of this section may not be reinstated under this subsection. A license revoked under paragraph (b)(1) of this section may only be reinstated pursuant to subsection (n) of this section and a license suspended under subsection (c) of this section may only be reinstated pursuant to paragraph (c)(5) of this section or after a hearing before the Standards Board.

(p) In any hearing before the Standards Board to challenge action taken under this section, the Standards Board shall have the power to administer oaths, order the taking of depositions, issue subpoenas, and compel attendance of witnesses and the production of books, accounts, papers, records, documents, and testimony.

(q) Notice of the limitation, revocation, suspension or reinstatement of a license shall be made by the Secretary, or the Secretary's designee, to all chief state school officers of the other states and territories of the United States.

(r) All communications between a license holder and the Department or Standards Board provided for in this section shall be by certified mail, with a return receipt requested.

(s) For the purpose of this section only, the term "license" shall include a Standard or Professional Status Certificate issued by the Department prior to August 31, 2003, an initial license issued pursuant to § 1210 of this title, a continuing license issued pursuant to § 1211 of this title, or an advanced license issued pursuant to § 1213 of this title.

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**TITLE 18**

**Insurance Code**

**Insurance**

**CHAPTER 65. Insurance for the Protection of the State**

**Subchapter I. General Provisions**

* * *

**§ 6503 Forms of coverage.**

The Committee shall:

(1) Protect this State from loss to state-owned property;

(2) Protect the public from wrongful actions of state officials and employees and failure or malfunction of state-owned property;

(3) Secure for this State the maximum economic advantage feasible in the operation of its insurance coverage program, including, when deemed appropriate to such end, the utilization of blanket

policies, deductible or excess loss insurance, and self-insurance;

(4) Determine such insurance protection as shall be required by the needs of the State and as shall be most economically advantageous to the State by providing for, as they shall deem appropriate, no insurance on small losses, coverage by commercial insurance, coverage by self-insurance or a combination of such methods.

* * *

**§ 6508 Duties of the Insurance Coverage Office.**

The Insurance Coverage Office shall provide:

(1) The placement of all insurance with commercial insurers as directed by the Committee;

(2) The operation of the Self-Insurance Fund, as established in subchapter III of this chapter;

(3) Centralized responsibility for the operation of the state insurance coverage program vested in a single agency with an adequate staff of legal, actuarial and administrative resources;

(4) The establishment and operation of an open bid procedure to be maintained for purchasing new insurance coverage from commercial insurers and renewing existing contracts with such commercial insurers which will permit the free forces of market competition to operate to the benefit of the state insurance coverage program;

(5) The keeping of all policies with commercial insurers and all records necessary and pertinent thereto in some safe and secure place;

(6) The keeping in some safe and secure place of all records, accounts, claims files, statistical studies and other such records and documents necessary and proper in the administration of the self-insurance program, when and if the Committee deems it proper to utilize same;

(7) The periodic preparation of reports as to the commercially procured insurance coverage part of the program which shall present the basic statistical-actuarial data pertaining to the experience of that part of the program and its component parts, which reports shall be public documents;

(8) Provide to the commercial insurance industry such information about bidding procedures as is required by the statutes of this State, so that any qualified commercial insurer may have an opportunity to offer its service to this State in the areas where the Committee has deemed it desirable to procure commercial coverage;

(9) Periodic comprehensive insurance surveys of program needs, and a continuing review of existing commercially procured insurance contracts, as well as analysis of commercial rates in terms of changing economic conditions, and periodic studies of commercial market conditions and developments;

(10) Such special investigations and reports as may be requested by the Committee Chair;

(11) Technical assistance to the volunteer fire departments in the State concerning insurance matters relating to their operations. Such assistance

shall be given only at the request of the president of a company; and

(12) The implementation and monitoring of loss prevention activities.

* * *

**§ 6511 Defense of sovereignty prohibited.**

The defense of sovereignty is waived and cannot and will not be asserted as to any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.

## DELAWARE CONSTITUTION

## ARTICLE XIV. OATH OF OFFICE

### § 1. Form of oath for members of General Assembly and public officers.

Members of the General Assembly and all public officers executive and judicial, except such inferior officers as shall be by law exempted, shall, before they enter upon the duties of their respective offices, take and subscribe the following oath or affirmation:

"I, (name), do proudly swear (or affirm) to carry out the responsibilities of the office of (name of office) to the best of my ability, freely acknowledging that the powers of this office flow from the people I am privileged to represent. I further swear (or affirm) always to place the public interests above any special or personal interests, and to respect the right of future generations to share the rich historic and natural heritage of Delaware. In doing so I will always uphold and defend the Constitutions of my Country and my State, so help me God."

No other oath, declaration or test shall be required as a qualification for any office of public trust.

## RULES OF CIVIL PROCEDURE FOR THE SUPERIOR COURT OF THE STATE OF DELAWARE

### Rule 15. Amended and supplemental pleadings.

(a) Amendments. – A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders.

(aa) Form of amendments. – A party serving an amended pleading shall indicate plainly in the amended pleading in what respect the amendment differs from the pleading which it amends.

(b) Amendments to conform to the evidence. – When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of

any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the Court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation back of amendments. – An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B)

knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(d) Supplemental pleadings. – Upon motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

| Page: | Report Date: | Agency: | Complaint: |
|---|---|---|---|
| **1** | **02/18/2009** | **TROOP 2 STATE POLICE** | [redacted] |

| Reported Date and Time | Initial Crime Report | Occurred: |
|---|---|---|
| **WED 02/18/2009 1125** | | **TUE 01/27/2009 1230 thru TUE 01/27/2009 1345** |

Location:
**2501 Ebright Concord High School Wilmington, DE 19810**
**CLASSROOM / ROOM AA 208**

M. O. and Incident Overview:
Suspect Clouser is currently being investigated by Brandywine School District for improper use of a school computer (possible child porn site). Computer has been seized and placed into Troop 2 Evidence for High Tech Crimes Unit.

| Grid | Sector | County | Domestic Related | Gen Broadcast Sent? | Gang Related? | Gun Related? | |
|---|---|---|---|---|---|---|---|
| **114-380** | **12** | **New Castle** | ☐ Yes ☒ No | ☐ Yes ☒ No | ☐ Yes ☒ No | ☐ Yes ☒ No | |

Related School Name
**Concord High School**

Victim Information

| Victim Number | Name | | | | |
|---|---|---|---|---|---|
| **001** | | | | | |
| Type | Sex | Race | Ethnic Origin | Age | D.O.B. |
| **Society/Public** | | | | | |

| Address | Resident Status | Home Telephone | Cell Phone | |
|---|---|---|---|---|
| | | | | |

| Reporting Person? | Victim Injured? | Victim Deceased? | Officer Comments |
|---|---|---|---|
| ☐ Yes ☒ No | ☐ Yes ☒ No | ☐ Yes ☒ No | |

| Injuries | Description of Injuries |
|---|---|
| | |

Suspect/Defendant Information

| Sequence | Type | SSI Number | |
|---|---|---|---|
| **001** | **Suspect** | | |

| Name | Nick Name |
|---|---|
| **CLOUSER, JEFFREY** | |

| Sex | Race | Ethnic Origin | Age | D.O.B. | Height | Weight | Skin Tone | Eye Color |
|---|---|---|---|---|---|---|---|---|
| **Male** | **White** | **Not Hispanic/Latino** | **40** | **04/20/1968** | **5' 11"** | **175** | | **Blue** |

| Hair | Hair Length | Hair Style | Facial Hair | Voice Speech | Teeth | Build | Glasses |
|---|---|---|---|---|---|---|---|
| **Brown** | **Short** | **Straight** | | | | **Average** | |

| Disguises | Disguise Color(s) | Resident Status | Unusual Characteristics | Armed With |
|---|---|---|---|---|
| | | **Full Time** | | **Unarmed** |

| Address | Home Telephone | Cell Phone | |
|---|---|---|---|
| **404 Concord AVE**<br>**WILMINGTON, DE 19803** | **(302) 475-3951** | | |
| Arrest Number | Suspect's Clothing Description | | |
| Employer/School<br>**COCORD HIGH SCHOOL**<br>**2501 EBRIGHT RD**<br>**WILMINGTON, DE 19810** | Work Telephone<br>**(302) 475-3951** | | |

Crimes and Associated Information

| Victim Number | Crim Seq. | Statute | Crime Description |
|---|---|---|---|
| **001** | **001** | | **Miscellaneous Investigation, Industrial Accident, Lost Property** |

| Location of Offense | Status | Involvement | General Offense |
|---|---|---|---|
| **School/College** | **Service Clear 02/23/2009** | ☐ Alcohol ☐ Drugs ☐ Computer | |
| Suspected Hate/Bias<br>☐ Yes ☒ No - N/A | Crime Code<br>[redacted] | | |

Victim – Suspect/Defendant Relationships

| Victim – 001 | |
|---|---|
| **Society/Public** | |
| Suspect/Defendant – 001<br>**CLOUSER, JEFFREY** | Victim Offender Relationship<br>**Victimless Crime** |

Witness Information

| Sequence | Type | Name | Sex | Race | Age | D.O.B. |
|---|---|---|---|---|---|---|
| **001** | **Reporting Person** | [redacted] | [redacted] | [redacted] | | |

| Address | Home Telephone | Cell Phone | |
|---|---|---|---|
| [redacted] | [redacted] | | |
| Employer/School<br>[redacted] | Work Telephone | | |

**Investigative Narrative**

On 02/18/09 I was contacted by [redacted] in reference to the facts of the case. [redacted], stated that they are investigating a Concord High School teacher from improper use of a school computer. [redacted], RP, stated that they were alerted by their "IT guys" that suspect Jeffrey Clouser used his log on password several times to access "child porn". RP advised that they are scheduling a meeting for 2/19/09 at 0900 hrs and that [redacted] would provide more information.

After receiving this report from RP [redacted] I immediately notified both my supervisor, SGT Bordley and High Tech crimes unit. I was advised to secure the computer from Concord High School and take said evidence to Troop Two's evidence locker.

I then responded to Concord High School and picked up said computer from [redacted]). [redacted] had the computer secured (locked with key) inside of [redacted] wall locker. The computer was disconnected by Concord's [redacted] stated that he removed the power cable, keyboard cable, mouse cable and then the network cord. [redacted] stated that he then walked the computer (hard drive) to [redacted] office.

On 02/19/09 I will be responding to RP [redacted]'s office for further information. RP [redacted] advised that suspect Clouser has resigned from his teaching position and that no further district action will be taken.

On 02/23/09 I was advised by Sgt Bordley that High Tech crimes did not find any "porn" on suspects computer and that there would be no criminal charges made.

Case has been cleared as "service clear". Nothing follows.

Statement of Witness 001 – [redacted]

See narrative for statement.

| Reporting Officer<br>**CPL FLOWERS - 1304** | Supervisor Approval<br>**ROBERT F STEVENS**<br>**PSPT828**<br>**Date 03/04/2009 0835** | |
|---|---|---|
| Detective Notified | Referred To | |
| Solvability Factors<br>☐ Witness ☐ M. O.<br>☐ Suspect Named<br>☐ Suspect Described | ☐ Trace Stolen Property<br>☐ Suspect Located<br>☐ Suspect Identified<br>☐ Suspect Vehicle Identified | Status<br>**Closed** |

| Page: | Report Date: | Agency: | Complaint: |
|---|---|---|---|
| **1** | **04/16/2009** | **DSP HEADQUARTERS** | [redacted] |

Supplemental Report

Original Occurrence. Dates and Times: **TUE 01/27/2009 1230 thru TUE 01/27/2009 1345** Grid **114-380** Sector **12**

Original Location: **2501 Ebright Concord High School Wilmington, DE 19810 CLASSROOM / ROOM AA 208**

Investigative Narrative

Writer was requested by Cpl Flowers to examine the two seized computers for this investigation. All computers were seized and turned over to Writer by Cpl Flowers, refer to Cpl Flowers report for a detail description of the computers. The case involves a teacher of the school who was using the school internet and the search engine Google to search terms that had been filtered by the school as inappropriate. The second computer was seized due to the fact the owner is an administrator at the school and had used her personal computer to access the information the suspect was attempting to access. All computers were examined [redacted] and following all standard operating/ acquisition procedures.

The first computer examined was a HP Compaq desktop computer. After examining the computer it was determined there were no illegal images. The second computer that was examined was a Gateway

laptop computer. After examining the computer it was determined there were no illegal images.

The computers have been returned to Cpl Flowers for his investigation. No further action is required of Writer at this time.

| Reporting Officer<br>**DET SPILLAN - 6492 001** | Supervisor Approval<br>**KEVIN A PERNA PSPT846**<br>**Date 05/05/2009 0733** | |
|---|---|---|
| Solvability Factors<br>☐ Witness ☐ M. O.<br>☐ Suspect Named<br>☐ Suspect Described | ☐ Trace Stolen Property<br>☐ Suspect Located<br>☐ Suspect Identified<br>☐ Suspect Vehicle Identified | Status |

**Articles**

PROMISING THE CONSTITUTION

*Richard M. Re*

* * *

[p. 308] Those informal methods of instilling promissory obligation operate in the real world as well, but they do so in tandem with a formal oath that affords officials an efficient and familiar means of achieving the same moral objective—that is, of assuring the public through personal commitment. The formal oath also fosters and entrenches the informal practices and public expectations that can help create officials' promissory obligations. As a result, the public can assume that officials promise adherence to the Constitution, even when their formal oaths are unpublicized or postponed for emergencies." For these reasons, "the oath" is best understood to encompass both formal and informal sources of officials' promissory obligations.

* * *

[p. 313] Officials take the oath under conditions that permit the creation of moral obligation. No hand—either dead or alive—forces individuals to run for office, take the oath, or lead others to think that they will take "the Constitution" seriously. And because officials in the United States take the oath with democratic approval, action in compliance with the oath is itself imbued with democratic legitimacy.

* * *