THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-00013

Maureen T. Coffey, ... Respondent,

v.

Community Services Associates, Inc., and
George F. Breed, Jr. ..... Appellants.

INITIAL REPLY BRIEF OF APPELLANT GEORGE F. BREED, JR.

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I. The Court should reject Judge Coffey's preservation/presentation arguments.

With respect to all but one of the arguments raised by Mr. Breed on appeal, Judge Coffey attempts to circumvent this Court's review by arguing that the arguments and issues are not preserved and/or not properly raised on appeal. While pointing the Court to preservation errors constitutes good advocacy in appropriate cases, Judge Coffey's repeated and invalid attempts to circumvent appellate review merely highlight the inherent weaknesses in her case and her inability to respond substantively to the critical issues raised by Mr. Breed.

A. The issues raised in Appellants' Motion for Directed Verdict and JNOV are properly preserved for appellate review.

Once again, Judge Coffey argues that all of the issues raised in Appellants' Motion for Directed Verdict are not preserved, based on a hyper-technical and incorrect application of Rule 50, SCRCP, raising the same arguments she raised in her Motion to Strike, which was denied by this Court. This Court should likewise reject her arguments here. As is the case with Judge Coffey's other preservation arguments, the argument in Section I of her Brief is little more than an attempt to deter this Court from reviewing the fact that there is insufficient evidence of falsity, actual malice, and damages for this case to have been submitted to the jury, and that the Circuit Court failed to rule as a matter of law that Mr. Breed's publication of the Letter was privileged.

Arguments I and II of Mr. Breed's Brief are preserved for appellate review because: 1) the Circuit Court specifically instructed the parties when to raise their directed verdict motion; 2) the rebuttal testimony was extremely brief and entirely inconsequential; 3) Appellants substantially complied with the rule governing directed verdicts; and 4) adopting Judge Coffey's position would result in a manifest injustice because the verdict in this case lacks factual and/or

legal support. While both South Carolina and federal courts have discussed strict adherence to the rule that a party must move for directed verdict at the close of all of the evidence, at the same time both also recognize that rules of civil procedure are to be construed liberally in the interest of justice. *See* Rule 1, SCRCP; Rule 1, FRCP.

Under Rule 50(b), SCRCP, "[a] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50, SCRCP. Because Rule 50 is modeled after the corresponding federal rule, South Carolina courts routinely look to federal court interpretation of the rules of civil procedure. *See, e.g.*, Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004) (looking to "the prevailing view among federal courts" regarding post-trial motions). Furthermore, like federal courts, our courts apply the rules of civil procedure in a manner that promotes the interests of justice and a search for the truth. "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party ..." Elam, 361 S.C. at 25, 602 S.E.2d at 780; *see also* James v. South Carolina Dept. of Transp., 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (same). Instead, procedural rules should be liberally construed in order to "do substantial justice." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Federal courts recognize limited exceptions to the strict rule that a party must move for directed verdict at the close of all of the evidence.[1] In Singer v. Dungan, 45 F.3d 823 (4th Cir. 1995), the defendants made a Rule 50(a) motion at the close of the plaintiff's case but did not renew it at the close of all of the evidence. The Fourth Circuit instructed that the issues raised in

[1] These exceptions are "necessary to serve the interests of justice and to ensure that all circumstances are fairly considered at the post-trial stage." Cretella v. Kuzminski, 640 F. Supp. 2d 741, 755 (E.D. Va. 2009); *see also* Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968, 972 (1st Cir. 1969) (noting that, in a proper case, the strict requirements under Rule 50(b) should be relaxed in the interest of justice).

a prior Rule 50(a) motion may be preserved for appeal where, "(1) the court indicated that the renewal of the motion was unnecessary and/or; (2) the evidence following the party's unrenewed motion under Rule 50(A) was either nonexistent or was brief enough to be obviously inconsequential on the issue of the evidence's legal sufficiency." 45 F.3d at 829.

Judge Coffey argues Singer should not apply. Contrary to Judge Coffey's assertions, the Singer test does not ask solely whether the evidence was "brief" versus "lengthy." Furthermore, South Carolina courts have acknowledged that these exceptions may be warranted in some cases. Henderson v. St. Francis Cmty. Hosp., 295 S.C. 441, 447, 369 S.E.2d 652, 656 (Ct. App. 1988), *rev'd on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990).[2] Federal courts have also recognized exceptions, "where there has been substantial compliance with the rule," and/or "where manifest injustice will otherwise occur [where] the verdict is wholly without legal support." Smith v. University of N.C. at Chapel Hill, 632 F.2d 316, 339 (4th Cir. 1980).

All of the exceptions recognized in federal and South Carolina courts apply in this case.[3] First, the Circuit Court clearly instructed the parties that they would renew their motions, then hear the rebuttal witness, and then proceed directly to the jury charges and closing arguments. The judge expressed several times her personal time constraints in concluding the trial. (Tr. 1710-1711). After the jury returned its verdict, the Circuit Court instructed the parties that she would entertain post-trial motions filed within ten days. (Tr. 1923, lines 9-10). Thus, the Circuit Court instructed the parties when to file their motions for directed verdict and clearly

[2] In Henderson, the plaintiff moved for directed verdict after the close of evidence by two of three defendants, but failed to move again after the third defendant, Snoddy & McCulloch, presented its evidence. In denying the plaintiff's appeal of the court's denial of her JNOV motion, this Court found significant the facts that the trial court "never suggested to Henderson that the renewal of the motion would not be necessary to preserve her rights, and the evidence offered by Snoddy & McCulloch following Henderson's unrenewed motion for directed verdict was neither brief nor inconsequential." 295 S.C. at 447, 369 S.E.2d at 656.

[3] Judge Coffey's argument regarding 2006 changes to Rule 50, FRCP, is irrelevant. Singer, and the sections from *Moore's Federal Practice* cited therein were based on language substantively identical to current Rule 50, SCRCP and are, therefore, entirely applicable and persuasive.

signaled her belief that those issues were preserved for post-trial motions. Furthermore, by not arguing at the post-trial hearing that Appellants had failed to renew their motion for directed verdict,[4] Judge Coffey affirmed her understanding that Appellants' directed verdict motion and JNOV were timely and effective.

Second, the rebuttal testimony presented by Judge Coffey was **both** brief and inconsequential. In Bayamon Thom McAn, the court excused a failure to renew a motion for directed verdict at the close of all the evidence where the additional evidence consisted of "two pages of transcript and involving no more than a few minutes ..." 409 F.2d at 972. The court held that there was "no possibility that any of this [testimony] could have changed the court's mind in ruling on a repeated motion." Id.; *see also* Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (where the defendant failed to resubmit its motion for directed verdict at the end of all of the testimony, and where the additional testimony was "brief and largely cumulative," finding "no logical purpose would be served by holding that the district court was precluded from entertaining TRW's motion for a judgment n.o.v."). In Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970), defendants were excused from resubmitting their motions for a directed verdict at the close of all the evidence where the additional testimony consisted of brief testimony by three witnesses that was relevant to one defendant but which, "bore only tangentially on the liability of the remaining defendants." 427 F.2d at 670.

Contrary to Judge Coffey's assertions, this analysis does not require the Court to "weigh" the evidence; rather, the Court accepts the evidence as true and then determines whether it is so inconsequential that it could not possibly have changed the Circuit Court's ruling. Here, Ms. Hamilton's rebuttal testimony was slightly over three pages long (in a trial

[4] (Post-trial Mot. Tr. 4, lines 9-11) (Id. 8, lines 7-15) (Id. 13, lines 5-18) (Id. 14, line 20) (Id. 17, line 15 – 35, line 13) (Id. 37, line 6 – 39, line 18) (Id. 42, line 3 – 46, line 10).

transcript running in excess of 1,900 pages), and only covered the location of Judge Coffey's office, whether it had a window, and whether she recalled Captain McSwain visiting Judge Coffey in her office. (Tr. 1725, line 3 – 1728, line 5). None of these facts are relevant to any material issue in this case. It is entirely irrelevant whether Judge Coffey made the statement about moving her brother "out of town" to Captain McSwain or to Detective Baird.[5] In fact, the statements Judge Coffey admitted she made to Detective Baird are far more problematic (*i.e.*, that she was going to have her brother Otis move out of state and that she was attempting to coerce him into taking a lie detector test) than any statement allegedly made to Captain McSwain. Thus, Ms. Hamilton's rebuttal testimony was not only extremely brief but entirely inconsequential to the defamation claim, and could not possibly have affected the Circuit Court's ruling on the directed verdict motion.

Judge Coffey's reliance on Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983) is misplaced, as the facts are substantively different. In Coker, the defendant moved for directed verdict at the end of the plaintiff's case but failed to do so at the close of its own case. Although the defendant argued that its witness's testimony was short, it was the defense's sole witness, whereas in this case, Ms. Hamilton was only one of over 20 witnesses and had already testified fully. (Tr. 1042-1054). GMC v. Seay, 388 Md. 341, 879 A.2d 1049 (Md. 2005), cited by Judge Coffey, is entirely inapplicable because the Maryland rule of civil procedure on which it is based contains mandatory language that is absent from Rule 50, SCRCP. The Maryland rule provides that, "[i]n a jury trial, a party may move for judgment notwithstanding the verdict *only if* that

[5] Judge Coffey now asserts that Captain McSwain was a "key witness in the trial." However, Judge Coffey never alleged that Captain McSwain defamed her or that Mr. Breed had any reason to disbelieve what Captain McSwain told him about the meeting with Judge Coffey. Judge Coffey's burden in this case was not to prove that what Captain McSwain told Mr. Breed was false but rather, assuming for the sake of argument that it was false, whether there was any reason for Mr. Breed to mistrust the information provided by Captain McSwain. Ms. Hamilton's testimony does not provide any insight as to Mr. Breed's knowledge and, therefore, is entirely inconsequential and irrelevant to the material issues in this case.

party made a motion for judgment at the close of all the evidence ..." 388 Md. at 351, 879 A.2d at 1055. The analysis and discussion in GMC center on the development and evolution of Maryland rules of civil procedure, which have no application in South Carolina.[6] The notes to Rule 50 enforce this distinction, by explaining that it "conforms to the Federal Rule," and noting that "[t]he motion for directed verdict **may** be made at the close of plaintiff's evidence, as well as at the close of all the evidence." Rule 50, SCRCP, Note 2 (emphasis added).

Third, Appellants substantially complied with the rule by renewing their directed verdict motion when requested to do so by the court at the close of their case. At the time the Circuit Court heard the renewed motion for directed verdict, she was aware that Judge Coffey was planning to recall a rebuttal witness. (Tr. 1710, lines 8-22). Furthermore, the Circuit Court made it clear throughout the trial that she believed the defamation claim was going to go to the jury.[7] Therefore, "it was not incumbent upon defense counsel to harass the judge by parading the issue before him again ..." Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993); *see also* Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (where an objection has already been raised and ruled on by the court, there is no need for defense counsel to repeatedly object to similar testimony); State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 854-55 (1994) (holding that, once defense counsel objected, "it would have been futile to move to strike testimony which the trial court had already ruled was proper"). In State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011), the Court held that defense counsel's motion to exclude hearsay evidence at trial was preserved for appellate review because

[6] Note that, although GMC purports to list South Carolina as a state that follows the same rule, the case it cites for this proposition, Benton & Rhodes, Inc. v. Boden, 310 S.C. 400, 406, 426 S.E.2d 823, 827 (Ct. App. 1993) merely states that a directed verdict is a prerequisite for a subsequent motion for JNOV. It does not speak to renewing a motion for directed verdict after brief and inconsequential rebuttal testimony.

[7] (Tr. 1424, line 10 – 1425, line 4 (ruling "[a]s far as the defamation claim is concerned, I'm going to let it go to a jury")) (Tr. 1714, line 18 – 1715, line 2).

it substantially complied with procedural requirements, even though counsel did not make a contemporaneous objection. In this case, Appellants' motion for directed verdict likewise substantially complied with procedural requirements and is preserved for review.

Fourth, even where a party fails to move for a directed verdict at the close of all the evidence, courts "are not powerless to grant relief. Where a jury's verdict is wholly without legal support, we will order a new trial in order to prevent a manifest injustice." Sojak v. Hudson Waterways Corp., 590 F.2d 53, 54-55 (2nd Cir. 1978); *see also* Singer, 45 F.3d at 828 (recognizing "the precept that, even in the wake of a complete failure to move for judgment as a matter of law, if plain error would result, appellate review is permissible"). Here, Judge Coffey totally failed to meet her burden of proof on a number of issues, including falsity, constitutional actual malice, and damages. To preclude review of a multi-million dollar verdict in a vitally important case involving criticism of a sitting judge, based on a mere technicality, would be the definition of manifest injustice.

The exceptions discussed above make sense and should be applied in this case. In Singer, the Fourth Circuit explained that a motion under Rule 50(b) may be granted "despite the movant's failure to renew a previous motion under *Rule 50(a)* at the close of all of the evidence, where the purposes of *Rule 50* have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury." 45 F.3d at 829. In Boynton, the Sixth Circuit admonished that, "[w]hile 'it is certainly the better and safer practice to renew the motion for directed verdict at the close of all of the evidence,' the application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of its particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for truth.'" 858 F.2d at 1185. The purpose of the requirement

that a motion for directed verdict be made at the close of all of the evidence is to alert "the opposing party to the alleged insufficiency of the evidence at a point in the trial where that party may still cure the defect by presenting further evidence. Failure to renew an earlier motion for a directed verdict may lull the opposing party into believing that the moving party has abandoned any challenge to the sufficiency of the evidence once all of the evidence had been presented." Farley Transp. Co., Inc. v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1346 (9th Cir. 1985). No such concerns arise in this case. Neither Judge Coffey nor the court was under any illusion that Appellants had abandoned their challenge to the sufficiency of the evidence on the defamation claim. Instead, both Judge Coffey and the court were aware that Appellants continued to believe the evidence was insufficient to present a jury issue. The Court should reject Judge Coffey's repeated attempts, including this one, to curtail its review of substantive issues that should never have been allowed to go to the jury.

B. Other issues Judge Coffey asserts are not preserved were raised to and ruled on by the Circuit Court.

Judge Coffey contends that various arguments put forth by Mr. Breed were either not raised to and ruled on by the Circuit Court, or not presented in Appellants' post-trial motion.[8] For example, Judge Coffey alleges that Appellants did not argue in their post-trial motions that the statements in Mr. Breed's Letter were substantially true; however, this issue was adequately raised in the Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial, ("JNOV Motion") p. 2 (arguing Judge Coffey failed to prove the statements were false),

[8] "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 34 (1998).

and Memorandum in Support of Defendants' Post-Trial Motions ("Memorandum"), pp. 1-2.[9] In addition, Appellants clearly raised the following arguments that Judge Coffey incorrectly asserts are not preserved: 1) that Mr. Breed's statements were protected opinion[10]; 2) that Judge Coffey failed to present competent evidence of damage to her reputation[11]; and 3) that the Letter was absolutely privileged.[12]

In addition, the Circuit Court clearly ruled on Appellants' argument that publication of the letter to Mr. DeLoach, the Assistant Town Manager, was conditionally or qualifiedly privileged.[13] That the Court's ruling was erroneous does not mean the issue was not addressed.

Judge Coffey also suggests that certain evidentiary arguments are not preserved because they were not raised at the time Mr. Breed's deposition was read into the record. However, counsel for Appellants raised appropriate objections to the testimony at the time Mr. Breed's deposition testimony was offered, which then were ruled on by the court. Therefore, the objections are properly preserved. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 849 (1993) does not hold differently. While a ruling *in limine* is not a final ruling on an objection, a ruling made when the evidence is offered is a final ruling that preserves the issue for appeal. 312 S.C. at 507, 435 S.E.2d at 862; *see also* State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (ruling by the judge, out of the presence of the jury and immediately before the witness is called, was a final ruling that preserved the evidentiary issue for appeal); *cf.* McCreight v. MacDougall, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966) (holding objection

[9] Note that, at the same time she alleges Appellants did not preserve this issue, Judge Coffey admits that Mr. Breed asserted at trial that his statements were substantially true, citing the 58-page range of testimony that she cites for numerous other points. (Resp. Br. p. 25).
[10] (JNOV Motion, p. 2) (Memorandum, p. 3).
[11] (JNOV Motion, p. 2) (Memorandum, pp. 3-4, 6).
[12] (JNOV Motion, p. 2) (Memorandum, p. 4).
[13] (Order, filed October 15, 2012, p. 2 (ruling that, "while a qualified privilege likely extended to Breed's publication of the letter to the CSA Board, his employer, it is clear that any privilege that may have existed between Breed and the CSA Board was exceeded when that confidential letter was given to Greg DeLoach, the Assistant Hilton Head Town Administrator whose departments include managing the Town's Municipal Court")).

was untimely when it was first raised three years after the trial). In Mueller, the court explained that "[t]he fact that the motion was heard and the ruling was made out of the presence of the jury and before the witness was called does not turn the motion into an in limine motion," 319 S.C. at 269 n.1, 268-69, 460 S.E.2d at 411 n.1 as Judge Coffey appears to suggest here.

For example, Appellants clearly objected to testimony regarding a defamation suit Mr. Breed brought against a neighbor, (Tr. 904, line 6 – 908, line 11), and obtained a final ruling from the Court. (Tr. 922, line 11 – 923, line 9).[14] Similarly, Appellants objected to the testimony of William Waxel and obtained a final ruling from the Court. (Tr. 152, line 5 – 154, line 10). Appellants indisputably raised the issue of improper application of Rule 801(d), SCRE, to the Circuit Court. (Tr. 213, line 11- 214, line 14) (Tr. 217, line 8 – 226, line 23) (Tr. 278, lines 2-22). And, as is addressed in more detail below in Section V.A and V.E, Appellants properly preserved their challenge to the admission of CSA's Financial Statement and of impermissible hearsay. The Court should hold that all of these issues were properly preserved.

C. Mr. Breed adequately raised his challenge to evidentiary errors in his Statement of Issues on Appeal.

Judge Coffey attempts to circumvent this Court's review of all of the evidentiary issues raised by Mr. Breed on a hyper-technical application of Rule 208(b)(1)(B), SCACR. (Resp. Br. pp. 30-31, nn.10&11, 41, 51). Mr. Breed's Brief complies sufficiently with Rule 208(b)(1)(B), SCACR by listing in his Statement of Issues on Appeal, "Whether the Circuit Court committed evidentiary errors that require reversal?" The Table of Contents lists six specific categories of evidentiary rulings that require reversal, which are argued in detail in the Brief. There is no question here of the Court having to "grope in the dark" or weed through a "hodgepodge" of arguments in order to ascertain what issues Mr. Breed is contesting on appeal. Instead, where, as

[14] With respect to Judge Coffey's argument that this issue was not properly raised on appeal, *see* Section I.C, below.

is the case here, "the issue ... is *reasonably clear* from an appellant's arguments," the appellate court will consider the issue. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 462 (2011).[15]

The Court should reject Judge Coffey's arguments based on Rule 208(b)(1)(B).

II. Judge Coffey mis-states and misconstrues the facts in her Statement of the Case.

Judge Coffey's recitation of the facts underlying this appeal mis-states and/or misconstrues a number of key facts.[16] For example, Judge Coffey asserts that Mr. Breed "was engaged in his own investigation of a rash of break-ins in the Sea Pines community," and that, "[a]t trial, Breed claimed Respondent was interfering with the sheriff's department's investigation..." (Resp. Br. pp. 2, 8, 9, 10, 11, 26, 27, 29). Mr. Breed consistently denied that he was investigating crimes. (Tr. 1142, line 2 – 1144, line 10). In fact, it was Judge Coffey's counsel who initially suggested to Mr. Breed, "Would it be safe for me to say that you believe she did something that hindered or interfered with an investigation?" to which Mr. Breed merely agreed. (Tr. 1141, line 22 – 1142, line 10). However, the June 6, 2008 letter ("Letter") does not mention anything about Judge Coffey interfering in an investigation. (PEX #4). This is one of many "red herrings" exploited by Judge Coffey below to confuse the jury as to whether statements in the Letter were true or false, and to attack Mr. Breed's character in general.

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[15] *See also* Windsor Prop., Inc. v. Dolphin Head Constr. Co., Inc., 331 S.C. 466, 470 n.3, 498 S.E.2d 858, 860 n.3 (1998) (rejecting argument that statement of issue on appeal did not "concisely and directly identify the question before this Court"); State v. Cheeks, 400 S.C. 329, 339 n.6, 733 S.E.2d 611, 617 n.6 (Ct. App. 2012) (rejecting argument that issue was not sufficiently presented pursuant to Rule 208(b)(1)(B)); Bean v. South Carolina Central Ry., Inc., 392 S.C. 532, 547 n.8, 709 S.E.2d 99, 107 n.8 (Ct. App. 2011) (addressing the merits of an argument that was not included at all in the appellant's statement of issues on appeal "because this issue is pertinent to the disposition of the overall appeal..."); Eubank v. Eubank, 347 S.C. 367, 374 n.2, 555 S.E.2d 413, 417 n.2 (Ct. App. 2001) (rejecting argument that issue was not properly presented on appeal pursuant to Rule 208(b)(1)(B) where a general statement of the issue "read in conjunction with [appellant's] argument adequately raised the issue"); Swentor v. Swentor, 336 S.C. 472, 488 n.8, 520 S.E.2nd 330, 339 n.8 (Ct. App. 1999) (finding issues properly presented on appeal even though "lumped together under one issue on appeal").

[16] Mr. Breed is not challenging herein any of Judge Coffey's assertions regarding the slanderous statements allegedly made about an extra-marital affair solely because he was granted a directed verdict on that cause of action. CSA addresses that issue and Judge Coffey's inaccurate statement of the facts with regard to this issue.

Judge Coffey erroneously and repeatedly states that Mr. Breed published the Letter to the Board of Directors for CSA. (Resp. Br. pp. 5, 9, 24, 35, 37, 40). Mr. Breed testified specifically that he did not share the Letter with the CSA Board, (Tr. 1161, lines 15-24) (Tr. 1173, line 1 – 1175, line 2) (Tr. 1178, lines 7-12), and there was no credible evidence presented to the contrary.

Moreover, Judge Coffey claims that Mr. Breed provided the Letter to the CSA Board of Directors "in part, in an attempt to explain why a number of incidents at Sea Pines had gone unresolved and cited his letter to the Commission as one of the 'hurdles' to resolving those incidents." (*See* Resp. Br. pp. 4, 29, 34). First, as noted above, Mr. Breed did not publish or provide the Letter to the CSA Board. Second, Mr. Breed testified that the Bridge Report, which contains the explanation that the Letter was relevant to some of the hurdles his security department was facing concerning the recent "burglaries, peeping Tom reports," was sent only to Mr. Kelley, as his direct report. (Tr. 1166, lines 9-18). Third, the insinuation that the Letter provided "an explanation or a rationalization for why you haven't been successful in closing the cases that are pending," (Tr. 1224, lines 22-25), was Judge Coffey's counsel's characterization, which was never confirmed by Mr. Breed, (Tr. 1224, line 11 – 1226, line 6), or any other witness at trial.[17] Statements by counsel do not constitute evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

Finally, although Judge Coffey raises numerous preservation and procedural challenges to the substantive arguments raised by Mr. Breed, she is inarguably in violation of this Court's

[17] The fact that Mr. Birdwell might have had concerns about recent security issues, "such as the missing couple and peeping Tom," and that additional security cameras were under consideration, (Tr. 982, lines 1-15), does not mean the Letter was an attempt by Mr. Breed to divert "blame." When pushed by Judge Coffey's counsel to link the Board discussion to "a certain lawlessness or reported rash of burglaries or peeping Toms," Mr. Birdwell clarified that the "discussions were really more about the security cameras and where they should be located ... and the potential cost of the cameras." (Tr. 982, lines 15-24). Mr. Birdwell also rejected Judge Coffey's counsel's attempt to portray the encounter between CSA security officers and Otis Coffey on May 20, 2008 as a "response to [his] conversation with Mr. Breed about [his] concern about the lawlessness of the community." (Tr. 985, lines 5-9). Mr. Kelley denied that the Letter was a response to Mr. Birdwell's concerns. (Tr. 1297, lines 13-25).

Rule 208(b)(4), SCACR, which provides, in pertinent part, that "[i]n the initial briefs, ... references should be to the page and line number of the transcript prepared by the court reporter." In her Brief, Judge Coffey cites to a 58-page range of the hearing transcript (Tr. 1121-1179) no fewer than 32 times as support for specific facts. This repeated use of the 58-page "citation" forces Appellants and this Court to review and search out where in that range of pages the alleged fact might be supported. Judge Coffey repeats this practice with other multiple-page cites throughout her Brief, leading one to conclude that the transcript does not support her statements. While merely erroneous in some instances, this practice is more problematic in others. For example, on page 37 of her Brief, Judge Coffey cites pages 1121-1179 of the hearing transcript for her assertion that, "[a]fter sending the letter to the Commission, Breed then republished it to a number of people. Breed republished the letter to the assistant managers of the Town of Hilton Head, the Board of Directors for CSA and the chief executive at CSA." As noted above, the only people Mr. Breed sent the Letter to, other than the Commission, were Mr. DeLoach, (Tr. 1124, line 21 – 1125, line 7), and Mr. Kelley, Mr. Breed's "direct report," but no one else at CSA or the Town. (Tr. 1155, line 21 – 1156, line 15) (Tr. 1159, lines 2-13).[18]

Judge Coffey cites this 58-page range for the assertion that Mr. Breed "sent his letter to the assistant town manager as well, despite the assistant town manager's instruction not to do so." (Resp. Br. pp. 29, 30, 37; *see also* 39). In fact, nowhere in those 58 pages, nor anywhere else in the trial transcript, is there testimony that Mr. DeLoach instructed Mr. Breed NOT to send

[18] Judge Coffey also implies that Mr. Breed published it to "assistant managers" plural, and "others" in the Town of Hilton Head. (Resp. Br. pp. 24, 37). There is no evidence whatsoever in this record, including the 58-pages cited repeatedly by Judge Coffey, that Mr. Breed published the Letter to anyone other than the Commission, Mr. DeLoach and Mr. Kelley. The only evidence to support Judge Coffey's allegation that Mr. Breed "caused the letter to be shared with Mr. Coltrane, another assistant manger [sic] with the Town of Hilton Head at the time and others then working at the town of Hilton Head including Steve Riley (town manager) and Brian Hulbert (attorney with the Town of Hilton Head)," (Resp. Br. pp. 9-10), is Judge Coffey's own testimony which she herself admitted was based on hearsay. (Tr. 215, lines 23-25) (Tr. 412, line 16 – 427, line 19) (Tr. 1705, lines 17-23).

him the Letter. Mr. Breed testified that he learned about the Commission from Mr. DeLoach. (Tr. 1149, lines 13-19).[19]

Although Judge Coffey cites the 58-page span of the hearing transcript as support for the fact that Mr. Breed "never interacted with or even met Respondent prior to her deposition," (Resp. Br. pp. 8), that statement does not appear anywhere in the 58 pages. It was Judge Coffey who testified that she had never met or spoken to Mr. Breed or Mr. Kelley prior to the lawsuit. (Tr. 439, lines 8-13). Similarly, although Judge Coffey cites to this lengthy portion of Mr. Breed's testimony for the assertion that "with respect to other municipal judges, Breed would often call them to express his concern about an issue," (Resp. Br. p. 8), that statement is not supported anywhere in the 58 pages. Instead, a discussion of Mr. Breed's limited contact with other judges appears at Tr. 1189-1190.

The Court should reject Judge Coffey's vague references to the record, and should scrutinize carefully her characterization of the facts against the actual evidence and testimony to ensure accuracy.

III. Judge Coffey failed to meet her burden of proof.

Judge Coffey admits that she bears the burden of proving "by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff." Erickson v. Jones Street Pub. LLC, 368 S.C. 444, 468, 629 S.E.2d 653, 666 (2006). Although a great deal of evidence was presented at trial, there is virtually no credible evidence that supports her defamation claim and, as a result, this case should never have been sent to the jury.

[19] Mr. DeLoach explained that, Mr. Breed called him "to say that he wanted to complain to someone, because he was complaining to me at the time. And at that point, I said that – that Mrs. Coffey worked for the town council, not for me. And he then asked who else he could complain to. And I indicated to him that he could complain to – file a complaint with the Commission on Judicial Conduct. That's what he wanted to do." (Tr. 746, lines 8-15) (Tr. 748, lines 18-23) (Tr. 753, lines 16-18).

Judge Coffey relies on Quesinberry v. Rouppasong, 331 S. C. 589, 503 S.E.2d 717 (1998) for the proposition that, if the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury. However, South Carolina courts make a clear distinction between reasonable inferences and mere speculation or conjecture. *See*, Redfearn v. Board of State Canvassers, 234 S.C. 113, 120-121, 107 S.E.2d 10, 14 (1959) (holding that when a plaintiff has failed to prove a material element of her claim, "it becomes the duty of the court to resolve the issue against the party having the burden of proof"); Gibson v. Gross, 280 S.C. 194, 199, 311 S.E.2d 736, 740 (Ct. App. 1984) (ruling against party because "mere speculation or conjecture" did not meet his burden of proof), *citing* Leek v. New South Express Lines, 192 S.C. 527, 7 S.E.2d 459 (1940). In Leek, the Supreme Court held a directed verdict should have been granted because the circumstantial evidence offered required the court "to indulge in sheer speculation." 192 S.C. at 535, 7 S.E.2d at 462. The same is true here.

A. Judge Coffey failed to prove the statements about her in the Letter were false.

Although Judge Coffey admits that she bears the burden of proving the statements about her were false, both at trial and on appeal she places that burden on Mr. Breed. (Tr. 1758, lines 11-20 (Judge Coffey's counsel arguing that Mr. Breed failed to introduce evidence proving his opinions and statements were true)) (Resp. Br. pp. 24-26 (arguing that Mr. Breed failed to prove his statements were substantially true)). Her only evidence that the statements were false consists of testimony by three witnesses who said she had treated them fairly and/or that they did not know of instances where she had been biased, prejudiced or partial,[20] as well as her own self-serving testimony that she was fair and impartial in all cases pending before her. This evidence simply does not prove that the statements in the Letter were false. As case law establishes and

[20] *See* (Tr. 463, lines 9-18 (John Jolin); Tr. 1362, line 5 – 1364, line 3 (Cary Kelley); and Tr. 1598, lines 14-24 (Captain Toby McSwain).

the Circuit Court acknowledged, the standard a public figure or public official must meet for proving the allegedly defamatory statements are false is clear and convincing. Erickson, 368 S.C. at 467, 629 S.E.2d at 665. (Tr. 1857, line 22 – 1859, line 5). Here, Judge Coffey has not even met the lighter burden of proving falsity by a preponderance of the evidence. All she has shown is that Mr. Breed did not prove the truth of his statements, which was not his burden in the first place. Beckham v. Sun News, 289 S.C. 28, 30, 344 S.E.2d 603, 604 (1986). "Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish the statement was, in fact, false." 289 S.C. at 31, 344 S.E.2d at 605. Essentially, Judge Coffey's argument is that, although she bore the burden of proving the allegedly defamatory statements were false, Mr. Breed did not prove that his statements were true; therefore, she met her burden of proving the statements are false. This Court should reject such faulty and self-serving logic.

Judge Coffey does not seriously contend that the statement she focuses on, (that, "[i]n summary, as a result of Judge Coffey's actions, she has given the distinct and transparent appearance of bias and partiality, and is not able to be a neutral and detached arbiter of the many cases that have been and will be pending before her") is a factual statement as opposed to Mr. Breed's opinion. Her only argument on this point is contained in a one-sentence footnote on page 25 of her Brief. As Judge Coffey so often points out, a cursory and unsupported argument is deemed abandoned on appeal. In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001).

Furthermore, Judge Coffey's trial counsel specifically asked Mr. Breed: "Is it your **opinion** that Judge Coffey was biased – isn't it your **opinion** that Judge Coffey was biased, partial, and prejudiced?" to which Mr. Breed honestly responded, "I believe that the – that's reflected in here. I believed that to be the truth as reflected in this letter, referring to the scenario

described in that letter." (Tr. 1126, lines 2-11) (emphasis added). After clearly recognizing Mr. Breed's statement regarding whether Judge Coffey was biased, partial and prejudiced was opinion, Judge Coffey's trial counsel then proceeded to grill Mr. Breed on Appellants' interrogatory responses regarding her performance on the Bench. Mr. Breed made it very clear that he was "not speaking of [her] actions on the Bench" but, instead, based his opinion on the scenarios described in his Letter. (Tr. 1127, line 1 – 1129, line 11). Mr. DeLoach also understood this to be Mr. Breed's opinion of Judge Coffey. (Tr. 758, line 20 – 759, line 4).

Judge Coffey insinuates that Mr. Breed admitted the statements in the Letter regarding her inability to be impartial were false. (Resp. Br. pp. 10-11). Not only did Mr. Breed not admit that his statements were false, but he testified repeatedly that it was his opinion based on the incidents recounted in the Letter, which he continued to believe was true. (Tr. 1127, line 1 – 1129, line 11) (Tr. 1141, lines 6-9).

Judge Coffey also argues that she proved the statements in the Letter regarding a meeting with Captain McSwain were false. (Resp. Br. p. 26). The fact that she testified the meeting did not occur, when Captain McSwain testified that it did, (Tr. 1578, line 19 – 1580, line 5), is not clear and convincing evidence that the statement is false. Furthermore, as noted above, the statements she admitted making to Detective Baird in a meeting around the same general timeframe are far more problematic for her than the statements Captain McSwain confirmed.

The Court should hold Judge Coffey failed to meet her burden of proving the statements in the Letter were false.

B. Judge Coffey failed to prove actual malice.

Because Judge Coffey failed to present any evidence that the statements about her in the Letter were false, the Circuit Court should have granted Appellants' motion for a JNOV and/or a

new trial. However, for the sake of argument, Mr. Breed addresses the remaining arguments raised in Respondent's Brief. Judge Coffey argues that she met her burden of proving actual malice by clear and convincing evidence by rehashing the same evidence she relies on with regard to falsity, *i.e.*, that because Mr. Breed did not prove the truth of his statements, she met her burden of proving he acted with actual malice. (Resp. Br. pp. 28-31). She also suggests that, because Mr. Breed and Mr. DeLoach did not share a common employer or (erroneously) a common interest, this is further evidence of "the malice with which Breed acted." (Resp. Br. p. 29). Neither of these is a test for actual malice.

As a public official, Judge Coffey had to prove, by clear and convincing evidence, either that Mr. Breed knew the statements he was making about her were false, that he had serious reservations about their truthfulness, or that he published them with reckless disregard for the truth. *See, e.g.*, Holtzscheiter v. Thomson Newspapers, Inc., 332, S.C. 502, 515, 506 S.E.2d 497, 504 (1998). "A 'reckless disregard for truth' requires more than a departure from reasonably prudent conduct. 'There must be sufficient evidence to permit the conclusion that the defendant **in fact entertained serious doubts as to the truth of his publication**.' ... There must be evidence the defendant had a '**high degree of awareness of ... probable falsity**.'" Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (emphasis in original). Judge Coffey did not present any evidence proving that the statements in the Letter were false, let alone any evidence that Mr. Breed did not believe his statements and opinions were entirely correct.

Judge Coffey asserts that she proved actual malice because the evidence showed that Mr. Breed was using the Letter "as an excuse for his department's failure to solve a rash if incidents at Sea Pines." (Resp. Br. p. 29). As explained above, the insinuation that the Letter served as

Mr. Breed's excuse for not resolving certain security issues came from Judge Coffey's trial counsel, (Tr. 1224, lines 22-25), and was never confirmed by Mr. Breed or any other witness.

Alternatively, Judge Coffey re-phrases Mr. Breed's Letter in order to argue she presented clear and convincing evidence of actual malice. For example, she writes, "[t]he letter plainly states that Breed knew Judge Coffey had not been a neutral and detached arbiter of the many cases 'that have been .... pending before her.'" (Resp. Br. p. 28). Judge Coffey also implies that the Letter charged her with interfering with an investigation of her adopted brother. In fact, as this Court can discern for itself, that is not at all what the Letter states. After reciting the specific incidents where Judge Coffey and/or her family interposed her position between her brother Otis and CSA Security Officers and/or BCSO, Mr. Breed stated his belief and opinion,

> that ***Judge Coffey's inability to remove and insulate herself from personal relationships and overt involvement both past and present have caused her to insert herself in these scenarios to the detriment of the community at large.*** Further, it has manifested itself and caused her to engage in conduct prejudicial to the effective and expeditious administration of the business of the courts and criminal justice process. In summary, ***as a result of Judge Coffey's actions***, she has given the distinct and transparent appearance of bias and partiality, and is not able to be a neutral and detached arbiter of the many cases that have been and will be pending before her.

(PEX #4) (emphasis added). Thus, it is fairly evident that all of the conclusions and opinions in the final sentence of Mr. Breed's Letter were drawn from the scenarios recited in the Letter, and not on specific cases pending before her. Mr. Breed confirmed this position at the hearing. (Tr. 1128, line 3 – 1130, line 5). This is characteristic of her attacks on many of Mr. Breed's arguments – mischaracterizing an argument so that it can be struck down, but failing to address or meaningfully counter the substance of the actual argument made by Mr. Breed. This tactic of setting up a "straw man" that is easily knocked down should be roundly rejected. Mr. Breed's failure to point to specific cases in which Judge Coffey may have been biased or partial simply is

not evidence of actual malice. *See* George v. Fabri, 345 S.C. 440, 457-60, 548 S.E.2d 868, 877-78 (2001) (defendant's acknowledgement that she did not know whether her statements about the plaintiff were true was not evidence that she entertained serious doubts about the truth of the statements).

In addition, the fact that Mr. Breed did not retract his statement is not evidence of actual malice. It is only the refusal to retract "an exposed error" that may, under certain circumstances, support a finding of actual malice. Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987); Restatement 2d of Torts § 580A *comment d* (under certain circumstances, evidence of a "defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory ... might be relevant in showing recklessness at the time the statement was published"). In this case, Judge Coffey neither asked Mr. Breed to retract his Letter nor proved an "exposed error." Instead, she filed a lawsuit. Similarly, the fact that he did not inform Mr. DeLoach or the CSA Board that the Complaint to the Commission had been dismissed is not evidence of actual malice. Mr. Kelley testified that he informed the CSA Board of the dismissal of Mr. Breed's Complaint by the Commission, (Tr. 1646, line 25 – 1648, line 4), and Mr. DeLoach testified that he knew the Complaint had been dismissed. (Tr. 771, lines 7-15).

Finally, evidence that Mr. Breed had previously been a plaintiff in a defamation action, and that he deeded his house to his wife in July 2008 are entirely irrelevant to the standard of actual malice.[21] Relevant evidence is evidence that tends to prove or disprove the existence of a material fact. Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). Judge Coffey cites no case where proof that a defendant brought a previous defamation claim was ever accepted as proof of actual malice. There is no logical connection between the two.

[21] With respect to Judge Coffey's argument that these issues were not properly raised on appeal, *see* Section I.C, above.

Mr. Breed testified that the reason he deeded his house to his wife was because of a medical condition, the same medical condition that induced him to retire from CSA. In addition, as Mr. Breed argues in his Brief and below, this evidence was improperly admitted due to its prejudicial nature and lack of probative value.

The Court should hold that Judge Coffey failed to meet her burden of proving constitutional actual malice.

C. Judge Coffey failed to prove any special damages related to the alleged defamation.

Judge Coffey argues that "special damages" in this case equate to "out of pocket expenses" for babysitting and therapy sessions. Citing a plethora of out-of-state cases, Judge Coffey ignores the fact that the South Carolina Supreme Court has spoken to this issue and, therefore, no reason exists to seek authority from foreign jurisdictions. "Special damages are **tangible losses** or injury to the plaintiff's **property**, **business**, **occupation** or **profession**, capable of being assessed monetarily, **which result from injury to the plaintiff's reputation**." Holtzscheiter, 332 S.C. at 510 n.4, 506 S.E.2d at 502, n.4 (emphasis added).[22] Just because Judge Coffey cannot meet the standard set out in Holtzscheiter is no reason to look to foreign jurisdictions for a different rule. Furthermore, all but one of the cases cited at page 32 of her Brief are from intermediate appellate courts and are not, therefore, statements by the highest courts of North Carolina, Indiana or Maryland. Moreover, none of the cases cited by Judge Coffey discusses what constitutes special damages in a public official defamation case.[23]

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[22] In Miller v. City of West Columbia, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996), relied on by Judge Coffey, the public official proved that the "defamatory statement effectively destroyed [the plaintiff's] reputation and ended his distinguished twenty-five year law enforcement career." In contrast, Judge Coffey has demonstrated absolutely no damage to her reputation or career.

[23] *See* Araya v. Deep Dive Media, LLC, 2013 U.S. Dist. LEXIS 117841 (W.D. N.C. 2013) (common law defamation claim brought by high school student), *citing* Tallent v. Blake, 57 N.C. App. 249, 291 S.E.2d 336 (N.C. App. 1982) (common law defamation claim by school board food service employee); Picone v. Talbott, 29 Md. App. 536, 349 A.2d 615 (Md. Ct. Spec. App. 1975) (common law defamation claim by lessee against lessor). Kaiser v. Hardin,

DeLoach v. Beaufort Gazette, 281 S.C. 474, 316 S.E.2d 139 (1984), relied on by Judge Coffey in her discussion of punitive damages, supports the argument that a public figure or public official must prove actual damages by clear and convincing evidence. "While we hold no error, we add that for actual damages in a libel action neither *New York Times v. Sullivan* nor *Gertz v. Robert Welch, Inc.* require the states to adopt a degree of proof more demanding than by a 'preponderance of the evidence' **where a private individual is involved.**" 281 S.C. at 480, 316 S.E.2d at 143 (emphasis added). The clear implication is that where a public official is involved, special or actual, calculable damages to one's property, business, occupation or profession must be proved by clear and convincing evidence.

Although Judge Coffey testified about her need for babysitters, and the jury apparently awarded her those costs, (Verdict Form), Judge Coffey has presented no case stating that babysitting fees equate to or can legitimately be construed as medical costs. She also has failed to cite to any controlling cases holding that counseling costs incurred as a result of alleged stress constitute special damages, *i.e.*, damages to her profession or reputation, in the context of a public official defamation case. However, even if, solely for the sake of argument, those costs could be construed to satisfy the definition of special damages, she has utterly failed to prove that they were incurred as a result of Mr. Breed's Letter, as is discussed more fully in Section I.C. of Mr. Breed's Brief. In fact, Judge Coffey conceded at trial that no physician has ever causally related Mr. Breed's Letter to her medical treatment. (Tr. 450, lines 13-24).

Because the jury apparently rejected Judge Coffey's claim of damages based on the renewal of her contract for two, rather than three years, (Verdict Form), Judge Coffey simply has demonstrated no loss or damages associated with her property, business, occupation or

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953 So. 2d 802 (La. 2007) and Posey Cnty v. Chamness, 438 N.E.2d 1041 (Ind. App. 1982), are not even defamation cases, but involve damages arising out of car accidents.

profession.[24] She was and continues to be employed in the same capacity by the Town of Hilton Head. (Tr. 789, lines 7-22) (795, lines 15-23).[25] Her entirely unsubstantiated assertion that lawyers challenged her more often or moved for recusal more often, (Tr. 280, line 17 – 281, line 3), does not constitute evidence of calculable harm. Judge Coffey testified that Mr. Breed's Letter did not damage her reputation. (Tr. 360, lines 20-25). As to her purported plans to "seek higher office on the bench," (Resp. Br. p. 33), Judge Coffey readily admitted she had neither attempted to obtain a different job nor taken any steps toward applying for a position as a family court judge. (Tr. 454, lines 2-22). There simply is no evidentiary support for the jury's award of either special or general damages, which should be reversed. Without special or general damages, the award of punitive damages is entirely inappropriate and must also be reversed. McGee v. Bruce Hosp. Sys., 344 S.C. 466, 470, 545 S.E.2d 286, 288 (2001); Stroud v. Elliott, 316 S.C. 242, 244-45, 449 S.E.2d 261, 262 (Ct. App. 1994) (reversal of actual damages award requires punitive damage award to be vacated).

Although Judge Coffey argues that Mr. Breed did not contest the amount of the punitive damages award, she proceeds to argue that the amount is proper and does not shock the conscience. First, of the cases cited by Judge Coffey regarding punitive damages, only Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1991) and Stevens v. Sun Pub. Co., 270 S.C. 65, 240 S.E.2d 812 (1978), involve public figure defamation claims. In Sanders, the Supreme Court reversed the jury's excessive verdict because the plaintiff failed to prove any damage to her reputation or profession, rendering a multi-million dollar award of damages unwarranted. 304 S.C. at 239, 403 S.E.2d at 642. The same is true in this case. In Stevens, the Supreme Court did

[24] The parties agreed to the jury instruction that "Special damage is the manifestation of injury to **reputation** which is computable in money or capable of being assessed at monetary value. Once the plaintiff has proved special damages, you may then consider general damages for the Plaintiff." (CT EX 4, p. 13) (emphasis added).

[25] Mr. DeLoach testified that nothing Mr. Breed wrote or did influenced Judge Coffey's salary or the length of her contract with the Town. (Tr. 792, line 22 – 793, line 3).

not discuss damages except to note that they were awarded.[26] Simply because punitive damages may have been properly awarded in other cases does not mean they are proper here. Furthermore, punitive damage awards that are based on extraneous evidence which unfairly amplifies the degree of reprehensibility of conduct and, in turn, inflates the punitive damages award, are improper. Atkinson v. Orkin Exterm. Co., Inc., 361 S.C. 156, 166-67, 604 S.E.2d 385, 390-91 (2004).

The Court should hold that Judge Coffey did not meet her burden of proving she suffered special damages that would entitle her to general or punitive damages and that the award in this case is patently excessive.

IV. Mr. Breed's publication of the Letter was privileged.

A. Mr. Breed's publication of the Letter enjoyed an absolute privilege.

First, Judge Coffey mistakenly asserts that Mr. Breed did not argue that his publication of the Letter to Mr. DeLoach and Mr. Kelley was protected by an absolute privilege. Mr. Breed does argue precisely that in Section II.A. of his Brief. (App. Breed Brief, pp. 30-33). After discussing the public policy underlying Rule 13, RJDE, Rule 502 SCACR, Mr. Breed argued that he was not prohibited from disclosing his complaint to others, that public policy weighs heavily against the precise outcome in this case, and that the Circuit Court committed reversible error in failing to dismiss Judge Coffey's defamation claims based on the Letter.

Second, none of the cases Judge Coffey relies on are controlling authority. The only South Carolina case she cites, Eub anks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987), is inapplicable because it involved a claim of "an absolute or a qualified privilege as an executive

[26] Other cases cited by Judge Coffey in this discussion do not even deal with punitive damages at all. Duncan v. Hampton Cnty Sch. Dist. #2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) (actual damages reduced from $1,000,000 to $250,000); Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984) (discussion of whether actual damage award was excessive but no discussion of punitive damages).

official ..." After holding that the defendant did not possess an absolute executive privilege in the first place, the court determined that his publication of defamatory remarks to the press exceeded any qualified privilege he might have had because the plaintiff proved common law actual malice. The only press coverage of the contents of Mr. Breed's Letter were as a direct result of the lawsuit filed by Judge Coffey herself. The sections of the Restatement 2d Torts cited by Judge Coffey deal with conditional, not absolute privileges.[27] Also, the cases cited by Judge Coffey refer to common law absolute privilege instead of absolute privilege created by rule. Rule 13, RJDE, Rule 502 SCACR. The fact that Rule 12(d), RJDE, Rule 502, SCACR allows a respondent in a proceeding before the Commission to apply for a protective order is a strong indication that this privilege has a broad reach.

Third, Judge Coffey mischaracterizes Mr. Breed's argument concerning the absolute privilege that attached to his Letter as an argument "that a judge should not generally be able to maintain a defamation suit." (Resp. Br. 12-13). This is yet another straw man argument set up to be knocked down. Mr. Breed has never argued that sitting judges cannot ever bring defamation claims. His argument is that fair criticism or complaints concerning how a sitting judge performs her judicial duties and obligations should be protected and that the outcome in this particular case is precisely what Rule 13 seeks to avoid. Furthermore, the cases cited by Judge Coffey arose from vastly different factual settings (*i.e.*, none involved a complaint filed with a commission on judicial conduct) and, in some cases, do not even stand for the propositions for which they are cited. Bunton v. Bentley, 176 S.W.3d 18 (Tex. App. 1999) (excessive award in defamation case where radio talk show host repeatedly accused judge of being corrupt on the air for months, reduced (not affirmed) from $7 million to $250,000 in part

[27] Restatement 2d of Torts § 604 addresses when publication is excessive so that it destroys a conditional privilege; Restatement 2d of Torts § 605 addresses when the subject matter of a defamatory statement exceeds the parameters of a conditional privilege.

because the Judge did not lose his job and failed to show any other harm to his professional reputation); Gaylord Broadcasting Co., L.P. v. Francis, 7 S.W.3d 279 (Tex App. 1999) (affirming denial of summary judgment in a defamation claim brought by a judge over an investigative news broadcast because the evidence showed the reporter made up some of the reported "facts" and included data that pre-dated the judge's term of service); DiSalle v. P.G. Pub. Co., 375 Pa. Super. 510, 544 A.2d 1345 (Pa. Super. 1988) (affirming defamation award based on allegations that a local attorney (who later served on the bench) had participated in producing a fraudulent will and engaged in an affair with one of the siblings who would inherit under the will); Thibadeau v. Crane, 131 Ga. App. 591, 206 S.E.2d 609 (Ga. App. 1974) (reversing summary judgment in newspaper libel case that was granted solely on the basis of the complaint, answer and motion, which were filed without any supporting affidavits). In fact, in Thibadeau, the court admonished that,

> One who is a public official or who is a candidate for public office must subject himself to the criticisms of both the press and the public for his conduct of ... the office which he holds. Some, or even much of it may be and often is unwarranted and hostile, engendered by partisan views of the critic. Some of it is bilge and billingsgate, often unfair and slanted by its author. It is part of the "heat in the kitchen" to which President Truman referred in saying that "if you can't stand the heat, get out of the kitchen." Mere unfairness or hostility, however, does not make it actionable.

131 Ga. App. at 593-94, 206 S.E.2d at 611.

The Court should hold that Mr. Breed's Letter was absolutely privileged.

B. Alternatively, Mr. Breed's publication to Mr. DeLoach and Mr. Kelley enjoyed a conditional privilege.

Judge Coffey first points out that Mr. Breed and Mr. DeLoach have different employers, and then asserts that they "had no shared interests."[28] However, Mr. Breed testified that Mr.

[28] Judge Coffey asserts several times that, had Mr. Breed only sent his Letter to the Commission, there would have been no suit brought against him. (Resp. Br. pp. 13, 36-37). However, the original Complaint in this action, cited

DeLoach was the person he would go to if there was an issue with the Town, depending on what department it related to. (Tr. 1146, lines 2-6). The uncontradicted evidence in this case is that one of Mr. DeLoach's areas of responsibility was supervision of the municipal court. (Tr. 746, lines 20-22) (Tr. 785, lines 8-16). He was responsible for negotiating the Town's employment contract with Judge Coffey, and had in the past made recommendations to the Town Council regarding renewal of her contract. (Tr. 762, line 22 – 763, line 8) (Tr. p. 764, lines 4-7).[29] In addition, Mr. DeLoach previously had received complaints about town employees, including town judges. (Tr. 783, lines 12-25). Mr. Breed's position as head of CSA Security required him to protect the interests of the residents and guests of Sea Pines. (Tr. 1641, line 22 – 1642, line 1). Thus, the interests that Mr. Breed and Mr. DeLoach shared include security in residential areas of the Town of Hilton Head, including Sea Pines, as well as the fair and impartial operation and appearance of the Town's Magistrates court and court officials.[30] Here, the Circuit Court erred by failing to determine, as a matter of law, that a conditional privilege existed between Mr. Breed and Mr. DeLoach, and by sending to the jury only the question of whether any conditional privilege had been exceeded.

In addition, Judge Coffey completely fails to address Mr. Breed's argument that the statements about her as municipal judge are matters of public interest and, as such, are subject to criticism. The privilege of fair comment applies to opinion, comment, or criticism based upon facts that are true or substantially true. 50 Am Jur 2d *Libel and Slander* § 317. By failing to address this argument in any way, this Court may assume Judge Coffey has conceded it. Turner v. South Carolina Dept. of Health & Envtl. Control, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct.

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by Judge Coffey in her Counter-Statement of the Case, reveals that that is precisely what her initial action charged. (Complaint, filed Nov. 20, 2008).

[29] Judge Coffey testified that Mr. DeLoach is her liaison to the Town Council. (Tr. 214, line 24 – 215, line 1).

[30] As noted above, Mr. DeLoach never instructed Mr. Breed NOT to send him the letter – he merely advised that he was not Judge Coffey's direct supervisor.

App. 2008) (where a respondent "fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a [concession] that the appellant's position is correct"), *citing* First Union Nat'l Bank of S.C. v. FCVS Commc'ns, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

Judge Coffey does not appear to contest that Mr. Breed had a shared interest with Mr. Kelley and the CSA Board with regard to the Letter (although Mr. Kelley, not Mr. Breed, shared the Letter with the CSA Board). However, she argues that Mr. Breed's publication to his supervisor, Mr. Kelley, was unprivileged because he shared the Letter itself and did not just inform him that he had filed a Complaint with the Commission. "Under South Carolina law, communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege." Bell v. Evening Post Publ. Co., 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct. App. 1995). As explained in Section II.B.1 of Mr. Breed's Brief, the Letter concerned incidents occurring within Sea Pines Plantation. Therefore, sharing the Letter with Mr. Kelley was a proper communication on a proper occasion. Conwell v. Spur Oil Co., 240 S.C. 170, 180, 125 S.E.2d 270, 275 (1962). Mr. Kelley's publication to the CSA Board is likewise conditionally privileged. As Mr. Kelley explained several times, he shared the Letter with the CSA Board because he reports directly to the Board. (Tr. 1289, lines 3-6) (Tr. 1292, lines 15-22) (Tr. 1641, line 22 – 1643, line 10).

Finally, as noted above, the only "testimony" that Mr. Breed's motive in sharing the Letter with Mr. Kelley or Mr. DeLoach for an improper reason, *i.e.*, "as an excuse as director of security," is Judge Coffey's trial counsel's insinuations and assumptions, which are not evidence. Bowers, 304 S.C. at 68, 403 S.E.2d at 129. Instead, courts look for "whether there is in the record any credible testimony pointing to the fact that the occasion was used for the unlawful

purpose of defaming and injuring the respondent..." Bell v. Bank of Abbeville, 211 S.C. 167, 175, 44 S.E.2d 328, 331 (1947).[31] Here, there is no such evidence.

Alternatively, the Court should hold that Mr. Breed's publication to Mr. Kelly and Mr. DeLoach enjoyed a qualified or conditional privilege.

V. The Circuit Court committed numerous evidentiary errors.

A. The Circuit Court erred by admitting CSA's Financial Statement into the record after closing arguments and after the jury had been instructed and sequestered.

On appeal, Judge Coffey asserts that, during the post-trial motions hearing, the Circuit Court ruled there had been a stipulation not only as to the authenticity of CSA's Financial Statement but also as to its admissibility, and that Appellants failed to challenge this ruling. The Circuit Court did not rule that Appellants had stipulated to the admissibility of the Financial Statement. First, at the post-trial motions hearing, the parties, including the bench, were working without the benefit of a transcript. (Post-trial Mot. Tr. 10, lines 16-25). Second, the Circuit Court merely explained that she had gone "back and looked at my notes on that, and I've got it as a stipulation, and that it was in." (Post-trial Mot. Tr. 36, line 24 – 37, line 1). The parties then proceeded to discuss whether it had actually been admitted, with Appellants' counsel stating that, "It's [sic] authenticity was stipulated to; not the admissibility,"[32] and Judge Coffey's counsel stating, "It's my belief, your Honor, that it would have been admitted, but for the fact that I forgot ..." (Post-trial Mot. Tr. 39, lines 5-6). The last pronouncement by the Circuit Court on this issue was, "So you requested [portions related to ASPPPO] be put out, so I just let him specifically – I think it's Page 11 that I've got written down. Okay." (Post-trial Mot. Tr. 39,

[31] Interestingly, the Court also noted the unduly voluminous nature of the record in Bell, which contained "many pages" of testimony unrelated to the actual defamation charge, and that "the result of the trial suggests that the matters above referred to, together with inflammatory statements and irrelevant and disparaging remarks incorporated in questions asked and comments made by plaintiff's counsel in the course of the trial might have had something to do with the verdict." 211 S.C. at 171, 44 S.E.2d at 329. The same is clearly true here.

[32] Because Appellants did NOT stipulate to the admission of the Financial Statement, cases cited by Judge Coffey regarding the effect of a party's stipulation have no bearing on this issue.

lines 2-4). This is hardly a ruling and, as such, there was nothing to "challenge" at that point. Furthermore, the transcript of the trial demonstrates that the Financial Statement was not admitted until after both sides presented closing arguments, the jury received instruction and had been sequestered. (Tr. 1866, line 6 – 1869, line 10) (Tr. 1914, lines 4-15). Thus, because Appellants timely challenged the Circuit Court's ruling on this issue, the law of the case doctrine does not defeat Mr. Breed's challenge to the late submission of this highly prejudicial document to the jury.

Next Judge Coffey cites a case from Alaska arguing that Mr. Breed should be precluded from arguing this issue because CSA did not also raise the issue.[33] First, the case relied on by Judge Coffey, Wal-Mart, Inc. v. Stewart, 990 P.2d 626, 1999 Alas. LEXIS 149 (Alas. 1999), does not address an issue even remotely similar to the point for which she cites it. Second, the issue in Stewart was that Wal-Mart had first stipulated to the use of an employee's personnel file at trial for impeachment purposes and that the court could instruct the jury regarding a prior lawsuit. When Wal-Mart later objected to the evidence, it attempted to characterize its prior stipulation as an objection, which the court found "defie[d] logic." 990 P.2d at 640. Here, Appellants quite simply never stipulated to the admissibility of the Financial Statement and have not taken "opposing positions" on its admissibility. *See* Wilder, 330 S.C. at 76-77, 497 S.E.2d at 733-34 (noting that a party can stipulate to the accuracy of a calculation but not the theory underlying it). Thus, stipulations as to accuracy do not automatically waive other objections.

Rather than address the serious harm caused by the admission of a prejudicial piece of evidence after closing arguments, jury instruction and sequester, Judge Coffey suggests that, because her counsel referred to the Financial Statement as "being in the record" in his closing

[33] Judge Coffey makes a similar point with regard to other issues that CSA did not directly address in its Brief. (Resp. Br. pp. 40, 44, 49-50, 51, 53, 56). Because she cites no relevant authority for this proposition, her argument should be summarily dismissed. McCracken, 346 S.C. at 92, 551 S.E.2d at 238.

argument, Mr. Breed has waived this issue. Scott v. Porter, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000), does not hold that every inaccurate statement in a closing argument is waived unless objected to. What was at issue in Scott were inflammatory comments in a closing argument that "heaped abuse and scorn on defendant and her expert witness." 340 S.C. at 165, 530 S.E.2d at 393. Judge Coffey cannot really believe that by mentioning a piece of evidence in her counsel's closing argument, she has entered it into evidence. Appellants objected repeatedly to the admission of this evidence when the Circuit Court proposed sending it to the jury. (Tr. 1911, line 1 – 1914, line 13).

Finally, the fact that Judge Coffey fails to rebut any of the points raised in Section III.A of Mr. Breed's Brief indicates that she agrees that exposing a jury to evidence that has not been admitted during the trial is reversible error because, among other reasons, the defendants are not able to object or explain or cross-examine witnesses regarding the evidence. State v. Hill, 394 S.C. 312, 328, 714 S.E.2d 879, 888 (Ct. App. 2011); *citing with approval* State v. Pete, 152 Wn.2d 546, 555, 98 P.3d 803, 808 (Wash. 2004); *see also* United States v. Barnes, 747 F.2d 246, 250 (4th Cir. 1984) (holding that "[i]f prejudicial evidence that was not introduced at trial comes before the jury, the defendant is entitled to a new trial"); Harris v. State, 168 Ga. App. 159, 162, 308 S.E.2d 406, 408 (Ga. Ct. App. 1983) (the danger of allowing a jury to review evidence not admitted during trial presents an "extreme" danger and requires reversal); Vaughn v. United States, 367 A.2d 1291, 1296, 1977 D.C. App. LEXIS 406 *16 (D.C. 1977) (holding that, "[w]here unadmitted evidence is transmitted to the jury by a mistaken ruling of the trial court over the objection of trial counsel, we deem that error to be so fundamental that it would require reversal if there is the 'slightest possibility that harm could have resulted'").

B. The Circuit Court erred by admitting character and prior bad act evidence.[34]

Judge Coffey attempts to justify the repeated attacks on Mr. Breed's character at trial by implying that truthfulness is "a trait pertinent to the offense charged," citing State v. Weaverling, 337 S.C. 460, 523 S.E.2d 787 (Ct. App. 1999). Despite colorful language employed by her trial counsel,[35] Mr. Breed was not and is not charged with any criminal offense. In addition, both of the cases relied on by Judge Coffey for the proposition that the truthfulness of a defendant is always at issue in a defamation suit – Blyth v. McCrary, 184 N.C. App. 654, 646 S.E.2d 813 (N.C. App. 2007) and Rety v. Green, 546 So. 2d 410, 1989 Fla. App. LEXIS 665 (1989) – involved common law defamation claims, where each of the defendants placed his character for truthfulness at issue by raising truth as an affirmative defense. Here, since it was Judge Coffey's burden in the first instance to prove the falsity of the statements made about her in the Letter, Beckham, 289 S.C. at 30, 344 S.E.2d at 604, Mr. Breed did not place his character into issue by defending this claim. Furthermore, Mr. Breed was not, as Judge Coffey now suggests, defending statements regarding Judge Coffey's conduct of her court or actions on the bench. (Resp. Br. p. 42). Instead, he explained that his statements regarding bias, partiality and inability to be a neutral and detached arbiter arose out of and were directed to the specific instances recounted in the Letter, stating clearly and repeatedly that he was not referring to Judge Coffey's actions on the bench. (Tr. 1128, line 3 – 1131, line 16).

Next, Judge Coffey argues that admission of character evidence was appropriate here because it was evidence of a pertinent trait offered by the defendant. The Circuit Court erred here by admitting character and prior bad act evidence before Mr. Breed even testified – before he even had a chance to raise the issue of his character or truthfulness. *See* (Tr. 212, lines 14-15)

[34] With respect to Judge Coffey's argument that this issue was not properly raised on appeal, *see* Section I.C, above.
[35] For example, Judge Coffey's trial counsel described Mr. Breed as "the culprit in this case." (Tr. 1756, lines 17-18).

(Tr. 352, line 8 – 353, line 16) (Tr. 636, lines 10-15) (Tr. 260, line 24 – 261, line 12) (Tr. 500, line 10 – 508, line 14) (Tr. 570, lines 14-25).[36] Furthermore, the character and prior bad act evidence erroneously admitted here went far beyond Mr. Breed's reputation for truthfulness. Judge Coffey raised a number of extraneous issues in her direct testimony – from allegations that Mr. Breed spread a rumor about her having had an affair with Mr. Jolin, to allegations that Mr. Breed had pulled her mother's gate pass, to accusations that Mr. Breed had a history of banishing "undesirables" from Sea Pines, and more – that had nothing to do with Mr. Breed's tendency to tell the truth. The various points raised on page 43 of Respondent's Brief are attacks on Mr. Breed's "character and truthfulness," but that does not mean they are admissible.

Moreover, Judge Coffey's continued mischaracterization of what the evidence proved should be rejected. There is no evidence that Mr. Breed even knew about, much less directed, the one *nol prossing* instance discussed at Tr. 714-721. Furthermore, the Judge Coffey's trial counsel agreed he had no evidence that Mr. Breed directed this activity and the Circuit Court agreed this evidence was irrelevant and prejudicial. (Tr. 909, line 18 – 915, line 19). Mr. Breed did not lie about taping a phone conversation with Judge Herring – he admitted he taped the conversation but could not recall initially whether he told Judge Herring at the time that it was being taped. (Tr. 1191, line 19 – 1193, line 1). Mr. Breed never testified that he did not know who John Levy was; instead, he could not confirm for which crimes he had been arrested and convicted. (Tr. 1222, lines 15-21). Furthermore, Mr. Levy's arrest did not "disprove" Otis Coffey was a suspect, a fact Judge Coffey and others affirmed at trial. (Tr. 234, lines 15-20) (Tr. 1692, lines 1-13) (Tr. 657, lines 1-3) (Tr. 661, lines 21-23) (Tr. 1603, line 21 – 1604, line 2).

[36] As the North Carolina Court of Appeals noted in Blyth, "each defendant for whom evidence of truthful character was admitted had already been called as a witness and questioned before the admission of the evidence of his truthful character." 184 N.C. App. at 661, 646 S.E.2d at 818. That was not the case here.

Insinuations by Judge Coffey's trial counsel that Mr. Breed transferred his interest in his home to his wife for nefarious reasons, again, do not constitute evidence, but were presented to the jury in an attempt to "smear" Mr. Breed. Mr. Breed testified honestly that the reason for the transfer was a medical condition and, as noted above, he has since retired from CSA for the same medical reason. Mr. Breed did not "enter into an indemnification agreement" with the CSA Board; in fact, his unchallenged testimony is that he did not even know about the indemnification arrangements until he was deposed. (Tr. 1248, line 10 – 1249, lines 24). Finally, there was no proof that Mr. Breed "pulled" Mrs. Coffey's guest pass privileges at Sea Pines; in fact, Mr. Kelley confirmed after checking that Mrs. Coffey's guest pass privileges were never suspended. (Tr. 1640, lines 2-7).

C. The Circuit Court erred by allowing witnesses to testify who had not been identified prior to trial.

Judge Coffey argues that, because Appellants did not ask the correct question in discovery, they have waived any objection to non-disclosed witnesses testifying at trial. However, Judge Coffey both failed to update her interrogatory responses as required by Rule 33(b), SCRCP, and waited until the eve of trial to disclose the identity of two fact witnesses, Mr. Waxel and Mr. Sonberg, and one expert, Dr. Geiger. Neither Mr. Waxel nor Mr. Sonberg is identified as fact witnesses in any updated or amended response by Judge Coffey to Appellants' interrogatories. The fact that Mr. Waxel may have fallen within her "catch all" response of "CSA Employees" is insufficient to identify him as a fact witness for trial. The case cited by Judge Coffey to justify this lack of notice, Jenkins v. Few, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010), is readily distinguishable and highlights the unfairness of allowing undesignated witnesses to testify here. In Jenkins, the court pointed out that the witness at issue had been timely identified as a fact witness but that counsel had inadvertently failed to re-designate him as

an expert witness. Furthermore, defense counsel had been able to both depose the witness prior to trial and to cross-examine him during a proffer of his evidence. 391 S.C. at 220, 705 S.E.2d at 462-63. None of those ameliorative steps was reasonably available to Appellants in this case.

Judge Coffey cites to some 33 pages of transcript to prove that the Circuit Court adequately raised and considered the factors set forth in Bensch v. Davison, 354 S.C. 173, 580 S.E.2d 128 (2003). What those pages reveal is that the justification for Mr. Sonberg's testimony was purportedly that he "attended a conference by Cary Kelley in January of 2009 where Mr. Kelley said two things that were demonstratively false. One was that the arrest of Otis Coffey was imminent. And the other was that Judge Coffey had been concealing him from Law enforcement." He was being called "as someone who had knowledge of verbal repetition of the libel that's in the letter." (Tr. 140, line 23 – 141, line 6). The truth or falsity of what Mr. Kelley may or may not have said was not at issue in this trial. Second, there is nothing in the Letter about Otis Coffey's imminent arrest or Judge Coffey concealing Otis from law enforcement. (PEX #4). As for Judge Coffey's counsel's explanation as to why he did not list Mr. Sonberg earlier, he merely testified "I should have amended [the witness list] last week, but quite frankly, didn't have the time." (Tr. 142, lines 7-10). Although the Circuit Court indicated she was going to give defense counsel a chance to talk to Mr. Sonberg, prior to trial, they were simply given a phone number the evening before he was scheduled to testify. (Tr. 150, lines 7-22).

The Circuit Court performed virtually no analysis with respect to Mr. Waxel and Dr. Geiger but, instead, accepted Judge Coffey's "catch all" notice of witnesses. If this is not trial by ambush, it is hard to say what is. This approach allows parties to name specific individuals and then say "all other employees" or "all treating physicians" in order to have them considered timely and adequately noticed. The unfairness of such an approach is that it requires the

opposing party to interview and/or depose an entire category of possible witnesses prior to trial because they have no way of knowing which individuals may actually be called.

D. The Circuit Court erred by admitting other irrelevant and highly prejudicial evidence.[37]

Relying on McCracken, Judge Coffey asserts that Mr. Breed's argument regarding the improper admission of the letter from the Commission dismissing his Complaint is "conclusory and unsupported." Although Mr. Breed included this argument with a host of other evidentiary errors committed by the Circuit Court, he properly supported it with case law and cites to the transcript. This alone distinguishes Mr. Breed's Brief from the issue addressed in McCracken, which contained nothing beyond "[a] bald assertion" on an issue, 346 S.C. at 92, 551 S.E.2d at 238, and this Court should consider this argument.

Judge Coffey then suggests that the letter from the Commission was entered as evidence that Mr. Breed did not inform Mr. Kelley or Mr. DeLoach that his Complaint had been dismissed. However, the transcript reveals this letter, Plaintiff's Exhibit No. 7, was entered during Judge Coffey's testimony. After asking her about statements in the letter that were false, and Judge Coffey explaining what she believed was untrue in the Letter, her counsel asked her "And did the Commission on Judicial Conduct agree with you?" to which Judge Coffey replied, "They dismissed the complaint." (Tr. 255, line 16 – 257, line 10). Immediately following, she introduced the letter from the Commission, over Appellants' counsel's objection. (Tr. 258, lines 2-9). There is no doubt that this letter was introduced in order to demonstrate Judge Coffey had been "essentially exonerated." For her to now claim that it was entered solely to show the ongoing nature of the defamation, or to suggest that it was entered based on testimony elicited from Mr. Breed, is disingenuous at best.

[37] With respect to Judge Coffey's argument that this issue was not properly raised on appeal, *see* Section I.C, above.

Furthermore, introduction of the letter from the Commission does not provide evidence of concealment and, therefore, is not probative as to punitive damages. Mr. Breed did not withhold information but, instead, testified that he told Mr. Kelley that the complaint had been dismissed. (Tr. 1181, line 16 – 1182, line 12). He simply could not recall whether he had told Mr. DeLoach. (Tr. 1182, lines 13-15). Mr. DeLoach testified that he learned of the dismissal. (Tr. 771, lines 7-15). Judge Coffey has presented no evidence whatsoever that she requested Mr. Breed or anyone else to retract the statements made in the Letter.

Judge Coffey's assertion that Mr. Breed "entered into an indemnification agreement" with the CSA Board and that this provides further evidence of the "reprehensibility" of his conduct is yet one more place where she mis-states the record in attempt to justify an excessive jury verdict. Mr. Breed did not enter into any indemnification agreement with the CSA Board. Collins Entm't Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct. App. 2003) is entirely distinguishable and in applicable. There, the defendant entered into an indemnity agreement **prior to** and **specifically in order to** shield himself from his tortious actions. 355 S.C. at 141, 584 S.E.2d at 128. Mr. Breed took no such actions here. In fact, Mr. Breed's uncontroverted testimony is that he did not even know about the indemnification arrangements until he was deposed. (Tr. 1248, line 10 – 1249, line 24).

E. The Circuit Court erroneously admitted impermissible hearsay evidence.

First, this issue is properly preserved and presented for appellate review. Mr. Breed's argument concerning impermissible hearsay was raised both at the hearing and in post-trial motions, (Tr. 213, line 11 – 214, line 14) (Tr. 217, line 8 – 226, line 23) (Tr. 278, lines 2-22), and is adequately supported by record cites, case law and citations to the South Carolina Rules of Evidence.

Second, Judge Coffey offered the hearsay specifically for the truth of the matter asserted – that Mr. Hulbert told her he knew about the contents of the Letter and that Mr. Coltrane told her he had seen the Letter and discussed it with Mr. DeLoach.[38] This goes to the very heart of her assertion of unlawful publication of the Letter by Mr. Breed, which she herself admitted was hearsay. (Tr. 412, line 16 – 414, line 5). *See* Abofreka v. Alston Tobacco Co., 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) (holding testimony offered to show the defamatory remarks were disseminated "was inadmissible hearsay").

Third, the cases cited by Judge Coffey are distinguishable in a meaningful way and, therefore, inapplicable. In Goodwin v. Kennedy, 347 S.C. 30, 46, 552 S.E.2d 319, 328 (Ct. App. 2001), the statements were offered to show how the defamatory statements affected his relationship with students, which in turn went to prove damage to his reputation. Momah v. Bharti, 144 Wn. App. 731, 182 P.3d 455 (Wash. App. 2008), a Washington Court of Appeals case, considered whether printouts of a law firm's website, which included defamatory statements regarding the plaintiff, had been properly excluded. The court explained that the printouts themselves were not hearsay in that they were "offered for the purpose of showing republication and not to prove the truth of the contents ..." 144 Wn. App. at 749-50, 182 P.3d at 466. In contrast, Judge Coffey's hearsay statements were offered to prove that specific individuals – Mr. Hulbert and Mr. Coltrane – had seen the letter and that publication was Mr. Breed's fault. That is the very definition of hearsay. Rule 801(c), SCRE.

F. The Cumulative Errors Doctrine requires reversal.

[38] Judge Coffey repeats this assertion in her Brief in Response to CSA's Brief. (*See* p. 9).

Judge Coffey fails to address Mr. Breed's argument regarding the Cumulative Errors Doctrine, and therefore may be deemed to have conceded it.[39] That doctrine "provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial ...." State v. Johnson, 334 S.C. 78, 92-93, 512 S.E.2d 795, 803 (1999), *citing* Tennant v. Marion Health Care Found., 194 W.Va. 97, 117-118, 459 S.E.2d 374, 394-395 (1995) (noting that the cumulative error rule applies to civil cases).

The Court should hold that the cumulative effect of the numerous evidentiary errors committed by the Circuit Court effectively prevented Mr. Breed from receiving a fair trial.

VI. The Circuit Court gave an improper spoliation charge.

In her defense of the Circuit Court's erroneous spoliation charge, Judge Coffey asserts that she need not first show that the purportedly missing evidence ever existed. However, she can cite to no case where a spoliation charge was based on alleged evidence that never existed and Stokes v. Spartanburg Reg. Med. Ctr., 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006), does not support her argument. There, evidence was produced that blood, in fact, was drawn during the code, and the hospital admitted the vital signs flow chart existed but could not explain why it was missing. Here, there simply is no evidence that the various recordings and tapes that Judge Coffey avers were not produced ever were made. Simply because technology existed to record incoming calls to the dispatch center or some of the cruisers had cameras does not mean any of the tapes or videos Judge Coffey alleges went missing were ever recorded in the first place. Mr. Breed testified that not all of the phones at CSA have recording devices. (Tr. 1096, line 25 – 1097, line 5). As noted in Mr. Breed's Brief, audiotapes were routinely taped over in the normal course of business, and videotapes from the cruisers were the responsibility of

[39] An argument raised in an appellant's brief that is not responded to may be deemed a concession of that point. *See* Turner, 377 S.C. at 547, 661 S.E.2d at 121; First Union Nat'l Bank, 321 S.C. at 502, 469 S.E.2d at 617.

the individual officers.[40] Finally, the spoliation charge was improper because Judge Coffey failed to make any "showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009).

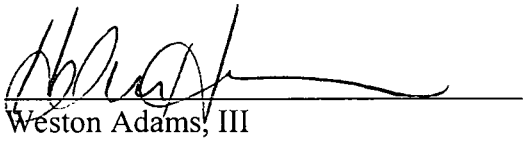
The Court should hold that the erroneous spoliation charge given by the Circuit Court constituted reversible error.

CONCLUSION

For all the reasons stated herein and in the Briefs of Appellants, this Court should reverse the verdict in this case and dismiss Judge Coffey's claim or, in the alternative, remand for a new trial.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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[40] (Tr. 566, lines 3-5) (Tr. 1095, line 1 – 1100, line 18) (Tr. 1108, line 7 – 1111, line 4) (Tr. 1239, line 22 – 1241, line 9) (Tr. 1367, line 9 – 1369, line 7) (Tr. 1109, line 2 – 1110, line 6).