

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schaefer Goodstein, Circuit Court Judge

Case No. 2015-000058

William McFarland and Jennifer McFarland.....Appellants-Respondents,

v.

Mansour Rashtchian and Amy Rashtchian.....Respondents-Appellants

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err by limiting evidence of specific acts to only those relevant to chastity, dishonesty, and racism where Appellants/Respondents have put their character and general reputation at issue by filing a defamation lawsuit?
2. Did the Trial Court err by excluding hearsay which was not offered to prove the truth of the matter asserted, but instead was offered as evidence of Appellants/Respondents' character and reputation in the relevant community?
3. Did the Trial Court err by refusing to charge the jury on relevant mitigating factors the jury could consider in its damages determination where supported by the issues and evidence presented at trial?
4. Did the Trial Court err by limiting the evidence of specific acts to an isolated time period where Appellants/Respondents have put their character and general reputation at issue and Appellants/Respondents have a prior and subsequent history of ill will between and amongst several members of the relevant community?
5. Did the Trial Court err by refusing to allow evidence of certain specific acts of racist comments after Appellant/Respondent Bill McFarland opened the door during direct examination by affirmatively stating that he is not a racist?

STATEMENT OF THE CASE

This case arises from alleged defamatory statements made on April 26, 2011. Respondents/Appellants Mansour and Amy Rashtchian live on Fludd Street in Summerville, South Carolina. Appellants/Respondents Bill and Jennifer McFarland reside in a private gated community ("the Live Oak Community") and the rear of their house has a gate onto Fludd Street. Appellants/Respondents Bill and Jennifer McFarland have been and are currently involved in similar disputes with several other neighbors within the Live Oak Community. See, Defs.' Exs.

5&10, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583.

The incident on April 26, 2011 is a culmination of events that began nine years before and continued even until the date of this trial. Appellants/Respondents moved to the area in 2002 and shortly thereafter began causing trouble in the neighborhood. Trial Tr., 213:15-17, Dec. 8-12, 2014. Appellant/Respondent Bill McFarland testified that on New Years Eve "there was an incident with some fireworks that were hitting my house" and "it was not a big deal." Trial Tr., 221:5-6&9. Despite the fact that it was "no big deal," police were called to the scene. Respondent/Appellant Mansour Rashtchian testified that the event had a different tone. Mr. Rashtchian testified that he was setting off fireworks with his two boys, sixteen and ten at the time. Trial Tr., 635:5-6. Mr. McFarland came out of his house yelling, "What the hell are you all doing? You are targeting my home. You all need to stop." Trial Tr., 635:12-13. The interaction escalated from there and as Mr. McFarland was leaving, he told Mr. Rashtchian, "Why don't you go where you came from." Trial Tr., 636:17-18. This statement was particularly offensive to Mr. Rashtchian because he is a proud, naturalized US citizen and this altercation occurred in front of his two boys. Trial Tr., 637:5-6. Mr. Rashtchian was born and raised in Iran and has a heavy accent and dark complexion. He was attending The Citadel Military College in Charleston, South Carolina when the Shah of Iran was overthrown by Ayatollah Khomeini and did not feel safe returning to Iran. He became a U.S. citizen in 1988.

The McFarlands continued to cause trouble in the neighborhood and in 2009, a conflict arose with the Mazells, the McFarlands' next door neighbors. Mr. McFarland, as HOA president for the Live Oak Community, decided to install a drainage line for and at the expense of the community on an easement on the Mazells' property. Trial Tr., 226:4-6. The drainage line could have been installed in the McFarlands' yard or directly on the property line, but Mr.

McFarland had built a fence along that line and did not want to damage his fence or yard. Trial Tr., 228:23-24. During the course of the drainage project, landscapers for the Mazells cut survey lines requiring a survey crew to reinstall those lines. Trial Tr., 358:14-15. Mr. McFarland believed the accidental cutting of a survey line warranted yet another call to the Summerville police department. Trial Tr., 358:17-19. Shortly thereafter, Appellant/Respondent Bill McFarland filed a notice of trespass against Mr. Mazell. Trial Tr., 467:8-21.

During this conflict over the boundary line, the Mazells asked Respondent/Appellant Mansour Rashtchian, who is a contractor, for assistance in having their own survey done to determine the actual location of the drainage easement and boundary line. Trial Tr., 465: 21-22. Mr. Rashtchian delivered the survey to the Mazells and observed Mrs. Mazell speaking with Mrs. McFarland at their fence line. Trial Tr., 427:5-16. As he approached, he noticed Mrs. Mazell was crying and upset. Trial Tr., 639:3-9. He put his arm around her and led her away and attempted to comfort her. Id. After that, Mrs. McFarland followed him back to his home and complained that the Rashtchians' floodlight shined into their bedroom window. Trial Tr., 427:17-25; 639:19-641:4. Mr. Rashtchian was admittedly perturbed, but later adjusted the floodlights. Trial Tr., 641:5-6.

After the incident in 2009, Appellant/Respondent Bill McFarland actively harassed Mr. Rashtchian because he "took a side" with the Mazells in the property line dispute. Trial Tr., 641:23. Whenever Mr. Rashtchian left his house and Mr. McFarland was in his yard, Mr. McFarland would openly display his middle finger towards Mr. Rashtchian and call him the "sand N-word." Trial Tr., 643:13-17 (during trial the term "N-word" was substituted for the real word that was actually used). Between 2009 and April 26, 2011, Appellant/Respondent Bill McFarland either said or mouthed the word "sand N-word" approximately ten times to Mr. Rashtchian. Trial Tr., 644:7-8.

On April 26, 2011, the McFarlands and Rashtchians spent the day working in their respective yards. During a brief respite from work, Mr. Rashtchian observed landscapers delivering mulch to Appellants/Respondents' back gate on Fludd Street. He also saw Mr. McFarland direct two cars over his grass and a plastic drainage culvert he had installed. Trial Tr., 686:7-11; 687:4-7; 597:11-15. The landscapers, Stephon and Lance Johnson, were spreading the mulch from the back of a sixteen foot trailer and their truck blocked Fludd Street for a period of time. Trial Tr., 236:19-21. While offloading, the landscapers did not pull into the McFarlands' yard because they knew Mr. McFarland gets upset when people drive onto the "town grass" on his side of the road. Trial Tr., 397:13-16; 549:7-10.¹ Mr. McFarland claims they were only there briefly, and he did not direct cars into the Rashtchian yard; but Lance Johnson testified Mr. McFarland "said that Mr. Rashtchian shouldn't have been angry because the grass was not even his property" and it was "town grass." Trial Tr., 548:12-16. A document prepared by Mrs. McFarland two years after the event indicates that a red car went onto the grass in front of the Rashtchians' property. Trial Tr., 569:17-25.

The initial confrontation that followed occurred between Mr. McFarland and Mr. Rashtchian. Mr. Rashtchian confronted Mr. McFarland in the road and said, "Why are you so inconsiderate? These are [sic] the kind of crap you do. Nobody likes you around here." Trial Tr., 649:22-23. Mr. Rashtchian asked the landscapers to move their vehicle and Mr. McFarland told him, "They're not going to move their trucks until they have finished their work." Trial Tr., 597:22-23. The two continued to argue and Mr. McFarland said "I know all about you. I know all about you." Trial Tr., 651:2. In response, Mr. Rashtchian said, "Look, I have seen you videotaping me, you doing this, you using binoculars, telescope." Trial Tr., 651:3-5. Mr.

¹ There is a fifty foot wide right of way that extends into both yards thirteen or fourteen feet which Mr. McFarland refers to as "town grass."

McFarland replied, "Why don't you go get your green card?" Trial Tr., 651:7-8. Mr. Rashtchian then told Mr. McFarland that "he's an F'ing racist" to which Mr. McFarland replied, "I know what kind of shoddy contractor you are." Trial Tr., 651:24; 652:5-7. Mr. Rashtchian was understandably angry and responded in the heat of the moment, "I'm a self-made person. I came to this country with one suitcase and I didn't steal my in-laws' business." Trial Tr., 653:8-10. Mr. Rashtchian understands that he showed poor judgment at the time and is sorry for what he said. Trial Tr., 653:11-15. The two then went their separate ways. Mr. Rashtchian testified that he never said anything about anyone coming to the McFarland house. Trial Tr., 660:12-15.

Mr. McFarland admits to yelling and cursing the Rashtchians, including using the "F-word." Trial Tr. 332: 7-13. He specifically admits to calling Mr. Rashtchian a "fucking asshole." Trial Tr. 333:7-14.

Although, Mr. McFarland admits that he used profanity, he claims that he was simply trying to get Mr. Rashtchian to calm down and told him the landscapers were about to move the truck. Trial Tr., 237:19-23. Mr. McFarland testified that Mr. Rashtchian "tore into him," and Mr. Rashtchian said "I know who comes to your home when you're out of town" and "I could tell you about the people that come to your home when you're not there." Trial Tr., 237:23-24; 238:4; 239:24-240:1. Mr. McFarland testified that he asked Mr. Rashtchian, "'Who the hell would tell you that, such a thing?' Mr. McFarland testified that Mr. Rashtchian pointed at the Mazells' home on Lot 4 and said, 'That woman.'" Trial Tr., 238:7-10. Mr. McFarland testified he calmly "retreated" and told his wife "You've got to hear this guy. He's claiming somebody's sneaking into our home when I'm out of town." Trial Tr., 238:23; 239:3-4. He later testified Mr. Rashtchian made a comment about his wife cheating. Trial Tr., 241:13. He also testified that Mr. Rashtchian said he stole from his wife's family and that he is a racist. Trial Tr., 239:8-11. Mrs. McFarland testified that no one else has ever claimed that she is unfaithful to her husband.

But see, Defs.' Exs. 5&10, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583 (In this lawsuit, Mrs. McFarland claims the Mazells slandered her by calling her unchaste.).

The second confrontation occurred about 30-35 minutes later. After Mr. McFarland ran home to tell his wife about what Mr. Rashtchian said, Mr. Rashtchian was in his yard moving a water hose. Mrs. McFarland approached Mr. Rashtchian and challenged him, "Where did you hear about my parents' business?" and "Where have you heard it?" Trial Tr., 655:3-6. She kept pointing her finger in Mr. Rashtchian's face. Mrs. Rashtchian saw this and responded by coming to the aid of her husband. Trial Tr., 656:1-2. The argument moved into the street, and there was profanity and raised voices on all sides. Trial Tr., 659:12-17. Mrs. McFarland and Mrs. Rashtchian continued to argue and Mrs. Rashtchian said, "Here you are worried about your own grass and yard, and you're doing this to us." Trial Tr., 708:4-5. She told Mrs. McFarland, "You really need to be worried, you know, about yourselves and your own affairs," and "Instead of worrying about us, you both ought to be worried about who comes over to your house when you're both not home." Trial Tr., 708:6-10. The last statement from Mr. McFarland was directed towards Mr. Rashtchian and he asked, "Why don't you go back where you came from?" Trial Tr., 698:4-5. This was heard and confirmed through testimony from the landscapers. Trial Tr., 400:17.

Throughout this whole incident, the audience was the landscapers. They were all sitting back, watching, and laughing because it was amusing and the group "was making a big deal out of nothing." Trial Tr., 398:10-16; 402:1-3. Mr. Stephon Johnson testified no one said anything about cheating and his opinions of the Appellants/Respondents did not change as a result of this incident. Trial Tr., 403:16-23.

The McFarlands did not call the police on the date of the incident. Trial Tr. 343:11-19.

Instead, they spoke to an attorney the day after the incident and then called the police two weeks later when the landscapers were at their home. Trial Tr. 343:11-19. The officers obtained statements from Ms. McFarland, Lance Johnson, Stephen Johnson and Mr. and Mrs. Rashtchian. Lance Johnson's prepared a hand written one-half page statement. Ms. McFarland decided to file suit by May 10, 2011, when the police were called to her house. Trial Tr. 345:3-13; 346:4-6.

Two years after the incident, Mrs. McFarland prepared a three page typed document titled "Confidential and Privileged Information for Lance Johnson." which she provided to Lance Johnson in June, 2013. Trial Tr., 444:21-445:3; see also, Defs.' Ex. 13, "Confidential and Privileged Information for Lance Johnson." This document was prepared in the third person and contains numerous inaccuracies and untrue statements. Trial Tr., 568:18-577:20; see also, Defs.' Ex. 13, "Confidential and Privileged Information for Lance Johnson." It is also missing a page and key details such as the fact that the landscapers were laughing the entire time. Trial Tr., 570:19-20; 577:16-19; see also, Defs.' Ex. 13, "Confidential and Privileged Information for Lance Johnson." Lance Johnson testified to the inaccuracies and felt like he was being used. Trial Tr. 578:11-17.

Mr. Lance Johnson testified that the McFarlands called him two years after the incident to put some rocks in their yard. Trial Tr. 565:11-24. He had stopped working for them at that time. Trial Tr. 565:11-24. He believed that they really wanted to talk to him about their lawsuit. Trial Tr. 656:15-17. After they asked about an estimate for rock for their yard, the McFarlands gave Mr. Johnson the document they had already prepared. Trial Tr. 566:2-5.

In contrast, Ms. McFarland testified that she met with Lance Johnson on June 11, 2013 at her house and met with Mr. Johnson for 25 minutes before preparing the document titled "Confidential and Privileged Information for Lance Johnson." Trial Tr. 483:10-484:20. Mr. McFarland testified that Ms. McFarland prepared the document at Mr. Johnson's request. Trial

Tr. 346:7-10. Mr. and Mrs. McFarland did not identify the June 11, 2013 “statement” of Mr. Johnson in their responses to the Rashtchians’ Interrogatories or Requests for Production dated November 8, 2013. Trial Tr. 489:12-490:12. Ms. McFarland was deposed the first time on November 25, 2013, five months after she prepared the document for Mr. Johnson.² Mrs. McFarland admitted at trial that she did not disclose her 25-30 minute meeting with Lance Johnson or preparing the document for him in her November 25, 2013 deposition. Trial Tr. 486:4-9. However, she claimed she produced the document to her former attorney, Richard Burke. Trial Tr. 490:6-12.³

Much has happened since the incident in April 26, 2011. Mr. Rashtchian’s brother visited in Summer of 2011. At trial, his deposition testimony was proffered and excluded. He testified that he and Mansour were walking down Fludd Street when Mr. McFarland was performing yard work and called them “sand N-word.” Trial Tr., 411:2-11; see also, Court’s Ex. 2, Majid Rashtchian Dep, 8:10-9:9; 19:2-19:23, Aug. 29, 2014. In October, 2012, Mr. Rashtchian’s sister who resides in Manchester, England was visiting. At trial, her deposition was proffered and excluded. She testified that Mr. McFarland called her and her brother “sand N-word.” Trial Tr., 411:12-20; see also, Court’s Ex. 3, Farima Rashtchian Dep, 9:11-10:25, Oct. 27, 2014.

In 2014, another incident occurred where Mr. McFarland is alleged to have intentionally driven on the Rashtchian’s lawn. Trial Tr., 365:19-18. When the police were questioning him about the event, Mr. McFarland referred to Mr. Rashtchian as a “GD Iranian.” Trial Tr., 365:7-

² The Rashtchians were allowed to reopen Mr. and Ms. McFarland’s depositions by Order of Judge Goodstein filed December 10, 2014 due to the McFarlands failure to produce the document previously. Order Granting Def.’s Mot. To Reopen Pls.’ Dep.

³ The McFarlands filed suit *pro se*. They then hired Richard Burke, Esq. to represent them once their depositions were noticed. Mr. Burke was relived as counsel and James Stuckey, Esq. was substituted by Order dated June 2, 2014. Mr. Stuckey was the McFarlands’ attorney at trial. Respondents/Appellants have not received an Order relieving Mr. Stuckey as attorney for the McFarlands. However, Steven Brown and Russell Hines entered a Notice of Appearance for the McFarlands on February 19, 2015.

10. The audio recording from the police car was proffered and excluded. Trial Tr., 376:1-5. Mr. McFarland admits to calling Mr. Rashtchian a “goddamn Iranian” in (sic) 2013. Trial Tr. 331:8-10. Ms. McFarland was present for that incident and admits her husband’s statement as well. Trial Tr. 471:3-6.

Respondents/Appellants also counter-designated former testimony from Mr. Rashtchian’s deposition that was presented in Appellants/Respondents’ case in chief. The Court excluded several portions requested. Trial Tr. 515:20-523:15; see also, Court’s Ex. 4, Mansour Rashtchian Dep. 44:23-47:14; 48:10-24; 52:2-53:18; 55:24-58:11; 60:10-25; 63:18-24; 76:5-78:3, Jan. 6, 2014.

The McFarlands filed their suit *pro se*, on April 24, 2013. Plfs.’ Compl. In their Complaint, Appellants/Respondents allege there were three defamatory statements made against them. Appellants/Respondents allege Respondents/Appellants slandered them by claiming 1) that Mrs. McFarland was having an extra-marital affair; 2) that Mr. McFarland stole his father in law’s business; and 3) that both the McFarlands are racists. Plfs.’ Compl. ¶ 3. During the trial, after Mr. McFarland testified that he is not a racist, Appellants/Respondents withdrew the allegation relating to racism. Trial Tr., 310:20-313:23.

Respondents/Appellants denied that either of them made a statement referencing Mrs. McFarland’s chastity. Respondents/Appellants admit that Mr. Rashtchian said "I'm a self-made person. I came to this country with one suitcase and I didn't 'steal my in-laws' business," but assert the affirmative defense of self-defense and/or provocation because Mr. Rashtchian responded in the heat of the moment to Mr. McFarland’s statement, “I know what kind of shoddy contractor you are.” Trial Tr., 653:8-10; 652:6-7.

Mr. McFarland testified that he is not a racist and has a good reputation in the community. Trial Tr. 333:20-23; 334:5-335:5. However, he admitted that he and his wife are

accused of “converting funds” of the neighborhood HOA, which he equates to “stealing.” Trial Tr. 334:5-335:5.

Respondents/Appellants proffered an email from Mr. McFarland in which he states that others, David Hanneman and Tom Morris, have defamed him. Trial Tr. 413:8-414:6; Defs.’ Ex. 1. Also proffered was an email from Mr. McFarland in which he indicated that others had likened him to Hitler. Trial Tr. 414:7-18; Defs.’ Ex. 1. Further, a letter from Mr. Hanneman and Mr. Morris was proffered, which is the partial basis of another defamation lawsuit. Defs.’ Ex. 9.

Ms. McFarland identified a verified lawsuit and testified that she has sued her current and former neighbors (Michael Mazell, Sofia Mazell, David Hanneman and Tom Morris). Trial Tr. 463:1-464:17; Defs.’ Exs. 5&10, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-25830. She alleges that the Mazells defamed her by saying that she was unchaste, stole her father’s business and is a racist. Trial Tr. 464:2-13.

At trial, the jury found in favor of the Respondents/Appellants. The Appellants/Respondents appealed asserting a jury instruction was improper. Respondents/Appellants conditionally appealed to address evidentiary issues and jury charges in an abundance of caution should the case be remanded for a new trial.

STANDARD OF REVIEW

The standard of review for evidentiary issues is clear and well-settled. “[T]he admission or exclusion of evidence in general is within the sound discretion of the trial court.” Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or lack thereof.” Id. at 26, 609 S.E.2d at 509. In the instant case, Respondents/Appellants have conditionally appealed in order to resolve certain

evidentiary issues if the case is remanded. Respondents/Appellants may be prejudiced by their inability to present evidence that is particularly relevant to damages and proximate cause thereof if the Trial Court's evidentiary rulings become the law of the case. In the interest of judicial economy, Respondents/Appellants request that these issues be addressed if the court remands the case for a new trial.

Jury charges are also within the discretion of the trial court. "A trial court must charge the current and correct law." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 495-96, 514, S.E.2d 570, 475 (1999) (citations omitted). "However, when reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Dixon v. Ford, 362 S.C. 614, 619, 688 S.E.2d 879, 882 (Ct. App. 2005). The trial court will only be reversed for improper jury charges where an appellant can show error and prejudice. Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 553 61 S.E.2d 165, 175 (1950). Again, in this case, Respondents/Appellants may be prejudiced by the Trial Court's error in instructing the jury should those charges become the law of the case. Respondents/Appellants also request that these issues be addressed if the court remands the case for a new trial.

SUMMARY OF THE ARGUMENT

The Trial Court erred as a matter of law in ruling that various proffered evidence was not relevant to the issues within the case and would be unfairly prejudicial. In so ruling, the Honorable Diane Goodstein held that only evidence related to a trait connected to a defamatory statement is admissible, which in this instance encompassed dishonesty, chastity, and racism. Trial Tr., 277:22-25 ("It has to be relevant regarding whether or not he is a thief, whether or not

-- you can ask him whether or not his wife is chaste and whether or not he is a racist, some form or fashion.”); see also Trial Tr., 312:1-313:9; 274:16-277:25.

The Trial Court erred when it excluded nonhearsay statements that were offered to show Appellants/Respondents’ character and reputation in the community. Trial Tr., 519:8-521:7.

The Trial Court erred in charging the jury. In her charge, Judge Goodstein failed to account for key factual and legal issues in evidence. Judge Goodstein charged the jury as follows:

Now, ladies and gentlemen, with regards to damages, there can be mitigation or aggravation. Depending on the facts and circumstances, the manner of the speaking, these matters, either the mitigation, which would lessen the damage, the aggravation, which perhaps would increase the damages.

Based on your view and based on your judgment, you certainly may consider mitigation that you find has been shown by the greater weight of or the preponderance of the evidence and aggravation that you may find has been shown by the greater weight or the preponderance of the evidence.

Trial Tr., 810-811. Counsel for the Respondents/Appellants took exception to this charge because it failed to provide the jury any meaningful guidance in determining the amount of damages it could award in the absence of justification or privilege. Counsel for the Respondents/Appellants requested the following charges:

If you find that the defendant actually believed the alleged defamatory statement, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement

If you find that the plaintiff’s reputation in the community was so bad that it could not be damaged further by the alleged defamatory statement, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

If you find that the person(s) to whom the statement was published did not believe the statement, you are entitled to consider that as a

mitigating factor to reduce the amount of any damages caused by the defamatory statement.

If you find that the plaintiffs' reputation remained unchanged in the eye of the person(s) to whom the defamatory statement was published, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

See Defs.' Proposed Jury Charges. These charges are supported by applicable case law and the facts in evidence in this case. While clearly the jury found that certain statements were not defamatory and others were justified under the circumstances, another jury could potentially come to a different conclusion; thus, a different jury might need additional guidance in calculating the amount of damages if this case is remanded.

The Trial Court also erred by ruling as a matter of law that relevant character evidence may only be admitted if it occurs at the time or just prior to the allegedly defamatory event. Trial Tr., 278:8-10. Evidence both prior to and subsequent to the allegedly defamatory event and relevant damages was excluded.

Finally, the Trial Court erred as a matter of law when it held that evidence of specific acts of racism were no longer relevant after Appellants/Respondents withdrew the allegations related to racism mid-trial, even though Mr. McFarland affirmatively testified that he is not a racist during his direct examination. Trial Tr., 242:13. Rebuttal and impeachment on this issue is certainly relevant to Mr. McFarland's credibility and reputation and should not have been excluded.

ARGUMENTS

The tort of Defamation is unique in that it "allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message

about the plaintiff.” Erickson v. Jones St. Publr., LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006).

In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Id. at 465, 629 S.E.2d at 664. Defamation has two forms; libel and slander. All libel is actionable *per se*. Slander, which was alleged in the case at bar, "is actionable *per se* when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001).⁴

If a defamatory statement is actionable *per se*, there is some measure of general damages that is presumed unless justification or privilege is proven. See Erickson, 368 S.C. at 465, 629 S.E.2d at 664. This is so because the law presumes that the speaker acted with common law malice. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 501-02 (1998). However, there is an important distinction between whether damages are presumed and the amount of damages that can be awarded in the absence of justification or privilege. The measure of damages in a defamation action is damage to the Plaintiff's reputation. Murray v. Holnam, Inc., 344 S.C. 129, 138; 542 S.E.2d 743, 748 (Ct. App. 2001). Under well-established South Carolina law, "the amount of damages [in a defamation action] is peculiarly within the province of the jury." Duncan v. Record Pub. Co., 145 S.C. 196, 280, 143 S.E. 31, 58 (1927); see also, id. at 353, 143 S.E. at 83 (Cothran, J, dissenting for the use of the word "substantial" in a

⁴ Respondents/Appellants deny that the statement that the McFarlands are racists falls within this category.

jury charge on damages) (“Though the law implies some damage from the utterance of words slanderous per se, the amount’ of the damages ‘is for the jury.’”) In making its determination, the jury is entitled to consider the totality of the circumstances, including the Plaintiff’s own character and reputation. See id. at 355, 143 S.E. at 84 (“[T]he amount of damages for a libel is peculiarly within the province of the jury, whose duty it is to consider all the circumstances under which the libel was published and the character and reputation of the plaintiff.”); see also McLeod v. Am. Publishing Co., 126 S.C. 363, 365, 120 S.E. 70, 71 (1923) (“It is true, as a general rule, reputation, good or bad, may not be pleaded or proved as a defense in a civil action. Exceptions to this rule embrace actions for breach of promise, seduction, malicious prosecution, libel and slander, assault and battery.”).

Evidence of a Plaintiff’s character and reputation is especially relevant where the defamation is actionable *per se* because there is no easily calculable dollar figure to assist the jury in assigning a verdict amount. As such, the Plaintiff’s character and reputation, good or bad, are necessarily at issue in the case and evidence should be admitted to assist the jury in assigning a value to that reputation, if any. See 20 S.C. Jur. § 112 Character of a Person Defamed (1993) (“Indeed, a particular plaintiff’s reputation may be so bad that the plaintiff is ‘libel-proof’....”) (citing Sawyer v. Eifert, 11 S.C. L. (2 Nott & McC.) 511, 515-16 (1820)); see also McLeod, 126 S.C. at 365, 120 S.E. at 71.

I. IN THIS ACTION FOR DEFAMATION, THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF SPECIFIC ACTS THAT ARE RELEVANT TO PLAINTIFFS’ CHARACTER AND GENERAL REPUTATION IN THE COMMUNITY.

The Trial Court erred by refusing to allow evidence of specific acts which are relevant to Appellants/Respondents character and reputation in the community. Rule 405 of the South

Carolina Rules of Evidence provides for the methods by which a party can prove character and reputation of another. Rule 405 states:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 405, SCRE. The annotations to Rule 405 indicate that 405(b) is identical to the corresponding federal rule; thus, the interpretation by Federal Courts is instructive.

There is little South Carolina case law directly on point with respect to the introduction of evidence under 405(b); however, several other jurisdictions have held that Rule 405(b) is applicable in defamation suits. See, e.g. World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132, 1138 (10th Cir. 2006); Schafer v. Time, Inc., 142 F.3d 1361, 1370 (11th Cir. 1998); Gov't of Virgin Islands v. Grant, 775 F.2d 508, 511 & n.4 (3d Cir. 1985); Rice v. Rose & Atkinson, 176 F. Supp. 2d 585, 594 (S.D. W. Va. 2001) (“To prove defamation, Rice would have had to prove the falsity of the Hospital's reasons, in particular sexual harassment, and demonstrate damage to his reputation. Both would open the door to character evidence about Rice”); Kadant Johnson, Inc. v. D'Amico, 2012 U.S. Dist. LEXIS 82378, 4 (E.D. La. June 14, 2012) (unpublished) (“Because they are claiming defamation, defendants' character is ‘an essential element’ of one of their claims, and thus under Federal Rule of Evidence 405(b), proof of ‘specific instances’ of Defendants' conduct may be introduced”); Longmire v. Ala. State Univ., 151 F.R.D. 414, 419 (M.D. Ala 1992); Daniels by Glass v. Wal-Mart Stores, Inc., 634 So. 2d 88, 93 (Miss. 1993).

The Tenth Circuit illustrates the use of Rule 405(b) in a defamation action in Schafer, 142 F.3d at 1370. Schafer involved a case of mistaken identity where a photograph of Mr. Schafer was erroneously used in a magazine article discussing a terrorist attack. During trial, the court allowed Defendant to question Plaintiff about “a felony conviction, a possible violation of his subsequent parole, convictions for driving under the influence, an arrest for writing a bad check, failure to file tax returns, failure to pay alimony and child support, and evidence concerning Schafer's efforts to change his name and social security number.” Schafer, 142 F.3d at 1371. These specific acts are unrelated to whether or not Mr. Schafer was a terrorist or traitor. In affirming the lower court’s ruling, the Eleventh Circuit was clear that although character evidence is generally inadmissible, “the issue of the plaintiff's reputation and character [in a defamation action] scarcely can be avoided because the plaintiff typically seeks to recover compensation for damage to his or her reputation.” Id. at 1371. Because “character is substantively at issue” in a defamation case, the court allowed evidence of specific acts under Rule 405(b), even those which had no relation whatsoever to the defamatory statement. Id. at 1372.

The Eleventh Circuit also provides meaningful interpretation of Rule 405(b) in a defamation action in World Wide, 450 F.3d 1132. In World Wide, Plaintiff alleged it was defamed by various online posts made by Defendant. During trial, Defendant presented negatively focused news stories about Plaintiff which aired on the show 48 Hours and were published in the Miami Herald and Forbes Magazine. Id. at 1137-38. These media accounts were unconnected to the alleged defamatory statements. Id. The lower court held the unrelated statements were admissible as being relevant to reputation, damages, and proximate cause. Id. The Plaintiff appealed the ruling of the lower court and the Tenth Circuit affirmed holding that evidence of “specific incidences of conduct” is relevant to the determination of the “quantum of

damages.” Id. at 1138-39. In simpler words, it is evidence of the value of the reputation that was allegedly harmed.

In the case *sub judice*, Respondents/Appellants were not permitted to present evidence related to Appellants/Respondents reputation in the community. See Trial Tr. 515:20-523:15; see also, Court’s Ex. 4, Mansour Rastchian Dep. 44:23-47:14; 48:10-24; 52:2-53:18; 55:24-58:11; 60:10-25; 63:18-24; 76:5-78:3. For example, the court excluded the following statement, “They have done a lot of stuff to us or others by coming out seven days a week, blowing their stuff on everybody else’s yard.” Id. at 44:25-45:3. In his deposition, Mr. Rashtchian testified that no one in the neighborhood cares for the McFarlands. Id., 45:7-15. Mr. Rashtchian also testified that the police were called relating to a neighbor driving over a corner of the yard. Id. at 46:17-23. He further testified that the Mazell’s were moving because they could not take the punishment and harassment. Id. at 47:12-14. This testimony about specific acts is relevant to Appellants/Respondents’ character and overall reputation in the community.

Mr. Rashtchian also testified to separate occasions where he was walking with relatives and Mr. McFarland called them “damn sand n-words.” Id. at 56:2-24. Mr. Rashtchian testified in further detail on these and other events in his deposition. See id. at 44-64. Separate and apart from the originally asserted defense of Truth, comments that are so openly racist bear on a person’s character and reputation.

Respondents/Appellants proffered an email from Mr. McFarland in which he states that others, David Hanneman and Tom Morris, have defamed him. Trial Tr. 413:8-414:6; Defs.’ Ex. 1. Also proffered was an email from Mr. McFarland in which he indicated that others had likened him to Hitler. Trial Tr. 414:7-18, Defs.’ Ex. 1. Further, a letter from Mr. Hanneman and Mr. Morris was proffered, which is the partial basis of another defamation lawsuit. Defs.’ Ex. 9.

The emails and letters, which were excluded, are demonstrative of Appellants/Respondents' character and overall reputation in the community.

As South Carolina jurisprudence is in accord with the liberal admission of evidence in an action for defamation, these specific acts should have been admitted as relevant to the issue of damages. McLeod, 126 S.C. at 367, 120 S.E. at 71 ("Courts of the land are more liberal in the admission of evidence in cases of libel and slander than in other cases..."). Respondents/Appellants may be prejudiced by their inability to present the above evidence that is particularly relevant to damages and proximate cause thereof if the Trial Court's evidentiary rulings become the law of the case.

II. THE TRIAL COURT ERRED BY EXCLUDING NONHEARSAY EVIDENCE THAT WAS OFFERED TO PROVE APPELLANTS/RESPONDENTS' REPUTATION IN THE RELEVANT COMMUNITY.

The Trial Court erred by excluding statements by Respondent/Appellant Mansour Rashtchian which are not hearsay. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000); State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) ("Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted."). "[I]n some scenarios, words or utterances themselves from an out of court declarant may, regardless of their truth, accompany an ambiguous act and give the act legal significance, be used circumstantially, such as to show a state of mind, or form part of an issue in a case." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 559, 658 S.E.2d 80, 87 (2008). "Examples of such words or utterances include words accompanying the making of a contract, utterances evidencing a promise to marry, words

accompanying the performance of a contract, words charged as a libel or slander, words evidencing the fact of sending notice, and words evidencing reputation. Again, these words or utterances are not defined as hearsay because they are not offered to prove the truth of the matter asserted.” Id. (citations omitted).

Goodwin v. Kennedy, is a case directly on point. 347 S.C. 30, 47, 552 S.E.2d 319, 328 (Ct. App. 2001). Goodwin is a slander case in which an assistant principal was defamed by statements made by a Parent in the reception area of the school and later at a school board meeting. Id. At trial, a witness who did not hear the alleged defamatory statements in the reception area testified that “the kids were beginning to say the same [defamatory] words [that the Defendant used].” Id. Over objection, the trial court admitted these statements. On appeal, the Court of Appeals affirmed the ruling of the lower court holding that “the testimony was not offered for the truth of the matter asserted, but to show the effect on the students to support Goodwin's claim of reputational damages.” Id. at 47-48, 552 S.E.2d at 328. “Testimony that students were repeating the slanderous statements was relevant for purposes of establishing Goodwin's reputational damages.” Id. at 48, 552 S.E.2d at 328.

In this case, the court excluded testimony from Respondent/Appellant Mansour Rashtchian that was not offered for the truth, but rather to demonstrate Plaintiff's reputation in the relevant community. Much of the above-referenced specific acts examples were also excluded as hearsay. For instance, the statement, "They have done a lot of stuff to us or others by coming out seven days a week, blowing their stuff on everybody else's yard," is not hearsay because it is being presented to show that all the neighbors dislike the Appellants/Respondents and they have a bad reputation in the community. Court's Ex. 4, Mansour Rashtchian Dep. 44:25-45:3. When Mr. Rashtchian testified that the police were called relating to a neighbor driving over a corner of the yard, it is irrelevant whether or not this statement is true because it

demonstrates the bad character and reputation of the Appellants/Respondents. Id. at 46:17-23. There are additional examples of excluded hearsay within the attached materials. See e.g., Trial Tr., 515:20-523:15; Court's Ex. 4, Mansour Rashtchian Dep. 44-64.

As these statements were not offered for the proof of the matter asserted, they are not hearsay and should not have been excluded. Respondents/Appellants may be prejudiced by their inability to offer nonhearsay evidence that is relevant to Appellants/Respondents' reputational damages.

III. IN THIS ACTION FOR DEFAMATION, THE TRIAL COURT ERRED BY NOT CHARGING THE JURY ON MITIGATING FACTORS THAT THE JURY COULD CONSIDER IN ITS DETERMINATION ON THE AMOUNT DAMAGES.

The Trial Court erred by refusing to charge the jury on specific factors which the jury could consider in mitigation of damages that it chose to assign, if any. "It is not error to refuse a request to charge when the substance of the request is included in the general instructions." Brown v. Stewart, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001). "However, when reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Dixon v. Ford, 362 S.C. 614, 619, 608 S.E.2d 879, 882 (Ct. App. 2005). In the instant case, the Trial Court did not consider the evidence and issues presented at trial. Specifically, the court was concerned "that [the requested charges] could be perceived as a charge on the facts, and [the Court][] charge[d] the general language but not the specific language." Trial Tr. 792:10-12. Unfortunately, the charge given is unlikely to provide any meaningful guidance to a jury in its determination of damages if the case is remanded because it is overly-generalized and does not address the specific issues and evidence presented at trial.

At trial, counsel for Respondents/Appellants cited several cases to support its charges. See McLeod, 126 S.C. at 367, 120 S.E. at 71 ("The cause and manner of speaking the slander are

in all cases proper to be given in evidence in order to guide the jury in the assessment of damages....”); Johnston v. Life & Cas. Ins. Co., 192 S.C. 518, 524, 7 S.E.2d 463, 465 (1940) (“evidence tending to show that the defendant had reason to believe the truth of the charge made might be introduced”); Taylor v. Dominick, 36 S.C. 368, 380, 15 S.E. 591, 594 (1892) (dissenting opinion citing Sawyer v. Eifert, 11 S.C. L. 511, 2 Nott & McC. 511(1820)) (“In action of slander, evidence of the plaintiff’s general bad character, but not of a particular criminal act, other than that imputed to him, is admissible in mitigation of damages.”).

Further support comes from Duncan v. Record Pub. Co., 145 S.C. 196, 143 S.E. 31 (1927). Duncan is a defamation case involving an alleged defamatory statement published in a newspaper. At the end of the trial, and in consideration of all the facts and evidence presented, the lower court charged the jury as follows:

If you find that the defendants, or either of them, have been proven guilty of publishing a libel, as defined in this charge, against the plaintiff, then, in determining the **amount of damages** to which the plaintiff may be entitled, you should take into consideration all the facts and circumstances of the case as disclosed by the evidence, the nature and character of the charges, the language, manner, and style in which such charges were made or published and their tendency, the occasion on which they were published, the extent of their circulation, **the probable effect of the publication upon those to whose attention it came**, and its natural and probable effect upon the plaintiff’s personal feelings, and **his standing in the community and in public estimation....**

145 S.C. at 256, 143 S.E. at 57 (emphasis added). The charge in Duncan specifically addresses the factual issues raised at trial and gave the jury meaningful guidance to make a determination on the amount of damages. This charge was affirmed upon review.

In the instant case, the Court did not consider the evidence and issues presented at trial when charging the jury. Chiefly, the Court refused to charge the Jury on mitigating factors such

as effect on listener, the defamation-proof plaintiff, and the belief by Defendant that the statements were true. The Court refused to charge the jury in the following manner:

If you find that the defendant actually believed the alleged defamatory statement, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

If you find that the plaintiff's reputation in the community was so bad that it could not be damaged further by the alleged defamatory statement, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

If you find that the person(s) to whom the statement was published did not believe the statement, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

If you find that the plaintiffs' reputation remained unchanged in the eye of the person(s) to whom the defamatory statement was published, you are entitled to consider that as a mitigating factor to reduce the amount of any damages caused by the defamatory statement.

See Defs.' Proposed Jury Charges. These charges are supported by the evidence presented at trial. Specifically, one of the landscapers to whom the alleged defamatory statements were published, Stephon Johnson, testified that all three were laughing at the ridiculousness of the group arguing. Trial Tr., 398:10-16; 402:1-3. Mr. Johnson also testified that the statements did not change his opinion of the Appellants/Respondents. Trial Tr., 404:21-23. His testimony is relevant to the issues of effect on listener and whether the opinion in the community changed as a result of the alleged defamatory statement, both of which are relevant to the amount of reputational damages in the absence of justification and privilege. Additionally, testimony and evidence which was improperly excluded is relevant to Appellants/Respondents' overall reputation in the community. See supra, Sections I-II & infra Section IV. Viewing the evidence in its totality, and that which should not have been excluded, the jury should be permitted to

consider whether the Appellants/Respondents are defamation-proof. Therefore, the Court should have instructed the jury in a similar fashion as in Duncan. Respondents/Appellants may be prejudiced by the Trial Court's refusal to properly charge the jury on specific factors it can consider in its computation of any amount of damages in the absence of justification and privilege.

IV. IN THIS ACTION FOR DEFAMATION, THE TRIAL COURT ERRED BY LIMITING EVIDENCE OF SPECIFIC ACTS TO THE TIME PERIOD OF THE DEFAMATORY ACT.

In ruling that certain specific acts evidence is inadmissible, the Trial Court also limited the admission of specific acts evidence to during or immediately prior to the alleged slanderous event. Trial Tr., 278:4-10. Rule 405, SCRE is again at issue and notably contains no temporal limitation. There is little South Carolina case law that addresses this issue directly; however, one can look to the routinely admitted evidence to demonstrate the lack of any temporal limitation on the admission of specific acts. In Goodwin, cited and more thoroughly explored supra, the Court admitted nonhearsay statements that were made after the defamatory event because they were relevant to reputational damages. 7 S.C. at 47, 552 S.E.2d at 328. Additionally, courts have indicated that reputational damages could presumably include some element of future reputational damages; therefore, subsequent acts by a plaintiff that affects that reputation is relevant to the determination of the amount of damages. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986) ("These elements of damage may extend into the future, and in a libel action it is not error to charge the jury on the mortality tables to assist them in determining these damages."). Furthermore, in its evaluation on damages, a jury can consider subsequent acts by the Defendant in mitigation. For example, the court might consider whether the defendant issued a retraction of the allegedly defamatory statement. Rogers v. Florence

Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958). Of course, a retraction by definition occurs after the alleged defamatory statement is made.

In this case, Respondents/Appellants were not permitted to present evidence of specific acts that were temporally unrelated to the alleged slanderous event, but are relevant to Appellants/Respondents general character and reputation in the community. The testimony of Majid Rashtchian was excluded where he referenced Mr. McFarland use of the term “sand N-word” when referring the Mansour and Majid. Trial Tr., 411:2-11; see also, Court’s Ex. 2, Majid Rashtchian Dep, 8:10-9:9; 19:2-19:23. Similarly, testimony of Majid Rashtchian was excluded where she testified that Mr. McFarland called her and her brother “sand N-word.” Trial Tr., 411:12-20; see also, Court’s Ex. 3, Farima Rashtchian Dep, 9:11-10:25. These two incidents are relevant to Mr. McFarland’s poor reputation and character, which bears on the issue damages and proximate cause thereof.

Respondents/Appellants may be prejudiced by their inability to present evidence of specific acts by Appellants/Respondents that are temporally unrelated to the alleged defamatory event, but are relevant to Appellants/Respondents’ character and reputational damages.

V. THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE THAT WOULD IMPEACH APPELLANT/RESPONDENT BILL MCFARLAND’S STATEMENT THAT HE IS NOT A RACIST.

The Trial Court erred by excluding evidence demonstrating Appellant/Respondent Bill McFarland’s racist character after Mr. McFarland testified on direct examination that he is not racist. A fundamental tenet of trial law is that a party “may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination.” State v. Culbreath, 377 S.C. 326, 333 (Ct. App. 2008); see also State v. Stroman, 281 S.C. 508, 513 (1984) (holding when a party introduces evidence of a particular matter, the other party is entitled to introduce evidence to explain or rebut it, even though the latter evidence would have

been incompetent or irrelevant had it been offered initially). This principle applies in both criminal and civil court. Floyd v. Floyd, 365 S.C. 56, 92 (Ct. App. 2005) (holding the door-opening doctrine applies not only in a criminal law context, but in a civil context as well).

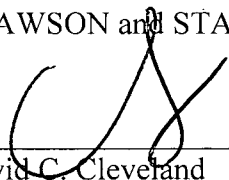
Appellant/Respondent Bill McFarland affirmatively testified that he is not a racist during his direct examination. Trial Tr., 242:13. Subsequently, Appellant/Respondent Bill McFarland withdrew his allegations of defamation related to racism, presumably because Respondents/Appellants have a rock-solid Truth defense. Trial Tr., 310:20-313:23. At that point, the Trial Court ruled that evidence of specific acts of racism were no longer relevant and any additional evidence related to Appellant/Respondent Bill McFarland's racist character and reputation was no longer admissible. Id.

Should the Trial Court's evidentiary ruling on this matter become the law of the case, Respondents/Appellants may be prejudiced by their inability to present impeachment and rebuttal evidence on this and similar issues.

CONCLUSION

In the interest of judicial economy, Respondents/Appellant request that this Court address the above-raised issues should it determine the case should be remanded.

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Charleston, South Carolina
June 24, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schaefer Goodstein, Circuit Court Judge

RECEIVED

JUN 26 2015

SC Court of Appeals

Case No. 2013-CP-18-0735

William McFarland and Jennifer McFarland,

Appellants-Respondents,

v.

Mansour Rashtchian and Amy Rashtchian,


Respondents-Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served all counsel of record with a copy of Respondents-Appellants' Initial Brief and Designation of Matter to be included in the Record on Appeal by mailing a copy of the same by United States Mail with first class postage prepaid to the following:

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File No. C-2013-0347-2010

JUN 26 2015

SC Court of Appeals

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211-1629

Re: William McFarland and Jennifer McFarland v. Mansour Rashtchian and Amy Rashtchian
Case No.: 2015-000058

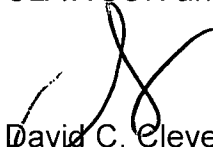
Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of the Respondents-Appellants, Respondents-Appellants' Designation of Matter to be included in the Record on Appeal and Proof of Service in the above referenced matter. Please file the original and return a stamped, filed copy of the Initial Brief of the Respondents-Appellants, Respondents-Appellants' Designation of Matter and Proof of Service.

By copy of this letter, I am serving a copy of the Initial Brief of the Respondents-Appellants, Respondents-Appellants' Designation of Matter and Proof of Service upon counsel of record.

Very truly yours,

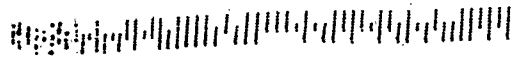
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Enclosures

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