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DISTRICT COURT  
**FILED**

JAN 28 2011

IN THE DISTRICT COURT OF TULSA COUNTY  
STATE OF OKLAHOMA

JIM SISNEY, an individual

Plaintiff,

vs.

MARYANNE FLIPPO; SHARI WILKINS;  
SHARON WHELPLEY, as individuals  
and in their official capacities as Members of  
the Broken Arrow Public School Board of  
Education and INDEPENDENT SCHOOL  
DISTRICT NO. 3 OF TULSA COUNTY,

Defendants.

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA. TULSA COUNTY

Case No. CJ-2008-06173  
Judge Daman Cantrell

**THE DEFENDANTS FLIPPO, WILKINS AND WHELPLEY'S  
MOTION TO DISMISS THE THIRD AMENDED PETITION**

Come now the Defendants, MARYANNE FLIPPO ("Flippo"), SHARI WILKINS ("Wilkins") and SHARON WHELPLEY ("Whelpley") and move this Court to dismiss the Third Amended Petition as against them. In support of this Motion to Dismiss, the individual Defendants present the following arguments and authorities.

***Standard of Review***

The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim. *Kirby v. Jean's Plumbing Heat & Air*, 2009 OK 65; *Zaharias v. Gammill*, 1992 OK 149, ¶ 6, 844 P.2d 137, 138. When considering a defendant's request for dismissal the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them. *Great Plains*

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STATE OF OKLA.

*Federal Sav. and Loan Ass'n v. Dabney*, 1993 OK 4, ¶ 2 n. 3, 846 P.2d 1088, 1090. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. *Girdner v. Board of Commissioners*, 2009 OK CIV APP 94; *A-Plus Janitorial & Carpet Cleaning v. The Employers' Workers' Compensation Ass'n*, 1997 OK 37, ¶ 9, 936 P.2d 916, 922; *National Diversified Business Services, Inc. v. Corporate Financial Opportunities, Inc.*, 1997 OK 36, ¶ 9, 946 P.2d 662, 665; *Delbrel v. Doenges Bros. Ford, Inc.*, 1996 OK 36, ¶ 3, 913 P.2d 1318, 1320.

## ARGUMENT AND AUTHORITIES

### I

#### **THE PLAINTIFF CANNOT PREVAIL ON HIS CLAIM OF BREACH OF CONTRACT AGAINST THE DEFENDANTS FLIPPO, WILKINS AND WHELPLEY**

Jim Sisney was employed as the Superintendent of Schools for the Broken Arrow School District ("District")<sup>1</sup>. Sisney entered into a written contract of employment with the District. It was voted on and approved by the members of the Board of Education.<sup>2</sup>

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<sup>1</sup>Paragraphs 6, 7 and 8 of the Third Amended Petition.

<sup>2</sup>Although Dr. Sisney incorrectly alleges that Shari Wilkins approved the employment contract (Wilkins was not a member of the Board of Education at the time Dr. Sisney's contract was voted on and approved, see paragraph 8 of the Third Amended Petition), for purposes of this Motion to Dismiss we must accept the fact as true. It has no material effect on the law to be applied to this set of facts.

Sisney alleges that the Defendants Flippo, Wilkins and Whelpley breached the terms of his employment contract.<sup>3</sup> There is no set of facts that will allow Sisney to prevail against the school board member Defendants on this claim.

A school district is a body corporate and has such powers as are conferred upon it by the laws of the State of Oklahoma. *Youngblood v. Consolidated School Dist. No. 3*, 230 P. 910 (1934); 70 Okl.Stat. Section 5-105. Only the Board of Education of an Oklahoma school district has the power to contract with and fix the duties and salary of the Superintendent of Schools. 70 Okl.Stat. Section 5-117.

School board members, individually, have no power and authority to bind a school district. *School Dist. No. 39 of Pottawatomie County v. Shelton*, 1910 OK 55, 109 P. 67 (1910); *Ryan v. Humphries*, 150 P. 1106 (1915). The power to act on behalf of the District is vested in a Board of Education, not five persons. *Aikman v. School Dist.*, 27 Kan. 129 (cited with approval in *Board of Education v. American National Co.*, 135 Okla. 253, 275 P. 285 (1928)).

School board members Sharon Whelpley, Shari Wilkins and Maryanne Flippo *are not parties to Sisney's employment contract*. In their individual capacity they have absolutely *no* authority to

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<sup>3</sup>Pages 3 to 6 of Third Amended Petition, paragraphs 13 to 28.

employ a superintendent of schools or bind the school district in any manner.<sup>4</sup> The only entity that can be pursued for a alleged breach of Sisney's employment contract is the District.

## II

### **THE PLAINTIFF HAS NO CAUSE OF ACTION AGAINST THE DEFENDANTS WILKINS, WHELPLEY AND FLIPPO FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING ARISING FROM HIS EMPLOYMENT CONTRACT WITH THE DISTRICT BECAUSE THE DEFENDANTS ARE NOT PARTIES TO THE CONTRACT**

"Every contract in Oklahoma contains an implied duty of good faith and fair dealing." *Wathor v. Mut. Assurance Adm'rs, Inc.*, 2004 OK 2, ¶ 5, 87 P.3d 559, 561. "The common law imposes this implied covenant upon all *contracting parties*, that neither *party* . . . will act to injure the *parties'* reasonable expectations nor impair the rights or interests *of the other* to receive the benefits flowing from the contractual relationship." *Embry v. Innovative Aftermarket Systems L.P.*, 2010 OK 82, citing with approval *First National Bank and Trust of Vinita v. Kisse*, 1993 OK 96, ¶ 24, 859 P.2d 502, 509.

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<sup>4</sup>The Plaintiff has also brought this cause of action against the Defendants in their "official" capacities. An official capacity claim is a cause of action against the Broken Arrow School District. See *Society of Separationists v. Pleasant Grove*, 416 F.3d 1239 (10th Cir. 2005): "The Federal Rules of Civil Procedure Advisory Committee in its 1961 Note to Rule 25(d) wrote: 'The expression 'in his official capacity' is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. . . . *In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office.*'"

Under ordinary principles of contract law (as applied to a commercial contract<sup>5</sup>), a breach of the duty of good faith and fair dealing results only in damages for breach of contract, ***not liability for the tort of bad faith***. *Wathor*, 2004 OK 2, ¶ 5, 87 P.3d at 561; *Worldlogics Corp. v. Chatham Reinsurance*, 2005 OK CIV APP 16; *Christian v. American Home Assur. Co.*, 1977 OK 141, 577 P.2d 899.

Individuals *who are not parties to the contract* are not subject to liability for breach of the implied covenant of good faith and fair dealing, ***even if their acts may have been material to a breach of the duty***. *Wathor*, 2004 OK 2, ¶18; *Timmons v. Royal Globe Ins. Co.*, 1982 OK 97, 653 P.2d 907, 912-13; *Gruenberg v. Aetna Ins. Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973).

The individual board members are not in privity of contract with Sisney. The Court should dismiss this claim.

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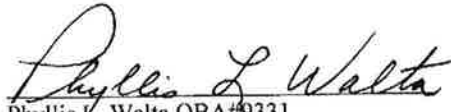
<sup>5</sup>This is different than an insurance contract where a “special relationship” has been held to exist between the insurance company and the insured. See *Christian v. American Home Assur. Co.*, 1977 OK 141, 577 P.2d 899 : “Insurance contracts, however, are not ordinary commercial contracts. A ‘special relationship’ exists between an insurer and its insured stemming from the quasi-public nature of insurance, the unequal bargaining power between the insurer and insured, and the potential for an insurer to unscrupulously exert that power at a time when the insured is particularly vulnerable. *Id.* at 902-04. The special relationship creates a nondelegable duty of good faith and fair dealing on the part of the insurer. An insurer's breach of this duty gives rise to a separate cause of action sounding in tort.” *Id.* at 904.

III

**THE PLAINTIFF HAS IMPROPERLY PLED HIS PREVIOUS CAUSES OF ACTION**

Sisney, in lieu of pleading separate causes of action, states in one fell swoop, (in paragraph 11 of the Third Amended Petition) that he is readopting and realleging his previous causes of action for defamation, intentional infliction of emotional distress and tortious interference with a contract against the "Board Members." This method of pleading is inadequate.

Although the Oklahoma pleading code contemplates a short and plain statement of the claim showing that the pleader is entitled to relief (12 Okl.Stat. Section 2008(A)(1)), the pleading code certainly demands more than "I readopt and reallege my prior causes of action". The pleading code requires a party to make a demand for judgment for the relief to which he deems himself entitled. (Section 2008(A)(2)). Sisney did not do that. The Defendants are requesting that the Court dismiss these 3 causes of action.



Phyllis L. Walta OBA#9331  
WALTA & WALTA  
Attorneys at Law  
120 East Oklahoma  
Hennessey, OK 73742  
(405) 853-2346

**CERTIFICATE OF MAILING**

This is to certify that on this the 25<sup>th</sup> day of January, 2011, the above and foregoing Motion to Dismiss was mailed to the following counsel of record:

Rachel Lawrence Mor  
Michael J. Blaschke  
S. Randall Sullivan  
Attorneys at Law  
3037 NW 63<sup>rd</sup> Street, Suite 200  
Oklahoma City, OK 73116

Kent B. Rainey  
Rosenstein, Fist & Ringold  
525 S. Main, Suite 700  
Tulsa, OK 74103

A handwritten signature in cursive script, reading "Phyllis L. Walter". The signature is written in black ink and is positioned to the right of the typed names.