

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
2011-CP-14-00541

James E. King,)
Plaintiff,)

vs)

Santee Resort Condominium)
Association, Inc., Leah Londree)
And James Kinser,)
Defendants.)

ORDER RULING ON
POST-TRIAL MOTIONS

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DATE 4/15/14

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BEULAH A. COLATA
CLERK OF COURT
CLARENDON COUNTY, SC

This matter is before the court for consideration of the defendants' "Motion for a New Trial Absolute, or for a New Trial Nisi remittitur, or for an Order Altering, Amending, Vacating, and/or Remitting the Award of Damages". Also before the court is Intervenor Travelers Casualty and Surety Company of America's (hereinafter referred to as "Travelers") "Motion to Alter, Amend, and/or Reconsider and/or for a New Trial". These motions were timely made.

After receipt of the instant motions, the court convened a hearing in Charleston County on January 22, 2014. Counsel for all parties and Travelers appeared and argued their respective positions. In this order, the court will address all motions and will also conduct the required post-trial review of any remaining punitive damages awards.

The plaintiff sued the defendants for slander. Travelers is defending the defendants under a reservation of rights. It has not commenced a declaratory judgment action on the coverage issue. Travelers transmitted a reservation of rights letter to the defendants, and the coverage reservations are referenced below.

The trial jury returned a verdict for the plaintiff against the defendant James Kinser (hereinafter referred to as "Kinser") in the amount of \$200,000.00 actual damages and \$100,000.00 punitive damages. The jury returned a verdict for the plaintiff against the defendant Leah Londeree (hereinafter referred to as "Londeree") in the amount of \$350,000.00 actual damages and \$240,000.00 punitive damages. Before jury arguments and the jury charge, the plaintiff and all three defendants agreed that a verdict returned against either or both individual defendants would be imputed and binding upon defendant Santee Resort Condominium Association, Inc. (hereinafter referred to as "Santee"). Therefore, these verdicts are against Santee as well.

The court granted Travelers' motion to intervene but denied its request to include coverage-related interrogatories on the verdict form. The court explained that its decision to allow Travelers to intervene was simply to allow Travelers to put on the record the interrogatories it was requesting the jury be allowed to answer.

**TRIAL EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE
PLAINTIFF**

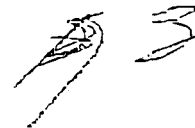
The following is a summary of the evidence introduced at trial that is taken in the light most favorable to the plaintiff. However, there are notations of areas of inconsistency in the testimony of Steve and Connie Robinson, as these inconsistencies are relevant to the discussion of certain motions made by defendant Kinser. Of course, this review of evidence could not possibly give full flavor to the demeanor of any witness or the impact any given testimony may have had upon the jury. The jury had full opportunity to evaluate the overall credibility of each witness and was instructed as to its role in determining credibility.



The plaintiff owned two condominium units in the Santee Resort Condominium development. Santee Resort Condominium Association, Inc. is the homeowners association (HOA) for the development. Londeree and Kinser were board members. Evidence introduced at trial was that at some point during the plaintiff's ownership of the condos, a South Carolina Sex Offender Registry flyer bearing a photograph pertaining to one William James King, Jr. was in the possession of board members. The flyer noted that this person had been convicted in North Carolina of committing a lewd act upon a minor under the age of sixteen. The plaintiff was not the person depicted in the flyer.

HOA board president Dr. Robert Varn testified that he was shown the flyer at a board meeting. Kinser and Londeree were present. He told the board he had known the plaintiff since the plaintiff was a young boy, and he told Londeree and Kinser that the plaintiff was not the person in the flyer. There is no dispute that Londeree and Kinser, as HOA board members, had the obligation and right to conduct a reasonable inquiry to make sure a potential child sex predator was not in the midst of owners and patrons of Santee Resort Condominiums.

Taken in the light most favorable to the plaintiff, it was established that Kinser had conversations with condo owner Steve Robinson about the flyer. Robinson testified that he did not know the plaintiff before he (Robinson) bought a condo in the development. He met the plaintiff in the parking lot in 2010. Kinser showed him the flyer in 2010 and Robinson told Kinser the person in the photograph was not the plaintiff. Kinser came to his home in Summerton and spoke with his wife, Connie, about the flyer. Connie told Kinser that the plaintiff was not the person in the flyer. Mr. Robinson



testified that Kinser insisted to him and his wife that the flyer depicted the plaintiff, despite their insistence to the contrary.

Connie Robinson testified that when Kinser brought the flyer to the house, he told her the plaintiff was the man in the flyer. She testified she told Kinser she had known the plaintiff all his life and that the plaintiff was not the person in the flyer. She testified that Kinser said "See, this is Jamie [the plaintiff]." She testified that she again told Kinser that the plaintiff was not the person in the flyer.

The testimony of Steve and Connie Robinson was certainly called into question through the introduction of their deposition testimony, in which they stated that Kinser had simply *asked* them if the flyer depicted the plaintiff. At trial, both insisted their trial testimony was the correct version of what Kinser had said to them. The court charged the jurors that they were to assess the credibility of all witnesses and that they could consider any prior inconsistent statements and that they were to give the testimony of a witness the weight they believed it deserved.

Rodney Royals, former maintenance man at the development, testified that he saw Londeree and Kinser showing the flyer to different tenants and that they were telling the tenants to call them if the tenants saw the person in the flyer. He testified that Londeree and Kinser also told the tenants that the units owned by the person in the flyer were in foreclosure and that he was not supposed to be on the premises. During this time, the plaintiff's units were in foreclosure.

Eva Stevens testified that she rented Unit 420 from the plaintiff from October 2009 through February 2010. She testified the plaintiff told her that his units were in foreclosure and that he did not know how long he could keep the unit she was renting.



She saw the flyer when she was approached by Kinser and Londeree and that they asked if she had seen the person depicted in the flyer. She told them she had not, but did note the name of the person was James King. Neither Londeree nor Kinser maintained to her that the person in the flyer was the plaintiff. She saw the flyer another time at the resort when a maintenance man other than Mr. Royals told her that if she saw the man in the photo to let him know.

Tina Rigden testified that in 2010 she was employed at First Citizens Bank in Orangeburg. She testified that she received a call from Londeree during the plaintiff's foreclosure process and that it was clear to her that Londeree was aware of the foreclosure. She testified that Londeree wanted to see what could be done to speed up the process. She testified Londeree specifically told her that the plaintiff was a convicted child molester and that he had prostitutes and strippers in his room at Santee Resort at all hours. Rigden testified that she told Londeree she had known the plaintiff since grade school and that she was wrong about him being a child molester. She testified she saw the plaintiff at Folly Beach at a later time and told him what Londeree had said. She said the plaintiff was shocked.

Londeree testified that she never confronted the plaintiff to ask him if the flyer depicted him because if he were truly a sex offender, she could not trust him to give her a truthful answer. She confirmed that Dr. Varn told her he had known the plaintiff since the plaintiff was a kid and that he did not think the flyer depicted the plaintiff, but that she could "research it." She testified that in April 2010, the plaintiff called her at home and told her to "quit f---ng with my renters." She testified she saw the plaintiff in May 2010 at the development that he told her one of his tenants was moving out, that the



foreclosure was being finalized, and that they could do whatever they wanted with his units. She testified she relayed this comment to the board and that Dr. Varn told her to call the bank to see if it would pay the delinquent regime fees owned by the plaintiff. She testified she spoke to Tina Rigden and that Rigden told her that Londeree would have to speak with someone involved in the foreclosure to see if the bank would pay the fees. Londeree denied she called the defendant a child molester and testified she used the word "pervert", but that she did not say he was a pervert. Londeree testified "I asked her if Jamie King was a pervert." She testified she never told anyone that the plaintiff was a sex offender. On cross-examination, Londeree testified that she still thinks the plaintiff is a pervert. Also, when asked if she was sorry about what the plaintiff had experienced, she replied "What do I have to be sorry for?"

Mary Clark testified that she was a board member and lived at the development from 2006-2010. She first saw the flyer on March 20, 2010 at a board meeting and that Dr. Varn said he did not think the flyer depicted the plaintiff and that Londeree put it back in the office.

Kinser testified he never told Connie and Steve Robinson that the flyer depicted the plaintiff and that he simply asked them if it did. He testified that when Connie told him it was not the plaintiff, "that ended it for me."

The plaintiff testified to what he generally described as intense embarrassment and humiliation at being cast as a convicted child molester. He recounted that one of his daughters overheard him and his wife talking about coming to court in this civil action, and that he had to explain to his daughter in some terms what the case was about. His wife, Christine King, testified he lost being 15 and 20 pounds and that he became

"clingy" to her and very emotional. The court will not now undertake to summarize the plaintiff's damages testimony, but the jury could well accept the plaintiff's testimony as compelling evidence of the shame, shock, embarrassment, and humiliation he felt.

In their memoranda in support of their motions, the defendants understandably downplay the tone of the testimony, and characterize the statements attributed to Kinser and Londeree as "isolated", "erroneous suggestions". Taken in the light most favorable to the plaintiff, these statements were not erroneous suggestions. Particularly as to Londeree, the evidence is susceptible of the clear and convincing conclusion that her statements were vicious, reckless, and malicious. Her demeanor as a witness was less than helpful to her credibility cause. The court is of the view that Kinser's statements to the Robinsons, if made, were much less egregious, and the court is mindful of the crucially inconsistent accounts given by Connie and Steve Robinson in their depositions and trial testimony. However, as noted above, the jury had the opportunity to weigh these inconsistencies.

DEFENDANTS' MOTIONS

I. New Trial Absolute

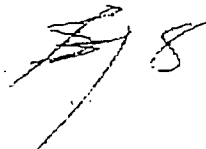
A. Golden Rule Argument

The defendants argue that plaintiff's counsel (Mr. Kent) made a prohibited "Golden Rule" argument during his closing argument. In South Carolina, it is improper for an attorney in an argument to either ask jurors to put themselves in the shoes of a party to the case. A Golden Rule argument is prohibited because it tends to destroy all sense of impartiality in the jury and, because it arouses passion and prejudice, the

argument invites the jury to decide the case on particulars not founded in the evidence. (citations omitted).

The defendants point to that portion of Mr. Kent's argument in which he states "Every person on this jury has something about themselves they don't want the world to know. Everybody does. As simple and small as it is." He later states "How much would you pay for the world not to know. . .", and after the defendants' objection was overruled, he stated "How much would you pay so the world don't know about your secrets?" The defendants claim these arguments were the end result of a progression from allowable argument to "directly inviting the jury to throw away any objectivity and put themselves personally in the position of both having a harmful secret and wanting it kept confidential." (p.2, Defendants' Supplemental Memorandum dated January 21, 2014).

The court concludes that none of the argument made by Mr. Kent violated the Golden Rule. As the plaintiff points out in his memorandum, this case was not about a plaintiff who was harboring secrets he did not want the world to know. Rather, it was about being falsely accused of being a sex offender. There were no secrets the plaintiff wanted kept. With all due respect to Mr. Kent, the arguments complained of did not comport to any factual theory advanced by the plaintiff at trial. Perhaps Mr. Kent's prefatory words "How much would you pay" would raise the hackles of any opposing counsel during the argument stage, but the rest of the statement, "so the world don't know about your secrets", has nothing to do with the plaintiff, as the plaintiff had no "secrets". He just did not want to be called a child molester. Therefore, Mr. Kent could not have been asking the jurors to put themselves into the plaintiff's shoes. Therefore, this was no Golden Rule argument. Even if it were, it was too innocuous to require a new trial.



B. Verdict Form

1. Initial Memorandum of Defendants

In their initial memorandum, the defendants argue that the court erred in submitting a verdict form which allowed the jury to consider damages in different amounts against the individual defendants. They claim that because only general, non-differentiated damages were involved in the case, the verdict form improperly allowed the jury to award different amounts of actual damages against both individual defendants. They argue that the actual damages verdicts are unclear, confused, and inconsistent and that without individualized proof of damages, the individualized verdicts are unsupported by the record and are internally inconsistent. They argue that because the plaintiff abandoned any claim for special damages, the verdicts may only be based on general damages and no basis exists to award different amounts of general damages against the individual defendants.

In their initial memorandum, the defendants also assert that plaintiff's counsel "argued at the charge conference that there was a universal type of general damages resulting from the collective defamation in this case", and that the plaintiff should be "judicially estopped from now suggesting divisible or differentiated levels of general damages were presented" to the jury.

2. (First) Supplemental Memorandum of Defendants

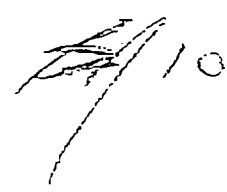
In their first supplemental memorandum dated January 21, 2014, the defendants continue to argue the theory that the plaintiff's "chosen damages" are indivisible as to the individual defendants. The defendants correctly assert that in a defamation case, "general damages" include things such as injury to reputation, mental suffering, hurt

feelings, and other similar intangible types of injuries incapable of being reduced to a definite value. The defendants again claim the plaintiff's damages were "indivisible" because there was no evidence that the plaintiff suffered damages attributable to one defendant but not the other.

In this supplemental memorandum, the defendants contend the plaintiff proceeded against Kinser and Londeree as joint tortfeasors. They argue that since the common law does not permit contribution among joint tortfeasors, the verdict form "erroneously allowed the totality of 'indivisible damages' to be divided and/or duplicated inconsistently among the alleged joint tortfeasors."

The defendants summarize general case law authority that discusses the common law prohibition against contribution and the statutory creation of contribution in 1988 (S.C. Code Section 15-38-10, et seq.). Londeree and Kinser claim that since they did not request an allocation of liability pursuant to Section 15-38-15(C) (3), the only proper actual damages verdict against them would have been a general verdict for one amount. The defendants claim that even if contribution were applicable and available under the facts of this case, "there would still need to be a clear single indication of the amount of 'indivisible damages'. The existing verdict form provides no such clarity—we do not know (and cannot know) if the amounts separately designated for each Defendant are distinct parts of a larger whole based upon allocated fault or if Defendant Kinser's amount is a subset of Defendant Londeree's amount."

It is clear from reading these first two memoranda that the defendants' argument is that at trial the plaintiff "relied solely upon an indivisible level of general damages where each Defendant's liability therefore (sic) was considered separately." The



defendants claim that the plaintiff chose to pursue a generalized level of damages attributable to the "collective conduct" of the defendants. The defendants conclude on page 9 of their supplemental memorandum by arguing that the plaintiff cannot now switch to a "new theory of special damages or individualized liability".

The foregoing arguments advanced by the defendants have no merit. There is no authority for the proposition that no basis exists for an award of different amounts of "general" damages against two defendants in a slander *per se* case. The notion of generalized "indivisible damages" does not have any basis in the law, or at least there is no authority for the proposition as applied to the facts of this case and as applied to how the case was tried and submitted to the jury

In 26 ALR 2d 1031, §2, it is observed

it has been generally held that slander, unlike other torts, is an individual tort, incapable of joint commission, and that therefore two or more individuals uttering slanders against the same person cannot be held jointly liable, in the absence of a conspiracy between them, even though they utter the identical words simultaneously between them.

The ALR annotation cites Nunnamaker v Smith's, 96 S.C. 294, 80 S.E. 465 (1913), along with cases from other states for this proposition. In Nunnamaker, the plaintiff employee sued the president and treasurer of a corporate store, along with the corporation itself, for slander. The plaintiff was the store cashier and was accused of theft by the president. The defendant demurred on several grounds, one of which was the complaint alleged joint liability of two persons in a slander action and that an action for slander cannot be maintained against two persons. The trial judge overruled the demurrer and the defendant appealed. Of course, our Supreme Court held that there was



no question of the liability of the corporation for slander committed by an employee. The court further noted

The general rule is that two are not liable jointly for slander even though they speak the same words. The reason for the rule is that, when two speak the same words, there are two slanders and each is liable for his own slander. Nunnemaker, 80 S.E. at 466.

Even though the court did not use the verdict form allowing for separate amounts of actual damages against Londeree and Kinser with this legal authority at hand, this is precisely the common sense reason that the form was used. As observed in the foregoing ALR annotation, another reason for the general rule "is that the words of one person may occasion greater injury than those spoken by another, even if they speak the identical words, and that each should be responsible only for the damage occasioned by his own words." See Webb v Cecil, 48 Am. Dec. 423 (Kentucky 1848) (other citations omitted). The verdict form used in the instant case allowed the general rule to be followed, albeit unintentionally. This general rule is the general rule because it simply makes sense.

3. 2ND Supplemental Memorandum of Defendants

After the January 22, 2014 motion hearing, the defendants submitted a third memorandum of law entitled "Defendants' 2ND Supplemental Memorandum. . ." The defendants continue to press their argument that Londeree and Kinser are joint tortfeasors, regardless of how the complaint reads. They point to authority cited in their 1st Supplemental Memorandum that "courts will not undertake to apportion damages among the various persons whose negligence concurred to cause the plaintiff's injury." South Carolina Ins. Co. v James C. Greene & Co., 290 S.C. 171, 348 S.E. 2d 617, 620

(Ct. App. 1986). The defendants cite Rourk v Selvey, 252 S.C. 25, 164 S.E. 2d 909 (1968) for the general proposition that our Supreme Court has rejected apportionment of fault among multiple defendant when their acts combined to produce an indivisible injury. The defendants acknowledge that Rourk and South Carolina Ins. Co. v James C. Greene & Co. are not defamation cases but argue that the principles applicable to alleged joint tortfeasors are not unique to one type of tort or another. However, it is clear that the foregoing annotation at 26 ALR 2d 1031, Webb, *supra*, and Nunnemaker, *supra*, indeed stand for the proposition that defamation cases involving multiple defendants are unique and are subject to the general rule set forth in the annotation, Webb, and Nunnemaker.

In this 2ND Supplemental Memorandum, the defendants complain for the first time in these post-trial proceedings that the verdict form was improper because of the allegations of the plaintiff's 3rd Amended Complaint. The defendants argue that since the plaintiff chose to allege therein that the defendants "conspired with one another", "collaborated" with one another, and shared a desired result, etc., the plaintiff was effectively alleging that one complete wrong was committed by the individual defendants. This is a new post-trial theory of the defendants. The court is reluctant to consider a new theory of post-trial relief at this stage, especially after the foregoing arguments concerning the inadequacy of the verdict form were so thoroughly briefed and argued by the parties. However, even so, the new argument advanced by the defendants does not warrant a new trial. The plaintiff correctly points out in his memorandum in response to the Defendants' 2ND Supplemental Memorandum that the case, as tried, was consistent with the complaint allegations that the individual defendants were jointly liable, not with each other, but with the corporate defendant under master-servant

principles. At trial, there was evidence that Londeree uttered defamatory statements to certain people at certain times. There was evidence that Kinser uttered defamatory statements to certain different people at certain different times. The plaintiff argued that Londeree and the HOA were jointly and severally liable for her statements and that Kinser and the HOA were jointly and severally liable for his statements. There was never any argument advanced at trial by the plaintiff that Londeree was liable for Kinser's statements or *vice versa*. The defendants cannot avail themselves of this argument in light of how the case was tried. Therefore, I respectfully reject this argument. In doing so, I note and reject the defendants' arguments in support of the applicability of Connelly v State Co., 152 S.C. 1, 149 S.E. 266 (1929).

C. GROSS EXCESSIVENESS OF VERDICT

The defendants argue that the verdicts are so shockingly disproportionate to the damages sustained by the plaintiff that the court must conclude that the jury acted out of passion, caprice, prejudice, or some other consideration not founded on the evidence. Therefore, they contend the court must set aside the verdicts and order a new trial. They point to an annotation found in Defamation in South Carolina: A Primer on Damages and Defenses, 21 S. Carolina Lawyer 36 (2009) which states "appellate courts often scrutinize defamation awards for excessiveness". They cite Sanders v Prince, 304 S.C. 236, 403 S.E. 2d 640 (1991) as an example of a case in which our Supreme Court overturned an actual damages award and a punitive damages award in a defamation case. In Sanders, the defendant Prince, a Sumter County school board member, publicly accused two other school board members of engaging in bribery, malfeasance, kickbacks, mismanagement of funds, etc. Shortly after deliberations began, the jury sent out a

question asking if it could force the defendant to resign his position from the school board. The trial judge properly responded to that question, according to the Supreme Court. The jury returned verdicts for both plaintiffs in the amount of \$1,250,000.00 actual damages and \$750,000.00 punitive damages. The Supreme Court determined the trial court erred in not ordering a new trial, first stating that the aforesaid question from the jury was evidence that the jury was motivated by passion, caprice, and prejudice. The Court also noted that even though there was some evidence that the plaintiffs' reputations had been damaged, their reputations were not damaged to the extent that multi-million damage awards were warranted.

The defendants also cite Holtzscheiter v Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E. 2d (1998) (Holtzscheiter II) as a case in which the Supreme Court overturned an excessive jury award. Any reliance on Holtzscheiter II as controlling authority is misplaced, except to the extent that it is a decision in which the Court reversed a verdict for punitive damages. In that case, the Supreme Court reversed a punitive damages award on the ground that there was no evidence the defendant newspaper acted with constitutional actual malice. Though the Court noted the newspaper's argument that the punitive damages award was the result of the jury's passion, caprice, and prejudice, the Court did not reverse the award for that reason.

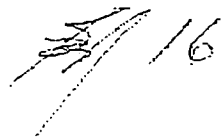
The defendants also claim that the award of actual damages was arbitrary and capricious in light of the absence of proof of "real" damages, i.e., proof of actual monetary loss or proof that someone believed the statements and thought less of the plaintiff. The defendants agree that the plaintiff was not required to prove actual damage to his reputation, as the defamatory words uttered by the defendants alleged the plaintiff



had committed a crime of moral turpitude. However, the defendants claim that since there was no proof of "real" damages, the size of the jury's awards demonstrates the "prohibited factors of passion, caprice, prejudice, or some other consideration without any reasonable basis in the evidence. Allowing this verdict to stand will allow these prohibited factors to control our judicial system and its outcomes." (Page 12, Defendants' initial memorandum in support of motion). The defendants also claim that the prohibited Golden Rule argument contributed to the passion, caprice, prejudice, and improper motive upon which the verdicts were based.

The court has already denied the defendants' motion for new trial based on their Golden Rule argument. Therefore, the court will focus upon whether the size of the verdicts establishes that the jury was motivated by passion, caprice, etc. It is settled law in this state that when a money damages verdict is returned for a plaintiff, a trial judge has the power to grant a new trial absolute, but only when the verdict is so excessive as to shock the conscience of the court and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. As noted in Burke v AnMed Health, 393 S.C. 48, 710 S.E. 2d 84 (Ct. App. 2011):

Courts have used varying language to describe the circumstances in which a circuit judge may grant a new trial absolute. See O'Neal v Bowles, 314 S.C. 525, 527, 431 S.E. 2d 555, 556 (1993) ("If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute."); Chapman v Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E. 2d 852, 856 (Ct. App. 2005) (The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.)



(quoting Vinson v Hartley, 324 S.C. 389, 405, 477 S.C. 2d 715, 723 (Ct. App. 1996)).”

Burke, 393 S.C. at 56, fn.3.

The court is mindful that a jury's determination of damages is entitled to “substantial deference.” Todd v Joyner, 385 S.C. 509, 685 S.E. 2d 613, 618 (Ct. App. 2009), *aff'd* at 385 S.C. 421, 685 S.E. 2d 595 (2009).

Here the jury returned a verdict for the plaintiff against Ms. Londeree in the amount of \$350,000.00 actual damages and \$240,000.00 punitive damages. The defamatory statements attributed to Londeree were primarily those she uttered to Tina Rigden, the First Citizens Bank employee. As noted above, Ms. Rigden testified that Londeree called her and was obviously aware of the foreclosure proceedings against the plaintiff. She testified Londeree wanted to know what could be done to speed up the process. Ms. Rigden was a credible witness and she was confident in her testimony that Londeree told her during their phone conversation that the plaintiff was a convicted child molester and that he had strippers and prostitutes in his room at all hours. There was no evidence any of this was true. Ms. Rigden testified that she told Londeree that she had known the plaintiff for many years and that he was not a child molester. Londeree testified that she called Ms. Rigden to see if there was a chance the First Citizens would pay the plaintiff's regime fees during the foreclosure. She testified she called Ms. Rigden because Ms. Rigden was the loan officer when the foreclosed loan was made to the plaintiff. Londeree claims that Ms. Rigden told her someone else at the bank would have to address that question. Londeree testified that she asked Ms. Rigden if she knew the plaintiff and that she merely asked Ms. Rigden if the plaintiff was a “pervert”. Londeree testified that she never told anyone that the plaintiff was a sex offender.



Londeree testified on cross-examination that she still believes the plaintiff is "a pervert". The jury certainly had the opportunity to weigh the credibility of Londeree and Ms. Rigden. To put it mildly, the jury could have easily concluded that Londeree's demeanor as a witness was less than desirable, and the jury could have easily believed Rigden over Londeree. There is ample evidence in the record to establish that Londeree uttered despicable defamatory statements to Ms. Rigden to the effect that the plaintiff had committed deviant sexual acts against a child. It would be difficult to imagine being falsely accused of anything worse. The defendants are correct that the plaintiff did not present evidence that anyone believed the statements made by Londeree; however, that is not a requirement to prove entitlement to actual damages for defamatory statements alleging guilt of a crime of moral turpitude. Thus, we return to the basic question, i.e., is the amount of the actual damage award such that it shocks the conscience of the court and thus indicates that passion, caprice, prejudice, or other improper motive not reflected in the evidence affected the amount of the award. The court has carefully reviewed the evidence, and while sizable, the verdict does not shock the conscience of the court. A reasonable jury could have awarded more or less. The court viewed all the witnesses, listened carefully to their testimony, and is confident the actual damages verdict against Londeree survives a motion for a new trial absolute.

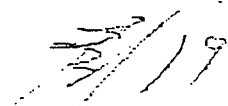
As for the \$240,000.00 punitive damages award against Londeree, the court reaches the same conclusion insofar as a motion for a new trial absolute is concerned. The discussion below of the Mitchell v Fortis factors is incorporated herein to the extent that is necessary to a new trial absolute analysis. The statements made by Londeree to Ms. Rigden were particularly reprehensible and certainly went beyond any license she

had to reasonably investigate the possibility that the plaintiff was the person depicted in the flyer. There is clear and convincing evidence that Londeree's defamatory statements to Ms. Rigden were motivated by ill will, malice, and reckless disregard for the rights of the plaintiff. The court would have been surprised if a punitive damages award of some amount had not been assessed against Londeree.

The jury also returned a verdict for the plaintiff against James Kinser in the amount of \$200,000.00 actual damages and \$100,000.00 punitive damages. The defamatory statements attributed to Kinser were such that the actual damages award was certainly generous. There is evidence in the record that he asserted unequivocally to Connie and Steve Robinson that the plaintiff was the person depicted in the sex offender flyer. As stated above, the court is aware that both Connie and Steve Robinson were impeached at trial with their deposition testimony that Kinser simply asked them if the plaintiff was the person in the flyer. However, the jury was free to believe their trial testimony over their deposition testimony. The court has considered very carefully the arguments of the parties in conjunction with applicable case law and concludes that the awards against Kinser were not so excessive so as to shock the conscience of the court and the sizes of the awards do not lead me to conclude that the jury was motivated by passion, caprice, prejudice, or other improper motive not founded in the evidence.

D. Thirteenth Juror Doctrine

The defendants also claim the court should grant a new trial to Kinser under the thirteenth juror doctrine. In South Carolina, a trial judge may grant a new trial following a jury verdict under the thirteenth juror doctrine. As observed by our Supreme Court in Lane v Gilbert Const. Co. Ltd., 383 S.C. 590, 681 S.E. 2d 879 (2009), "[t]he doctrine



"entitles the judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" Norton v Norfolk Southern Railway Co., 350 S.C. 473, 478, 567 S.E. 2d 851, 854 (2002), citing Folkens v Hunt, 300 S.C. 251, 387 S.E. 2d 265 (1990). As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. Id.

The court is aware that it need not even give a reason for granting a new trial to Kinser under this rule. Even though the court may now "hang the jury", the court declines to grant a new trial to Kinser under the thirteenth juror doctrine.

The court declines to grant a new trial to Londeree under the thirteenth juror doctrine.

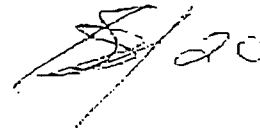
II. NEW TRIAL NISI REMITTITUR

A. James Kinser Verdicts

1. Actual Damages

When the trial court determines that a jury award is unduly liberal, it has the authority to grant a defendant a new trial *nisi remittitur*. "The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive." Indeed, when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to grant a new trial *nisi remittitur*." Becker v Wal-Mart Stores, 339 S.C. 629, 529 S.E. 2d 758, quoting Rush v Blanchard, 310 S.C. 375, 381, 426 S.E. 2d 802, 806 (1993).

Compelling reasons must accompany the grant of a new trial *nisi* in order to justify invading the province of the jury. Becker, 330 S.C. at 639. The trial court must



evaluate the amount of the verdict in light of the evidence presented. *Id.* at 637. The court has concluded above that the actual damages award of \$200,000.00 was not so shockingly excessive as to warrant a new trial. However, the question of whether the award should be reduced for being unduly liberal is a closer question. The arguments advanced by Kinser and Santee in support of their motion for new trial absolute based on the excessiveness of the verdict are also arguments in favor of their *nisi remittitur* motion. The court again respectfully rejects both the Golden Rule argument and the verdict form argument of the defendants as a ground for granting a *nisi remittitur*. However, the remaining arguments merit consideration.

The Robinsons maintain Kinser insisted to them that the person depicted in the flyer was the plaintiff, despite their equal insistence to the contrary. Some damages are presumed, as these statements assert the plaintiff had committed a crime of moral turpitude. It is hard to imagine that any person would not suffer severe humiliation, emotional upset, embarrassment, mental anguish or any other intangible mental strife at being falsely accused of being a child molester. Lives are destroyed when such false allegations are made, and in many instances it is impossible to remove the taint of a blatantly false allegation. In other words, once the allegation has been made, the damage has been done to the falsely accused person. It is obvious from the plaintiff's testimony that he was acutely aware of these realities and that his mental suffering arose from the fear that his life was ruined. The Robinsons did not believe the allegations, and they both defended him when Kinser persisted. Kinser's defamatory statements warrant some amount of actual damages, but not as high as the \$200,000.00 awarded by the jury. In my view, the fact that the comments were made in the privacy of the Robinsons' home



and that they resulted in no tangible damage to the plaintiff's reputation are compelling reasons to remit the actual damages award against Kinser to \$60,000.00. In my view, this figure represents a reasonable judgment against Kinser for the words he uttered and the damage reasonably sustained by the plaintiff.

2. Punitive Damages

Over Kinser's objection, the court submitted the issue of punitive damages to the jury. "[E]ven where the trial court has submitted the issue of punitive damages to a jury, the defendant still has an opportunity to challenge the propriety of any resulting punitive damages award. The trial court has the authority to review the punitive damages award and if the court finds the award is inappropriate or excessive, it has the discretion to order a new trial or remittitur." Fairchild v South Carolina Dept. of Transportation, 398 S.C. 90, 102, 727 S.E. 2d 407, 413 (2012). The Fairchild court indicates that a trial court's consideration of a punitive damages remittitur motion and a trial court's post-judgment review of a punitive damages award may go somewhat hand-in-hand. Fairchild, 398 S.C. at 102, citing Mitchell v Fortis Ins. Co., 385 S.C. 570, 686 S.E. 2d 176 (2009) for the proposition that a reviewing court should consider the following set of factors in conducting a post-judgment review of an award of punitive damages: (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of 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.

The defendants argue that the plaintiff "failed to present evidence sufficient to meet the clear and convincing threshold required to recover punitive damages." (See

page 15 of defendant's initial memorandum). S.C. Code Section 15-33-135 provides that in any civil action in which punitive damages are claimed, "the plaintiff has the burden of proving such damages by clear and convincing evidence." The court charged the jury that in order to recover punitive damages, the plaintiff had to prove by clear and convincing evidence that the defendant either realized the defamatory statement was false or had serious reservations about its truth. The court also charged the jury that the plaintiff had to prove by the same standard that the defendant acted with actual malice in making the defamatory statement. Further, the court charged the jury that "actual malice" meant that the statement was motivated by ill will with the intent to injure the plaintiff or that the statement was made with such recklessness as to show a conscious indifference toward, or disregard of, the plaintiff's rights. The court also charged the jury on the definition of clear and convincing evidence and included the principle that "clear and convincing" means that the evidence is not ambiguous, doubtful, equivocal, or contradictory.

The trial testimony of the Robinsons was certainly called into question when they were very impeached with their deposition testimony. It was very telling to the court that they both testified during their deposition that Kinser only asked them if the plaintiff was the person in the flyer, while they both testified at trial that Kinser insisted to them that the plaintiff was the person in the flyer. A reasonable juror could conclude that when the Robinsons told identical stories at the deposition stage and then told identically different stories at the trial stage, there was some collusion between them to alter their stories to make their testimony more beneficial to the plaintiff. Defense counsel very effectively impeached the Robinsons with these crucial inconsistencies. As noted above,

the jury was charged that they were to evaluate the credibility of all witnesses and that inconsistent testimony was a factor that could be considered in that evaluation.

One mental hurdle for the court is whether it can or should take these testimonial inconsistencies into account in determining whether, as a threshold matter, the punitive award against Kinser should be stricken in its entirety. In other words, do these obvious and duplicate inconsistencies compel the court to find as a matter of law that the plaintiff has failed to establish Kinser's ill will, actual malice, conscious indifference, recklessness, etc., by evidence that is "not ambiguous, doubtful, equivocal, or contradictory", as was charged to the jury? The court concludes that it is permitted under the law to so consider these contradictions in determining whether the plaintiff has proved entitlement to punitive damages as a matter of law; however, the court further concludes that it will respect the jury's conclusion that the plaintiff met his burden of proving entitlement to punitive damages by clear and convincing evidence, even with regard to the Robinsons' testimonial discrepancies. There was more than one reasonable inference to be drawn from the evidence as to whether Kinser's behavior was motivated by ill will, actual malice, conscious indifference, recklessness, etc. However, the Mitchell v Fortis analysis immediately following will result in a complete review the issue of the punitive damages award against Kinser.

In Mitchell v Fortis Ins. Co., 385 S.C. 570, 686 S.E. 2d 176 (2009), our Supreme Court set forth the requisite post-judgment review of punitive damages awards to be conducted by trial and appellate courts. The reviewing court is to consider (1) the reprehensibility of the conduct, (2) the ratio between the actual or potential harm and the award, and (3) comparative awards in other cases. Mitchell, 385 S.C. at 587-89.

a. **Reprehensibility**

In considering reprehensibility, the court is to consider whether (i) the harm caused was physical as opposed to economic; (ii) the conduct evinced an indifference to or reckless disregard for the health and 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 a mere accident. As observed in Mitchell, reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." 385 S.C. at 587, quoting BMW of North America v Gore, 517 U.S. 559, 565. "This principle reflects the view that some wrongs are more blameworthy than others." Mitchell, 385 S.C. at 587, quoting Gore, 517 U.S. at 565.

In the instant case, there is evidence the harm caused had a physical component, as the plaintiff's wife testified the plaintiff lost about fifteen pounds from the stress and anxiety he experienced upon hearing of the false allegations. Other than the evidence of weight loss, the harm caused was that contemplated in a slander *per se* case, i.e., intangible embarrassment, mental anguish, humiliation, etc. The court concludes that these intangible damages have a physical feature.

Kinser's conduct evinced no real measure of disregard for the health and safety of others in the traditional sense, although his conduct did evince a measure of indifference for the mental well-being of the plaintiff. Any reasonable person would have to realize that such horrific allegations, obviously false, would tend to cause significant anguish, embarrassment, and humiliation.

In my view, the plaintiff was financially vulnerable, as both of his condo units were in foreclosure, and the evidence establishes that Kinser was aware of this. The evidence establishes that Kinser's conduct was relatively isolated, in that his defamatory statements to the Robinsons occurred within the privacy of their home. There was evidence that he showed the flyer to condo occupants and employees, but there is not clear and convincing evidence he uttered defamatory statements to these people. There is evidence of a limited amount of intentional malice on his part in making the statements to the Robinsons.

b. Ratio

Under Mitchell, "a court need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff." 385 S.C. at 590 (emphasis in original). There is certainly evidence that Kinser's conduct adversely impacted the plaintiff in the form of mental anguish, embarrassment, and humiliation. There is also evidence that the harm could have potentially been worse, as by sheer luck, Connie Robinson had known the plaintiff for many years and did not believe Kinser's accusations. By extension, Steve Robinson did not believe the allegations based on his wife's familiarity with the plaintiff. Had Connie been a stranger and believed the allegations, the harm caused to the plaintiff would have been more severe.

The original ratio of punitive to actual damages in this case was 1:2, well within the due process limits prescribed by the U.S. Supreme Court. (citations omitted). As instructed by Mitchell, the court must turn to the third guidepost, which instructs the reviewing court to compare the present award to penalties imposed in other cases.


c. **Comparative Awards**

The defendants cite several cases involving punitive damages award in defamation cases, Wilhoit v WCSC, 293 S.C. 34, 358 S.E. 2d 397 (Ct. App. 1987); Rogers v The Florence Printing Co., 233 S.C. 567, 106 S.E. 2d 258 (1958), Deloach v The Beaufort Gazette, 281 S.C. 474, 316 S.E. 2d 139 (1984), West v Morehead, 396 S.C. 1, 720 S.E. 2d 495 (Ct. App. 2011), Williams v City of West Columbia, 322 S.C. 224, 471 S.E. 2d 683 (1996), Constant v Spartanburg Steel Products, Inc., 316 S.C. 86, 447 S.E. 2d 194 (1994) and Sanders v Prince, 304 S.C. 236, 403 S.E. 2d 640 (1991).

In West, the attorney plaintiff was awarded \$10,000.00 actual damages and \$30,000.00 punitive damages against the defendant newspaper. The Court of Appeals reversed the punitive damages award on the ground that the plaintiff had failed to prove the defamatory statement was made with knowledge it was false and had failed to prove the statement was made with reckless disregard of whether it was false. The Court determined that under the facts of that case, the plaintiff's proof had failed. In the instant case, the defendant tries to analogize the Court of Appeal's discussion of the "fair report privilege" to Londeree's and Kinser's right or duty to make a reasonable inquiry into whether the plaintiff was a sex offender. However, the evidence in the instant case is that by the time she spoke to Ms. Rigden, Londeree knew or easily should have known that the plaintiff was not a sex offender. There is less evidence that Kinser knew or should have known that the plaintiff was not the person in the flyer at the time he spoke to the Robinsons at their home. A closing observation regarding West is that the punitive award in West was not reversed for excessiveness; rather, it was reversed for lack of proof. West is therefore not particularly analogous to the instant case.

In Wilhoit, the plaintiff was a character witness for a criminal defendant in a trial. The defendant TV station aired an attempted interview of the plaintiff after the defendant was convicted. The film was presented in such a way that it was arguable the plaintiff was actually the criminal defendant. The plaintiff received an actual damage award of \$1 and a punitive award of \$45,000.00. It was affirmed on appeal. The Court of Appeals noted that the plaintiff "proved no special damages and relied upon the proposition that the broadcast was libelous *per se*." The Court agreed and affirmed the \$1 actual damage award. In reviewing the punitive damages award, the Court held it was not excessive, citing the "evidence of flagrant misconduct" of the defendant. This is analogous to Londeree's conduct but not Kinser's.

Since Wilhoit was decided before the decisions adopting the specific constitutional guideposts for evaluating punitive damages awards, there was no analysis of the award from the perspective of a skewed ratio. In any event, the award was affirmed, and the fact that Wilhoit dealt with presumed damages in a defamation *per se* case is instructive. Part of the defendants' argument in the instant case is that there should be heightened scrutiny of a punitive award in cases involving presumed, "non-special" damages. The defendants claim that "the amounts affirmed in the Wilhoit case would serve as an appropriate cap for any damages remittitur in this case." (See page 23, Defendants' Initial Memorandum). In making this argument, the defendants ignore the fact that a \$1 actual damage award is not the rule in a defamation *per se* case. The jury in the instant case chose to award a significant amount of actual damages, and there is nothing to suggest that a punitive award should be restricted to an amount handed down by a jury in a defamation *per se* case thirty years ago.



In Williams v City of West Columbia, *supra*, a \$250,000.00 actual damages award and a punitive award of \$500,000.00 was affirmed by our Supreme Court. This decision was rendered after the Court first adopted the requirement of a post-trial review of punitive damages in Gamble v Stevenson, 305 S.C. 104, 406 S.E. 2d 350 (1991). The defendants argue that the Williams awards cannot be a relevant comparison to the instant case, because in Williams, the defamatory statements "effectively destroyed [the plaintiff's] reputation and ended his distinguished twenty-five year law enforcement career." 322 S.C. at 231. From the standpoint of the \$240,000.00 punitive verdict against Londeree, it should be noted that Williams was decided eighteen years ago, and the punitive verdict in that case was more than two times the punitive award against Londeree.

In Constant v Spartanburg Steel Products, *supra*, an employee was falsely accused by his employer of stealing equipment and the theft allegation was published to third parties. The employee was fired and there was evidence he was unable to find a permanent full-time job. The jury awarded \$400,000.00 actual damages and \$100,000.00 punitive damages. The Supreme Court affirmed the award, finding it not to be grossly excessive. Constant was evidently tried pre-Gamble, as there was no analysis of the Gamble factors.

In Lynch v Toys "R" Us-Delaware, 375 S.C. 604, 654 S.E. 2d 541 (Ct. App. 2007), the plaintiff was falsely accused of shoplifting and was arrested and spent ten hours in jail. The jury awarded \$50,000.00 in actual damages and \$250,000.00 in punitive damages. The Court of Appeals upheld the verdict. It should first be noted that there was no Gamble review, as the defendant did not raise that issue on appeal. Second,

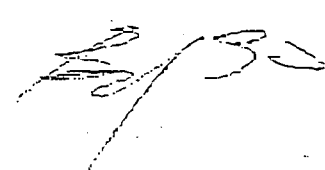
it should be noted that the Lynch opinion was vacated by the Supreme Court upon joint motion of the parties. See Lynch v Toys "R" Us-DeJaware, 384 S.C. 511, 682 S.E. 2d 824 (2009). Therefore, Lynch is of doubtful authority, and even if it were valid authority, the punitive awards in the instant case were less than the punitive award in Lynch.

The defendants argue that the punitive awards in the instant case should be vacated or substantially reduced when compared to the punitive awards in the foregoing cases, as there is no evidence that the plaintiff was "actually harmed" by the defamatory statements of Kinser and Londeree. The defendants also claim that the plaintiffs in the foregoing cases in which awards were sustained were "subject to broader defamatory communications [and] received far less." (page 24, Defendants' Initial Memo). There is no authority for the proposition that current jury awards must exactly comport to affirmed awards in past cases. The requirement that these awards be compared is part of the overall review of punitive damages awards under Mitchell v Fortis. Again, reprehensibility is the single most important factor in this review.

The court concludes first of all that the punitive award against Kinser should be reduced in recognition of its reduction of the actual damages award from \$200,000.00 to \$60,000.00. After careful consideration of all relevant guideposts, the court concludes the punitive damages award should be reduced to the sum of \$30,000.00. This award comports to the evidence adduced at trial, maintains the 1:2 ratio, and is within the parameters set by Mitchell.

B. Leah Londeree Verdicts

1. Actual Damages



The case citations and summaries set forth above in the discussion of Kinser *nisi remittitur* motion apply to this discussion as well. The jury returned an actual damage verdict of \$350,000.00 against Londeree. As noted above, the court has determined that this award was not shockingly excessive and does not warrant a new trial absolute. The arguments advanced by Londeree and Santee in support of their new trial absolute motion apply to the *nisi* motion as well. The court rejects the Golden Rule argument and the verdict form argument advanced by Londeree and Santee, but the court will review the remaining arguments.

The evidence is susceptible of the inference that Londeree was aggravated with the plaintiff because he was behind on his regime fees at Santee. Dr. Vam suggested that she call First Citizens to see if it would pay the fees during the foreclosure process. Instead of restricting her inquiry to that issue, Londeree could not contain herself and told bank officer Tina Rigden that the plaintiff was a convicted child molester and had prostitutes and strippers in his room at all hours. This testimony is compelling evidence that Londeree went well beyond the bounds of conducting a reasonable inquiry into payment of regime fees. Luckily for the plaintiff, Ms. Rigden knew the plaintiff and did not believe the allegations. However, general damages are presumed, as Londeree's words asserted that the plaintiff had committed a crime of moral turpitude. As noted in the discussion pertaining to the verdict against Kinser, any person falsely accused of such deviant acts would likely suffer significant humiliation, emotional upset, embarrassment, mental anguish, and other mental strife. The court cannot imagine any human being, especially in this hyper-vigilant day and age, who would not suffer significant mental distress at being defamed in this way. As noted above, once falsely labeled a child

molester or sex offender, a person can be tainted forever and his or her life destroyed. It is obvious from the plaintiff's testimony that he was aware of these realities and that his mental suffering arose from the fear that his life could be ruined.

Even though Ms. Rigden did not believe the allegations, the very nature of the statements made by Londeree warrant a significant actual damages award. The court reduced the award against Kinser because his statements were made in the privacy of the Robinsons' home and did not result in definite damage to the plaintiff's reputation. The statements made by Londeree were made in a business setting to someone she had absolutely no reason to make the statement to, and the content of Londeree's statements to Ms. Rigden was extremely defamatory. The court is aware that that statements uttered by Kinser and Londeree are not necessarily to be compared to one another when determining whether the actual damages awards should be reduced, but there is no question that Londeree's statements were much more defamatory. It is obvious the jury determined that Londeree's statements resulted in more actual damage to the plaintiff.

However, it must be noted that the words uttered to Rigden were made on just one occasion and Rigden did not believe them. While the statements made warrant a significant award, the foregoing analysis warrants a remittitur to \$250,000.00.

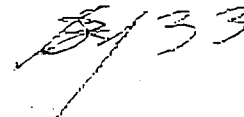
2. Punitive Damages

In the above discussion of the punitive damages award against Kinser, the court cited Fairchild v SCDOT, Mitchell v Fortis, S.C. Code Section 15-33-135, and the jury charge given in this case. That general discussion is incorporated herein by reference.

Londeree argues that the plaintiff has failed to present clear and convincing evidence to sustain an award of punitive damages and that the punitive award against her

should be vacated. The jury was charged that it had to find by clear and convincing evidence (1) that Londeree either realized her defamatory statement was false or had serious reservations about its truth and (2) that she acted with actual malice in making the statement. The jury was instructed that "actual malice" meant that the statement was motivated by ill will with the intent to injure the plaintiff or that the statement was made with such recklessness as to show a conscious indifference toward, or disregard of, the plaintiff's rights. Evidence presented at trial clearly allowed the jury to find each one of the foregoing by clear and convincing evidence.

The evidence in support of a punitive damages award against Londeree was not ambiguous, doubtful, equivocal, or contradictory. Londeree had the right to inquire of Ms. Rigden whether First Citizens would pay the plaintiff's regime fees during foreclosure; however, Londeree chose to include in that conversation her callous and untrue statement that the plaintiff was "convicted child molester" and that he had strippers and prostitutes in his room at all hours. The defamatory statement had no connection whatsoever to her calling a bank officer to discuss regime fees. The jury could easily conclude that the defamatory statement was a calculated and hostile attempt to smear the plaintiff's name. Londeree claimed she merely asked Ms. Rigden if the plaintiff was a "pervert" and that she never called the plaintiff a child molester, but the jury was in the best position to judge her credibility on that point. Londeree's demeanor as a witness was less than desirable, and the jury could easily conclude that Ms. Rigden was very convincing. It was very telling that even after it had been indisputably established and even stipulated by defense counsel that the plaintiff was not a convicted sex offender, Londeree testified that she still thought the plaintiff was a pervert.



The following is a review of the factors set forth in Mitchell v Fortis:

a. Reprehensibility

As discussed above, there is evidence that the harm caused to the plaintiff had a physical component, as his wife testified he had lost about fifteen pounds from the stress and anxiety he experienced. The statements caused harm that is presumed in a slander *per se* case, such as mental anguish, humiliation, embarrassment, etc., which in my view have a physical component.

Londeree's conduct may not have been calculated to be in disregard for the safety and health of the plaintiff in the traditional sense, but there was clear and convincing evidence that she said what she said with a total disregard of the plaintiff's mental well-being. A reasonable person would doubtless realize that such defamatory words would cause significant embarrassment, anguish, and humiliation. The clear evidence is that Londeree did not care.

There was undisputed evidence that the plaintiff was financially vulnerable, as Londeree's stated reason for calling Ms. Rigden was to talk about the plaintiff's regime fee arrearages and future payment thereof, as the plaintiff was losing the units in foreclosure. Londeree vindictively used the financial straits of the plaintiff as a platform for making the defamatory statements.

Londeree's statements to Ms. Rigden were isolated, in that there was only one conversation between Londeree and Ms. Rigden. However, there is clear and convincing evidence that Londeree knew or certainly should have known by that time that the plaintiff was not a convicted child molester. Her statement to Ms. Rigden was motivated by intentional malice, ill will, and hostility, as there was no reason to include in a

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conversation with a bank officer that its customer in foreclosure was a convicted child molester. Her words were no "mere accident".

Our Supreme Court observed in Mitchell v Fortis that reprehensibility is perhaps the most important indicium of the reasonableness of a punitive damages award. The court concludes that Londeree's conduct was exceedingly reprehensible.

b. Ratio

Mitchell v Fortis holds that a reviewing court "need not always compare the punitive damages award to the actual damages awarded, but in certain cases may compare it to the *potential* harm suffered by the plaintiff." 385 S.C. 570, at 590. There is evidence that the defamatory statements caused embarrassment, humiliation, and anguish to the plaintiff. There is certainly no question that the harm caused could have been infinitely worse, as Ms. Rigden coincidentally knew the plaintiff and did not believe the statements. Had Ms. Rigden been a stranger, believed the statements, and repeated them to others, the harm to the plaintiff would have surely been more severe.

Even without the more severe potential harm, the ratio of punitive damages is .69:1. That is well within the constitutional parameters set forth in applicable case law.

c. Comparative Awards

See the discussion above of reported decisions cited by the defendants. The jury was well within its authority to award significant punitive damages.

The reprehensibility of Londeree's conduct is the most significant factor in support of the punitive damages award against her and warrants a significant punitive damages award. The original ratio between punitive and actual was .69:1. The court

concludes that in light of the reduction of the actual damages award to \$250,000.00, the punitive award should be reduced to \$172,500.00.

TRAVELERS' MOTION

This jury trial commenced on December 2, 2013. On that date, Travelers moved to intervene anonymously under Rule 24, SCRCP, for the purpose of requesting that the court include special interrogatories on the verdict form. The court permitted Travelers to intervene so it would have standing to make the specific interrogatory request; however, the court denied Travelers' motion to include special interrogatories on the verdict form. The court concluded that the requested interrogatories would confuse the issues for the jury.

Travelers is defending the defendants under a reservation of rights. Travelers provided the court with copies of reservation of rights letters sent to Londeree at various times throughout the litigation, the latest dated November 19, 2013. In that letter and in its motion, Travelers cites policy exclusions that it claims may be applicable. First, Travelers states that the term "Loss" in the policy does not include the "multiple portion" of any multiple damages award and does not include criminal or civil fines imposed by law. Second, it cites an exclusion for losses in connection with any claim brought about or contributed to by "any deliberately fraudulent or dishonest act or omission or any purposeful violation of any statute or regulation by such Insured." It also cites a policy exclusion for costs and expenses incurred to comply with an order, judgment, or award of injunctive relief. It also cites an exclusion for losses in connection with any claim made against an insured for "bodily injury, sickness, mental anguish, emotional distress, disease or death of any person" unless claimed as part of a claim for wrongful

employment practices. In the reservation of rights letter but not in the motion, Travelers states that a coverage endorsement precludes coverage for damages arising from "defamation/slander/libel and intentional infliction of emotional distress." (See page 4, letter of November 9, 2013). The only cause of action submitted to the jury was for slander.

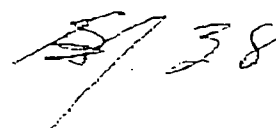
Travelers argues the Supreme Court's holding in Auto-Owners Ins. Co., Inc. v Newman, 385 S.C. 187, 684 S.E. 2d 541 (2009) required this court to allow interrogatories on the verdict form that would be tailored to resolving factual issues pertaining to one, more, or all of the exclusions cited above. In Newman, a homeowner sued a homebuilder for negligence and breach of contract arising primarily from the defective installation of stucco siding by a subcontractor. The liability issues were tried in front of a single arbitrator. Auto-Owners defended the homebuilder under a reservation of rights. The arbitrator awarded itemized damages to the homeowner. Auto-Owners commenced a declaratory judgment action against both the homebuilder and the homeowner, claiming that the damages were not covered under the CGL policy it issued to the homebuilder. Sitting without a jury, the trial court determined that the damages occurred as a result of an "occurrence" under the policy and that Auto-Owners failed to establish the applicability of policy exclusions. On appeal, the Supreme Court held that some of the damages awarded by the arbitrator were covered under the policy but that any amount in the arbitrator's award allotted to the removal and replacement of the defective stucco was not covered under the CGL policy. The Supreme Court concluded that it was not possible to determine what amount of the itemization of damages was attributed to non-covered items of damage and that it was not the purpose

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of the declaratory judgment action to relitigate the issue of damages, stating that "Auto-Owners had an opportunity to raise this matter when the issue of damages were litigated before the arbitrator, who issued a final, binding award on the merits." Since it did not do so, Auto-Owners was required to pay the entire award.

At first glance, it appears that under Newman, in any instance when there is a coverage issue that might be resolved by the trier of fact at the fault stage, the insurer has an unqualified right to intervene so the trier of fact can also resolve the factual coverage issues. However, in my view, the Court's holding in Newman does not stand for the blanket proposition that insurance carriers have the right to intervene in every action for the purpose of securing special interrogatories pertaining to possible coverage exclusions. Special interrogatories tailored to resolve coverage issues may be warranted in some circumstances, but in my view, were not appropriate here.

A jury was empaneled for the purpose of determining whether the defendants were liable to the plaintiff for defamation. The jury was charged that the tort of defamation allows a plaintiff to recover for injury to his reputation as the result of the defendant's communications to others of a false message about the plaintiff, and that defamation is a communication which tends to impeach the plaintiff's honesty, integrity, virtue, or reputation and expose him to public contempt, hatred, or ridicule. The jury was charged that an action for slander is based on the violation of a person's right to enjoy his good reputation, unimpaired by false and defamatory attacks. The jury was charged that in order to prove defamation *per se*, the plaintiff had to prove that Londree and/or Kinser published a statement about the plaintiff that tended to degrade him, i.e., reduce his character or reputation in the estimation of his friends or acquaintances, or the



public, or to disgrace him, or render him odious, contemptible, or ridiculous. The jury was also charged that a statement was classified as defamatory *per se* when the meaning or message is obvious on its face, and that defamation is actionable *per se* when the statement charges the plaintiff with commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in one's profession or business. The jury was also charged that when a statement is classified as actionable *per se*, the words carry with them the presumption that actual damages to reputation and character directly and proximately result therefrom, and that when a statement is classified as actionable *per se*, the defendant is presumed to have acted with common law malice and that the plaintiff is presumed to have suffered general damages.

On the issue of recoverable damages, the jury was charged that actual proof of damages is not required if the defamation is actionable *per se*. The jury was charged that when the plaintiff is entitled to recover actual damages for the injury the statement has caused him, the damages include, injury to reputation and standing in the community, embarrassment, personal humiliation, mental anguish and suffering, and wounded feelings.

The defamatory words uttered by Londeree and Kinser fell only into the category of defamation *per se*, and the words were actionable *per se*.

Travelers requested the court to include on the verdict form an interrogatory inquiring into whether the defendants' conduct amounted to a "deliberately fraudulent or dishonest act or omission". Travelers did not point to any policy definition or other definition of "deliberately fraudulent or dishonest act" that would give guidance as to how these terms might be explained to the jury. The plaintiff and defendants would have been in the position of having to argue to the jury not only the law of defamation and

recoverable damages, but also whether the conduct complained of did or did not rise to the level of a "deliberately fraudulent or dishonest act" in connection with a coverage dispute that was invisible to the jury. Travelers' involvement would not have been known to the jury, and it would have been very confusing to the jury to hear a detailed charge on the law of slander and then include a charge addressing whether the conduct complained of constituted deliberately fraudulent or dishonest acts. Simply placing an interrogatory about deliberately fraudulent or dishonest acts on the verdict form was not appropriate under the circumstances.¹

The court does not recall whether Travelers also requested interrogatories pertaining to other potential exclusions referenced in the motion and the reservation of rights letter. If it did so request additional interrogatories, to include them would have made the jury even more confused.

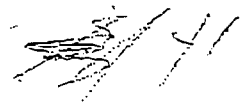
Based on the foregoing, Travelers' motion to alter, amend, and/or reconsider, and/or for a new trial is denied.

¹ The placement of coverage-related interrogatories on the verdict form would have been improper for the reasons stated above. In addition, since Travelers wanted to intervene anonymously, it would have had no opportunity or right to frame the coverage-related issues to the trial jury, and would have had no opportunity or right to argue its position to the trial jury. Though trial counsel for the defendants stated they took no position on the motion to intervene, defendants' trial counsel surely would have been required, out of sole loyalty to the defendants, to argue to the jury that the coverage-related questions should be answered in a way that would lead to coverage. In addition, plaintiff's counsel would have surely argued to the jury that the coverage-related questions should be answered in a way that would lead to coverage. The plaintiff and the defendants have a common interest in that regard, and they could have even stipulated that the jury answer the questions in a way that would lead to coverage. Travelers certainly could not take the position that the plaintiff and the defendants could not present argument to the jury that the questions be answered in a certain way. By logical extension, if Travelers were to be "anonymous" to the jury and have no role in the presentation of issues and argument, Travelers could not prevent the plaintiff and defendants from jointly requesting the court to enter a stipulation on the coverage-related interrogatories that would be binding on the jury. The court doubts Travelers would want this to be the result of its intervention. The observations in this footnote have no bearing on the court's denial of Travelers' post-trial motion, but these observations are worth noting.

CONCLUSION

This case was expertly tried by eminently capable attorneys on both sides. The issues were clearly placed in front of a very attentive jury. The post-trial motions were very capably argued by both sides and by Travelers. After carefully considering all of the arguments made by the parties, the court concludes as follows:

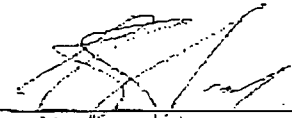
1. The defendants' motion for a new trial absolute is denied.
2. Defendant Santee Resort Condominium Association, Inc. and defendant James Kinser's motion for a new trial *nisi remittitur* is granted as to the verdict for actual damages, and the actual damages verdict award against them is remitted to \$60,000.00.
3. Defendant Santee Resort Condominium Association, Inc. and defendant Leah Londeree's motion for a new trial *nisi remittitur* is granted as to the verdict for action damages, and the actual damages award against them is remitted to \$250,000.00.
4. Pursuant to analysis of the factors set forth in Mitchell v Fortis, the punitive damages award against Santee Resort Condominium Association, Inc. and James Kinser is reduced to the sum of \$30,000.00.
5. Pursuant to analysis of the factors set forth in Mitchell v Fortis, the punitive damages award against Santee Resort Condominium Association, Inc. and Leah Londeree is reduced to the sum of \$172,500.00.
6. The plaintiff has judgment against James Kinser and Santee Resort Condominium Association, Inc. in the amount of \$60,000.00 actual damages and \$30,000.00 punitive damages, jointly and severally.



7. The plaintiff has judgment against Leah Londeree and Santee Resort Condominium Association, Inc. in the amount of \$250,000.00 actual damages and \$172,500.00 punitive damages, jointly and severally.

8. Travelers' motions are denied.

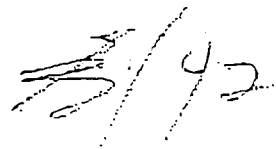
AND IT IS SO ORDERED.



George C. James, Jr., Judge

Sumter, South Carolina

April 15, 2014



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James E. King v. Santee Resort Condominium Association, Inc., Leah Londeree and James Kinser
 Civil Action No.: 2011-CP-14-00541
 Re: Notice of Appeal mailed May 15, 2014

Dear Ms. Kitchings,

Pursuant to the instructions from your office today, please attach this Order to the Notice of Appeal dated May 15, 2014 which we inadvertently omitted when mailing. We appreciate your assistance in this matter.

THE INFORMATION CONTAINED IN THE FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. THANK YOU.