

1 send you back to your jury room.

2 Again, do not discuss this case. It wouldn't be
3 appropriate to do so at this time. I will be right back
4 with you in a matter of ten minutes, at the very most.
5 All right. Thank you.

6 JURORS LEAVE COURTROOM 1:25 P.M.

7 RENEWING MOTIONS:

8 BAILIFF: The jury is clear. The door is closed,
9 your Honor.

10 THE COURT: Mr. Mathison, do you have any rebuttal
11 witnesses?

12 MR. MATHISON: I have one, your Honor.

13 THE COURT: Okay.

14 MR. MATHISON: Ms. Hamilton will testify again as a
15 rebuttal witness.

16 THE COURT: Okay. Okay. Well then, what we need to
17 do is let's renew our motions. Let's do this somewhat
18 quickly, again. And then we'll go ahead and bring the
19 jury back to hear your rebuttal witness. Then, I don't
20 see any way we can go over the charge, argue motions, you
21 all argue, me charge, and get this to them by 5:30 in any
22 way, shape, or form today. I can just tell you, as I see
23 it, allowing both of you an hour to argue, as much as I
24 know everyone would like to, I think that what we need to
25 do is, we'll go ahead and get all the testimony and get

1 the rebuttal testimony. And from there, obviously, I
2 could hear motions. We can go ahead and talk about the
3 charge. We can talk about the verdict form, unless
4 anyone has a better idea. And I actually even thought of
5 letting you all argue today, and I could charge in the
6 morning.

7 Again, it's problematic for me that, again, I have
8 my son's graduation tomorrow. So by the time we argue
9 and charge, my thought is, is that if we actually argued
10 and charged tomorrow, that I would bring them in at 9:00.
11 That would put us to probably 11:45 or 12:00 when it got
12 to them. I could run till -- I mean, could literally
13 give them a good, hopefully, four-and-a-half hours or so
14 to deliberate. And then we'd have to break if they
15 hadn't come back by then, and come back on Thursday.
16 What about arguing today?

17 MR. MATHISON: Your Honor, may it please the Court.
18 I would rather argue tomorrow.

19 THE COURT: I'm sure you would rather, but again, to
20 get things done, we may want to go ahead and do that.
21 Okay. Well, let's do this. I think you need to renew
22 your motions at this point. And if you don't mind, we
23 can do pretty summarily.

24 MS. JOLLEY: Your honor, we filed a written motion,
25 for direct verdict. We're happy to, and we've argued

1 previously, we're happy to rely on that argument and
2 submit motion.

3 THE COURT: Okay. As well.

4 MS. JOLLEY: We'll re-submit it at this point.

5 THE COURT: Okay. And that's fine, and I appreciate
6 that. I am back to again, the ASPPPPO defendant on
7 whether or not they committed civil conspiracy.

8 Mr. Mathison, tell me, where did Cary Kelley act
9 under his ASPPPPO authority in any of the actions he took
10 that was put in evidence?

11 MR. MATHISON: I don't think that there's any
12 evidence that specifically identifies his acting or
13 ASPPPPO, as opposed to his acting for CSA.

14 THE COURT: Okay. And again, his authority under
15 ASPPPPO is to enforce covenants, correct? Or ASPPPPO's
16 purpose.

17 MR. MATHISON: ASPPPPO's purpose is to enforce
18 covenants. His authority is general. He's got the
19 authority as a general agent, which is what a registered
20 agent is by definition, to take all lawful ways and means
21 on their behalf to accomplish whatever their objectives
22 are; and to the extent that he's acting for them, to take
23 all unlawful ways and means, which is what we're alleging
24 that he did.

25 THE COURT: Okay. And looking back at the bridge

1 reports, which were my concerns, those are security
2 reports that I understand came from George Breed to Mr.
3 Kelley. They weren't something that he generated. And
4 I can tell you, that, until I saw that, I didn't quite
5 realize that. So I don't know if the jury's confused, as
6 well, but hopefully not.

7 I can tell you, Mr. Mathison, I just don't see in
8 any way Mr. Kelley acted under his ASPPPPO authority. I'm
9 just having a hard time with the civil conspiracy. Was
10 hoping that -- I was hoping that when Mr. Kelley got on
11 here on the stand, and you had an opportunity to cross-
12 examine him, you were going to ask him something about
13 his ASPPPPO hat and what he did, and it just never came.

14 MR. MATHISON: That's true, your Honor.

15 THE COURT: Okay. Well, respectfully, I am going to
16 grant the motion for a directed verdict as to the civil
17 conspiracy claim against ASPPPPO. And I'm assuming, was
18 there still surviving a civil conspiracy claim against
19 CSA, or was that gone, too, already? I mean, obviously,
20 you have to be able to conspire with someone, so.

21 MS. JOLLEY: I believe it was still there, your
22 Honor.

23 THE COURT: Okay.

24 MS. JOLLEY: But --

25 THE COURT: Of course, it doesn't survive if there

1 is no one to conspire with.

2 MS. JOLLEY: Yes, your Honor.

3 THE COURT: Well, actually, that's not true.

4 MR. MATHISON: That's not true, your Honor.

5 THE COURT: That's not true. You can actually sue
6 someone for civil conspiracy, even if you don't name all
7 of the conspirators. So again, you would have to show,
8 Mr. Mathison, who he conspired with. And again, under
9 the same lack of evidence in the case, you haven't showed
10 who he conspired with.

11 MR. MATHISON: I think that you could make a pretty
12 good case that he conspired with the Beaufort County
13 Sheriff's Office. We don't want to make that case, and
14 we're not going to. And under *Angus*, we can't make a
15 case that there was a conspiracy between the municipality
16 and CSA, because, quite frankly, we concede that *Angus*
17 would catch that if we did.

18 THE COURT: Right. Okay. All right. Well,
19 respectfully, then, the civil conspiracy is out as to
20 either or all persons. And what we have left is the
21 defamation cause of action, so.

22 MR. MATHISON: That's --

23 THE COURT: That's what we got.

24 MR. MATHISON: That's where I think we need to be.

25 THE COURT: I think that's what you all have

1 basically put out in front of this jury, quite frankly,
2 so. Okay. Yes?

3 MS. JOLLEY: Your Honor, one question. There's both
4 the libel claim based on the letter, and the slander
5 claim based on the allegation of adultery. And I don't
6 believe there's any evidence in the record linking the
7 allegations regarding adultery between Mr. Jolin and
8 Judge Coffey, to CSA or to George Breed.

9 THE COURT: Mr. Mathison?

10 MR. MATHISON: There very definitely is evidence in
11 the record. There's evidence that Mr. Woods is the
12 person -- Lieutenant Woods is the person to whom this
13 defamation was traced. It's alleged that employees of
14 CSA, not just Breed, engaged in the defamation. We
15 believe that they did it purposefully on his watch.

16 If you remember the testimony of Mr. Waxel, he said
17 he heard it three times at work, right? And --

18 THE COURT: Right.

19 MR. MATHISON: He then communicated --

20 THE COURT: I would agree with you that I think the
21 CSA employees have testified that they perpetuated it.
22 My problem is, is there any slander back to George Breed
23 personally? Because I don't think you made that tie.

24 MR. MATHISON: I don't think --

25 THE COURT: I think there's definitely -- I think

1 there's definitely slander among the CSA employees, like
2 you said, under Woods' testimony.

3 MR. MATHISON: There's direct evidence, which is
4 that Woods more or less admitted it to Mr. Jolin. But
5 there's also indirect evidence that he said it's three
6 times to Waxel, when Waxel was working for Sea Pines
7 Security. And finally, after the third time, Mr. Waxel
8 told it to Mr. Jolin. All right. And then, in addition,
9 other people told Mr. Jolin's wife.

10 THE COURT: Again, how does that get back to Mr.
11 Breed, though, is my question? I agree with you that I
12 think it goes toward slander as to CSA. But remember,
13 we've got two defendants here. We've got CSA and we've
14 got George Breed individually.

15 MR. MATHISON: I think that, with respect to whether
16 he's libel for the slander, it would have to be an
17 inference that was taken from the fact that it went on
18 repeatedly during the period that he was in charge. I
19 realize that each one of the CSA witnesses who've taken
20 the stand have been very careful to say that Mr. Breed
21 didn't know anything about anything. It makes it very
22 difficult for me to comprehend how he holds his job. But
23 they have been very, very careful to say that.

24 If you remember, for example, the testimony of
25 Lieutenant Woods -- excuse me -- I think Lieutenant

1 McNeill, the testimony was to the extent that, shortly
2 after Mr. Jolin thought he'd identify Coffey, everybody
3 at Sea Pines knew that he hadn't. When asked to clarify
4 that specifically, did everybody include Mr. Breed, the
5 testimony was, he couldn't say what Breed knew.

6 THE COURT: Um-hmm.

7 MR. MATHISON: And that's, in fact, the pattern
8 throughout this case, is that you go down one dead end
9 after another looking for Mr. Breed to know anything.
10 There's a reason Mr. Breed didn't testify in this case.
11 I think there's enough circumstantial evidence in the
12 record to establish that this form of malignant
13 denigration of a former employee and sitting judge would
14 not have taken place if Mr. Breed hadn't wanted it to
15 happen. So, I --

16 THE COURT: Wait a minute, though. Don't we have to
17 establish, once again, the slander by actual malice?
18 There has to be actual malice. And if we can't even have
19 him saying it, how in the world do you prove actual
20 malice as to a slander? Am I correct in --

21 MS. JOLLEY: Yes, your Honor.

22 MR. MATHISON: If you're talking about
23 constitutional actual malice? I believe --

24 THE COURT: As to Breed. Yeah.

25 MR. MATHISON: Well, I'm not -- all I'm arguing is

1 that I have a circumstantial case against Mr. Breed, in
2 that multiple officers in his employ were all saying this
3 at the same time, in such a way that it got back to
4 people throughout the community.

5 THE COURT: Um-hmm.

6 MR. MATHISON: If that's not sufficient to impute
7 knowledge to Breed, it's -- there's no question but what
8 Mr. Woods did not say that Breed had told him that.

9 THE COURT: Right.

10 MR. MATHISON: I mean, that's the only person that
11 testified on that specific issue, and he said he didn't
12 say it.

13 THE COURT: Okay.

14 MR. MATHISON: And the only reason I asked him the
15 question is you told me I had to put the words in Breed's
16 mouth.

17 THE COURT: Um-hmm.

18 MR. MATHISON: And I tried, and it didn't work out.

19 THE COURT: Again, I still don't know how you reach
20 the hurdle proving the actual malice and the slander if
21 we don't have it tied to him. I just don't know how a
22 jury could arrive, by clear and convincing evidence, that
23 Breed slandered her. I think, based on the testimony of
24 McNeill and Woods, I think that -- I guess there's a
25 possibility that it could come to the idea that it was

1 done with actual malice. I don't know. I think it's a
2 jury issue. That is at least a jury issue I think that's
3 created. I'm not so sure as to Mr. Breed, though. Yes?

4 MS. JOLLEY: Your Honor, one thing I'd like to say
5 about the --

6 THE COURT: Yes.

7 MS. JOLLEY: -- CSA claim. There's been no evidence
8 that McNeill or Woods acted with any apparent authority
9 from CSA, such that the jury could arrive and say there's
10 clear and convincing evidence that CSA made those
11 comments through these lower officers about something
12 personal about Judge Coffey that no one in a position of
13 control or authority with CSA even knew were being made
14 until this action was filed. That's the testimony in the
15 record.

16 MR. MATHISON: Being able to say that with round
17 eyes is something only Ms. Jolley could do. I think that
18 everyone knew that it was going on, and that's why it was
19 so prevalent. The fact that these are low officers,
20 you've got a gentleman with 29 years of experience and
21 another with 19 years of experience; they have ranks of
22 lieutenant. I think that they are certainly high enough
23 in the chain that, if they're slandering someone, the
24 Community Service Associates ought to be responsible for
25 it.

1 THE COURT: Okay.

2 MR. MATHISON: I think they've got enough -- and
3 there's no question Mr. Waxel heard this slander, not in
4 a night club somewhere. He heard it at work, from people
5 with whom he was working.

6 THE COURT: Okay. Okay. Again, I don't think
7 there's enough to make that claim against Mr. Breed
8 individually, but I do think you can bring it against
9 CSA.

10 MR. MATHISON: One thing I want to show. I want to
11 use the implications of sexual impropriety as additional
12 evidence of constitutional actual malice.

13 THE COURT: Against CSA? Yeah.

14 MR. MATHISON: Yes.

15 THE COURT: I understand that.

16 MR. MATHISON: I mean, I think --

17 THE COURT: I mean, your argument obviously would be
18 is, you know, you couldn't get her fired, so then you
19 attacked her chastity, but.

20 MR. MATHISON: I think that, once they found out
21 Officer Jolin was going to cooperate, it was as much an
22 attack on him as it was on her. It's a standard card
23 that's played, typically, if you want to destroy
24 someone's character in the public eye.

25 THE COURT: Okay. All right. Well, let's do this,

1 then. Respectfully, like I said, I think I am granting
2 the motion as to Mr. Breed, again individually, but not
3 CSA. This makes for a very, very difficult jury charge,
4 you all.

5 MR. HALIO: And the verdict form just got
6 complicated, too.

7 THE COURT: I know. Okay.

8 MR. MATHISON: I believe there's sufficient evidence
9 that it could go to the jury against Mr. Breed.

10 THE COURT: Mr. Breed.

11 MR. MATHISON: But I concede it's only
12 circumstantial. There is, you know --

13 THE COURT: It's just I'm just having a hard time
14 with it has to be proven by clear and convincing
15 evidence, the actual malice portion of it. And so,
16 that's where I'm not so sure the jury can do that, based
17 on the evidence. I don't think they can, based on the
18 evidence they've heard. How do you show that someone
19 acted with malice if we don't even have him saying it?
20 Or even admitting to ever having heard it?

21 MR. MATHISON: I think that the case itself, the one
22 that's cited that is the most pertinent, says that most
23 people who engage in defamation never admit it.

24 THE COURT: Right.

25 MR. MATHISON: And if you can't prove it in some

1 way, other than out of their own mouths, --

2 THE COURT: Right.

3 MR. MATHISON: -- there would be no defamation
4 claims most of the time.

5 THE COURT: I would agree with you, except that the
6 difference in this case is, is that she is a public
7 figure. I mean that's -- a public official. That's
8 where the problem lies for you, I think, and that's why
9 these cases are so difficult.

10 Okay. All right. Well, let's do this then. Let's
11 bring the jury back in, and you can call your rebuttal
12 witness. And then what I propose -- what about you all
13 being able to argue today? I mean, I would love it if
14 you could argue today, considering you both are going to
15 argue for an hour. And I think that's a good use of our
16 time. We come back at 9:00 a.m. in the morning. I'll
17 charge them on the law. Because I'm going to tell you
18 quite frankly, my charges, I'm going to have to go
19 through it yet again. I just can't send it to them
20 today. It's just too late. And I do have one juror that
21 needs to leave by 5:45 today, anyway. So I don't think
22 it's going to be of much use.

23 MR. HALIO: I don't have a problem with that. I
24 would like to get something to eat at lunch. But other
25 than that.

1 THE COURT: Sure. Okay.

2 MR. MATHISON: Your Honor.

3 THE COURT: Yes, sir.

4 MR. MATHISON: Based on what they said yesterday
5 with their witness list, my assumption was we would do
6 the argument and charges tomorrow. I would prefer to
7 have this evening to think about what I'm going to say,
8 instead of basically having to duel with my colleagues
9 here, and think of it at the same time.

10 THE COURT: I'm confident you can do that.

11 MR. MATHISON: Well, but I'm --

12 THE COURT: I'm absolutely confident you can do
13 both. All right. Let's do this. What I'm going to do
14 is, I will -- let's hear the rebuttal testimony. I'm
15 going to send them to lunch. I'm going to tell them to
16 come back, and I do propose that we go ahead and argue
17 today, unless something drastically changes my mind in
18 the meantime. Okay? So that's, I think, how we're going
19 to handle it. So let's go ahead and bring them back in,
20 Al, and --

21 MR. MATHISON: May I have just a moment, your Honor?

22 THE COURT: You need just five minutes?

23 MR. MATHISON: Yes.

24 THE COURT: We're going to take five minutes Al, and
25 then we'll come back. Okay?

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OFF THE RECORD 1:40 P.M.

BACK ON THE RECORD 1:50 P.M.

BY THE COURT:

THE COURT: All right. Okay. And I wanted to ask, Ms. Jones, Mr. Halio, which one of you is going to do the closing argument for you all? Mr. Halio is? Okay.

All right. Well, let's bring the jury back in and you'll call -- you got one rebuttal witness, you said, Mr. Mathison?

MR. MATHISON: I do.

THE COURT: Thank you. All right. Let's bring them in.

BAILIFF: Yes, your Honor.

JURORS ENTER COURTROOM 1:51 P.M.

BAILIFF: The jury is entering, your Honor.

THE COURT: Thank you. Ladies and gentlemen of the jury, I know it's running late, and I know you all are hungry. But at this point, we do have one rebuttal witness, so I was hoping to go ahead and get that witness up, and then we'll go ahead and break for lunch.

All right? Mr. Mathison.

MR. MATHISON: The plaintiff would call Ms. Sherry Hamilton, please.

THE COURT: Come on forward, Ms. Hamilton.

WITNESS SWORN.

1 SHERRY HAMILTON, ON REBUTTAL

2 DIRECT EXAMINATION, MR. MATHISON:

3 Q Ms. Hamilton, you offered testimony during the
4 plaintiff's case in chief; didn't you?

5 A Yes, sir.

6 Q I believe it was on Wednesday. Isn't that correct?
7 Last Wednesday. It's been quite a while.

8 A It was one day last week, sir.

9 Q Were you here this morning when Mr. McSwain
10 testified?

11 A No, sir.

12 Q Do you know whether Captain Toby McSwain made an
13 appointment to come and visit Judge Coffey in 2004?

14 A I can't recall 2004. I can give you speculation. My
15 speculation is --

16 MS. JONES: Your Honor, I object to speculation.

17 A Okay.

18 THE COURT: Okay.

19 A That's okay.

20 BY MR. MATHISON:

21 Q Let me ask you this --

22 A Yes, sir.

23 Q In 2004, was Judge Coffey the principal judge, or was
24 she an associate judge?

25 A She was an associate judge.

1 Q And her office, was it at the end of the hall in the
2 municipal court? That is the main judicial office?

3 A Her office back in 2004 was not where it is now.

4 Q Right. The person in that office in the very back as
5 you go down the hall and turn right, that was Judge
6 Herring; wasn't it?

7 A That is correct, sir.

8 Q And where was her office in relation to coming in the
9 door?

10 A Well, you entered into my office. I shared an office
11 with another secretary. There were two desks and a space
12 about ten by ten. And you had to come -- we had to open
13 the door, they walked between the desks, back to a --
14 back to what we call our file room, because that's where
15 all the file cabinets were. And she had one of those
16 little portable desks like kids use in college.

17 Q Um-hmm.

18 A She had one of those kind of desks. She had no
19 window, and the door wouldn't shut.

20 Q So her office was filled with filing cabinets, had a
21 little desk and a chair. Is that right?

22 A That is correct, sir.

23 Q And there were no windows.

24 A Absolutely, yes, sir. That's correct.

25 Q And anybody getting in there had to walk right by

1 whom?

2 A Me and the other secretary, Lisa.

3 Q Did you ever see Toby McSwain in 2004, anywhere near
4 your office, going toward what you just identified as
5 basically a file room, which is where my client had set
6 up shop?

7 A I don't ever remember Toby McSwain coming in, except
8 in the courtroom itself. He would come in the courtroom,
9 because he would have cases from time to time. But to
10 walk in our office and sit down with Judge Coffey in the
11 back, I don't ever remember that.

12 Q Do you remember Mr. McSwain ever making an
13 appointment in 2004 to come see Ms. Coffey?

14 A That, I don't recall at all, sir.

15 MR. MATHISON: Thank you. Excuse me, one second.

16 Thank you, Ms. Hamilton.

17 THE COURT: Anything?

18 MR. HALIO: If it please the court.

19 THE COURT: Yes, sir.

20 SHERRY HAMILTON, ON REBUTTAL

21 CROSS-EXAMINATION, MR. HALIO:

22 Q I would imagine, like everybody else, you take
23 vacation, and you get sick, and take lunch, and you go on
24 breaks, and that sort of stuff, right?

25 A Well, thank Lord I haven't been sick lately, and

1 don't take breaks, and I don't take lunch. I eat at my
2 desk. I do take vacations.

3 Q Okay. So you're not in the office 24/7, 365 days a
4 year.

5 A 24/7 365 days, no, sir.

6 MR. HALIO: Okay. Thank you.

7 THE COURT: Anything further?

8 SHERRY HAMILTON, ON REBUTTAL

9 RE-DIRECT EXAMINATION, MR. MATHISON:

10 Q Are there windows in the main judge's office?

11 MR. HALIO: Objection. This is not proper re-
12 direct. We didn't talk about the layout of the office.

13 MR. MATHISON: I'm sorry.

14 THE COURT: You are a bit outside the scope.

15 MR. MATHISON: I'm finished, your Honor.

16 THE COURT: Okay.

17 MR. MATHISON: Thank you very much.

18 THE COURT: All right. Ms. Hamilton, you may step
19 down.

20 A Thank you.

21 THE COURT: Mr. Mathison, at this time, do you rest?

22 MR. MATHISON: I do, your honor.

23 PLAINTIFF RESTS.

24 BY THE COURT:

25 THE COURT: All right. Ladies and gentlemen of the