THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

MAUREEN T. COFFEY'S FINAL RESPONDENT'S BRIEF IN RESPONSE TO COMMUNITY SERVICES ASSOCIATES, INC.'S FINAL APPELLANT'S BRIEF

C. Mitchell Brown
SC Bar No. 012872
mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
matt.bogan@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
(843) 785-6503

Attorneys for Respondent Maureen T. Coffey

RECEIVED
FEB 11 2014
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

MAUREEN T. COFFEY'S FINAL RESPONDENT'S BRIEF IN RESPONSE TO COMMUNITY SERVICES ASSOCIATES, INC.'S FINAL APPELLANT'S BRIEF

C. Mitchell Brown
SC Bar No. 012872
mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
matt.bogan@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
(843) 785-6503

Attorneys for Respondent Maureen T. Coffey

Table of Contents

Page

Table of Authorities iii

Counter-Statements of Issues on Appeal 1

Counter-Statement of the Case 2

Standard of Review 7

The Facts Viewed Most Favorably to Respondent 8

Argument 13

I. CSA is not entitled to a directed verdict because it failed to make a directed verdict motion at the close of all evidence, thereby waiving all arguments seeking judgment in CSA's favor 15

II. CSA failed to raise several arguments to the trial court and/or failed to obtain a ruling from the trial court on those arguments 22

III. The trial court properly rejected Appellants' arguments that, as a matter of law, the republication of its agent's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by an absolute (or judicial) privilege because the publication exceeded permissible bounds 24

A. Breed was acting in the scope of employment and CSA was fully aware of his actions thereby creating liability for CSA 25

B. Breed's republication of the defamatory letter exceeded the scope of any protection under an absolute privilege 26

IV. The trial court properly allowed witnesses to testify at trial in this matter who were identified to Appellants in the course of discovery prior to trial 30

V. CSA's arguments on Respondent's libel claim fail on the merits because Respondent proved that Breed published false statements about Respondent with constitutional actual malice, which caused damage to Respondent 34

A. Breed published his statements in the course of employment with the knowledge of CSA 35

B. CSA's agents republished false statements about Respondent's ability to be impartial, fair, and unbiased in matters that had been

pending before her Court and false statements about her alleged interference with an investigation 36

C. CSA's agents republished false statements about Respondent with actual malice and a reckless disregard for the truth of his statements 39

D. Respondent proved damage arising from CSA's agents' republication of false statements by a preponderance of the evidence 42

VI. The trial court properly reviewed the punitive damages award under *Mitchell v. Fortis* as dictated by *BMW v. Gore* and concluded that it was constitutional 47

A. Breed's conduct was reprehensible 48

1. *Respondent suffered physical and economic harm* 48

2. *Breed's tortuous conduct evinced an indifference to or a reckless disregard for Respondent's health* 48

3. *The target of the conduct had financial vulnerability* 49

4. *The conduct involved repeated actions* 50

5. *The harm was the result of intentional malice, trickery, or deceit, rather than mere accident* 50

B. The ratio between actual and punitive damages is within constitutional limits 51

C. Comparable cases justify the punitive damages award in this case 53

VII. Sufficient evidence existed that CSA's employees and/or agents published slanderous statements regarding Respondent and an alleged extra-marital affair to support the general verdict on slander against CSA 54

VIII. CSA's agents' republication of the letter was not protected by any qualified privilege 56

Conclusion 59

Table of Authorities

Page

Cases

Anderson v. Augusta Chronicle,
355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003) 7, 34

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 7

Araya v. Deep Dive Media, LLC, et. al.,
Case No. 5:12-cv-163, 2013 U.S. Dist. LEXIS 117841 43

Asay v. Hallmark Cards, Inc.,
594 F.2d 692 (8th Cir. 1979) 27

Atl. Coast Builders & Contrs., LLC v. Lewis,
398 S.C. 323, 730 S.E.2d 282 (2012) 13, 45

Ballenger v. Bowen,
313 S.C. 476, 443 S.E.2d 379 (1994) 15

Beckham v. Sun News,
289 S.C. 28, 344 S.E.2d 603 (1986)..36

Bell v. Bank of Abbeville,
208 S.C. 490, 38 S.E.2d 641 (1946)..56, 57

Bell v. Evening Post Pub. Co.,
318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995) 7

Bensch v. Davidson,
354 S.C. 173, 580 S.E.2d 128 (2005) 32

BMW of North America v. Gore,
517 U.S. 559 (1996) 47

Boling v. Clinton Cotton Mills, et. al.,
163 S.C. 13, 161 S.E. 195 (1931)...25, 35, 55

Brown v. Collins,
402 F.2d 209 (D.C. Cir. 1968) 27

Bunton v. Bentley,
176 S.W.3d 1 (Tex. App. 1999)...14

Castine v. Castine,
403 S.C. 259, 743 S.E.2d 93 (Ct. App. 2013)...37

Coker v. Amoco Oil Co.,
709 F.2d 1433 (11th Cir. 1983) 19

Cole v. Raut,
378 S.C. 398, 663 S.E.2d 30 (2008)..13, 45

Collins Cadillac, Inc. v. Bigelow-Sanford, Inc.,
276 S.C. 465, 279 S.E.2d 611 (1981) 16

Cox Broadcasting Corporation v. Cohn,
420 U.S. 469 (1975) 36

Deloach v. Beaufort Gazette,
281 S.C. 474, 316 S.E.2d 139 (1984) 53

DiSalle v. P.G. Pub. Co.,
375 Pa. Super. 510, 544 A.2d 1345 (Pa. Super. 1988) 14

Duncan v. Ford Motor Co.,
385 S.C. 119, 682 S.E.2d 877 (Ct. App. 2009) 53

Elam v. S.C. Dep't of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 22

Elder v. Gaffney Ledger,
341 S.C. 108, 533 S.E.2d 899 (2000) 7, 39

Erickson v. Jones Street Publishers, LLC,
368 S.C. 444, 629 S.E.2d 653 (2006) 34, 42

Eubanks v. Smith,
292 S.C. 57, 354 S.E.2d 898 (1987) 26

Fulton v. Atlantic Coast Line R. Co.,
220 S.C. 287, 67 S.E.2d 425 (1951) 57

Gamble v. Int'l Paper Realty Corp. of S.C.,
323 S.C. 367, 474 S.E.2d 438 (1996) 31

Gaylord Broad. Co., L.P. v. Francis,
7 S.W.3d 279 (Tex. App. 1999) 14

GMC v. Seay,
879 A.2d 1049 (Md. Ct. App. 2005) 18

Goodwin v. Kennedy,
347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) 54

Hendrix v. Eastern Distribution, Inc.,
316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994) 15

Holtzscheiter v. Thomson Newspapers, Inc.,
332 S.C. 502, 506 S.E.2d 497 (1998) 39

In the Matter of the Care and Treatment of McCracken,
346 S.C. 87, 551 S.E.2d 235 (2001) 23

Jamison v. American Workmen Ins. Co.,
169 SC 400, 169 S.E. 83 (1933) 53

Kaiser v. Hardin,
953 So.2d 802 (La. 2007) 43

Kenneth B. Jenkins, Respondent, v. Benjamin Scott Few and Few Farms, Inc.,
391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) 31

Kinard v. United Ins. Co.,
237 S.C. 266, 116 S.E.2d 906 (1960) 53

Laney v. Bi-Lo, Inc.,
309 S.C. 37, 419 S.E.2d 809 (1992) 18

Laney v. Hefley,
262 S.C. 54, 202 S.E.2d 12 (1974) 31, 32, 33

Limehouse v. Hulsey,
397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2005) 53

Mains v. K Mart Corp.,
297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) 54

Miller v. City of West Columbia,
322 S.C. 224, 471 S.E.2d 683 (1996) 7

Mitchell v. Fortis Ins. Co.,
385 S.C. 570, 686 S.E.2d 176 (2009) .... passim

Murphy v. Jefferson Pilot Communs. Co.,
364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005) 25, 35, 55

Murray v. Holnam, Inc.,
344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) 54

Patterson v. Reid,
318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) 16

Picone, et. al. v. Talbott,
349 A.2d 615 (Md. Ct. Sp. App. 1975) 43

Posey County v. Chamness,
438 N.E.2d 1041 (Ind. Ct. App. 1982) 43

Quesinberry v. Rouppasong,
331 S.C. 589, 503 S.E.2d 717 (1998) 42

Riley v. Life & Casualty Ins. Co.,
184 S.C. 383, 192 S.E. 394 (1937) 53

Rogers v. Florence Printing Co.,
233 S.C. 567, 106 S.E.2d 258 (1958) 53

Singer v. Dungan,
45 F.3d 823 (4th Cir. 1995) 17, 18, 19, 20

Spencer v. Spencer,
479 N.W.2d 293 (Iowa 1991) 27

Sriberg v. Raymond,
544 F.2d 15 (1st Cir. 1976) 27

State Farm v. Campbell,
538 U.S. 408 (2003) 52

State v. Bryant,
316 S.C. 216, 447 S.E.2d 852 (1994) 20, 21

State v. Dowd,
306 S.C. 268, 411 S.E.2d 428 (1991) 43

State v. Mueller,
319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) 23

State v. Schumpert,
312 S.C. 502, 435 S.E.2d 859 (1993) 23

Sullivan v. Birmingham, et. al.,
416 N.E.2d 528 (Mass. 1981) 27

Swinton Creek Nursery v. Edisto Farm Credit, ACA,
334 S.C. 469, 514 S.E.2d 126 (1999) 7, 56, 57, 58

Tallent v. Blake,
57 N.C. App. 249, 291 S.E.2d 336 (N.C. Ct. App. 1982) 43

Thibadeau v. Crane,
131 Ga. App. 591, 206 S.E.2d 609 (Ga. App. 1974) 14

Tribble v. Hentz,
285 S.C. 616, 330 S.E.2d 560 (Ct. App. 1985) 31

Vahlsing Christina Corp., et. al. v. Stanley,
487 A.2d 264 (Maine 1985) 27

Washington v. Whitaker,
317 S.C. 114, 451 S.E.2d 898 23

Weir v. Citicorp Nat'l Servs.,
312 S.C. 511, 435 S.E.2d 864 (1993) 53

Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998) 22

Wright v. Craft,
372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2007) 15

Wright v. Royse,
43 Ill. App. 2d 267 (Ill. App. 1963) 31

Yarborough v. Bankers Life & Casualty Co.,
225 S.C. 236, 81 S.E.2d 359 (1954) 53

Rules

Rule 13 of 502, SCACR 22, 28

SCACR Rule 208(b)(1)(C) 2

SCRCP Rule 33(b) ... 30
SCRCP Rule 40(j) ... 5
SCRCP Rule 50 ... passim
SCRCP Rule 50(b) ... 19
SCRCP Rule 59(e) ... 22
SCRE Rule 801(d) ... 54

Other Authorities

Moore's Federal Practice: Civil § 50.40 ... 17
Restatement (Second) of Torts § 593 (1977) ... 56
Restatement (Second) of Torts § 604 (1977) ... 27
Restatement (Second) of Torts § 605 (1977) ... 27

Counter-Statements of Issues on Appeal

I. **Did CSA waive all arguments requesting judgment in its favor due to CSA's failure to renew its directed verdict motion at the close of all evidence?**

II. **Are issues CSA attempts to raise on appeal unpreserved due to its failure to properly raise the issues to the trial court and/or obtain a ruling from the trial court on the issues?**

III. **Did the trial court correctly reject Appellants' arguments that, as a matter of law, the publication of Breed's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by an absolute (judicial) privilege?**

IV. **Did the trial court properly allow witnesses to testify at trial in this matter who were identified to Appellants in the course of discovery prior to trial?**

V. **Was there any evidence of a clear and convincing quality that the statements in the letter of CSA's agent, published to the assistant town manger for the Town of Hilton Head and CSA's Board, were false; that CSA's agent acted with actual malice in publishing his letter beyond the Commission on Judicial Conduct; and that Respondent proved damage by a preponderance of the evidence as a resulted of the defamatory publication by CSA's agent?**

VI. **Did the trial court properly review the punitive damage award and conclude that it was within constitutionally permissible limits?**

VII. **Was there sufficient evidence that CSA's employees and/or agents published slanderous statements regarding Respondent and an alleged extra-marital affair to support the general verdict on slander against CSA?**

VIII. **Was there sufficient evidence that CSA's agent Breed published his letter containing false statements in the course of his employment with CSA and did the trial court correctly reject Appellants' arguments that, as a matter of law, the publication of Breed's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by a qualified privilege?**

Counter-Statement of the Case

Pursuant to Rule 208(b)(1)(C), SCACR, Respondent Maureen T. Coffey ("Respondent" or "Judge Coffey") includes her own Statement of the Case. This appeal arises out of a $6,006,050.00 general verdict in favor of Respondent against George F. Breed, Jr. ("Breed") and Community Services Associates, Inc. ("CSA") in a defamation action. (Judgment and Verdict Form; R. 1 & 1881) The trial court entered judgment for Respondent on June 18, 2012. (*Id.*)

Respondent is a municipal court judge for the Town of Hilton Head. (Am. Compl.; R. 41.) Breed was the director of Security and Community Affairs at Sea Pines and CSA is the entity that owns and manages Sea Pines and employed Breed. (Am. Compl.; R. 41.) Breed, in his capacity as the director of security, was engaged in his own investigation of a rash of break-ins in the Sea Pines community in 2004 and more in 2008. (T 235-248; 470-495; 842-846; 1118-1129; R. 324-337; 467-492;729-73;975-986.) Of course, the Beaufort Sheriff's Department would be the entity conducting any official criminal investigation. (Tr. 1121-1179; R. 978-1036.) Breed and CSA's security agents suspected that Respondent's adopted brother, Mr. Otis Coffey, was responsible for the break-ins. (*Id.*) Otis Coffey was never charged for the break-ins. (Tr. 467-470; 1133-1135; 1118-1120; R. 464-467; 990-992; 975-977.) Respondent presided over various cases in the Town of Hilton Head, including cases involving CSA security and Breed but recused herself from such matters after Breed lodged his complaint with the Commission on Judicial Conduct. (Tr. 210-211; 232-234; 261-267; R. 299-300; 321-323; 350-356.)

While investigating the break-ins in Sea Pines, Breed wrote a letter to the South Carolina Commission on Judicial Conduct and stated that "[s]he [Respondent] 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." (Tr. 1121-1179; Plaintiff's Exs. 4 & 18; R. 978-1036; 1721 & 1739.) Among other statements, Breed also stated in the letter that "Judge Coffey has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (*Id.*) Breed further stated that "[t]his conduct was/is pervasive and invasive in nature, and directly results in Judge Coffey's inability to maintain the impartiality so necessary to the successful balance of our legal system." (*Id.*) Breed sent the letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1739.)

Prior to sending the letter, Breed contacted Mr. Greg DeLoach, the then Assistant Town Manager for the Town of Hilton Head, to express his concerns about Respondent. (Tr. 1121-1179; R. 978-1036.) Mr. DeLoach informed Breed that Respondent did not report to Mr. DeLoach but instead she reported to the Town Council for the Town of Hilton Head. (Tr. 1123-1128; 1141-1147; R. 980-985; 998-1004.) Because Mr. DeLoach was not Respondent's supervisor, Mr. DeLoach informed Breed that Breed should send any concerns about Respondent to the South Carolina Commission on Judicial Conduct (sometimes "the Commission"). (*Id.*; Tr. 745-750; R. 660-665.) Breed then sent the aforementioned letter to the Commission. (Tr. 1121-1179; R. 978-1036.) After sending his letter to the Commission, Breed provided a copy of the letter to Mr. DeLoach. (Tr. 1121-1179; R. 978-1036.) Mr. DeLoach and Breed work for separate

employers and do not work together. (*Id.*) The town of Hilton Head employs Mr. DeLoach and CSA employed Breed. Despite the absence of common employers and Mr. DeLoach having informed Breed where to file a complaint about Respondent, Breed sent Mr. DeLoach a copy of the letter anyway. (*Id*; *see also* Tr. 746-748; R. 661-663.)

Further, prior to sending the letter to the Commission, Breed provided a copy of the letter to Mr. Cary Kelley, the Executive Vice President and Chief Operating Officer at CSA. (Tr. 1121-1179; R. 978-1036.) After Breed sent the letter to the Commission, Mr. Kelley provided copies of the letter to the full Board of Directors for CSA on June 24, 2008. (Tr. 1121-1179; 976-995; 1222-1226; 1289-1292; R. 978-1036; 839-858; 1079-1083; 1144-1147.) Breed did so, 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. (Tr. 1222-1226; 1164-1171: R. 1079-1083; 1021-1028.)

In the course of discovery and at trial, Breed admitted that he could not identify any cases in which Respondent acted with bias or partiality. (Tr. 230-234; 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005 & R. 1723.) Further, at trial it was admitted that on October 1, 2008, the Commission dismissed Breed's complaint against Respondent. (Pl. Ex. 7; Tr. 1179-1182; R. 1724; 1036-1039.) Breed did not inform DeLoach that the complaint against Respondent had been dismissed or report that information to the Board himself. (*Id.*; 999-1000; R. 862-863.)

Also during the course of the above events, CSA employees alleged that Respondent was engaged in an extra-marital affair with a CSA Officer named John Jolin. (Tr. 516-522; R. 513-519.) This statement was spread by CSA employees Ms. Bobbie

Martin and Mr. Randy Woods. (Tr. 516-522; 813-814; 818-819; R. 513-519; 712-713; 715-716.) Mr. William Waxel testified as to these false statements being spread, (Tr. 848-850; R. 732-734.) as did Ms. Sherry Hamilton, Judge Coffey's court assistant. (Tr. 1048-1050; R. 909-911.) Mr. Woods testified that others in the employ of CSA had asked him about the allegations of an affair, naming CSA employees Mr. Waxel, Mr. Ryan, and Mr. Hahn, specifically at trial. (Tr. 856-860; R. 739-743.) Respondent testified about what she heard being spread about her as well. (Tr. 260-263; R. 349-352.) Respondent testified that such statements were especially troubling because another associate municipal judge had previously been relieved of her duties for having an affair. (*Id*; *see also* Tr. 777-779; R. 692-694.)

Arising out of: 1) Breed's dissemination and publication of his letter to Mr. DeLoach and the CSA Board; and 2) the statements of CSA employees concerning her alleged infidelity to her husband, Respondent filed this action. On November 20, 2008, Respondent originally filed suit against Breed and Community Services Associates, Inc. (collectively sometimes "Appellants" [1]). (Compl.; R. 12.) Initially, the suit also named Sea Pines Committee. (Compl.; R. 12.) On January 12, 2010, Respondent removed the case from the active docket pursuant to Rule 40(j), SCRCP. (Rule 40(j) filing; R. 39.) On January 4, 2011, Respondent restored the action to the active docket. On February 8, 2011, Respondent filed an Amended Complaint naming Breed, CSA, and adding the Association of Sea Pines Plantation Property Owners. (Am. Compl.; R. 41.) The trial court later dismissed the Association of Sea Pines Plantation Property Owners. (Tr. 1713-1714; R. 1461-1462.)

[1] Breed and CSA were represented jointly at trial by the same counsel.

Respondent's Amended Complaint asserted causes of action for common law libel and slander, constitutional libel and slander, civil conspiracy, and negligence. (Am. Compl.; R. 41.) The trial court dismissed Respondent's claims for civil conspiracy and negligence. (Tr. 1714; R. 1462.) At the start of trial, the trial court ruled that Respondent was a public figure, thereby removing her common law causes of action for libel and slander. (Tr. 135; R. 245.) Further, prior to trial, the trial court directed a verdict in favor of Breed, but not in favor of CSA, on the constitutional slander claim. (Tr. 1715; R. 1463.) Thus, at trial the remaining claims were for constitutional libel and slander against CSA and constitutional libel against Breed.

The action was tried before a jury in Beaufort County from May 29, 2012 through June 6, 2012. (Judgment and Verdict Form; R. 1 & 1881.) Breed and CSA made joint directed verdict motions at the close of Plaintiff's case, which the trial court denied (Tr. 1385-1443; R. 1240-1298.) Breed and CSA again made joint directed verdict motions which the trial court again denied. (Tr. 1710-1724; R. 1458-1472.) The Appellants did not make their renewed directed verdict motions, however, at the close of all evidence. (Tr. 1728; R. 1476.) Instead, following the second set of directed verdict motions, Ms. Sherry Hamilton testified and Breed and CSA failed to renew their directed verdict motions thereafter. (Tr. 1725-1728; R. 1473-1476.) On June 6, 2012, the jury returned the general verdict against Breed and CSA. (Judgment and Verdict Form; R. 1 & 1881.)

On June 15, 2012, Breed and CSA filed post-trial motions. (Appellants' Post-Trial Mot. & Memo.; R. 166-167.) The trial court denied the post-trial motions, and filed an Order on October 15, 2012 regarding them. (October 10, 2012 Order; R. 3.) CSA and Breed appealed.

Standard of Review

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); *see Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995). A directed verdict motion on liability for defamation is properly denied where evidence exists justifying submitting the issue to the jury. *See Anderson v. Augusta Chronicle*, 355 S.C. 461, 471, 585 S.E.2d 506, 51 (Ct. App. 2003) (internal citations omitted).

Whether a public figure-plaintiff has presented evidence sufficient to constitute actual malice is, in the first instance, a question of law for the trial court. *See Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("When determining if . . . actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*."). Similarly, the appellate court is obligated to independently examine the entire record on appeal and decide, *de novo*, whether the evidence presented below is of sufficient quantity and quality to sustain a finding of actual malice. *See Elder*, 341 S.C. at 113-114, 533 S.E.2d at 902; *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996). In all cases the court must ask "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255-56.

The Facts Viewed Most Favorably to Respondent

Respondent is a municipal judge for the Town of Hilton Head. (Tr. 203; R. 292.) She has been employed either part-time or full-time by the Town since 2000. (Tr. 200-207;R. 290-296.) Respondent's family lives in Hilton Head in the Sea Pines Community. (Tr. 360; R. 406.) Her adopted brother, Otis Coffey, lived with her parents in Sea Pines. (Tr. 230-237; 253-256; R. 319-326; 342-345.) Her father died in 2005. (*Id.*)

The community of Sea Pines experienced a rash of break-ins during 2004 and more in 2008. Breed and his officers in the security patrol, employed by CSA, were on guard and attempting to stop the break-ins and identify suspects though the Beaufort Sheriff's Department would ultimately be responsible for any official criminal investigation and prosecution of an offender. (Tr. 235-248; 470-495; 843; 845; 1118-1129; R. 324-337; 467-492; 729-730; 975-986.) At some point in the course of events, Breed and his team focused on Otis Coffey as a possible suspect regarding the break-ins. (*Id.*) This resulted in several interactions with Otis Coffey, his parents, and the CSA security personnel. (Tr. 230-257; 1121-1179; R. 319-346; 978-1036.) Mr. Otis Coffey was never charged in these incidents. (Tr. 467-470; 1133-1135; 1118-1120; R.464-467; 990-992; 975-977.) Breed never interacted or even met Respondent prior to her deposition in this matter. (Tr. 1121-1179; R. 978-1036.)

Breed, in his capacity as director of security for CSA, claimed to conclude that Respondent was interfering with the break-ins investigations as a result of those interactions. (Tr. 1121-1179; R. 978-1036.) Prior to her deposition in this suit, Breed had not met Respondent. (Tr. 1121-1179; R. 978-1036.) Further, with respect to other municipal judges, Breed would often call them to express his concern about an issue.

(*Id.*) Breed did not talk to Respondent or her mother about his alleged problems with their family. (*Id.*) At trial, Breed claimed Respondent was interfering with the sheriff's department's investigation through he could not cite one instance of such interference or name one person who said Respondent interfered. (Tr.112-1179; R. 978-1036.) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed did not talk to Respondent or her mother about his alleged problems with their family. (*Id.*)

Breed called Mr. DeLoach, the assistant manager for the Town of Hilton Head to complain about Respondent. (Tr. 1123-1128; 1141-1147; R. 980-985; 998-1004.) Mr. DeLoach informed Breed that Respondent did not report to Mr. DeLoach but that Respondent reported to town council and that Breed should lodge any complaint about Respondent with the Commission on Judicial Conduct. (*Id.*; Tr. 745-750; R. 660-665.) Breed did so in the form of the aforementioned letter. Breed sent the letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1739) Thereafter, despite Mr. DeLoach's statements that Respondent reported to town council, Breed sent a copy of the letter to Mr. DeLoach. (Tr. 1121-1179, R. 978-1036.) Mr. DeLoach was employed by the town of Hilton Head and Breed by CSA. Thus, despite the lack of a common employer or interest, Breed published his letter to Mr. DeLoach. (*Id.*)

The complaint was later dismissed by the Commission. (Tr. 1179-1182; Pl. Ex. 7; R. 1036-1039; 1724.) Breed, however, never informed Mr. DeLoach of that fact. (*Id.*)

Before sending the letter to the Commission, Breed provided a copy of a draft to Mr. Kelley, the chief executive of Sea Pines. (Tr. 1121-1179; R. 978-1036.) Mr. Kelley and Breed then shared the letter with the full Board of CSA. (*Id.*) At other points, according to the testimony of Respondent, Breed caused the letter to be shared with Mr. Coltrane, another assistant manger 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). (Tr. 213-218; 231-232; R. 302-307; 320-321.) Breed's stated reason for sharing the letter with the Board was that he needed to account to the Board as to why the rash of incidents in Sea Pines had gone unsolved and his department was experiencing "hurdles" in solving the crimes. (Tr. 1224-1226; 1164-1171; 1278-1295; 982-985; R. 1081-1083; 1021-1028; 1133-1150; 845-848.) In other words, Breed was using his letter and the false statements therein to blame Respondent for the failures to solve the break-ins at Sea Pines. (*Id.*) Breed testified that the letter was published to the Board. (Tr. 1121-1179; R. 978-1036.) Breed never informed the Board that his complaint against Respondent had been dismissed by the Commission. (*Id.*; Tr. 1179-1182; 999-1000; R. 1036-1039; 862-863.)

At trial, Breed's testimony, read in via deposition, established that he had no foundation for making the statements about Respondent's alleged inability to be impartial and unbiased. (Pl. Ex. 6; Tr. 230-234; Tr. 1125-1148; R. 1723; 319-323; 982-1005.) He could not cite to a single case where Respondent had acted improperly or unfair in a case. (*Id.*) Respondent testified that she always acted with impartiality and fairness in every case before her. (Tr. 210-212; 230-234; 256-260; R. 299-301; 319-323; 345-349.) Similarly, other witnesses at trial said Respondent was fair in cases before her, and no

instance of her acting otherwise was revealed. (Tr. 461-463; 789; 1598-1599; R. 458-460; 702; 1374-1375.)

Moreover, Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would prosecute anyone arrest for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.) Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations. (Tr. 1143; R. 1000.)

Thus, Breed's disseminated statements about Respondent's alleged inability to be impartial were admittedly false. Breed made other false statements in the letter, including the allegation of Respondent's interference with investigations of her adopted brother. (Pl.'s Exs. 4 & 18; R. 1721 & 1739) Breed's false statements caused Respondent damage. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Respondent testified that as a result of the statements by Breed, the town of Hilton Head only renewed her contract for two years instead of the normal three year period she had previously had. (Pls. Exs. 1-3; Tr. 202-210; 274-281; R. 1712-1720; 291-299; 363-370.) Respondent also experienced more parties asking for her to recuse herself because of the allegations that she could not be fair, damaging her reputation. (Tr. 280-282; R. 369-371.) Breed's statements thus made it difficult for her to function in her job as a judge.

Further, Breed's statements caused Respondent to seek medical care and she incurred costs arising from that care. (Tr. 208-218; 228-287; 935-942; 972-974; R. 297-307; 317-376; 799-806; 836-838.) Respondent also suffered debilitating migraine headaches where she was incapacitated and could not always care for her young children and was required to hire babysitters as a result. (Tr. 270-287; R. 359-376.)

Trial testimony also revealed that Mr. Otis Coffey was not charged for the incidents at Sea Pines, but a Mr. Levy was. (Tr. 1118-1120; 1133-1135; R. 975-977; 990-992.) Breed was aware of this fact but continued to operate as if Mr. Otis Coffey was responsible for the prior incidents as revealed in this letter. (*Id.*; Tr. 1583-1586; Pl. Ex. 18; R. 1359-1362; 1886.) Thus, there was never any basis for any of Breed's actions respecting the Coffey family.

<u>**Argument**</u>

CSA does not challenge the amount of the general verdict in this case as unconstitutional, unduly liberal, or ask for it to be reduced with respect to Respondent's cause of action for slander. CSA only raises issue with the amount of the general verdict as to the libel claim based on its agent Breed's publication of the letter to personnel at the Town of Hilton Head and the CSA Board. Nor does CSA claim that the slanderous statements by its employees were subject to any privilege. Thus, the Court need only determine if there is evidence to support the slander claim and the judgment should be upheld under the two-issue rule. *See Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (holding the two-issue rule barred a challenge to the result below because a second supporting ground for the result was not challenged on appeal); *Cole v. Raut*, 378 S.C. 398, 407, 663 S.E.2d 30, 34-35 (2008) (upholding a general verdict based on the two-issue because the verdict was independently supported by another claim). Here, as detailed in Section VII, sufficient evidence exists to support the slander claim against CSA, and thus the entire verdict is sustained by that claim alone.

Moreover, all of CSA's arguments requesting judgment as a matter of law are unpreserved because of CSA's failure to renew its directed verdict motion at the close of all evidence. As detailed in Section II, other preservation hurdles exist with respect to CSA's arguments due to its failure to properly raise certain issues to the trial court and/or obtain a ruling from the trial court on the issues. With respect to the identification of witnesses, regarding which CSA seeks a new trial, those arguments are without merit because the trial court properly exercised its discretion in permitting the two challenged

witnesses to testify, and because CSA has shown no legal prejudice resulting from the alleged errors. As detailed at length, should the Court overlook the many preservation of error flaws in this appeal, Respondent has proved by evidence of a clear and convincing quality that CSA's agent published false statements in his letter with actual malice that harmed Respondent. The trial court also properly examined the punitive damages award and held it to be within constitutionally permissible limits. Again, CSA does not challenge the slander claim in this regard, however, and sufficient evidence exists to warrant the verdict as to slander against CSA.

CSA also attacks the judgment on the basis that a judge should not generally be able to maintain a defamation suit. (CSA Initial Br. at 7-8; 11-12.) CSA warns that if this judgment is not reversed, it will mark the end of a citizen's ability to criticize a judge and "ruin all but a few families in this State, likely depriving their younger children of educations and lowering the standard of living for the family." (*Id.* at 8.) CSA's hyperbolic contentions are unsupported by the law and wrong. Judges can and do file successful defamation suits.[2] Further, this suit does not challenge the ability of a person to complain about a judge to the Commission on Judicial Conduct. Instead, this suit challenges the ability of a person to make false statements about a judicial officer beyond the venue of the Commission on Judicial Conduct. (Am. Compl.; R. 41.) Had Breed, as

---

[2] *See Bunton v. Bentley*, 176 S.W.3d 1 (Tex. App. 1999) (affirming an award of damages in favor of a judge who brought a defamation action against host of local television show who called the judge corrupt); *Gaylord Broad. Co., L.P. v. Francis*, 7 S.W.3d 279 (Tex. App. 1999) (holding that a question of fact existed as to whether statements made by a news reporter against a judge were made with actual malice); *DiSalle v. P.G. Pub. Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (Pa. Super. 1988) (affirming an award in favor of a judge who sued newspaper for publishing a libelous statement from a private citizen); *Thibadeau v. Crane*, 131 Ga. App. 591, 592, 206 S.E.2d 609, 610 (Ga. App. 1974) (reversing a grant of summary judgment against a judge because issues of material fact as to truth and actual malice remained).

CSA's agent, only filed his grievance with the Commission on Judicial Conduct, no suit would lie. Breed went beyond that protected venue, however, and used his communication to the Commission as an opportunity to publish the statements therein to others and to falsely attack Respondent with knowledge that his statements about her were untrue. Breed further used the letter as justification to CSA and its Board as to why several incidents in Sea Pines had gone unsolved and identified Respondent as a "hurdle[]" in his investigations. This Court should reject CSA's plea for the Court to ignore the dissemination of admittedly false statements by its agent.

I. CSA is not entitled to a directed verdict because it failed to make a directed verdict motion at the close of all evidence, thereby waiving all arguments seeking judgment in CSA's favor.

All of CSA's arguments which are grounded upon the failure to grant judgment notwithstanding the verdict are not preserved. Thus, the Court should decline to entertain CSA's arguments that it is entitled to judgment as a matter of law in this case.

"When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of ***all evidence***." *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 at 496 (Ct. App. 2007) (emphasis added). The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a ***strict*** one. *Hendrix v. Eastern Distribution, Inc.*, 316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994) (emphasis added). Further, "[w]hen a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Id.*

Legal arguments for judgment are preserved only via proper directed verdict and JNOV motions for matters arising during the trial. *See Ballenger v. Bowen*, 313 S.C.

476, 443 S.E.2d 379 (1994) (denial of summary judgment does not establish the law of the case . . . issues raised in the motion may be raised again later . . . by a motion for a directed verdict). *Collins Cadillac, Inc. v. Bigelow-Sanford, Inc.*, 276 S.C. 465, 279 S.E.2d 611 (1981) (failure to raise legal issue on motion for directed verdict precluded review on appeal). *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995) ("a party cannot for the first time raise an issue by a Rule 59(e) motion which could have been raised at trial").

Appellants did jointly renew directed motions, but did not do so at the close of all evidence. Rather, ***after*** the renewed motions were made, Respondent put up a rebuttal witness, Ms. Sherry Hamilton, who was questioned by both Respondent's counsel and Appellants' counsel. The trial court did not instruct the Appellants as to when the directed verdict motions had to be made. However, and most importantly, even assuming *arguendo* that the trial court "instructed" the Appellants to make their directed verdict motions before the rebuttal witness testified, the trial court certainly ***did not*** preclude the Appellants from renewing their motions for directed verdict after the rebuttal witness testimony concluded. Instead, after the trial judge made the point of asking Respondent's counsel "at this time, do you rest?," to which Respondent's counsel replied "I do, your honor," (Tr. 1728; R. 1476) Appellants' trial counsel then said nothing and made no effort to renew anything. The trial judge said nothing at all about renewal of the directed verdict motion at that point in the proceedings. Thus, Appellants may not blame their failure to renew their Rule 50 motion after the testimony of witness Ms. Sherry Hamilton on the trial court.

The requirement under Rule 50 that directed verdict motions must be made at the close of all evidence cannot be disregarded. CSA will argue that this Court can ignore Rule 50's requirements if the evidence that comes in after the directed verdict motion is "brief or inconsequential"—a test adopted by the Fourth Circuit in *Singer v. Dungan*, 45 F.3d 823 (4th Cir. 1995). Respondent submits the *Singer* analysis is flawed and should not be followed for several reasons.

First, just because evidence is "brief" says nothing about its probative power. To determine, therefore, whether certain testimony was "brief" versus "lengthy" is simply illogical and should not be adopted as a test of any sort by any court.

Second, the *Singer* rule was expressly connected by the Fourth Circuit to the existence of the "plain error" doctrine in federal court—a doctrine which does not exist in South Carolina state courts. *See Singer*, 45 F.3d at 847. Application of the *Singer* rule here would require the appellate court in the ***first instance*** to consider evidence under a Rule 50 standard at the close of the evidence. The trial court was never asked to, and did not, consider the Sherry Hamilton testimony in the context of a Rule 50 motion. Appellants nevertheless want this Court to do that as an initial matter, and then go further and reverse the trial court regarding a ruling she never made. This request by CSA should be rejected.

Third, the language the *Singer* Court quotes from *Moore's Federal Practice* no longer appears in the current version of *Moore's*. This is because FRCP Rule 50 was amended in 2006 and no longer requires a motion for directed verdict to be renewed "at the close of all evidence." The amendment to the rule was in response to federal courts, like *Singer*, contriving exceptions to the requirement. *See generally Moore's Federal*

Practice: Civil § 50.40. Rule 50 of the South Carolina Rules of Civil Procedure has not been so amended, and our courts have not expressly adopted any exceptions to the requirement that a directed verdict motion must be made at the close of all the evidence.

Fourth, the *Singer* analysis of determining whether evidence is "inconsequential" conflicts with the historic role that our appellate courts have stated they play in a directed verdict context. The following was stated by the South Carolina Supreme Court regarding that role in *Laney v. Bi-Lo, Inc.*, 309 S.C. 37, 419 S.E.2d 809 (1992):

> Since this is a law case, we must view the evidence and all its reasonable inferences in the light most favorable to Mrs. Laney, the party who resisted the motion for directed verdict, and most strongly against Bi-Lo, the party making the motion. Because we are not a jury, ***we do not weigh the evidence and we do not decide matters of credibility.*** We also eliminate from our consideration all evidence contrary to or in conflict with the evidence favorable to Mrs. Laney and give to her the benefit of every favorable inference that the facts reasonably suggest.

309 S.C. at 38, 419 S.E.2d at 810 (emphasis added). Here, contrary to the above stated rule from the *Laney* Court, CSA desires that this Court weigh the Hamilton evidence and determine that it is "inconsequential," as compared with other evidence. The South Carolina Supreme Court has stated that our appellate courts do not play that role. Hence, this Court should not follow *Singer* or the federal cases like *Singer* but must adhere to the holding in *Laney*.

Fifth, before the change to federal rule 50, the federal courts were split on whether Rule 50 should be strictly applied and the liberal exceptions rules followed by some federal courts had been expressly considered and rejected by some state appellate courts. *See, e.g., GMC v. Seay*, 879 A.2d 1049 (Md. Ct. App. 2005) (discussing split among the federal courts on the issue and declining to adopt any liberal exception to the requirement

that a directed verdict motion be made at the close of all evidence, including after rebuttal testimony). In *Coker v. Amoco Oil Co.,* 709 F.2d 1433 (11th Cir. 1983) (superseded by statute on other grounds), Amoco moved for a directed verdict at the conclusion of the plaintiff's case but did not renew the motion at the conclusion of its own case. On appeal, Amoco argued that although it had not presented its motion at the close of all the evidence, it should not be prevented from arguing for JNOV because it had presented only a single witness, whose testimony comprised only nine pages of transcript. The court refused to overlook the failure, stating that Rule 50(b) "clearly requires a movant to file a directed verdict motion at the end of all the evidence in order to challenge the sufficiency of the evidence on appeal." 709 F.2d at 1438. The court also explained that "[t]he length of a movant's evidentiary presentation or demonstration, after the fact, that compliance would probably have been futile does not satisfy the rule's requirement." *Id.*

Assuming *arguendo* that a *Singer* test is followed, the testimony of Sherry Hamilton was of important consequence and thus Appellants' argument should be rejected in any event. Part of the support for the Appellants' defenses and the charges regarding Respondent was the testimony of Captain Toby McSwain. McSwain testified that Respondent met him in her office and sought to influence an investigation of her adopted brother. (*See* Tr. 1579-80; R. 1355-1356.) This claim by McSwain was alleged foundational support for the Breed written defamation of the Respondent. McSwain further testified that this meeting was in late 2004. (*Id.* at 1578, 1613; R. 1354, 1389.) Further, McSwain described the Respondent's office in appearance in which the meeting supposedly occurred. (*Id.* at 1611-14; R. 1387-1390.) Conversely, the Respondent denied ever having a meeting with Captain McSwain, period. (*Id.* at 239; R. 328.) Sherry

Hamilton testified that Respondent's office was actually in a different location in late 2004 and early 2005 than her current office. (*Id.* at 1726-27; R. 1474-1475.)[3] She further testified that at such different location, the office was configured in a manner so that anyone had to walk past her and another clerk to get to the Respondent's office. (*Id.* at 1726-27; R. 1474-1475.) Lastly, she testified she never saw Captain McSwain ever come to that office. (*Id.* at 1727; R. 1475.)

As stated, Captain McSwain was a key witness in the trial.[4] His credibility and the evidence concerning his actions and testimony were important to both sides. Respondent's credibility and testimony were also obviously key. Ms. Hamilton's testimony (both her original testimony and her rebuttal testimony) related to and was probative with respect to both key witnesses' credibility and to evidence submitted by both sides as to the respective claims and defenses in the case. Thus, even if a *Singer* rule were followed, it cannot be said that the Hamilton testimony was "inconsequential."

Finally, CSA did not substantially comply with Rule 50 by moving for directed verdict before Ms. Hamilton testified or because the law does not require a motion to be made "repeatedly." Appellants here ***never*** requested that the trial court consider the ***totality*** of the evidence and make a ruling on a directed verdict motion after doing so. Hence, there is ***no ruling, at all,*** by the trial judge on a request for a directed verdict based on all of the evidence before the court. Thus, an appellate court cannot "reverse" the trial court on a ruling she was never asked to make and never made. Further, *State v.*

---

[3] Captain McSwain's description of Respondent's office was of her current office. (*Id.* at 1612-13; R. 1388-1389.) Hence, the implication of Ms. Hamilton's testimony was that McSwain was fabricating the existence of the meeting, as Respondent testified he was, since his description of the office was faulty, and since, at Respondents' office during the relevant time frame, Ms. Hamilton never saw McSwain visit.

[4] Captain McSwain has, since the trial, been hired to replace George Breed.

Bryant, 316 S.C. 216, 447 S.E.2d 852 (1994) does not save CSA's failure to make a proper Rule 50 motion on the basis that the trial court noted her ruling and it would have been fruitless to renew the motion again. Adopting such an argument would mean that no Rule 50 motion is required to be renewed (after the court has denied a directed verdict at the close of the plaintiff's case, for instance). *Bryant* does not stand for the proposition that Rule 50 motion requirements, which our courts have stated are "strict" requirements, can be disregarded based on trial court commentary during trial about submitting this or that claim to the jury. The requirements on filing directed verdict motions are well known, strict requirements which cannot be ignored.

As the Record reveals, no directed verdict motion was renewed after Ms. Hamilton testified. Therefore, South Carolina appellate courts will not review the defective directed verdict motion as to either Appellant. Nor can the Court review the appeal of any JNOV denial order. This is because, as set forth above, the JNOV motion is considered waived by virtue of the defectiveness of the renewed directed motions.

As a result, the following arguments of Appellant CSA are not preserved:

Argument I, pages 5-13
Argument III, pages 29-39[5]
Argument IV, pages 46-53

Accordingly, this Court should hold that the arguments in which CSA requests judgment as a matter of law are unpreserved due to its failure to renew a directed verdict motion after the close of all evidence.

[5] Appellant CSA's argument regarding the constitutionality of punitive damages with respect to the *de novo* review of the determination of constitutionality, and with respect to the proper ratio is addressed in Section VI of this brief.

II. CSA failed to raise several arguments to the trial court and/or failed to obtain a ruling from the trial court on those arguments.

In order for an issue to be preserved for appellate review, the issue must have been raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, if an issue is raised to a trial court but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the order to provide a chance for the trial court to rule upon any issues not previously addressed. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (stating an issue must be raised to and ruled upon by the trial court in order to be preserved for appellate review, and that a party must file a Rule 59(e), SCRCP, motion to preserve an issue on which the trial court fails to rule).

On appeal, CSA argues that the trial court erred in failing to dismiss the libel claim against it based on judicial immunity. This point was not raised or ruled upon below and, thus, it is not preserved for appellate review. The arguments a pp. 5-9 of CSA's brief should not be considered.

CSA argues that the trial court erred in ruling that Rule 13 of 502, SCACR was a hybrid privilege, part absolute and part qualified. CSA did not raise this issue to the trial court and the issue was not ruled upon by the trial court. The argument is unpreserved and the points at pp. 9-12 of CSA's brief should be disregarded.

CSA's argument that Respondent improperly listed potential witnesses in "groups" is not preserved. The issue was not raised to or ruled upon by the trial court. Thus, the Court should not consider the points contained at pp. 13-16 of CSA's brief.[6]

---

[6] Further, CSA brief lists other witnesses by name including: Ms. Florencio, Mr. Sonberg, Ms. Martin, Mr. Woods, and Mr. McNeil. CSA offers no argument as to these witnesses.

CSA's contention that Mr. William Waxel should not have been permitted to testify is not preserved. The argument at pp. 19-21 regarding this witness should not be considered. CSA did not object to Waxel taking the stand contemporaneous with Waxel being called a witness. (Tr. 847; R. 731.) Therefore, the objection has been waived. *See Washington v. Whitaker*, 317 S.C. at 114, 451 S.E.2d at 898 (to preserve an issue regarding the admissibility of evidence for appellate review, a contemporaneous objection must be made).[7]

CSA contends that there in insufficient evidence to support the $2 million judgment for actual damages because it is based on speculation and conjecture. This point was not raised to or ruled upon by the trial court. The argument at pp. 29-31 of CSA's brief is not preserved.

CSA argument that Respondent's own testimony about her loss of reputation is insufficient to support a substantial award of punitive damages was not raised to or ruled upon by the trial court. The argument is not preserved and the Court should not consider the point raised at pp. 29-31 of CSA's brief.

On appeal, CSA contends that Respondent's primary harm is economic harm. At trial, CSA contended only that psychological harm is not physical harm. Thus, the

---

Thus, the issues concerning this witnesses are waived. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

[7] While Breed moved *in limine* to exclude Waxel, his failure to renew that objection prior to his testimony waived the objection. *See State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (holding that because a ruling in an *in limine* motion is not final, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) (same).

argument concerning economic harm was not raised or ruled upon by the trial court. Therefore, the points noted at p. 41 of CSA's brief are not preserved for review.

On appeal, CSA contends that Breed's intention in publishing his letter was to protect the safety and welfare of the residents of Sea Pines. This argument was not raised or ruled upon by the trial court. Therefore, the points at pp. 41-43 of CSA's brief are not preserved.

On appeal, CSA argues that Respondent disseminated the defamatory statements more than CSA or Breed by filing suit. This argument was not raised or ruled upon by the trial court. The issue is not preserved. The Court should not consider the points at pp. 43-44 of CSA's brief on this issue.

CSA now argues that Breed's letter was not the product of trickery or deceit. This argument was not made below and not ruled on by the trial court. Hence, the points contained at pp. 44-45 of CSA's brief are not preserved.

CSA now argues that the slanderous statements about an alleged affair between Mr. Jolin and Respondent were possibly made in jest. This was not raised to the trial court or ruled on by the trial court. The points at p. 47-48 of CSA's brief are not preserved and should not be considered.

III. The trial court properly rejected Appellants' arguments that, as a matter of law, the republication of its agent's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by an absolute (or judicial) privilege because the publication exceeded permissible bounds.

To the extent this Court finds the issue to be preserved, the trial court correctly rejected CSA's contention that its agent's letter was protected by an absolute privilege and submitted the case to the jury.

A. Breed was acting in the scope of employment and CSA was fully aware of his actions thereby creating liability for CSA.

It is well-established that a principal may be held liable for defamatory statements made by an agent while acting within the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question. *Boling v. Clinton Cotton Mills, et. al.*, 163 S.C. 13, 26-27, 161 S.E. 195, 200-201 (1931); *see also Murphy v. Jefferson Pilot Communs. Co.*, 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005) (discussing that "a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority" and that "a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment.")

Here, Breed sent the defamatory letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; 1721 & 1729) Breed published this letter to Mr. DeLoach at the town of Hilton Head. (Tr. 1121-1179; R. 978-1036.) Breed and Mr. DeLoach did not share a common employer or common interest regarding Judge Coffey. Mr. DeLoach expressly informed Breed to file any complaint against Respondent with the Commission because Respondent did not report to Mr. DeLoach (assistant town manger). (Tr. 745-750; R. 660-665.) Breed also caused the letter to be published to the CSA Board. (*Id.*) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creating "hurdles" with CSA's investigation of Mr. Otis Coffey as an excuse to the CSA Board for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) Breed also

testified he provided copies of the letter to Mr. Kelley, a chief executive at CSA, before and after sending it. (Tr. 1121-1179; R. 978-1036.)

Thus, the evidence established that Breed sent the letter while acting in the scope of his duties as director of security for CSA and that CSA was fully aware of his actions.

B. Breed's republication of the defamatory letter exceeded the scope of any protection under an absolute privilege.

Further, Breed admitted that he published the letter he sent to the Commission on Judicial Conduct to Mr. DeLoach, the assistant Town Manager for the Town of Hilton Head; CSA's chief executive; and to the full Board of Directors for CSA. (Tr. 1121-1179; R. 978-1036.) Breed's publication of the letter to the assistant town manager, among others, removed any protection the letter might have had as absolutely or judicially privileged. Breed and Mr. DeLoach did not share any common interest in the topics contained in Breed's letter. Breed and Mr. DeLoach were employed by separate entities; Mr. DeLoach told Breed that Respondent reported to the town council and not to Mr. DeLoach; and Mr. DeLoach informed Breed that Breed needed to lodge any complaint about Respondent with the Commission. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) Despite those facts, Breed published his letter (or caused it to be published) to those at the Town of Hilton Head (including DeLoach, Coltrane, Riley, and Hulbert).

While a defamatory pleading or complaint is absolutely (or judicially) privileged, that pleading cannot be a basis for dissemination of defamatory statements to the public or third parties not connected with the judicial proceeding. South Carolina adheres to this well-reasoned rule. *See, e.g., Eubanks v. Smith*, 292 S.C. 57, 63, 354 S.E.2d 898, 901-902 (1987) (demonstrating that the republication of false statements which exceeds the

necessary occasion are not protected by an absolute privilege even when the original forum in which the statements were made may have shielded the speaker from liability).

Otherwise, "to cause great harm and mischief a person need only file false and defamatory statements in a judicial pleading and then proceed to republish the defamation at will under the cloak of immunity." *Spencer v. Spencer*, 479 N.W.2d 293, 295-296 (Iowa 1991) (quoting *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698 (8th Cir. 1979). Thus, the absolute privilege cannot be exploited as an opportunity to defame with impunity, because it is available only when the challenged remarks are relevant or pertinent to the judicial proceedings. *Sullivan v. Birmingham, et. al.*, 416 N.E.2d 528, 530 (Mass. 1981). Further, the privilege may be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged. *Brown v. Collins*, 402 F.2d 209, 213-214 (D.C. Cir. 1968); *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1976) ; *see also* Restatement (Second) of Torts §§ 604, 605 (1977); *see also Vahlsing Christina Corp., et. al. v. Stanley*, 487 A.2d 264, 267 (Maine 1985) (holding that "[t]he privilege may well have been lost by unnecessary or unreasonable publication beyond the scope of the privileged circumstances.") (internal citations omitted).

CSA, without any support for the point, contends that "Mr. Breed's presentation of the letter to the board of Sea Pines or sending it to Mr. DeLoach would be absolutely privileged" and "[i]t is the communication itself that is privileged, not dependent on the audience which it is published." (CSA Initial Br. 11.) That is simply not supported under the law. CSA recites general propositions concerning the absolute privilege as the privilege relates to disciplinary or judicial proceedings. (*Id.*) The stated authorities relied upon by CSA do not address the factual circumstances of this case, however. CSA further

relies upon Rule 13 of Rule 502, SCACR, which governs immunity from civil suits for communications ***to the Commission on Judicial Conduct.*** Rule 13 does protect communications to the Commission and those individuals who send complaints to the Commission from civil suit for doing so. Respondent has never contended otherwise. Instead, Respondent sued Breed and CSA due to Breed's ***dissemination*** of the letter ***beyond*** the purview of the Commission on Judicial Conduct. Respondent has not sued Breed and CSA because he filed the complaint with the Commission.

Had Breed, as CSA's agent, sent his letter only to the Commission on Judicial Conduct, no cause of action would lie. Breed's actions extended beyond the singular act of writing the Commission. (Tr. 1121-1179; R. 978-1036.) Before sending the letter to the Commission, Breed provided a copy to Mr. Kelley, a chief executive at CSA. (Tr. 1121-1179; R. 978-1036.) After sending the letter to the Commission, Breed then republished it to a number of people. Breed republished the letter or caused the letter to the assistant managers of the Town of Hilton Head, the town manager, the Board of Directors for CSA, and the chief executive of CSA. (Tr. 208-218; 228-287; 1121-1179; R. 297-307; 37-376; 978-1036.) Breed sent the defamatory letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1739.) Hence, any protection the letter might have had as absolutely privileged was destroyed. Breed's single act of sending the letter to Mr. DeLoach removed any protection of the absolute privilege he might have had. Breed and Mr. DeLoach have no shared employer, no shared interest, Mr. DeLoach told Breed to complain about Respondent to the Commission on Judicial Conduct (and not to Mr. DeLoach or the town); and Mr. DeLoach was not involved at all in the proceedings

before the Commission. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) Breed had no reason to send the letter to him.

Further, the trial court did not charge the jury with an erroneous "hybrid" privilege of absolute and qualified privilege, as CSA contends. First, Appellants requested the trial court charge the jury on both privileges. (Tr. 1752-1754; 1826-1828; R. 1500-1502; 1574-1576.) Thus, they cannot now complain of this as an alleged error, as any error was invited by Appellants. Second, the trial court properly charged the law on both privileges and whether or not the scope of the privileges was exceeded by Breed's republication beyond the appropriate occasion. (Tr. 1882-1892; R. 1630-1640.) Hence, the trial court made no error in charging the jury on South Carolina law respecting absolute and qualified privilege.

As the Record reveals, the assistant town manager specifically directed Breed to make any complaint he might have about Respondent to the Commission and ***not*** to the Town of Hilton Head. (Tr. 745-750; 1123-1128; 1141-1147; R. 660-665; 980-985; 998-1004.) While Breed did send the letter to the Commission, he went beyond the protected occasion and sent his letter to the assistant town manager as well, despite the assistant town manager's instruction not to do so. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) As the law makes clear, such unwarranted and unnecessary publication takes away any absolute privilege that might have attached to the communication in the original forum. Hence, the communication is not absolutely privileged and the trial court properly sent the case to the jury.

IV. The trial court properly allowed witnesses to testify at trial in this matter who were identified to Appellants in the course of discovery prior to trial.

CSA next contends the trial court committed reversible error in permitting Mr. William Waxel and Dr. Lynn E. Geiger to testify at trial. (CSA Initial Br. at 18-21.) CSA bases its argument on the claim that it was taken by surprise and ambushed by Respondent's calling of these witnesses at trial. CSA's arguments are without merit.

CSA posits that Respondent did not comply with Rule 33(b), SCRCP by failing to specifically identify, by name, witnesses expected to testify at trial via supplemental discovery response. First and most importantly, CSA and Breed's discovery requests did not request that Respondent identify which fact witnesses would be expected to testify at trial. (Court Ex. 2: R. 1797.) Instead, the discovery request only sought the names of those that might have information as to the facts of the case. (*Id.*) The issue is thusly waived. With respect to expert witnesses, Respondent identified treating physicians as possible witnesses at trial, and listed Dr. Geiger specifically by name and address. (*Id.*)

In addition, Mr. Waxel was identified in the course of discovery sufficient to put Breed on notice the witness may testify at the trial of this matter. Mr. Waxel was an employee of CSA and was identified by a catchall response identifying "other employees" of CSA that might have relevant information concerning the case. (Tr. 151-154; R. 261-264.) While not identified by name in the discovery response, Mr. Waxel testified concerning the slanderous statements repeated by CSA employees concerning the alleged affair between Respondent and Mr. Jolin. (*Id.*; Tr. 847-850; R. 731-734.) Counsel for CSA (who was also Breed's counsel) could speak to Mr. Waxel at any time of their choosing in their own investigation of the case.

Generally, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." *Kenneth B. Jenkins, Respondent, v. Benjamin Scott Few and Few Farms, Inc.*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) (citing and quoting *Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996)). The same is true for an expert witness: "[w]here a party fails timely to disclose the identity of an expert witness, the question of whether the witness'[s] testimony may be received in evidence is left largely to the discretion of the trial judge." *Id.* (citing *Tribble v. Hentz*, 285 S.C. 616, 618, 330 S.E.2d 560, 562 (Ct. App. 1985)).

When considering the issue, the South Carolina Supreme Court has held:

> We hold that the exclusion of a witness whose name is not given in answer to an interrogatory calling for it is but one of the discretionary powers committed to a trial judge for the proper conduct of litigation. . . . We further hold that there is no mandatory rule requiring the trial court to exclude a witness whose name is not given, but that the trial court is under a duty, when the situation arises, to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness' name, and the degree of surprise to the other party, including prior knowledge of the name by said party.

Laney v. Hefley, 262 S.C. 54, 59-61 202 S.E.2d 12, 14-15 (1974) (citing and quoting *Wright v. Royse*, 43 Ill. App. 2d 267 (Ill. App. 1963)). Further, the Supreme Court has emphasized that "the fact that the opposing party has independent knowledge of the existence of such witness prior to the trial is a ***major consideration*** . . . ." *Id.* (emphasis added).

In *Laney*, the Court found that "[i]n the present case the defendant had knowledge through the deposition of the mother of the child, taken more than a month before the

trial, of the presence of [the challenged witness] in the residence at the time of the accident." *Laney*, 262 S.C. at 60-61, 202 S.E.2d at15. The Court further found that "[w]hile the defendant was given no information as to what, if anything, she knew about the accident, we do not think the defendant was warranted in assuming that she knew none of the details surrounding the accident, or that she was not possessed of any information of probative value as to how the accident occurred, even though she did not see it." *Id.*

Continuing from this precedent, the South Carolina Supreme Court adopted the "*Bensch*) " test for analyzing whether the witness should be permitted to testify. *Bensch* provides that before excluding a witness as a sanction for violating the continuing duty to disclose information, the trial court should ascertain: (1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party. *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2005).

In this case the trial court appropriately considered the relevant factors. The trial court considered the type of witnesses involved—Mr. Waxel as a fact witnesses, and Dr. Geiger as an expert. (Tr. 138-171; R. 248-281). The trial court next considered the expected content of the testimony of each. (*Id.*) The trial court heard the explanation from Respondent's counsel as to why the interrogatory responses were not supplemented with particularity prior to trial even though each witness had been revealed in the course of discovery. (*Id.*) Next, the trial court examined the importance of the testimony with

respect to each. (*Id.*) Finally, the trial court found that the fact that the witnesses would be called at trial was not an unfair surprise to Appellants. (*Id.*)

This final factor—unfair surprise—is the focal point of CSA's misgivings about the trial court's ruling. When considering the circumstances regarding these witnesses, Appellants cannot plausibly claim surprise. Mr. Waxel is a CSA employee and Respondent listed "other employees of CSA" in his response to Breed's inquiry about potential witnesses. (Tr. 152-157; Court Ex. 2; R. 262-267; R. 1797.) It should be no surprise that an employee of CSA and Breed's co-worker with knowledge of the facts relevant to this case and security at Sea Pines would be a potential witness at trial.

Dr. Geiger's treatment of Respondent was testified to at Respondent's deposition which took place well in advance of trial. (Tr. 138-171; R. 248-281.) Dr. Geiger was identified as a potential expert witness and her name and address were provided. (Court Ex. 2; R. 1797.) Dr. Geiger's records and billing invoices were produced in discovery, which also contained all relevant contact information for her office. (*Id.*) Her testimony detailed the treatment of Respondent as reflected by the billing records. (Tr. 935-942; 972-974; R. 799-806; 836-838.)

There is simply no ground for arguing surprise in this case with respect to Mr. Waxel or Dr. Geiger. As the Supreme Court noted in *Laney*, "[i]f there was prejudice or surprise it was, at least in part, due to failure of the defendant to inquire more fully into the nature and significance of" the witness. *Laney*, 262 S.C. at 60, 202 S.E.2d at 15 (internal citations omitted). Appellants here failed to investigate further as to each and

cannot now claim surprise.[8] Hence, the trial court did not abuse its discretion in permitting the witnesses to testify at trial, and the judgment should thus be affirmed.

V. CSA's arguments on Respondent's libel claim fail on the merits because Respondent proved that Breed published false statements about Respondent with constitutional actual malice, which caused damage to Respondent.

If the Court reaches the merits of the arguments contained in CSA's brief despite the preservation issues detailed in Sections I and II herein, the Court should hold that Respondent met her burden on her constitutional libel claim against CSA.

To prove fault in a defamation action, a plaintiff who is a public official or public figure must prove 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 Publishers*, LLC, 368 S.C. 444, 467, 629 S.E.2d 653, 665 (2006) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80) (additional internal citations omitted). When determining if clear and convincing evidence exists upon which to submit a public figure defamation case to the jury, the trial court must look to the quantum and quality of the evidence. *See Anderson v. Augusta Chronicle*, 355 S.C. 461, 471, 585 S.E.2d 506, 51 (Ct. App. 2003) (reversing the trial court's decision to grant directed verdict, finding that the quality of the evidence was of a convincing clarity sufficient to submit the issue to the jury when viewed in the light most favorable to the plaintiff). A plaintiff must prove the false statements caused damage by a preponderance of the evidence. *Erickson v. Jones*

[8] Further, while the documentation appears not to have been admitted at trial, the trial transcript reveals that the Appellants were definitively provided advance notice of who Respondent was calling as a witness at trial via a witness list produced one week prior to trial. (Tr. 138-139; R. 248-249.) Further, Appellants moved to limit the admission of these witnesses, showing that Appellants knew who the witnesses were. (Tr. 138-139; R. 248-249.) Thus, Appellants had notice. Rather than attempt to depose or talk to the identified witnesses, the Appellants chose to attempt to have the court exclude them.

St. Publishers, L.L.C., 368 S.C. 444, 475, 629 S.E.2d 653, 670 (2006) ("Appellant is required to . . . show actual injury in the form of general or special damages . . . by a preponderance of the evidence."). Respondent met her burden in this case with respect to Breed's publication of the letter to the assistant town manager, others at the town of Hilton Head, the CSA chief executive, and the CSA board in this case.

A. Breed published his statements in the course of employment with the knowledge of CSA.

It is well-established that a principal may be held liable for defamatory statements made by an agent while acting within the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question. *Boling v. Clinton Cotton Mills, et. al.*, 163 S.C. 13, 26-27, 161 S.E. 195, 200-201 (1931); *see also Murphy v. Jefferson Pilot Communs. Co.*, 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005) (discussing that "a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority" and that "a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment."

Here, Breed sent the defamatory letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1739) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creating "hurdles" with CSA's investigation of Mr. Otis Coffey as an excuse to the CSA Board for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) Breed also testified to providing copies of the letter to Mr. Kelley before and after sending it. (Tr. 1121-1179; R. 978-1036.)

Thus, the evidence established that Breed sent the letter while acting in the scope of his duties as director of security for CSA and that CSA was fully aware of his actions.

B. CSA's agents republished false statements about Respondent's ability to be impartial, fair, and unbiased in matters that had been pending before her Court and false statements about her alleged interference with an investigation.

A defamed public official or public figure must prove the falsity of the allegedly libelous publication. *Beckham v. Sun News*, 289 S.C. 28, 31, 344 S.E.2d 603, 604 (1986) (citing *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975)). This requirement follows necessarily from the actual malice standard. *Id.* Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish the statement was, in fact, false. *Id.* (internal citations omitted).

In the letter Breed published to the assistant town manager and CSA Board, letter, Breed stated:

> 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 <u>have been</u>*** and will be ***pending before her.***

(Plaintiff's Exs. 4 & 18; R. 1721 & 1739) (emphasis added). Mr. Kelley, CSA chief executive, assisted in this publication. (Tr. 1121-1179; R. 978-1036.)

Breed's published statements[9] about Respondent's alleged inability to be fair in past cases pending before her was proven false, both in discovery and at trial. Breed admitted that he was not aware of any cases where Respondent acted with bias or partiality. (Plaintiff's Ex. 6; R. 1723.) Further, no witness at trial was able to identify a single case where Respondent acted with partiality. (Tr. 463, 1362-1363, 1598; R. 460,

[9] These are statements of alleged facts, and are not merely opinions.

1217-1218; 1374.) Moreover, Respondent testified that she always acted with fairness and impartiality in all cases pending before her. (Tr. 210-212; 230-234; R. 299-301; 319-323.) Thus, the ***only*** evidence presented at trial was that Breed's published statements about Respondent's alleged inability to be fair, impartial, and unbiased were false at the time of publication.

Despite the evidence and his admission regarding his lack of support for his statements, Breed and CSA attempted to defend his statements at trial by arguing that the letter as a whole was substantially true. (Tr. 1121-1179; R. 978-1036.) Breed and CSA failed to prove this, however. As noted above, Breed admitted that he had no basis for his published statements. (Tr. 230-234; 1125-1148; Plaintiff's Ex. 6; R. 299-301, R. 982-1005; 1723.) Further, South Carolina law requires that a defendant demonstrate that each individual statement within the overall publication is substantially true, not that the content of a publication as a whole is substantially true. *Castine v. Castine*, 403 S.C. 259, 266, 743 S.E.2d 93, 96-97 (Ct. App. 2013) (finding a letter to be defamatory based upon examination of each statement in the letter). At trial, Breed attempted to clarify his statements in the letter by claiming that he was not speaking about actions Respondent took judging cases or on the bench. (Tr. 1128; R. 985.) On appeal, Breed and CSA now contend that the whole letter shows that Breed was expressing his opinion in the context of the investigation of Mr. Otis Coffey in connection with the break-ins at Sea Pines. (Breed Initial Br. at 20-25; CSA Initial Br. at 34-35.) These post-revisionist efforts must be rejected. Respondent proved that particular statements of fact in the letter were false, and Breed and CSA did not establish any grain of truth for the statements about Respondent's alleged inability to fairly judge past cases by their own admission.

Accordingly, Respondent proved by clear and convincing evidence that Breed's published statements to the town of Hilton Head and the CSA Board regarding her alleged inability to be fair and impartial in cases were false. Other statements in the letter were also testified to as false by Respondent. The letter by Breed sets forth a detailed meeting that allegedly occurred between the Respondent and Captain Toby McSwain. (Plaintiff's Exs. 4 & 18; R. 1721 & 1739). Breed writes that during this meeting the Respondent and McSwain discussed the investigation of her adopted brother, Otis Coffey. *Id.* Respondent denied that such a meeting ever occurred, and thereby testified the allegation in the letter was false. (Tr. at 239; R. 328.) The letter also falsely accused Respondent of engaging in "conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure" (Plaintiff's Exs. 4 & 18; R. 1721 & 1739) in connection with the investigation of her adopted brother, an accusation vehemently denied by Respondent. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would officially investigate and prosecute anyone arrested for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.) Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations.

(Tr. 1143; R. 1000.) Hence, the record reveals no evidence of Respondent interfering with an investigation.

C. CSA's agents republished false statements about Respondent with actual malice and a reckless disregard for the truth of his statements.

In order to establish actual malice, a public figure plaintiff must demonstrate that the defendant knew the statement was false or had serious reservations about its truthfulness when the statement was made. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 515, 506 S.E.2d 497, 504 (1998).

As the South Carolina Supreme Court explained in *Elder*:

> ***Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements.*** The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, 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.***
>
> Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant.

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (citations, quotes, and emphasis added).

In this case, evidence was adduced at trial that Breed knew that the statements contained in his letter published to the assistant town manager of Hilton Head and the Board of CSA were false. In his letter, Breed wrote:

> 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***.

(Plaintiff's Exs. 4 & 18; R. 1721 & 1739) (emphasis added). Breed also stated that "Judge Coffey ***has engaged*** in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (*Id.*) (emphasis added). Breed stated that "***[t]his conduct was/is pervasive and invasive in nature, and directly results*** in Judge Coffey's ***inability to maintain the impartiality*** so necessary to the successful balance of our legal system." (*Id.*) (emphasis added). In his publication to the assistant town manager and the CSA Board, Breed went on to cite Cannons 1, 2, and 3 of the Code of Judicial Conduct. Breed noted that his statements were the "result of much serious, sober and deliberate examination and contemplation." (*Id.*)

In discovery, Breed admitted that he could not name a single case in which "Plaintiff has acted with bias, partiality or prejudice." (Plaintiff's Ex. 6; R. 1723). Breed's admission proves that he knew his publication to be false at the time he wrote it. The letter plainly states that Breed knew Respondent had ***not*** been a neutral and detached arbiter of the many cases "that have been . . . .pending before her." (Plaintiff's Exs. 4 & 18; R. 1721 & 1739.) Hence, Breed's published statements about Respondent's ability to be fair in cases pending before her was proven to be made with knowledge of its falsity or with a reckless disregard for its truth. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005; 1723.) The evidence showed that Breed and CSA did not attempt to retract his statements and that Breed did not inform DeLoach

or the Board that his complaint with the Commission had been dismissed. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039; 862-863.) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creating "hurdles" with CSA's investigation of Mr. Otis Coffey as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) This evidence alone is of sufficient quality to establish that Breed acted with reckless disregard for the truth of his statements, in the course of his employment, in an effort to shield his own investigation work from criticism. The letter also falsely accused Respondent of engaging in "conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure" (Plaintiff's Exs. 4 & 18; R. 1721 & 1739.) in connection with the investigation of her adopted brother, an accusation vehemently denied by Respondent. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would prosecute anyone arrested for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.) Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations. (Tr. 1143; R. 1000.)

Hence, the record reveals no evidence of Respondent interfering with an investigation and that Breed acted without basis for his statements on this point as well.

Further, Respondent offered testimony that Breed had previously been a plaintiff in a defamation action.[10] (Tr. 1186-1188; R. 1043-1045.) Breed thus had personal experience with the harmful consequences that making false statements can have on an individual. Despite that knowledge, Breed published his statements to the assistant town manager and the full Board of CSA with no regard for the truth of his statements. Breed also deeded his interest in his home to his wife shortly after his publication of the false statements concerning Respondent.[11] (Tr. 1149-1155; R. 1006-1012.)

Breed's own admission in discovery and at trial that his statements were not based upon actual cases Respondent had adjudicated, alone, is sufficient evidence for the trial court to submit this case to the jury. *See Erickson*, 368 S.C. at 463, 629 S.E.2d at 663 (citing *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998) (noting that if the evidence is susceptible to more than reasonable inference, the case should be submitted to the jury). Accordingly, Respondent proved by clear and convincing evidence that Breed knew his statements to be false and/or acted with a reckless disregard for the truth in the scope and course of his employment with CSA.

D. Respondent proved damage arising from CSA's agents' republication of false statements by a preponderance of the evidence.

In order to recover in a defamation action, a public figure plaintiff must demonstrate, by a preponderance of the evidence, that the false statements caused harm. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. at 475, 629 S.E.2d at 670. Two

[10] CSA does not challenge the admission of this evidence.
[11] CSA does not challenge the admission of this evidence.

categories of damages are recoverable—general damages and special damages. As the Supreme Court has stated:

> 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. Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages.

Id., 368 S.C. at 465, 629 S.E.2d at 664, fn. 6. Thus, South Carolina permits a public figure-plaintiff to recover for actual injury which means not only out-of-pocket losses, but includes injury to reputation, mental suffering and anguish, and personal humiliation.

Moreover, when South Carolina law does not provide a specific answer, our appellate courts often look to North Carolina law if an issue is considered to be novel. *See State v. Dowd*, 306 S.C. 268, 269, 411 S.E.2d 428, 429 (1991) (stating that the Court will rely on North Carolina law in a novel case that "has been directly addressed by our sister state, North Carolina"). North Carolina law recognizes that that "medical care and expense" are recoverable as special damages. *Araya v. Deep Dive Media, LLC, et. al.*, Case No. 5:12-cv-163, 2013 U.S. Dist. LEXIS 117841 * 45-46 (citing *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E.2d 336, 340--41 (N.C. Ct. App. 1982). Other states similarly recognize recovery for medical treatment arising due to defamatory statements. *Kaiser v. Hardin*, 953 So.2d 802, 810 (La. 2007) ("Special damages are those which have a ready market value, . . . [that] may be determined with relative certainty, including medical expenses and lost wages."); *Posey County v. Chamness*, 438 N.E.2d 1041, 1049 (Ind. Ct. App. 1982) (noting that Indiana courts refer "to the cost of sessions with a clinical psychologist as "special damages.'"); *Picone, et. al. v. Talbott*, 349 A.2d 615, 620 (Md.

Ct. Sp. App. 1975) (noting that special damages included medical treatment for a condition partially caused by a slander).

Respondent testified concerning the amount of special damages she incurred in connection with her having to obtain babysitters on the weekends, due to her incapacitation due to debilitating migraine headaches caused by the false statements Breed published about her. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Further, Respondent sought treatment from a psychologist because of the defamatory remarks, and those costs were testified to at trial by Respondent and her physician. (Tr. 208-218; 228-287; 360-366; 458-460; 935-942; 972-974; R. 297-307; 317-376; 406-412; 455-457; 799-806; 836-838.) Thus, Respondent proved by competent evidence that she suffered identifiable special damages. The jury properly awarded those amounts.

As to general damages, Respondent similarly proved that she had suffered injury though no specific amount was identified—nor was one required. Respondent testified that her contract with the Town of Hilton Head was not renewed for another three year period, only two. (Tr. 208-218; 228-287; R. 297-307; 317-376.) Respondent further testified that other lawyers/litigants now moved for recusal in cases pending before her due to the allegations Breed levied against her and published to many in the community. (Tr. 280-282; R. 369-371.) Respondent also testified as to her emotional distress, humiliation, and hurt feelings because of the attacks Breed made about her ability to be fair and impartial, because those false statements damaged her reputation and standing in the community. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Others similarly testified. (Tr. 707-714; 760-761; 827; R. 633-640; 675-676; 724.)

Respondent experienced a tough time with her co-workers from the town and she was unable to accomplish all that she set out to do in her job. (Tr. 208-218; 218-287; R. 297-307; 317-376.) Respondent further testified that the statements harmed her ability to seek higher office on the bench. (Tr. 228-287; R. 317-376.) The jury considered all of the testimony and awarded $2,000,000 in general damages.[12] This amount is supported by the record and the law.

The jury also awarded Respondent punitive damages. The trial court properly evaluated the award and refused to set it aside. On appeal, Breed does not challenge the punitive damages award as unduly liberal or challenge the trial court's evaluation of the award. Breed only contends that the award is not supported because she did not prove special and general damages and the award is therefore excessive. (Breed Initial Br. at 29.) Similarly, CSA does not challenge the amount of the general verdict with respect to the slander claim.[13]

The evidence showed that Breed knowingly published false statements about Respondent's ability to be fair as a judge beyond the venue of the Commission on Judicial Conduct. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; Pl. Exs. 4 & 8; R. 319-323; 982-1005; 1723; 1721 & 1885.) The evidence showed that

---

[12] Further, Respondent suffered damage to her reputation due to the slanderous comments published about her alleged infidelity to her husband. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.)

[13] As a result, the two-issue rule bars any challenge by CSA as to the amount of the verdict because CSA has only argued against the amount awarded for damages for the libelous letter Breed published to the Town of Hilton Head and the Board of CSA and not the amount as to the slanderous statements about an extra-marital affair. *Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (holding the two-issue rule barred a challenge to the result below because a second supporting ground for the result was not challenged on appeal); *Cole v. Raut*, 378 S.C. 398, 407, 663 S.E.2d 30, 34-35 (2008) (upholding a general verdict based on the two-issue because the verdict was independently supported by another claim).

Breed did not attempt to retract his statements and that Breed did not inform those to whom he published the defamatory communication that his complaint with the Commission had been dismissed. (Pl. Ex. 7; Tr. 1179-1182; R. 1724; 1036-1039.) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creation of "hurdles" with CSA's investigation of Mr. Otis Coffey, as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1031; 1133-1150; 845-848.) Hence, the evidence was sufficient for the trial court to submit the issue of punitive damages to the jury. Breed's (CSA's agent) behavior is reprehensible and warrants the imposition of punitive damages.

As to the slander claim against CSA, evidence established that CSA employees alleged that Respondent was engaged in an extra-marital affair with a CSA Officer named John Jolin. (Tr. 516-522; R. 513-519.) This statement was spread by CSA employees Ms. Bobbie Martin and Mr. Randy Woods while at work. (Tr. 516-522; 813-814; 818-819; R. 513-519; 712-713; 715-716.) Mr. William Waxel testified as to these false statements being spread, (Tr. 848-850; R. 732-734.) as did Ms. Sherry Hamilton. (Tr. 1048-1050; R. 909-911.) Mr. Woods testified that others in the employ of CSA had asked him about the allegations of an affair. (Tr. 856-860; R. 739-743.) Respondent testified about what she heard being spread about her as well. (Tr. 260-263; R. 349-352.) Respondent testified that such statements were especially troubling because another associate municipal judge had previously been relieved of her duties for having an affair. (*Id*; R. 777-779; R. 692-694.) Respondent testified these allegations caused her damage. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) This evidence alone is

sufficient to uphold the entire verdict against CSA due to its failure to challenge the amount of the verdict with respect to the slander claim.

VI. The trial court properly reviewed the punitive damages award under *Mitchell v. Fortis* as dictated by *BMW v. Gore* and concluded that it was constitutional.

Breed does not even raise this issue on appeal. This is no doubt because the issue is manifestly without merit. As shown below, the trial court engaged in the requisite analysis and the award of punitive damages is proper in this action.

Our appellate courts review the constitutionality of a punitive damages award *de novo*. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) As provided by the recent decision of *Mitchell v. Fortis Ins. Co.*, in evaluating the constitutionality of a punitive damages award, the courts must consider:

> (1) the degree of reprehensibility of the defendant's 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.

385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009) (citing *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996). When considering the reprehensibility of the defendant's conduct, the Court should consider:

> (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.

Mitchell, 385 S.C. at 587, 686 S.E.2d at 185 (internal citations omitted).

In this case, the trial court properly examined each of the three *Gore* factors in detail in the instant action. (October 10, 2012 Order at 3-4; R. 5-6.)

A. Breed's conduct was reprehensible.

The trial court concluded that Breed's conduct was reprehensible based on the considerations respecting this factor under *Mitchell.*

1. Respondent suffered physical and economic harm.

The trial court's order denying Appellants' post-trial motions analyzed the damages suffered by Respondent. (October 10, 2012 Order at 1-3; R. 3-5.) The court noted that Respondent suffered economic harm (*i.e.*, special damages) in the form of costs for medical treatment and babysitting. (*Id.* at 2.) The court noted that Respondent suffered general damages in the form of reputational damage, embarrassment, personal humiliation, mental anguish, and wounded feelings. (*Id.* at 3.) Respondent and others testified as to these matters. (Tr. 208-218; 228-287; 260-366; R. 297-307; 317-376; 349-412.) The court's listing of the categories of damages, and the numerous elements of damage Respondent physically suffered, demonstrates the trial court properly considered that Respondent suffered far more physical harm than economic harm. This is supported by the record. The jury's verdict further supports the trial court's finding (awarding $2,000,000 in general damages and $6,050 in special damages). Hence, this consideration warrants the imposition of punitive damages against Breed and CSA.

2. Breed's tortuous conduct evinced an indifference to or a reckless disregard for Respondent's health.

Remarkably, CSA attacks the trial court's analysis on punitive damage, in part, on the basis that Breed's letter was purportedly intended to protect residents of Sea Pines by calling to the attention of others that Respondent was interfering with CSA's investigations in Sea Pins. Such post hoc justification is without merit or support under the law.

Instead, the focus is on Breed's conduct and whether he considered the health and well being of Respondent. He did not. The trial court properly analyzed this consideration. The trial court found there was sufficient quality and quantum of evidence that Breed made false statements with actual malice. (October 10, 2012 Order at 1-2; R. 3-4.) Further, the trial court found that Breed published the false statements about Respondent to others, including her employer—the Town of Hilton Head. (*Id.* at p. 1.) The trial court also noted that neither Breed nor Mr. Kelley informed Mr. DeLoach or the town of Hilton Head or the CSA Board that the complaint Breed filed against Respondent was dismissed by the Commission. (October 10, 2012 Order at 3-4; R. 5-6.) This extended the duration of the persistence of the false allegations levied at Respondent. (*Id.*) The trial court further concluded that there was sufficient quality and quantum of evidence the false statements were made with a reckless disregard as to their falsity. (*Id.*)

3. The target of the conduct had financial vulnerability.

The trial court properly considered the financial vulnerability of Respondent. The trial court noted that one category of special damages suffered by Respondent was for increased babysitting costs. (October 10, 2012 Order at 2; R. 4.) This category of damage was supported by the evidence showing that Respondent is a single working mother of three. (Tr. 208-218; 254; 274; R. 297-307; 343; 363.) Further, the false statements put her at risk in her job. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Respondent had more difficulty at work and experienced a higher number of recusal motions. (*Id.*) Further her contract was renewed for a shorter term than in the past following Breed's defamatory statements. (*Id.*) This factor thus weighs in favor of the punitive damages award.

4. The conduct involved repeated actions.

The trial court properly noted that Breed did not attempt to correct his false statements by informing Mr. DeLoach, for the town of Hilton Head, or the CSA Board that his complaint had been dismissed by the Commission. (October 10, 2012 Order at 4; R. 6.) The record evidence supports the trial court's analysis. The evidence showed that Breed did not attempt to retract his statements and that Breed did not inform Mr. DeLoach or the town of Hilton Head or the Board that his complaint with the Commission had been dismissed. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039; 862-863.) Nor did Mr. Kelley. (October 10, 2012 Order at 4; R. 6.)

Mr. Breed furthered his wrongdoing by using his letter as justification for his department's failure to solve incidents at Sea Pines. The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creation of "hurdles" with CSA's investigation of Mr. Otis Coffey, as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.)

5. The harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Breed, in his employ at CSA, published false statements questioning Respondent's ability to be fair and impartial in cases that had been and will be before her. (Pl.'s Exs. 4 & 8; R. 1721 & 1726.) Further, the evidence showed that Breed knowingly published false statements about Respondent's ability to be fair as a judge. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005; 1723.) The evidence showed that Breed did not attempt to retract his statements and that Breed did not inform Mr. DeLoach or the Board that his complaint with the Commission had been

dismissed. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039; 862-863.) Nor did Mr. Kelley. (October 10, 2012 Order at 4; R. 6.) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creation of "hurdles" with CSA's investigation of Mr. Otis Coffey, as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) Further, trial testimony also revealed that Mr. Otis Coffey was not charged for the incidents at Sea Pines, but a Mr. Levy was. (Tr. 1118-1120; 1133-1135; R. 975-977; 990-992.) Breed was aware of this fact but continued to operate as if Mr. Otis Coffey was responsible for the prior incidents as revealed in this letter. (*Id.*; Tr. 1583-1586; Pl. Ex. 18; R. 1359-1363; 1886.) The trial court properly considered this evidence and the jury's findings with respect to falsity and malice and concluded that the punitive damages award was constitutional based on the degree of reprehensibility of Breed's and Mr. Kelley's conduct. (October 10, 2012 Order at 1-4; R. 3-6.) Breed was deceptive and acted with malice in the publication and furtherance of his conduct. The award must stand.

B. The ratio between actual and punitive damages is within constitutional limits.

Respondent established her damages by a preponderance of the evidence. The actual damages award here was for $2,006,050 and the punitive damages award was $4,000,0000. A ratio of 1.99:1. The trial court found this to be a proper award of punitive damages.

Our Supreme Court has noted that the United States Supreme Court has remarked that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Mitchell v.*

Fortis, 385 S.C. at 588, 686 S.E.2d at 185 (quoting *State Farm v. Campbell*, 538 U.S. 408, 425 (2003)). Nevertheless, the Supreme Court has made clear that "there are no rigid benchmarks that a punitive damages award may not surpass," so long as "the measurement of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered." *Id.* (quoting *Campbell,* 538 U.S. at 425-26). The South Carolina Supreme Court has instructed that "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." *Id.*

The trial court considered the ratio of punitive damages to actual damages. (October 10, 2012 Order at 4; R. 6.) Thus, the trial court found the punitive award reasonably related to the actual harm caused by the defamatory publication. (*Id.*) No further finding or analysis was necessary in light of the guidance provided by *Mitchell v. Fortis.*

The award is further supported by the record, however. CSA's financial statement was admitted at trial, a piece of evidence not challenged on appeal by CSA, which shows that CSA has a reserve of $6.7 million dollars. (Pl.'s Ex. 7; R. 1724.) This amount demonstrates an ability to pay the award. Further, the verdict will no doubt have a deterrence effect.

C. Comparable cases justify the punitive damages award in this case.

The trial court further considered comparable cases. The trial court cited *Mitchell v. Fortis* (9:1 ratio)[14], *Limehouse v. Hulsey*, 397 S.C. 49, 80, 723 S.E.2d 211, 227 (Ct. App. 2005) (2:1 ratio) (subsequently reversed on other grounds by *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013), and *Duncan v. Ford Motor Co.*, 385 S.C. 119, 146, 682 S.E.2d 877, 891 (Ct. App. 2009) (6:1 ratio).

The Court noted that the ratio of 2:1 in this case was comparable to these above cases and upheld the punitive damages award. (October 10, 2012 Order at 4; R. 6.)

Moreover, a number of cases in the defamation context support the imposition of punitive damages here. *See Weir v. Citicorp Nat'l Servs.*, 312 S.C. 511, 435 S.E.2d 864 (1993) (affirming an actual and punitive damages award in a defamation action); *Deloach v. Beaufort Gazette*, 281 S.C. 474, 316 S.E.2d 139 (1984) (affirming an actual and punitive damages award in a libel action); *Rogers v. Florence Printing Co.*, 233 S.C. 567,

[14] The South Carolina Supreme Court in issuing its decision in *Mitchell v. Fortis* cited to a number of cases in justifying the award in that case: *See Kinard v. United Ins. Co.*, 237 S.C. 266, 116 S.E.2d 906 (1960) (where the jury awarded $ 200 in actual damages and $ 1,300 punitive damages against an insurer who stopped collecting the premiums from the insured, with knowledge from the claims filed and from the agent's observation that the insured was near death, so that the policy would lapse); *Yarborough v. Bankers Life & Casualty Co.*, 225 S.C. 236, 81 S.E.2d 359 (1954) (where the jury awarded $7.50 in actual damages and $1,000 in punitive damages against an insurer who repudiated a health insurance policy by failing to send a notice of premiums due after the insured filed a claim for gall-bladder trouble, and attempted to have the insured agree to a retroactive rider excluding illnesses resulting from gall-bladder trouble); *Riley v. Life & Casualty Ins. Co.*, 184 S.C. 383, 192 S.E. 394 (1937) (where the jury awarded $36 in actual damages and $1,000 in punitive damages against an insurer who stopped collecting premiums from the insured after it was clear that his health was failing and with the obvious intention to cancel the life insurance policy); *Jamison v. American Workmen Ins. Co.*, 169 SC 400, 169 S.E. 83 (1933) (where the jury awarded $20 in actual damages and $480 in punitive damages against an insurer who stopped notifying the insured when premiums were due after the insured became very ill in hopes that the insured would miss a payment and thereby justify rescission).

106 S.E.2d 258 (1958) (affirming an actual and punitive damages award on a slander verdict); *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (affirming an actual and punitive damages award on a slander verdict); *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (affirming an actual and punitive damages on a slander verdict).

The award here is within permitted limits and does not run afoul of prior decisions of this Court or the South Carolina Supreme Court. No grounds exist for vacating the verdict. As articulated above, the punitive damages award is proper under the law and the trial court engaged in the appropriate analysis in considering CSA's challenge to punitive damages.

VII. Sufficient evidence existed that CSA's employees and/or agents published slanderous statements regarding Respondent and an alleged extra-marital affair to support the general verdict on slander against CSA.

Respondent's cause of action for slander was only against CSA at the time of trial. Through the testimony of its own employees, it was established that employees made statements alleging that Respondent was engaged in an extra-marital affair.

First, the slanderous statements were admitted by CSA employees at trial. (Tr. 812-814; 847-850; 857; R. 711-713; 731-734; 740.) This is an admission by a party and supports the trial court's sending the slander claim to the jury. Defamatory statements made by an agent in the scope of agency at the time the agency exists are binding on the principal as admissions by party-opponent. *See Murray v. Holnam, Inc.*, 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001) ("[A] principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority."); Rule 801(d), SCRE ("[A] statement by the

party's agent or servant concerning a matter within the scope of the agency or employment" is not hearsay).

Second, the employees of CSA, making the slanderous comments about Respondent's alleged infidelity, were all working for CSA at the time the statements were made. Thus, CSA, as the principal, is liable for the statements of its employees and agents engaged in their scope of employment at the time of the defamatory remarks. *See Boling v. Clinton Cotton Mills, et. al.*, 163 S.C. 13, 26-27, 161 S.E. 195, 200-201 (1931) (holding that a principal may be held liable for defamatory statements made by an agent while acting within the scope of his employment and in the actual performance of the duties of the corporation touching the matter in question); *see also Murphy v. Jefferson Pilot Communs. Co.*, 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005) (discussing that "a principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority" and that "a master is liable for and is charged with knowledge of the acts and conducts of his servants operating within the scope of their employment."

Evidence at trial established that CSA employees alleged that Respondent was engaged in an extra-marital affair with a CSA Officer named John Jolin. (Tr. 812-814; 847-850; 857; 516-522; R. 711-713; 731-734; 740; 513-519.) This statement was spread by CSA employees Ms. Bobbie Martin and Mr. Randy Woods while at work. (Tr. 516-522; 813-814; 818-819; 847-850; 857; R. 513-519; 712-713; 715-716; 731-734; 740.) Mr. William Waxel testified as to these false statements being spread, (Tr. 848-850; R. 732-734.) as did Ms. Sherry Hamilton, Judge Coffey's court assistant. (Tr. 1048-1050; R. 909-911.) Mr. Woods testified that others in the employ of CSA had asked him about

the allegations of an affair, naming CSA employees Mr. Waxel, Mr. Ryan, and Mr. Hahn, specifically at trial. (Tr. 856-860; R. 739-743.) Respondent testified about what she heard being spread about her as well. (Tr. 260-263; R. 349-352.) Respondent testified that such statements were especially troubling because another associate municipal judge had previously been relieved of her duties for having an affair. (*Id*; R. 777-779; R. 692-694.) Respondent testified these allegations caused her damage. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) This evidence is sufficient to support the trial court's denial of CSA's directed verdict motion on the slander claim. Further, this evidence alone is sufficient to uphold the entire verdict against CSA due to its failure to challenge the amount of the verdict with respect to the slander claim.

VIII. CSA's agents' republication of the letter was not protected by any qualified privilege.

CSA asserts that the statements in Breed's letter about Respondent concerned shared interests between Breed and CSA and the Town of Hilton Head, and thus a qualified privilege should apply as a matter of law. This argument should be rejected.

In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484-485, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts, § 593 (1977) and *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946)).

In *Bell*, the South Carolina Supreme Court held:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Bell, 208 S.C. at 493-94, 38 S.E.2d at 643. Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded. *Swinton*, 334 S.C. at 484-485, 514 S.E.2d at 134 (citing *Fulton v. Atlantic Coast Line R. Co.*, 220 S.C. 287, 67 S.E.2d 425 (1951) and 53 C.J.S. Libel and Slander § 79 (1987)).

In *Swinton*, the South Carolina Supreme Court reversed the trial court's decision to grant a directed verdict where a bank, through its agent, made statements about the plaintiff-borrower to another potential borrower. *Swinton*, 334 S.C. at 486, 514 S.E.2d at 134-135. The potential borrower was considering buying property and equipment from the plaintiff-borrower. *Id.* In the course of dealings with the potential borrower, a loan officer of the bank, acting in the course of his employment with the bank, wrote a letter to the potential borrower informing the potential borrower that the plaintiff-borrower's business operation was under "financial duress." *Id.* The Supreme Court held that even if the bank made the communication in good faith, the jury might conclude that the statement was defamatory under the circumstances. Thus, the trial court erred in

directing a verdict for the bank because the qualified privilege, as a matter of law, did not bar the action based on its agent's conduct.

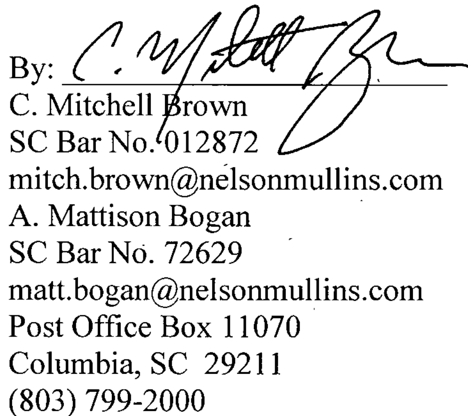
The same analysis applies here. Here, in viewing the evidence in the light most favorable to Respondent, sufficient and quality evidence was admitted showing that Breed shared his statements with the assistant town manager of Hilton Head, the chief executive for CSA, and then the Board of CSA. Breed had no shared interests with Mr. DeLoach, the assistant town manager. In fact, Mr. DeLoach told Breed to report to others, not to him. (Tr. 1123-1128; 1141-1147; R. 980-985; 998-1004.) Breed nevertheless sent the letter at issue to Mr. DeLoach after sending it to the Commission. (Tr. 1121-1179, R. 978-1036.) This alone made any conditional or qualified privilege issue a jury question. Further, while possibly having a shared interest with CSA and Mr. Kelley, Breed did not merely inform them he had filed a complaint with the Commission on Judicial Conduct against Respondent. Rather, he went further and provided a draft copy of the letter, with its included false statements, to Mr. Kelley who passed the false statements on to the Board. Further, Breed presented the copy of his letter to the Board via Mr. Kelley to purportedly show why he was having difficulty solving a rash of incidents at Sea Pines, and to deflect any potential criticism of his investigative work. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) He thus utilized the letter and its misrepresentations about the Respondent as an excuse for his failings as director of security, knowing the letter contained false information. *Id.* This also destroyed any possible privilege that might have existed with respect to Breed and CSA and the Board. *See Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. at 484-485, 514 S.E.2d at 134 (qualified privilege exceeded where

publication went beyond the occasion when a bank officer made statements for the purpose of trying to dissuade a purchase by a potential borrower when the comments went beyond the scope of the potential purchase). Hence, the trial court correctly submitted the issues to the jury for determination.

Conclusion

For the above reasons, the judgment and the rulings of the trial court should be affirmed.

NELSON MULLINS RILEY & SCARBOROUGH

By: 

C. Mitchell Brown
SC Bar No. 012872
mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
matt.bogan@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
(843) 785-6503

Attorneys for Respondent Maureen T. Coffey

February 11, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH

By: ______________________
C. Mitchell Brown
SC Bar No. 012872
mitch.brown@nelsonmullins.com
A. Mattison Bogan
SC Bar No. 72629
matt.bogan@nelsonmullins.com
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
(843) 785-6503
Attorneys for Respondent Maureen T. Coffey

February 11, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

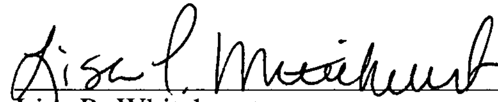
Pleadings:

Maureen T. Coffey's Final Respondent's Brief in Response to Community Services Associates, Inc.'s Final Appellant's Brief

Counsel Served:

Mark S. Barrow, Esquire
William R. Calhoun, Jr., Esquire
Sweeny Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

Weston Adams III Esquire
Helen F. Hiser, Esquire
M. McMullen Taylor, Esquire
McAngus Goudelock & Courie LLC.
P.O. Box 12519
Columbia, SC 29211-2519



Lisa P. Whitehurst
Administrative Assistant

February 11, 2014