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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. D. Morgan, Jr., Circuit Court Judge

Case No. 2019-CP-23-01522
Appellate Case No. 2024-000931

Samantha Katchick Respondent,

v.

Marshall Alexander Chapman, DMD, Brooke I. Chapman, Chapman Dental, P.A., Douglas P. Schmieding, CPA, Jennings Cook & Co., CPAs, PA, and Earl A. Simmons, CPA, Defendants,

of which Marshall Alexander Chapman and Chapman Dental, P.A. are the Appellants.

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STATEMENT OF THE CASE

This is an appeal from a terminated employee's verdict in her favor over the circumstances surrounding missing money from her employer. The Respondent, Samantha Katchick, filed a Complaint on March 25, 2019 against her former employer, Marshall Alexander Chapman, DMD, his wife Brooke I. Chapman, and Chapman Dental, P.A.[1] The Complaint alleged causes of action arising from the police investigation of missing money under her supervision and her subsequent arrest, including false imprisonment, malicious prosecution, and defamation, among others. Appellants answered and counterclaimed alleging malicious prosecution.

The case proceeded to trial by jury on April 22, 2024 before circuit court Judge G. D. Morgan, Jr. The case was bifurcated for purposes of punitive damages. Previously, Appellants moved unsuccessfully for summary judgment. Appellants unsuccessfully moved for a directed verdict at the close of the Respondent's case-in-chief and at the close of the evidence. On April 24, 2024, the jury returned a verdict in favor of Respondent. The jury awarded actual damages of $30,616 for false imprisonment, $49,001 for malicious prosecution, and $22,800 for defamation *per se*.

Appellants unsuccessfully objected to the case proceeding to the punitive damage stage. The jury then awarded punitive damages of $30,590 for false imprisonment, $25,000 for malicious prosecution, and $15,000 for defamation *per se*. The total verdict against Appellants was $277,417.00.

The Appellants thereafter filed post-trial motions including for judgment notwithstanding the verdict (JNOV), or alternatively a new trial absolute or new trial *nisi remittitur*. (R. --)

[1] Respondent filed an Amended Complaint on December 11, 2020 additionally naming Douglas P. Schmieding, CPA, Jennings Cook & Co., CPA's, PA, and Earl A. Simmons, CPA. Respondent settled with Schmieding, Jennings Cook, and Simmons prior to trial. Directed verdict was granted in favor of Brooke Chapman at trial.

Appellants also moved for a set-off on May 7, 2024 for prior settlements in the case. (R. ---) On May 8, 2024, Respondent filed her response in opposition.

The lower court issued a form order filed May 16, 2024 without a hearing, denying Appellants' motion for JNOV or alternatively for a new trial absolute or new trial *nisi remittitur*, but granting Appellants' motion for a $40,000 setoff. Written judgment of the jury verdict was entered June 3, 2024.

Appellants filed a timely appeal to this Court on June 4, 2024.

STATEMENT OF THE FACTS

The proper question for the jury was not whether Appellants were ultimately correct regarding Respondent taking money or even correct as to any of the information presented to Sheriff's Investigator Turner. Rather the proper question was (1) whether Dr. Chapman provided Sheriff's Investigator Turner with his good faith belief of the facts[2]; (2) whether he induced the police to unlawfully arrest the Respondent;[3] and (3) whether the facts within his knowledge would lead a reasonable person to believe Respondent was responsible for the missing money.[4] Appellants were not required to conduct a full investigation to verify the information they had gathered before going to the police.

The lower focused largely on the word "responsibility." Appellants used that term to describe Respondent's job duties, as she was responsible for the cash flow into the practice, whether through insurance providers or patient payment. She was also responsible for depositing funds into the bank. The proverbial buck stopped with her when it came to accounting for all funds

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[2] *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 272, 826 S.E.2d 609, 615 (2018) citing *Brice v. Nkaru*, 220 F.3d 233, 238 (4th Cir. 2000).
[3] *Sunshine Recycling, supra*, 426 S.C. at 273, 826 S.E.2d at 615, citing *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944).
[4] *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980).

coming into the practice. When it was discovered that money was missing, she was terminated. This solved the problem as no money was missing after she left the practice.

Third parties over whom Appellants had no control would later state Respondent had "sole control" over the funds. There is no evidence Appellants ever stated this to anyone. At trial Respondent wrongfully argued Appellants told police Respondent was "responsible" for missing money from the practice using the term in a legal sense. There is also no evidence that Appellants conveyed this to the police. What follows are summaries of the important facts of this case.

Respondent Comes to Work for Chapman Dental

Dr. Alex Chapman started Chapman Dental (collectively the Appellants) in 2013. (Tr. p. 441, ll. 20-21) The practice used Eaglesoft software which is a computer program that provides a practice management system that includes both patient records and accounting. The system is used to file insurance claims, post payments, and generate statements for patients. (Tr. p. 410, ll. 2-11). Respondent was hired as the Office Manager in December of 2013. (Tr. p. 235, ll. 12-16).

Respondent's Responsibilities

By all reports, Dr. Chapman liked and had a good relationship with Respondent and he trusted her as the Office Manager (Tr. 444, ll. 12-18). Her responsibilities included determining how much patients needed to pay, collecting amounts owed, submitting insurance claims, recording and depositing funds in the bank (Tr. 442, l. 16-p. 443, l. 1). If another employee took a payment from a patient (no other employee made deposits), Respondent still was responsible for making sure it was deposited and accurately recorded (Tr. p. 443, l. 7-17).

Respondent was also the only employee responsible for taking deposits to the bank (Tr. p. 442, l. 16-p. 443, l. 1; p. 443, ll. 7-17). Deposits were made on a weekly basis (Tr. p. 280, ll. 3-7). Only on rare occasions might Dr. Chapman take a deposit to the bank (Tr. p. 120, ll. 22-23).

Respondent even admitted at trial that she was the employee responsible for handling the money for the dental practice (Tr. p. 279, ll. 5-7).

Respondent is Terminated

Brooke Chapman began working at the practice in January of 2017 (Tr. p. 408, ll. 2-3; 21-23). Her role included answering phone calls, scheduling patients, filing insurance claims, and collecting payments (Tr. p. 409, ll. 3-8). Shortly after arriving, Brooke ran a payment reconciliation in Eaglesoft for a bank deposit and was unable to get it to balance (Tr. p. 409, l. 19-p. 410, l. 1). This testimony undercuts Respondent's claim that despite having worked with Eaglesoft for more than three years, she did not have a method to reconcile deposits (Tr. p. 280, ll. 9-11).

The practice was experiencing a high number of unpaid insurance claims and patients that owed money. These were Respondent's responsibility (Tr. p. 444, l. 21-p. 445, l. 3). It was also discovered that Respondent had placed members of her family on an unapproved monthly payment plan of $25 that would have taken six or seven years to pay off (Tr. 436, ll. 16-20). Despite liking and being close to Respondent, Dr. Chapman had no choice to terminate her in March of 2017 (R. -, Ex. 12). He explained Respondent was terminated due to negative discrepancies between the collections and the deposits. (Tr. 455, ll. 16-20). There was money missing and she was responsible for the money in the office.

The same morning she was terminated, Respondent called a fellow employee and told her she had been fired for allegedly stealing money. (Tr. p. 111, l. 21-p. 112, l. 1). This employee later asked Dr. Chapman the reason, and she testified that Dr. Chapman did not tell her she had stolen from the practice. She admitted he never mentioned Respondent stealing money after she asked him about Respondent's termination. (Tr. p. 117, ll. 2-16).

Appellants Gather Information Regarding the Financial Discrepancies

Following Respondent's termination, the negative discrepancies between the Eaglesoft reports and bank statements ceased (Tr. p. 412, ll. 5-7; p. 445, ll. 8-13). Appellants did not jump to conclusions but rather attempted to determine the cause. In October of 2017, Appellants asked Simmons, a Certified Public Accountant, to compare bank records with printouts from Eaglesoft (Tr. p. 368, ll. 7-9). In making the comparison, he found a negative discrepancy indicating money reported to Eaglesoft was not deposited into the bank account (R. – Ex. 6).

Appellants sought a second opinion from Schmieding, the CPA at Jennings Cook, who performed a calculation that showed $3,505.19 was missing (Tr. p. 173, ll. 9-17; p. 174, ll. 16-23). Jennings Cook's letter dated November 14, 2017 clearly stated it was a calculation (R. - Ex. 9).

Respondent's own expert, O'Shea,[5] agreed at trial that there was a negative discrepancy between what was entered and the amount deposited (Tr. p. 355, l. 20- p. 356, l. 4). He couldn't offer an opinion that no money had been taken (Tr. p. 356, ll. 13-17; p. 361, ll. 17-24). He further agreed that an employee taking cash from the practice could cause the discrepancy (Tr. p. 357, ll. 7-10; p, 359, ll. 10-12). O'Shea also agreed that Dr. Chapman legitimately believed that money was being taken from the practice based on the discrepancies (Tr. p. 360, ll. 8-14).

Dr. Chapman Goes to the Police for Assistance

The CPAs Appellants consulted were not able to explain the cause of the missing money so they went to the police for assistance (Tr. p. 446, ll. 14-18). Dr. Chapman took the information to the Greenville County Sheriff and spoke with White Collar Crime Investigator Turner (R. -, Ex. 12 & 13). Turner has a banking background and is familiar with financial transactions (Tr. p. 136,

[5] O'Shea had a vested interest in Respondent winning the case, because he would not get paid unless she won. (Tr. p. 351, l. 14 – p. 352, l. 23).

ll. 3-8). Dr. Chapman explained that there was money missing from his practice and that he didn't understand what happened. He explained how his office worked and identified the employee (Respondent) who had responsibility for the money (Tr. p. 447, l. 22- p. 448, l. 12). Turner understood that Respondent was solely responsible for depositing money in the bank (Tr. p. 136, ll. 9-16). Dr. Chapman also informed Turner the discrepancies stopped after Respondent's termination (R. – Ex. 12).

A question arose at trial concerning how the information provided by Dr. Chapman was characterized. Investigator Turner testified that he "took it [the Jennings Cook work] to be" an "audit;" (Tr. p. 132, ll. 2-5) however, Chapman provided Turner with Jennings Cook's letter that clearly stated it was only a "calculation" (R. – Ex. 12). Turner mistakenly testified that he thought the financial chart in the packet was part of the letter from Jennings Cook (Tr. p. 132, ll. 9-17, Ex. 12). He admits that he made that assumption because the documents were in the packet together (*Id.*).

Dr. Chapman did not request, direct, or demand that Respondent be arrested or even brought in for questioning (Tr. p. 448, ll. 11-16). Dr. Chapman only conveyed to Investigator Turner he was "eager to have it looked at" [the discrepancy] (Tr. p. 132, l. 20 -. p. 133, l. 1). He never repeatedly contacted Turner nor pushed him for an arrest (Tr. p. 449, ll. 5-15; p. 450, ll. 8-16).

Investigator Turner Investigates the Case and Seeks a Warrant

Turner focused his investigation on who was responsible for taking the deposits to the bank (Tr. p. 148, l. 6-19). It did not matter that another employee may have occasionally received money from a patient unless there was evidence that person kept the money rather than entering it into the software (Tr. p. 148, 13-16). The fact the Eaglesoft system showed more money entered than

deposited indicated that was not the case. (Tr. p. 142, ll. 2-17). Investigator Turner was also aware that deposits were kept in an unlocked drawer in an open office, where they could potentially be accessed by others (Tr. p. 140, ll. 4-7; p. 159, ll. 7-9).

Turner contacted Respondent to find out her side of the story (Tr. p. 152, ll. 9-22). However, she was belligerent and difficult, and told him nothing: the conversation was not productive (Tr. p. 153, l. 5- p. 154, l. 2; Ex. 12). Respondent thus provided Turner with no information to assuage Appellants' concerns. Since white collar crime is different from more violent crimes, it was not uncommon for a suspect to cooperate and give their side of the story (Tr. p. 139, ll. 5-17).

Turner learned there had been other concerns regarding Respondent and proper handling of account balances with members of her family and that the issue had gone to Magistrate Court (Tr. p. 142, l. 22-p. 143, l. 1; Ex. 12). Turner (on his own) contacted Magistrate Ford regarding Respondent's family's non-payment under an unapproved payment plan. (Tr. p. 143, l. 25-p. 144, l. 12). He also contacted the head of the white collar unit of the Solicitor's Office regarding the missing funds and Respondent's potential culpability. (Tr. p. 144, ll. 15-22). The purpose of Turner's communication was to seek her advice regarding whether probable cause existed to issue a warrant against Respondent. (Tr. p. 145, l. 13-p. 146, l. 7).

Turner testified the Assistant Solicitor was comfortable with a warrant being signed if there was any evidence in the Magistrate case that Respondent had not properly collected fees for services rendered to her family (*Id.*) and she agreed that a warrant was appropriate (Tr. p. 155, ll. 24-25). This input played a large part in Turner's decision to pursue the warrant based on probable cause (Tr. p. 150, ll. 14-22). It was only after conducting his own investigation and speaking with the Solicitor's office that Turner sought a warrant for Respondent's arrest. This was his decision,

not Dr. Chapman's.

A Facially Valid Warrant is Issued

Investigator Turner, after having the Assistant Solicitor agree, sought a warrant for Respondent's arrest (R. - Ex. 2). He filled out an affidavit that stated the conclusion he reached in his investigation (R. - Ex. 2). The warrant was issued for Respondent's arrest on February 7, 2018 (R. - Ex. 2), following several months of investigation. The warrant was regular in format and was issued by a court with the authority to grant it (R.- Ex. 2). All of the procedures required for the proper issuance of the warrant had taken place (R. - Ex. 2).

Respondent was notified that a warrant had been issued for her arrest. Although she had initially refused to cooperate with the Sheriff's Department, Respondent voluntarily reported with her lawyer and was booked and released (Tr. p. 253, l. 17 – 254 l. 14). She was never put in a prison suit nor shackled. (*Id.*)

Probable Cause is Also Found by a Judge

Then, a Preliminary Hearing was held on March 26, 2018 (R. -Ex. 13). It was Investigator Turner who used the term sole "control" at the preliminary hearing and Appellants did not testify (R. -- Ex. 13). For a second time, probable cause was found and the judge bound the matter over for trial, thus confirming the facially valid warrant (R. - Ex. 13)

The Case Eventually Gets Dismissed

The Solicitor's office investigated the case and determined, for a third time, that there was probable cause to continue with the prosecution. Then, eight months later, the charges were dismissed (R. - Ex. 21). There is no evidence Appellants requested the Solicitors' office to continue with the matter, nor did they object to the dismissal (Tr. 452, ll. 20-22).

Allegations of Defamation

Respondent testified she began working for Greenville Orthodontics Group in April of 2017, shortly after her termination. (Tr. p. 246, ll. 14-16). When Respondent was informed that a warrant had been issued, she informed her new employer. (Tr. p. 102, ll. 14-16). Respondent herself made the allegations known to her employer. He testified that he was made aware of the arrest by his HR department. (Tr. p. 106, ll. 19-22).

Respondent filed suit on March 25, 2019, bringing causes of action for false imprisonment, malicious prosecution, and defamation, among others. Brian Smith (a former acquaintance of Dr. Chapman) testified at trial that after the lawsuit was filed, Dr. Chapman spoke with him about it. (Tr. p. 224, ll. 10-11; 13-16). Smith had no association or relationship with Respondent at the time (R. p. 227, ll. 18-21). Smith was vague regarding the timing of the conversation, giving an approximate year and time of year. He was also vague as to what was said or the context when he testified Dr. Chapman stated the Respondent stole from the practice (Tr. p. 199, ll. 11-16; p. 224, l. 10-p. 225, l. 1).

ARGUMENTS

I. THE LOWER COURT ERRED IN FAILING TO GRANT APPELLANTS MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO FALSE IMPRISONMENT

A. Standard of Review

"When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court." *Byrd as Next Friend of Julia B. v. McLeod Physician Assocs. II* , 427 S.C. 407, 412–13, 831 S.E.2d 152, 154 (Ct. App. 2019) (quoting *Wright v. Craft* , 372 S.C.1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006)). The court is required to view the evidence and

inferences that reasonably can be drawn in the light most favorable to the non-moving party. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002).

"When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law." *McKaughan v. Upstate Lung & Critical Care Specialists, P.C.*, 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) quoting *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010).

In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996).

Whether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The lower court must make such a determination before submitting the issue to the jury. When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. This review is necessary due to the unique character of the interest protected by the actual malice standard. *Id.* at 477, 629 S.E.2d at 670-71 (citations and internal quotation marks omitted).

B. The Lower Court's Denial of a Directed Verdict as to False Imprisonment Was an Error of Law When a Facially Valid Warrant had Been Issued

The lower court erred, as a matter of law, when it failed to grant a directed verdict in Appellants' favor as to false imprisonment. Although this cause of action overlaps with malicious prosecution, there is no false imprisonment if a facially valid warrant has been issued for the arrest.

Carter v. Bryant, 429 S.C. 298, 306, 838 S.E.2d 523, 528 (Ct. App. 2020).

The lower court failed to apply the long-held doctrine that one arrested pursuant to a facially valid warrant has no cause of action for false arrest. *See Carter, supra*, 429 S.C. at 306, 838 S.E.2d at 528; *Seabrook v. Town of Mount Pleasant*, 432 S.C. 441, 853 S.E.2d 508 (Ct. App. 2020); *Bushardt v. United Inv. Co.* , 121 S.C. 324, 330, 113 S.E. 637, 639 (1922) ("It has been definitely decided in this jurisdiction that where one is 'properly arrested by lawful authority,' 'an action for false imprisonment cannot be maintained against the party causing the arrest.'"). A facially valid warrant that later is found to lack probable cause does not make the initial arrest unlawful for the purposes of the tort of false arrest. Otherwise, the doctrine of facial validity would be extinct. *Carter*, *supra,* 428 S.C. at 307, 838 S.E.2d at 528.

Respondent incorrectly argued in response to Appellants' motion for JNOV that the defense of a facially valid warrant only applies to law enforcement and not to private individuals (R. -). This overlooks the fact that *Carter* favorably cites *Bushardt* in support. *Carter*, 429 S.C. at 306, 838 S.E. 2d at 528. The defendant in *Bushardt* was a private company. The arrest was made by a police officer with the only connection to the defendant being the "identification, accusation, and request for arrest made by its employee." *Bushardt,* 121 S.C. at 331, 113 S.E. at 639-40. The Court held the test to be applied "is the same as if this action for false imprisonment had been brought against the officer . . . alone." *Id.* Thus, the defense applies equally to private individuals.

Even if a jury question exists as to probable cause, which Appellants deny, the remedy is to sue for malicious prosecution, not false arrest. *Carter, supra*, citing *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996):

> At common law, allegations that a warrantless arrest or imprisonment was not supported by probable cause advanced a claim of false arrest or imprisonment. . . . However, allegations that an arrest made pursuant to a warrant was not supported

> by probable cause, or claims seeking damages for the period after legal process issued, are analogous to the common-law tort of malicious prosecution.

See generally Patrick Hubbard & Robert L. Felix, *The South Carolina Law of Torts* 455, 464 (4th ed. 2011)("The distinguishing factor of the tort of false imprisonment, is that, unlike either [malicious prosecution or abuse of process], it cannot, by definition, involve a lawful arrest or detention.").

Appellants presented undisputed evidence at trial of a facially valid warrant (R.-, Ex. 2). The facially valid inquiry is not an invitation to look beyond the language of the warrant, which need only contain information given under oath that "plainly and substantially" sets forth the offense charged. S.C. Code Ann. § 22-3-710 (2007). The warrant sets forth the offense of breach of trust: Respondent, who was employed by Chapman Dental and responsible for making deposits for the practice, took money from the practice. The warrant is, therefore, valid on its face. Appellants therefore respectfully request this Court reverse the lower court's denial of directed verdict and JNOV regarding false imprisonment.

C. No Reasonable Inference Can be Drawn That Appellants Requested, Directed, or Commanded an Unlawful Arrest

The lower court should have granted a directed verdict after determining a facially valid warrant was issued. Additionally, no reasonable inference could be drawn from the evidence presented that Appellants induced, requested, directed, or commanded Respondent's arrest.

South Carolina recognizes a cause of action against a private individual for false imprisonment if they "induce[d] an officer by request, direction or command to unlawfully arrest another." *Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 272, 826 S.E.2d 609, 615 (2018) citing *Wingate v. Postal Tel. & Cable Co.*, 204 S.C. 520, 528, 30 S.E.2d 307, 311 (1944).

There is no evidence in the record that Appellants "induced" Sheriff Investigator Turner to

unlawfully arrest Respondent. The lower court overlooked Turner's testimony that he pursued his own investigation after receiving the initial information from Appellants (Tr. p. 126, l. 16 – p. 127, l. 2). At no time did Appellants request, direct, or command Investigator Turner to arrest Respondent.

The Supreme Court in *Sunshine Recycling* cites three false imprisonment cases that illustrate the type of behavior that could subject a private individual to liability. This case is markedly different from the cases referenced in *Sunshine Recycling.* In all three, the defendants requested or facilitated the detention of the plaintiffs. Appellants in this case only brought a concern regarding missing funds, along with the information they had gathered, to Investigator Turner.

Sunshine Recycling first cites *Wingate, supra.* Wingate owned a grocery store. She sent two young men on an errand. The young men drove past the office of appellant, Postal Telegraph, and "hollered at" an employee of appellant. The employee claimed to the police that the young men tried to take a telegram from him. He requested they be arrested. Wingate drove her car to the market the next day where a police officer said: "Whoever is in the car is under arrest *** you are the one I am looking for." After a brief discussion, an officer released her.

Wingate sued for false imprisonment, and testified the Postal Telegraph manager told her "the boy came in and complained, and he said he told him to go and have the car picked up, and the people." This Court on appeal found the direction given by the manager to "have the car picked up and the people" was sufficient evidence of Postal Telegraph instructing the police to detain. Unlike *Wingate*, no evidence was presented in this case that Appellants instructed Investigator Turner to detain Respondent or to have her arrested.

Importantly, the Court in *Wingate* held:

> [i]f respondent was arrested by the police officers on their own volition, neither the messenger boy nor his employer could be held liable. Where a person merely directs the attention of a police officer to what he supposes to be a breach of the peace, or gives to such officer facts indicating such, and the officer, without other direction, arrests the offender on his own responsibility, the person who did nothing more than communicate the facts to the officer is not liable for causing the arrest . . . . *Id.* 204 S.C. at 528, 30 S.E. 2d at 311.

This is precisely the circumstances in the present case. Appellants merely directed the attention of Investigator Turner to what they believed to be a breach of trust. Investigator Turner stated only that Appellants were "eager to have it looked at" (Tr. p. 132, l. 20 - p. 133, l. 1). Wingate further held:

> Where a person has information or knowledge that the law has been violated, he not only has a right, but frequently it is his duty, to communicate such information or facts to the proper officer so as to give such officer the opportunity, if in his judgment it is proper to do so, to take whatever steps may be necessary to apprehend the offender. As said in *Burton v. McNeill*, 196 S.C. 250, 13 S.E.2d 10, 11 [(1941)] 133 A.L.R. 603, "Those who honestly seek the enforcement of the law *** and who are supported by circumstances sufficiently strong to warrant a cautious man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages." *Id.* at 204 S.C. at 528, 30 S.E.2d at 311.

Turner then conducted his own investigation, consulted with the Solicitor's Office and sought the warrant for Respondent's arrest of his own volition. The lower court erred in finding the jury could make a reasonable inference of false imprisonment in light of Turner's testimony.

Sunshine Recycling next cites *Whitmire v. Publix Theatre Corp.*, 164 S.C. 487, 162 S.E. 753 (1931). Lela Whitmire went into the ladies' restroom in defendant's theatre. A complaint was made to the cashier that a man dressed as a woman was in the rest room. The cashier went into the restroom to investigate. Whitmire's manner of dress and size caused the ladies in the rest room to suspect that she was a man. While the cashier was in the rest room, Whitmire left the building.

Defendant's agent Campbell heard the complaint. He called a policeman and pointed out

Whitmire, told him about the complaint, and asked him to tell her he wanted to see her. The policeman took Whitmire back to the theatre and remained with her until Campbell was satisfied that she was a woman. Unlike *Whitmire*, Appellants did not instruct Investigator Turner to detain Respondent.

Finally, *Sunshine Recycling* cites *Falls v. Palmetto Power & Light Co.*, 117 S.C. 327, 109 S.E. 93 (1921). Palmetto sold electrical appliances. An electric fan was stolen. Electric fans had been offered for sale that night to Howard at his restaurant, who described the seller (Falls). Howard later saw an individual he believed to be the seller (Falls). He advised Palmetto that the man was at the depot.

Hodges, a Superintendent of Palmetto, was an active participant in Falls' arrest. He took the officer in his car to the place of arrest. Falls had left, but Hodges watched Falls' baggage for his return. After he returned, Hodges took Falls and the officer to look for Howard. Falls was only released after Howard failed to identify him. The court found there was abundant evidence from which the jury might have inferred that Hodges was the effective manager of the entire proceedings, thus binding Palmetto.

Appellants did not take Investigator Turner to arrest Respondent, nor did they request that she be detained or taken in for questioning. Dr. Chapman testified he did not tell Investigator Turner he wanted anyone arrested (Tr. p. 448, ll. 13-16). This is supported by Turner's testimony that Appellants only conveyed they were "eager to have it looked at" (Tr. p. 132, l. 20 - p. 133, l. 1). He did not repeatedly contact Turner to ask how the case was progressing, nor did he ask if an arrest had been made.

Regarding the magistrate case against Respondent's family, Investigator Turner was clear: Appellants "were just bringing it to my attention that there were other accounts that were being set

up allegedly by her where, basically, family were getting free services" (Tr. p. 133, l. 13- p. 134, l. 4). Turner decided on his own to further investigate this matter (Tr. p. 145, ll. 13-19; Ex. 12). He talked with the magistrate before requesting a timeline of events from Brooke Chapman (Tr. p. 143, l. 25-p. 144, l. 12). He also spoke with the Solicitor's Office (Tr. p. 144, ll. 15-22). Turner agreed his purpose was to seek advice regarding probable cause (Tr. p. 145, l. 13-p. 146, l. 4). Turner further agreed that the Assistant Solicitor was comfortable with a warrant being signed if there was evidence in the magistrate case that Respondent had not properly collected fees for services rendered to her family. (Id.) This input played a large part in Turner's decision to pursue the warrant (Tr. p. 150, ll. 14-22).

The only reasonable inference to be drawn from the evidence and testimony presented at trial is that Appellants did not induce, direct, or command Investigator Turner to arrest Respondent. Turner, not Appellants, managed the investigation and made the decision to seek a warrant for Respondent's arrest. Appellants therefore respectfully request this Court to reverse the lower court's decision and grant a directed verdict as to false imprisonment in favor of Appellants.

D. No Reasonable Inference Can be Drawn That Appellants Provided Knowingly False Information

The question to be asked regarding Respondent's false imprisonment is whether Dr. Chapman "provided the police with his honest or good faith belief of the facts." *Sunshine Recycling, supra.,* 426 S.C. at 272, 826 S.E.2d at 615. There was not more than one inference that could be drawn by the jury on this issue: he did.

The lower court erred in failing to apply the holding in *Sunshine Recycling* that there is no duty for Dr. Chapman to investigate and analyze evidence in the same manner as law enforcement. He does not have to conduct an investigation in order to verify the information provided. As this Court stated in *Sunshine Recycling*:

> To interpret Wingate in such a manner would improperly subject witnesses and victims, who act in good faith when assisting law enforcement, to civil liability. *Id.*

An individual is only liable for false imprisonment when he or she acts in bad faith or knowingly reports incorrect information to law enforcement. *Id.*, 426 S.C. at 274, 826 S.E.2d at 616.

The question was not whether Appellants were ultimately incorrect regarding whether Respondent took money from the practice or even whether they were incorrect as to any of the information presented to Investigator Turner. The question is whether the evidence presented yielded a reasonable inference that Appellants presented knowingly incorrect information or did so in bad faith. *Id.* The lower court, and ultimately the jury, were clearly influenced by this misapprehension of the law.

Further, Dr. Chapman should not be held to be the guarantor of the accuracy of the identification of Respondent in the warrant as being "solely responsible for collection money from patients and making bank deposits..." (R., Ex. 2) There is a public policy favoring cooperation with law enforcement investigations. *Id.* Again, as quoted by the Supreme Court in *Sunshine Recycling*:

> In sum, we find the court of appeals' decision goes too far and risks chilling public cooperation with law enforcement investigations... *Turner v. Mellon*, 41 Cal.2d 45, 257 P.2d 15, 17-18 (1953) ("The victims of crimes should not be held to the responsibility of guarantors of the accuracy of their identifications... A view contrary to that ... would, we think, inevitably tend to discourage a private citizen from imparting information of a tentative, honest belief to the police and, hence, would contravene the public interest which must control.") 426 S.C. at 274; 826 S.E.2d at 615-16.

Dr. Chapman should not be held to such a high standard: he thought money was missing and imparted "information of a tentative, honest belief to the police." Therefore, Appellants' denial of directed verdict and/or JNOV for false arrest should be reversed. If upheld, this would risk chilling public cooperation with law enforcement investigations.

1. It was not knowingly incorrect for Appellants to use the term "solely responsible"

The Court in *Sunshine Recycling* cited the Fourth Circuit stating, "the critical question is whether the witness provided the police with his honest or good faith belief of the facts." *Id.* citing *Brice v. Nkaru*, 220 F.3d 233, 238 (4th Cir. 2000). Again, the Fourth Circuit noted, "we are aware of no authority supporting the novel proposition that a witness, by honestly providing information to a law enforcement official, may be held responsible for the official's execution of his independent duty to investigate." *Id.*

Much was made at trial of Dr. Chapman's report to Investigator Turner that Respondent was "solely responsible" for collecting payments and making bank deposits. Dr. Chapman testified he told Investigator Turner there was money missing and that he didn't really understand what happened. He explained how his office worked and identified for Turner the employee who was responsible for the money (Tr. p. 447, l. 22- p. 448, l. 12).

As Dr. Chapman testified, it was Respondent's duty as Office Manager to oversee the collection and recording of money even if another employee actually received it from a patient. She was also responsible for taking deposits to the bank (Tr. p.442, l. 16-p. 443, l. 1; p. 443, ll. 7-17), which she admitted at trial (Tr. p. 279, ll. 5-7).

Breach of trust involves a person who has the right to initially receive money but fails to provide it to their employer. Investigator Turner testified that his concern was who was responsible for taking the deposits to the bank (Tr. p. 148, l. 6-19). The only evidence before the jury was that the deposits did not match the Eaglesoft reports, which they would have if someone took funds at the point of receipt from patients and failed to enter it into Eaglesoft. (Tr. p. 142, ll. 2-17). This supported a reasonable belief that money went missing after it was entered into Eaglesoft.

Respondent admitted she was responsible for making the bank deposits (Tr. p. 279, ll. 16-18). This was confirmed by Brooke Chapman (Tr. p. 432, ll. 20-25) and Angela Hawthorne (Tr. p. 120, l. 7-p.121, l. 9).[6] The lower court itself suggested there was no evidence someone else took deposits to the bank (Tr. p. 394, ll. 5-13).

Dr. Chapman never reported Respondent had "sole control" over the money. It was Turner who used the term "sole control" at the preliminary hearing (R. - Ex. 13, Tr. p. 150, l. 23- p. 151, l. 3). Appellants did not mislead Turner as to who had access to the money. Turner admitted he was aware deposits were kept in an unlocked drawer in an open office, where they could potentially be accessed by others (Tr. p. 140, ll. 4-7; p. 159, ll. 7-9).

Even if Appellants used the term "solely responsible," it was used in good faith as Respondent's role as Office Manager made her the person responsible for receipt and deposit of funds. Even if a jury found that term to be imprecise, it was not knowingly incorrect. As the Court noted in *Sunshine Recycling*, "we find punishing an individual who . . . unwittingly provides what is later discovered to be incorrect information in a criminal investigation serves no purpose." *Id. supra*, 426 S.C. at 274, 826 S.E.2d at 616. The lower court erred in permitting the jury to do precisely that in this case.

The only evidence before the jury and the only inference to be drawn in the light most favorable to Respondent, was that Appellants did not knowingly report incorrect information to Investigator Turner. Therefore, Appellants respectfully request this Court to reverse the denial of directed verdict and JNOV and find in favor of Appellants.

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[6] Hawthorne testified Dr. Chapman would go to the bank occasionally (Tr. p. 120, ll. 22-23).

2. The only reasonable inference the jury could draw was that a negative discrepancy existed between the Eaglesoft reports and bank deposits and that the discrepancies ceased after Respondent was terminated

The only evidence before the jury was that there was a negative discrepancy between the Eaglesoft reports and the bank deposits and that the discrepancies ceased after Respondent was terminated. Dr. Chapman testified that discrepancies were discovered (Tr. p. 443, ll. 18-20; p. 444, ll. 6-7; p. 444, l. 23-p. 445, l. 13). Brooke Chapman testified that she initially discovered a discrepancy when she began working at the front desk (Tr. p. 409, l. 21- p. 410, l. 1). This testimony is consistent with the letter Appellants provided to Investigator Turner which stated that Respondent was terminated in March and was solely responsible for handling the finances through February of 2017 (R. – Ex. 12).

There is no evidence that Dr. Chapman knew or believed the Eaglesoft data was unreliable when he took the information to Turner. Appellants sought confirmation from two outside CPA sources regarding whether money may have been missing from the account. CPA Simmons testified he was asked to compare bank records with printouts from Eaglesoft (Tr. p. 368, ll. 7-9). He found a negative discrepancy showing money reported to Eaglesoft was not deposited into the bank account (R. – Ex. 6).

The Jennings Cook CPA was also asked to review Eaglesoft records and compare them with the bank statements (Tr. p. 173, ll. 9-17; p. 174, ll. 16-23). He calculated the discrepancy to be $3,505.19. He provided Dr. Chapman with a letter containing his findings (R. - Ex. 9).

Respondent's own expert O'Shea agreed that there was a negative discrepancy (Tr. p. 355, l. 20- p. 356, l. 4) and couldn't offer an expert opinion that no money had been taken (Tr. p. 362, ll. 17-24). He further agreed that an employee taking in cash and not depositing it could cause the discrepancy (Tr. p. 359, ll. 10-12).

O'Shea also agreed that Dr. Chapman may have thought money was being taken from the practice based on the discrepancies:

> Q . . . When the -- when the investigator gets information . . . it's very possible that Dr. Chapman thought money was missing; right?
> A Oh, I'm not saying that he didn't believe that there was.

(Tr. p. 360, ll. 8-14).

Appellants, therefore, correctly reported to Investigator Turner that money appeared to be missing. Appellants presented undisputed testimony that the discrepancies ceased after Respondent was terminated (Tr. p. 412, ll. 5-7; p. 445, l. 4-13). It was not, therefore, knowingly incorrect for Appellants to draw a connection between Respondent and the negative discrepancy.

3. Assumptions made by Investigator Turner cannot be imputed to the Appellants

Respondents argued that Appellants made additional false statements to Investigator Turner. However, the lower court erred to the extent it relied on Turner's testimony regarding his assumptions to allow false arrest to go to the jury and to deny a directed verdict.

Turner testified he was provided with a set of documents by Dr. Chapman and assumed the calculations behind Jennings Cook's letter were part of the letter. (Tr. p. 132, ll. 9-17). Dr. Chapman testified he handed all of the documents he had to Turner to review and did not indicate the calculations were part of the letter. (Tr, p. 456, l. 23-p. 457, l. 4). No evidence was presented that Chapman told Turner the chart was prepared by Jennings Cook.

Similarly, Turner testified that he took the letter to be an audit. (Tr. 131, l. 22- p. 132, l. 5). There was no evidence that Appellants informed Turner that Jennings Cook had conducted an audit. To the contrary, the letter clearly stated he prepared a "calculation." (R. – Ex. 12). Turner has a banking background and should have been familiar with the difference between an audit and a calculation. (Tr. p. 136, ll. 3-8). In contrast Dr. Chapman testified he did not know what a

forensic audit was. (Tr. p. 450, ll. 17-19). Assumptions made by Turner cannot be reasonably imputed to Appellants by the jury and, therefore, cannot create an issue of fact to defeat a motion for a directed verdict.

E. There is no evidence of bad faith

No evidence was presented from which a jury could reasonably infer that Appellants acted in bad faith in presenting their concerns to Investigator Turner. Bad faith has been defined as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." *Estate of Carr ex rel. Bolton v. Circle S Enters., Inc.*, 379 S.C. 31, 42-43, 664 S.E.2d 83, 88-89 (Ct. App. 2008) quoting *State v. Griffin*, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915).

Dr. Chapman testified he went to the police simply to seek answers regarding the money missing from his practice. (Tr. p. 445, ll. 14-16). The undisputed evidence presented at trial was that there were negative discrepancies during Respondent's employment and no discrepancies after her termination. (Tr. p. 173, ll. 9-17; p. 174, ll. 16-23; p. 355, l. 20-p. 356, l. 5; p. 412, ll. 5-7; p. 445, ll. 8-13, Ex. 6).

Respondent suggested that the time Appellants waiting between Respondent's termination and going to the police is evidence of bad faith. The opposite inference is the only reasonable one the jury could draw. Appellants did not rush to accuse Respondent. They were able to confirm after several months that discrepancies between collections and deposits did not continue after Respondent's termination. (Tr. p. 412, ll. 5-7; p. 445, ll. 8-13). They additionally showed good faith in asking two outside CPAs to verify that a discrepancy existed before going to the police.

There was no evidence that a reasonable person could conclude that Appellants acted in bad faith.

II. THE LOWER COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO MALICIOUS PROSECUTION

The lower court also erred in denying Appellants' motion for direct verdict and JNOV as to malicious prosecution.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) want of probable cause; and (6) resulting injury or damage." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965). An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including institution, malice and lack of probable cause. *Parrott,* 246 S.C. at 322, 143 S.E.2d at 609.

"[A]ctions for malicious prosecution . . . have never been regarded with favor and are not encouraged as it is in the interest of good order that criminals be brought to justice; and it is generally held that the prosecutor is free from damage if there be probable cause of the accusation made, the burden being upon the plaintiff to show the absence of probable cause as a part of the cause of action." *Prosser v. Parsons*, 245 S.C. 493, 502, 141 S.E.2d 342, 347 (1965).

A. No Reasonable Inference Could be Drawn that Appellants were Affirmatively Active in the Institution or Continuation of the Judicial Proceeding

Respondent must show Appellants were responsible for the institution or continuance of the original proceedings. "Generally, a mere passive knowledge of, acquiescence in, or consent to the acts of another, for which one is not otherwise responsible, is not sufficient to render the

latter liable in an action for malicious prosecution; it must be shown that he was affirmatively active in instigating or participating in the prosecution." *Gibson v. Brown*, 245 S.C. 547, 549-50, 141 S.E.2d 653, 654 (1965) citing 34 Am.Jur., Section 22, p. 715 and referencing 20 A.L.R. p. 1322.

The only evidence was that Appellants wanted to determine what had happened to the missing money. (Tr. p. 126, ll. 2-22). Appellants did not request, direct, or command that proceedings be instituted or continued against Respondent. (Tr. 448, ll. 11-16). They responded when Investigator Turner requested information but did not actively participate (Tr. 449, ll. 1-11) and they did not object when the charges were dropped (Tr. p. 450, ll. 8-16).

B. No Reasonable Inference Could be Drawn that Appellants Lacked Probable Cause

The evidence before the lower court, taken in the light most favorable to Respondent demonstrated probable cause. Probable cause means

> the extent of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor that the person charged was guilty of a crime for which he has been charged, and only those facts and circumstances which were or should have been known to the prosecutor at the time he instituted the prosecution should be considered.
>
> *Parrott*, 246 S.C. at 322, 143 S.E.2d at 609.

"Probable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." *Kinton v. Mobile Home Indus., Inc.*, 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980). In the present case, the lower court and jury improperly relied on whether they believed Respondent had stolen the money rather than the information known to Appellants, that Respondent's own expert admitted could reasonably lead a person to believe money had been taken from the practice. (Tr. p. 360, ll. 8-14).

Respondent did not present evidence to show Appellants lacked probable cause to take the information they had gathered to the police. The lower court overlooked the requirement that in determining the existence of probable cause, the facts must be "regarded from the point of view of the party prosecuting; the question is not what the actual facts were, but what he honestly believed them to be." *Eaves v. Broad River Elec. Co-op., Inc.*, 277 S.C. 475, 478, 289 S.E.2d 414, 415-16 (1982) (citing 54 C.J.S. *Malicious Prosecution* § 20, p. 977).

The undisputed evidence presented was that a comparison of the Eaglesoft reports and the bank deposits showed money was missing from the practice. (Tr. p. 355, l. 20-p. 356, l. 4). Respondent's own expert testified the discrepancies in these records could have been caused by an employee taking money. (Tr. p. 359, ll. 10-12). The discrepancies occurred while Respondent was employed as Office Manager with responsibility for the management of the funds. (Tr. p. 442, l. 13-p. 443, l. 1; Ex. 9). Respondent took the deposits to the bank. (Tr. p. 279, ll. 5-7). Finally, and critically, the discrepancies ceased when Respondent was terminated. (Tr. p. 412, ll. 5-7; p. 445, ll. 8-13). Taking the facts in the light most favorable to Respondent, the only reasonable inference the jury could draw was that probable cause existed for Appellants to believe money had been taken from the practice and that Respondent could be connected to the missing funds.

At most, Respondent presented arguments that a forensic investigation of the Eaglesoft data may have revealed other explanations for the missing funds. (Tr. p. 362, ll. 5-24). Appellants were not required to conduct such an investigation before going to the police in good faith. *Sunshine Recycling, supra,* 426 S.C. at 273, 826 S.E.2d at 615 (2018); *Jackson v. City of Abbeville* , 366 S.C. 662, 667, 623 S.E.2d 656, 659 (Ct. App. 2005) ("Probable cause is determined as of the time of the arrest, based on facts and circumstances—objectively measured—known to the arresting officer. The determination of probable cause is not an academic exercise in

hindsight.")

C. No Reasonable Inference Could be Drawn that Appellants Acted with Malice

Respondent presented no evidence at trial of malice by Appellants. Appellants had probable cause to request that the police investigate a breach of trust. In fact, Dr. Chapman liked and had a good relationship with Respondent. (Tr. p. 444, ll. 12-18).

Malice is defined as "the deliberate[,] intentional doing of an act without just cause or excuse." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982)). Respondent failed to show Appellants acted with actual malice.

However, even if there was evidence of malice, "no amount of malice affords any inference whatever for a want of probable cause, for all experience teaches that many of the best-founded prosecutions are prompted solely by malice." *Stoddard v. Roland*, 31 S.C. 342, __, 9 S.E. 1027, 1028 (1889). Appellants had probable cause to take the information regarding possible missing funds to the police for investigation.

Taking the evidence in the light most favorable to Respondent, there was no reasonable inference upon which the jury could find the elements of malicious prosecution had been met. Appellants therefore request this Court to reverse.

III. THE LOWER COURT ERRED IN FAILING TO GRANT APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO DEFAMATION

The lower court erred in failing to grant a directed verdict or JNOV in favor of Appellants as to defamation. The elements of defamation include: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence

of special harm caused by the publication. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998) (Toal, J., concurring in result in separate opinion).

A. Appellants are not Liable for Statements Published by the Respondent

Statements made to a fellow employee or her new employer did not create a cause of action for defamation. The employee testified Respondent called her immediately after her termination and told her she had been fired for allegedly stealing money (Tr. p. 11, l. 21-p. 112, l. 1). She testified she later asked Dr. Chapman why Respondent was terminated. Hawthorne did not testify that Dr. Chapman told her Respondent had stolen from the practice but did affirmatively state he never mentioned Respondent stealing money after she asked him about Respondent's termination (Tr. p. 117, ll. 2-16). The new employer similarly testified that he was made aware by his HR department than Respondent was being arrested (Tr. p. 106, ll. 19-22). Respondent reported this fact to her employer.

As this Court noted in *Murray v. Holnam, Inc.*, 344 S.C. 129, 144, 542 S.E.2d 743 (Ct. App. 2001), "self-publication of the allegedly defamatory statement may bar a plaintiff from recovery." *Id. citing* David P. Chapus, Annotation, *Publication of Allegedly Defamatory Matter by Plaintiff ("Self-Publication") As Sufficient to Support Defamation Action*, 62 A.L.R.4th 616 (1988). See also 50 Am.Jur.2d *Libel and Slander* § 241 (1995)(as a general rule, where a person communicates a defamatory statement only to person defamed and defamed person then repeats statement to others, publication of statement by person defamed, or "self-publication," will not support defamation action against originator of statements).

It has long been recognized in South Carolina that the element of publication is not met if the plaintiff is the one disseminating the statement. *See State v. Syphrett*, 27 S.C. 29, 2 S.E. 624 (1887) (finding element of publication not met where plaintiff asked his wife to read a letter from

the defendant for him); *Fonville v. McNease*, 319 S.C.L. (Dud.) 303 (1838) (finding where defamed party makes public a letter sent by the originator containing defamatory materials, "the defendant is not answerable for the consequences-for the act of publication is not his.")

B. Appellants' Statements were Privileged

Appellants' statements to Investigator Turner are subject to an absolute privilege. In *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct.App. 1999), this Court held that "the absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it." *See also Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct.App. 2002) ("The [absolute] privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.") "When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128,135,492 S.E.2d 103,106 (1997).

The statements are not actionable even if the privilege is qualified. *Murray v. Holnam, Inc.*, 344 S.C. 129, 142, 542 S.E.2d 743, 750 (Ct. App. 2001) ("[E]ven if the slander is actionable per se, if the communication is privileged, the plaintiff must prove actual malice."); *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994) ("A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable."); *Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 388, 90 S.E.2d 370, 372 (1955) ("A communication thus

qualifiedly privileged is not actionable, even though it contain[s] a charge of [a] crime, unless malice in fact be shown."). As set forth above, Respondent presented no evidence that Appellants acted with actual malice.

Appellants did not communicate with Investigator Turner in a manner that went beyond what was required for the circumstances. *Cullum, supra.*, 228 S.C. at 389, 90 S.E.2d at 372 ("[A] communication which goes beyond the requirement of the occasion loses the protection of the privilege."). Turner testified that any communications from the Appellants after the initial presentation of information was made only in response to his requests (Tr. p. 143, l. 17- p. 145, l. 19).

Additionally, as to the new employer:

> [A] communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. The essential elements of a conditionally privileged communication may accordingly be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. The privilege arises from the necessity of full and unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Conwell v. Spur Oil Co. of Western S.C., 240 S.C. 170, 125 S.E.2d 270 (1962). Even taken in the light most favorable to Respondent, Dr. Chapman expressed to Respondent's new employer a concern regarding his former employee. Such a communication was made under a qualified privilege. Respondent failed to show the communication was made with actual malice.

Brian Smith admitted in his testimony that Chapman's communication to him regarding Respondent involved Chapman's concern about the lawsuit filed by Respondent (Tr. p. 224, ll. 10-16). In *Texas Company v. C.W. Brewer & Company,* 180 S.C. 325, 185 S.E. 623 (1936), the South

Carolina Supreme Court established that pleadings, although they may constitute libel on their own, are absolutely privileged if they are relevant and legitimately related to the issues and inquiry at trial. Chapman's discussion about the lawsuit and his concerns would not constitute defamation. The statements made by Brian Smith were vague and conflicting. (Tr. p. 199, ll. 5-19; p. 224, ll. 17-24; p. 225, l. 19-p. 226, l. 1). In contrast, Dr. Chapman testified that he did not recall ever having a conversation with Smith about Respondent or the lawsuit. (Tr. p. 451, l. 23- p. 452, l. 14).

Therefore, Appellants respectfully request this Court to reverse the lower court's decision regarding defamation.

IV. THE LOWER COURT ERRED IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY WHEN THE JURY VERDICT REFLECTED IT HAD CONSIDERED PUNITIVE ELEMENTS IN ITS AWARD AT THE FIRST STAGE OF THE TRIAL

During closing arguments in the first stage of the trial, Respondent's counsel asked the jury to "send a message that this kind of conduct is not acceptable in the State of South Carolina." (Tr. p. 522, ll. 2-5). The jury's verdict reflected that it was sending this message. (R. -- Verdict form).

The primary purposes of punitive damages are punishment and deterrence. *Gamble v. Stevenson,* 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991). The South Carolina Supreme Court has recognized that it also "vindicate[s] a private right." *Id.* This Court explained: "punitive damages are not given with a view to compensation, [but] in addition to compensation...." *Shuler v. Heitley,* 209 S.C. 198, 202, 39 S.E.2d 360, 361-62 (1946). It was error to allow Respondent to present punitive damages to the jury a second time after asking them to send a message to Appellants.

Appellants objected to a second punitive damage stage of the trial following the award of damages in the first stage on statutory, common law, and constitutional grounds (Tr. p. 589, ll. 18-590, l. 5). The United States Supreme Court noted in *State Farm Mut. Auto. Ins. Co. v.*

Campbell, 538 U.S. 408, 409 (2003) that punitive damages should not be awarded where they duplicate a component of compensatory damages. *See id.* citing Restatement (Second) of Torts § 908, Comment *c,* p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both"). The lower court erred in allowing the jury to seek to punish Appellants twice.

V. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR DIRECTED VERDICT AS TO PUNITIVE DAMAGES

Further, the lower court erred in denying Appellants' motions as to punitive damages. (Tr. p. 665, ll. 10-25 – p. 66, l. 12). The lower court erroneously found there was more than one reasonable inference that could be drawn by the jury. (Tr. p. 672, ll. 21-25). This overlooks the fact that to proceed to punitive damages there must be evidence that the Appellants were not merely negligent but acted in a willful, wanton, or reckless manner. The evidence in the present case, at most, established that Appellants were negligent.

Respondent had the burden of proving by clear and convincing evidence Appellants' misconduct was willful, wanton, or with reckless disregard for her rights. S.C. Code Ann. § 15-33-135 (2004); *Taylor v. Medenica,* 324 S.C. 200, 221, 479 S.E.2d 35, 46 (1996). Clear and convincing evidence may be defined as "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Peeler v. Spartan Radiocasting, Inc.,* 324 S.C. 261, 269 n. 4, 478 S.E.2d 282, 286 n. 4 (1996) (citation omitted).

Respondent failed to present clear and convincing evidence that Appellants acted willfully, wantonly, or in reckless disregard for her rights. In the context of punitive damages, "[w]illfulness has been defined as a conscious failure to exercise due care." *Kuznik v. Bees Ferry Assocs.,* 342

S.C. 579, 611, 538 S.E.2d 15, 32 (Ct.App.2000). Recklessness is the doing of a negligent act knowingly; it is a conscious failure to exercise due care, and the element distinguishing actionable negligence from a willful tort is inadvertence. *Berberich v. Jack,* 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

Appellants sought confirmation from when there were discrepancies between the Eaglesoft reports and the bank statements during Respondent's employment. Appellants did not have a duty to investigate at a forensic level before taking the information to the police. *Sunshine Recycling, Id.* 426 S.C. at 273, 826 S.E.2d at 615. Critically, the discrepancies ceased after Respondent was terminated. (Tr. p. 412, ll. 5-7; p. 445, ll. 8-13). Even Respondent's expert witness agreed the discrepancies could have been caused by cash being taken from the practice. (Tr. p. 357, ll. 7-10; p. 359, ll. 10-12).

Investigator Turner conducted his own investigation and spoke with Magistrate Ford and the Assistant Solicitor before determining there was probable cause to seek a warrant. (Tr. p. 143, l. 25-p. 144, l. 12, 11. 15-22). Appellants did not pursue prosecution (Tr. p. 452, ll. 20-22) and any communication with Turner after Dr. Chapman's initial meeting was only in response to Turner's requests (Tr. p. 143, l. 17- p. 145, l. 19). Additionally, because a facially valid warrant was issued, Appellants are not liable for false imprisonment.

As to defamation, Respondent self-published to others that she was accused of stealing and was being arrested (Tr. p. 111, l. 21-p. 112, l. 1; p. 106, ll. 19-22). There is no evidence that Dr. Chapman was continually telling others that Respondent had stolen from him. The only testimony in the record is that he made limited statements that were privileged or in reference to the lawsuit Respondent had filed against him (Tr. p. 102, l. 10-p. 103, l. 1; p. 224, ll. 10-11; 13-16).

Clear and convincing evidence of actual malice is required to warrant an award of punitive damages on a defamation cause of action. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 466-67, 629 S.E.2d 653, 665 (2006) (explaining that to recover punitive damages on a defamation cause of action, the plaintiff "must prove by clear and convincing evidence that the defendant acted with constitutional actual malice, *i.e.*, the defendant published the statement with knowledge it was false or with reckless disregard of whether it was false or not"). Respondent did not present clear and convincing evidence of actual malice in this case. Therefore, Appellants respectfully request the punitive damages awards be reversed.

VI. THE LOWER COURT ERRED IN ALLOWING A FORMER EMPLOYEE'S TESTIMONY IN THE PUNITIVE DAMAGES STAGE

The lower court erred in allowing a former employee's (Althea Holland) testimony to go to the jury in the punitive damages stage of the trial. Because punitive damages are quasi-criminal in nature, the process of assessing them is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Atkinson v. Orkin Exterminating Co.,* 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); *see also BMW of North America v. Gore,* 517 U.S. 559, 568 (1996). Because civil defendants are not accorded the protections afforded criminal defendants, punitive damages pose an acute danger of arbitrary deprivation of property, which is heightened when the decisionmaker is presented with evidence having little bearing on the amount that should be awarded. *Campbell, supra.,* 538 U.S. at 409.

Allowing Holland's testimony (a hygienist, not an Office Manager) caused the degree of reprehensibility of Appellants' conduct to be unfairly inflated by allowing the jury to consider unrelated evidence regarding the general bookkeeping procedures of the dental practice. This, in turn, unfairly inflated the amount of punitive damages awarded. Holland also reversed her testimony from her proffered testimony that she was always paid for the work she performed, even

when paid in cash, to state she wasn't always paid what she was owed.[7]

The former employee had already testified that she didn't enter payments into Eaglesoft (Tr. p. 324, ll. 18-19), didn't know about the Eaglesoft reports (Tr. p. 324, l. 24-p. 325, l. 2), and wasn't told why Respondent was terminated (Tr. p. 327, ll. 6-8). Appellants objected to her testimony prior to its proffer, arguing that it was not relevant to the punitive factors (Tr. p. 583, l. 24- 583, l. 15; p. 591, l. 3- p. 592, l. 6; p. 592, ll. 15-25; p. 603, l. 19-p. 604, l. 24). Respondent did not argue Holland would testify to complaints similar to those of Respondent that she or others were wrongfully accused of stealing by Appellants or detained at their request, nor that Appellants had made defamatory statements about her.

Respondent proffered her testimony which was not relevant to any of the punitive factors. (R. Tr. p. 611, l. 24-p. 634, l. 13). Holland testified in the proffer regarding bookkeeping practices, including cash payments. The lower court initially recognized general bookkeeping procedures of the dental practice were not relevant to the issues of punitive damages. (Tr. p. 595, ll. 22-24) The lower court further recognized Holland testified in the liability stage and could have been asked about cash payments at that time. (Tr. p. 596, ll. 18-25). The lower court also agreed that relevant testimony was limited to "like conduct" and correctly stated, "any testimony about how the books were handled or whether you bartered with the barber down the road for services doesn't have any relation to the conduct, similar past conduct" and, therefore, was not relevant to the issues set forth in *Gamble* or S.C. Code § 15-32-520. (Tr. p. 606, l. 3-p. 607, l. 25).

Despite ruling that sloppy bookkeeping practices were not relevant, the lower court

[7] Holland proffered testimony that she was paid for all the work she performed. (Tr. p. 614, l. 17-p. 615, l. 19; Tr. p. 617, ll. 12-19; Tr. p. 617, l. 25-p. 618, l. 3). Holland reversed her testimony before the jury, however, to indicate she wasn't paid correctly. (Tr. p. 653, ll. 3-15; Tr. p. 655, ll. 7-23) The lower court noted this radical change in testimony (Tr. p. 659, ll. 8-24; p. 660, ll. 17-24) and was concerned enough to interject. (Tr. p. 658, ll. 6-17; p. 663, l. 25-p. 664, l. 3)

surprisingly ruled Holland could be questioned about being paid in cash for services and whether those transactions were zeroed out in Eaglesoft. (Tr. p. 634, ll. 18-24). These bookkeeping practices were not similar conduct to Respondent's claims of false imprisonment, malicious prosecution, and defamation as noted originally by the lower court. (Tr. p. 595, ll. 22-24). *See Campbell,* 538 U.S. at 409 (defendant's dissimilar acts, independent from acts upon which liability was premised, may not serve as basis for punitive damages). Punishment on the basis of dissimilar acts creates the possibility of multiple punitive damages awards for the same conduct. *Id.* at 422-423. These are the same general relevance safeguards addressed by Rule 403, SCRE (a court shall rule evidence inadmissible if its probative value is substantially outweighed by its prejudicial value).

Appellants renewed their objection and argued the introduction of the testimony violated Appellants' due process rights (Tr. p. 638, l. 24- 639, l. 24; p. 640, l. 17-641, l. 2). Nevertheless, the lower court allowed the former employee to testify before the jury. (R. Tr. p. 634, l. 18-p. 638, l. 11; p. 641, ll. 3-8) Holland testified before the jury regarding bookkeeping practices and how she was paid when customers made cash payments. (R. Tr. p. 654, ll. 3-25). This testimony suggested improper business practices regarding how Holland was paid and had nothing to do with the claims raised by the Respondent. This was highly prejudicial because it allowed the jury to punish Appellants for conduct unrelated to the conduct in the present case and unfairly exaggerated the degree of reprehensibility of Appellants' conduct. *Atkison v. Orkin Exterminating Co., Inc.*, 361 S.C. 156, 604 S.E.2d 385 (2004) (finding the trial court erred in allowing evidence of Orkin's directing agents to breach the fixed-rate provision (Orkin's past conduct) when it was dissimilar from Orkin's breach of the transferability provision in the present case).

The lower court erred in allowing Holland to testify and Appellants respectfully request

this Court to reverse the punitive damages or in the alternative to reduce the punitive damages award.

VII. THE LOWER COURT ERRED IN FAILING TO GRANT A NEW TRIAL ABSOLUTE

A. Standard of Review

In contrast to the scope of review for JNOV in the liability phase of the trial, the scope of review as to punitive damages and the lower court's application of the guideposts is *de novo*. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009); *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 418 (2003) (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 431 (2001)).

"[A] circuit court's order granting or denying a new trial upon the facts will not be disturbed unless its decision is 'wholly unsupported by the evidence or the conclusions reached are controlled by [an] error of law.'" *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 452, 778 S.E.2d 493, 502 (Ct. App. 2015) quoting *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 623, 720 S.E.2d 473, 479-80 (Ct. App. 2011). In reviewing the lower court's denial of a new trial motion, an appellate court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Umhoefer v. Bollinger*, 298 S.C. 221, 224, 379 S.E.2d 296, 297 (Ct. App. 1989).

B. The Lower Court Erred in Failing to Find the Evidence did not Justify the Verdict

"South Carolina's thirteenth juror doctrine allows the circuit court judge to grant a new trial absolute when the judge finds the evidence does not justify the verdict." *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 452, 778 S.E.2d 493, 502 (Ct. App. 2015) quoting *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004). "The effect is the same

as if the jury failed to reach a verdict, and thus, the circuit court is not required to give any reason for granting the new trial." *Id.*

Also, the lower court may grant a new trial absolute on the ground that the verdict is excessive. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). This is required if the amount is grossly excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. *See Cock-n-Bull Steak House, Inc. v. Generali Ins. Co.*, 321S.C. 1, 9, 466 S.E.2d 727, 731 (1996). The South Carolina Supreme Court has noted, "the failure of the trial [court] to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

The evidence in the present case did not justify the verdict. Appellants reasonably believed money was missing from the practice. Dr. Chapman provided the information he had gathered to the Sheriff's Office. He correctly informed Turner that Respondent was the Office Manager who had responsibility for the collection and deposit of money and that the discrepancies ceased when she was terminated. Appellants allowed Turner to handle the matter from there and did not seek to influence the outcome.

C. The Jury Awarded More in Special Damages than Respondent Presented

The lower court did not provide any analysis in its order, stating only, "[a]s to the Motion for New Trial Absolute, the Court does not find the verdict so grossly excessive that it shocks the conscience of the Court nor is it the result of passion, caprice, prejudice, partiality, corruption or improper motive."

The jury awarded $31,827 in general damages.[8] The jury also awarded $70,590 in special damages.[9] (R. verdict form) despite the fact Respondent only presented and requested a total of $46,108.79 in special damages. (Tr. p. 515, l. 18-p. 518, l. 20). This arbitrary increase demonstrates the verdict was the result of passion, prejudice, partiality, or improper motive by the jury.

D. The *Gamble* and *Gore* Factors do not Justify the Verdict as to Punitive Damages

Because punitive damages are quasi-criminal in nature, the process of assessing is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); *see also BMW of North America v. Gore,* 517 U.S. 559, 568 (1996) ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.") (internal quotations omitted).

In *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E. 2d 350 (1991) the South Carolina Supreme Court developed an eight factor post-verdict review that trial courts are required to conduct to determine if a punitive damages award comports with due process.[10] The U.S. Supreme Court set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process: (1) the degree of reprehensibility of the defendant's

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[8] General damages are inferred by the law itself, as they are the immediate, direct, and proximate result of the act complained of. *Sheek v. Lee,* 289 S.C. 327, 328-29, 345 S.E.2d 496, 497 (1986). General damages include injury to reputation, mental suffering, hurt feelings, emotional distress, and similar types of injuries which are not capable of definite money valuation. *Erickson v. Jones Street Publishers, LLC,* 368 S.C. 444, 465 n.6, 629 S.E.2d 653, 664 n.6 (2006).

[9] Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct. *Loeb v. Mann,* 39 S.C. 465, 469, 18 S.E. 1, 2 (1893). Special damages are not implied at law because they do not necessarily result from the wrong. *Sheek,* 289 at 329, 345 S.E.2d at 497. Special damages, which do not necessarily result, must be alleged. *Crozier v. Charleston & W. C. Ry. Co.*, 222 S.C. 121, 71 S.E.2d 800 (1952).

[10] These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble,* 305 S.C. at 111-12, 406 S.E.2d at 354.

conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore,* 517 U.S. at 575. *Gamble* remains relevant to the post-judgment due process analysis, but only insofar as it adds substance to the *Gore* guideposts. *Mitchell, supra.* In the present case, the lower court focused on a few of the *Gamble* factors without addressing the *Gore* guideposts.

1. Appellants actions were not reprehensible

The Supreme Court has stated that reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Gore,* 517 U.S. at 565. "This principle reflects the view that some wrongs are more blameworthy than others." *Id. Gore,* 517 U. S. at 576-577. The Court in *Gore* noted that it should be presumed that a plaintiff has been made whole by compensatory damages. Therefore, punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.,* at 575.

In considering reprehensibility the Supreme Court noted a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Campbell, supra*, 538 U.S. at 419.

The lower court did not address reprehensibility under *Gore* or the considerations cited in *Campbell.* Instead, the lower court's post-trial order refers only to the *Gamble* factor of culpability stating: "Defendants were very culpable". (R.--) "Culpable" in the civil context means "involving

the breach of a duty." *Black's Law Dictionary* 477 (11th ed. 2019). However, the evidence presented did not support this finding, particularly since the requirement that Appellant's conduct be done "wantonly" for punitive damages to be awarded signifies a more aware state of mind and higher degree of culpability. *See Black's Law Dictionary* 1815 (10th ed. 2014).

The lower court found: ". . . the analysis and investigation conducted by Defendants in determining she stole money and to report Plaintiff to law enforcement was not thorough. . .". (R.--) This finding completely ignored that Appellants did not have a duty to investigate thoroughly and verify before going to the police. *Sunshine Recycling, supra*, 426 S.C. at 273, 826 S.E.2d at 615. The lower court also cited as a factor, ". . . that Plaintiff was arrested one year after she was fired . . .". (R.---). This overlooked that Appellants had no control over the months the Sheriff's Office spent investigating the matter. Additionally it is inconsistent for the lower court to simultaneously find punitive damages were supported because Appellants took the time to confirm the discrepancies existed and that they had ceased following Respondent's termination before going to the police and that Appellants should have investigated even further before going to the police.

In considering reprehensibility, the lower court also overlooked the fact that Appellants did not direct or even encourage Investigator Turner's investigation and did not once ask him to arrest Respondent, conveying only that they were "eager to have it looked at." (Tr. p. 132, l. 20 -. P. 133, l. 1). The lower court also ignored the fact that a facially valid warrant was issued for Respondent's arrest and that Turner, the Magistrate who issued the warrant, the Judge who presided over the preliminary hearing, and the Solicitor's Office all determined there was probable cause to initially pursue the matter. It is clear that both the lower court and the jury were influenced by the fact that forensic accounting, performed after Appellants asked Turner to look into the matter, was unable

to confirm the source of the discrepancies. As a matter of law, this does not make Appellants "very culpable."

The lower court erroneously stated in its post-trial order: "evidence was submitted to the jury that Plaintiff did not steal any cash from Defendants" (R. ---). Other than Respondent's own statement she did not take the cash, the evidence presented to the jury was that the negative discrepancy between the Eaglesoft system and bank statements could be the result of cash being taken from the practice. (Tr. p. 357, ll. 7-10; p. 359, ll. 10-12). Even Respondent's own expert agreed. (*Id.*).

The lower court further stated: ". . . the basis of reporting Plaintiff to law enforcement for stealing was that she was the only one who had access when evidence revealed that was not true." (R.--) This is an erroneous statement of the evidence presented in the case. Investigator Turner was informed that Respondent was not the only person with access to the cash. (Tr. p. 140, ll. 4-7; p. 159, ll. 7-9)

The lower court failed to note that Appellants' conduct did not evidence an indifference or reckless disregard for the health or safety of people. The lower court also failed to take into consideration that the conduct alleged did not involve repeated actions. Appellants went to Investigator Turner on a single occasion, only communicating with him afterwards in response to his requests (Tr. p. 143, l. 17- p. 145, l. 19). Regarding the defamation action, testimony was presented as to only two times Dr. Chapman was alleged to have affirmatively stated Respondent stole from the practice (other than the report to the police) in the seven years between the time of Respondent's termination and the trial. As set forth in detail above, no evidence was presented that Appellants' actions were the result of intentional malice. At most, the evidence was that

Appellants could have investigated more before going to the police (even though the law does not require them to do so). The reprehensibility factor is not met.

2. The ratio is not supported by the guideposts

This Court should consider the disparity between the actual or potential harm suffered by the Respondent and the amount of the punitive damages awarded. *Mitchell, supra.*, 385 S.C. at 587-88, 686 S.E.2d at 185-86 (2009). A court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award. *Id.* at 588, 686 S.E.2d at 185. The punitive damages award is excessive as it is duplicative of damages awarded in the first stage of the trial and is not supported by the *Gore* guideposts, as set forth above.

3. The punitive damages award duplicated components of the compensatory award

The Court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Id.*, 385 S.C. at 583, 686 S.E.2d at 185, 183. In comparing the present case to *Campbell, supra*, 538 U.S. 408 (2003), it is clear that the compensatory damages awarded were likely based on a component that was duplicated in the punitive damages award. Respondent's counsel requested the jury to "send a message" at the close of the first stage of the trial. The jury awarded $24,481.21 more in special damages than the amount presented, in addition to $31,827 in general damages. This indicated that the award included punitive damages or was based largely on the emotional distress claimed by Respondent. The Supreme Court noted that compensatory damages already contain a punitive

element to compensate for emotional distress. *Id.* citing Restatement (Second) of Torts § 908, Comment *c*, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both").

It is clear the jury was influenced by factors beyond the evidence presented in the courtroom and awarded a verdict out of line with that evidence. Appellants therefore, respectfully request this Court to vacate the post-trial order and grant a new trial on all causes of action if JNOV is not granted.

VIII. THE LOWER COURT ERRED IN FAILING TO GRANT APPELLANTS' ALTERNATIVE MOTION FOR NEW TRIAL *NISI REMITTITUR*

A. Standard of Review

"The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." *James v. Horace Mann Ins. Co.* , 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006).

B. The Lower Court Failed to Evaluate the Verdict in Light of the Evidence Presented

The lower court's order only stated "[a]s to the Motion For New Trial Nisi Remittitur, the Court does not find the verdict excessive or unduly liberal. *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000)." "A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice[,] or prejudice." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "In considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented." *Id.*

Even if this Court determines the verdict in favor of the Plaintiff was proper, it should be reduced to match the evidence presented at trial.

1. The special damages awarded exceeds the award requested and is excessive

The jury awarded $70,590 in special damages. (R. Verdict Form) despite the fact Respondent only presented and requested a total of $46,108.79. (Tr. p. 515, l. 18-p. 518, l. 20). This award was in addition to the general damage award of $31,827. If the jury verdict is not overturned in its entirety, the award should be reduced to reflect the damages presented.

2. The verdict as to false imprisonment is excessive

As to false imprisonment there is no cause of action for false imprisonment under these circumstances. Appellants incorporate their arguments in Section I. As described above, the arrest was made on a facially valid warrant with no false statements or reckless omissions of fact. Moreover, Investigator Turner spent three months investigating the case prior to making a decision to arrest Respondent. Turner controlled the investigation and there is no evidence Appellants pushed for an arrest or exerted any influence over him. Therefore, Appellants respectfully request this Court reduce the verdict for false arrest if the verdict is not overturned in its entirety.

3. The verdict as to malicious prosecution is excessive

As set forth more fully in Section II, Appellants demonstrated probable cause to take their concerns regarding a breach of trust to the police. Appellants did not attempt to direct the prosecution or take any proactive steps to further the prosecution. Appellants only provided additional information when requested by Turner. There is no evidence Appellants objected to the dismissal of the charges against Respondent and there is no evidence of malice.

Therefore, Appellants respectfully request this Court to reduce the verdict for malicious prosecution if the verdict is not overturned in its entirety.

4. The verdict as to defamation is excessive

The defamation claimed in this case was minimal and the testimony vague. As set forth in Section III, Appellants' statements were subject to privilege and Respondent self-published the defamatory information to others. Respondent's next employer could not remember whether he took any action based on Dr. Chapman's statement to him. (Tr. p. 104, ll. 8-17) Respondent had already reported her arrest to her new employer (Tr. p. 106, ll. 19-22); therefore, there is no clear evidence that Respondent's temporary placement in another position at her new employment was due to any statements made by Dr. Chapman as opposed to Respondents' self-publication of her arrest.

Brian Smith vaguely testified that in the context of talking about the lawsuit against him, Dr. Chapman stated Respondent had stolen money. There is no evidence this statement altered Smith's opinion of Respondent, who he did not personally know.

The jury awarded $15,000 in special damages for defamation. The only special damages Respondent presented were related to her being moved temporarily from the front desk at her new job. She claimed $7,395 in wage loss and the cost of additional driving to and from the call center. Special damages should not have been awarded as Respondent self-published the information regarding her arrest to her employer, but at the very least they should be reduced to reflect the $7,395 presented.

The damages awarded for the other causes of action likely encompassed all of the damages awarded for defamation and should be reduced accordingly. Therefore, Appellants respectfully request this Court to reduce the verdict for defamation if the verdict is not overturned in its entirety.

5. The verdict as to punitive damages is excessive

The jury awarded $175,000 in punitive damages. This is excessive based on the facts of the case. As set forth above, none of the factors to be considered for a punitive damages award supported such a verdict.

The policy behind awarding punitive damages must remain consistent with the principle of the penal theory that the "punishment should fit the crime." *Mathias v. Accor Economy Lodging Inc. and Motel 6 Operating L.P.*, 347 F.3d 672, 676 (7th Cir.2003). "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell, supra*, 538 U.S. at 426.

While the circumstances described by Respondent were unfortunate, they do not warrant the punishment imposed against Appellants. Dr. Chapman testified be believed money was taken from the dental practice. (Tr. p. 446, ll. 3-13). Respondent's own expert testified the discrepancy could in fact have been the result of money taken by an employee. (Tr. p. 357, ll. 7-10; p. 359, ll. 10-12). Critically, the discrepancies ceased after Respondent's termination. (Tr. p. 412, ll. 5-7; p. 445, ll. 8-13). No witness (other than Respondent) ever testified Respondent was innocent of the charges.

Investigator Turner conducted his own investigation and there was no evidence Appellants influenced that investigation or urged him to arrest Respondent. Turner even conferred with the Assistant Solicitor before determining he had sufficient probable cause to seek a warrant. There was no evidence that probable cause for her arrest did not exist, and a facially valid warrant was issued. The Solicitor's office then found probable cause to pursue the case for eight months before dismissing it.

It is likely the jury considered the failings of other non-parties (like Turner) in awarding the excessive punitive damages award. Appellants therefore respectfully request this Court reverse the jury's finding of punitive damages and reduce the punitive damages award to either zero or a minimal amount that truly reflects the conduct in this case.

CONCLUSION

There is a public policy encouraging cooperation with law enforcement investigations and against "discourag[ing] a private citizen from imparting information of a tentative, honest belief to the police." *Sunshine Recycling, supra*, 426 S.C. at 274, 826 S.E.2d at 615-16. Potential victims are, therefore, not required to independently investigate the information it gathered before going to the police. The only reasonable inference for the jury based on the evidence and testimony presented at trial was that (1) Dr. Chapman provided Sheriff's Investigator Turner with his good faith belief of the facts; (2) Dr. Chapman did not induce or direct the police to unlawfully detain or arrest the Respondent; and (3) the facts within Dr. Chapman's knowledge, in particular the fact that all discrepancies ceased after her termination, would have lead a reasonable person to believe Respondent was responsible for the missing money.

The focus instead became whether the information gathered by Dr. Chapman was ultimately proven to be true and whether he could have performed a more thorough investigation. This was error and contravened public policy. Appellants motions for directed verdict and JNOV should, therefore, have been granted as to false imprisonment and malicious prosecution. In the alternative, the verdict should be reduced to reflect the evidence.

Likewise, as to punitive damages, there was no reasonable inference that Appellants were willful, wanton, or reckless in their actions. Respondent improperly received two bites at the apple as the jury was asked to "send a message" when it awarded compensatory damage and then a

second time at the punitive damages stage. An award of punitive damages does not comport with due process and Appellants request that the award be reversed or reduced to reflect the evidence presented.

Finally, the lower court erred in allowing defamation to go to the jury when Respondent self-published the statements complained of, the statements were privileged, and the vague testimony that Dr. Chapman stated on two occasions that Respondent stole money from him does not support the jury verdict. Appellants, therefore, respectfully request that the jury verdict be reversed as to all causes of action, or in the alternative, reduced to reflect the evidence presented.

Respectfully submitted,

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