THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2015-000613

Jeffrey Kennedy.....Respondent,

v.

Richland County School District Two, Eric Barnes and Chuck Earles.....Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

The Respondent, Jeffrey Kennedy (hereafter "Kennedy" or "Mr. Kennedy"), filed suit against Appellants and others on March 11, 2013 in Richland County. The Respondent subsequently dismissed certain named defendants from the lawsuit prior to trial.

This case was tried before a jury, with the Honorable Alison R. Lee presiding, beginning on September 29, 2014. The named defendants at the trial were Appellants and Kim Jones, a Richland Two employee. During the weeklong trial, the trial court granted Appellant Richland Two's directed verdict motion on the claim for negligent supervision, and also granted the Appellants' directed verdict motion as to the claim for intentional infliction of emotional distress. Tr. pp. 945-950. The trial court granted the directed verdict motion as to a defamation claim against Kim Jones, thereby dismissing her from the case entirely. Tr. pp. 570-573. Accordingly, the **sole** cause of action before the jury was a claim for defamation against Defendants/Appellants Chuck Earles and Eric Barnes, who are both employees in the security division of Richland County School District Two.

A verdict was rendered in favor of Mr. Kennedy on October 3, 2014. The jury specifically found, by way of a special interrogatory, that Chuck Earles and Eric Barnes defamed Mr. Kennedy and acted with actual malice in doing so. The jury entered a verdict against Chuck Earles in the amount of $100,000 actual damages and $200,000 punitive damages. The jury found against Eric Barnes in the amount of $100,000 actual damages and $150,000 punitive damages. The trial court denied the Appellants' post-trial motions by order dated February 24, 2015, and this appeal timely followed.

STATEMENT OF FACTS

Mr. Kennedy began working in the security division of Richland Two in May 2008, working third shift – essentially, he was the night watchman from approximately 11:00 p.m. – 7:00 a.m. Tr. pp. 112-113. Mr. Kennedy was born in Columbia, South Carolina, graduated from Keenan High School, and is an Army veteran. At the time of his hiring, Mr. Kennedy was a father, husband, and grandfather. Tr. pp. 111-112. He was also a leader at his church and participated in youth mentoring programs he had founded there. He also performed certain security functions for the church. His salary with Richland Two was $11.77/per hour, plus overtime, benefits and retirement. Tr. pp. 113, l. 8 -114, l. 15. Prior to the incident in question, Kennedy took home about $1600 - $1700 in wages every two weeks. Tr. p. 184.

At the time of his hiring in 2008, Kennedy was trained by the then-Chief of Security, Chief Propst, and others on how to perform night watchman duties. Tr. pp. 120, l. 21 – 121, l. 4, pp. 902-904. As part of his on-the-job training, Mr. Kennedy was instructed not to keep warm by sitting in a running vehicle, in order to help the District save on gas expenses. Tr. p. 135, l. 17-25. Additionally, he was taught how to "space out" his duties so they were not completed too quickly. Tr. pp. 119 -120, l. 5, Tr. pp. 896, l. 6-13. Finally, part of being a night watchman was to change up the routine so that others could not predict his actions and location. Tr. pp. 116, l. 12 – 118, l. 16; pp. 531, l. 3-18. Part of Kennedy's duties were patrolling schools, responding to calls, setting alarms, checking windows and doors, and generally observing the premises of certain Richland Two schools, including Spring Valley High School. Tr. pp. 114, l. 16 – 15, l.

18. Respondent Barnes testified that "boredom is a problem" on the job of the night watchman. Tr. pp. 285, l. 12 – 287, l.9.

Spring Valley High School is a huge, physical plant serving approximately 2,000 students. Tr. p. 708, l. 5-14. There are approximately 100+ thefts which occur every year; however, many of these thefts are never reported to the security division. There have been instances of people breaking in through ceiling panels and through open windows. Tr. p. 721. There have been robberies of student valuables, and creative means used to access areas of Spring Valley High School. Tr. p. 753, l. 18-755, l. 12.

Numerous witnesses testified that "everyone had keys" at Spring Valley and, in fact, the Richland Two security division did not know who had keys to what – that decision was made by Spring Valley's principal. Tr. pp. 126, l. 23 – 128, l. 25; Tr. pp. 220, 391-392. Appellants, among others, testified that it was a challenge to maintain security when they did not know who had keys to what buildings at Spring Valley. Tr. pp. 216-220, pp. 335-336. Kids, parents, and other staff members were all given or loaned keys from time to time. Tr. pp. 199, l. 8-22, 289. John Reid, a security guard, testified that Mr. Earles was surprised at how many people had keys at Spring Valley. Tr. pp. 217-218.

In order to work the third shift as the night watchman, Mr. Kennedy was given keys at the beginning of his shift to the buildings and offices of Spring Valley High School, among other schools. Beginning with his hiring in 2008, Mr. Kennedy was also able to work overtime, at a much greater rate of pay, at school events and athletic games and tournaments, thereby increasing his income. Tr. p. 113, l. 17-25.

In 2010, Chief Propst was fired by Richland Two and Chuck Earles assumed the position of Emergency Services Manager. Tr. pp. 121, l. 5-16. Mr. Earles subsequently hired Eric Barnes as his Assistant Security Manager. Tr. p. 122, l. 22-25. Both Earles and Barnes were former longtime employees of the Richland County Sheriff's Department and seasoned law enforcement professionals. The rank and file employees believed that Respondents wanted to make Richland Two security more like law enforcement, Tr. p. 123, l. 1-23; however, Richland Two security guards do not carry guns and were trained to call the police in the event a dangerous situation arose.

Respondent Earles believed that the Security Division had a rumor problem and a gossip problem and that Chief Propst allowed a lot of inappropriate conduct among employees. Tr. p. 390, l. 15 – 391, l. 18. As a result, Mr. Earles sought to "change the culture" of the Security Division by having employees, including Kennedy, read and sign a "Change of Culture" memorandum (Pl. Tr. Ex. 2) which provided, in part, that employees were to mind their own business. Tr. pp. 121-122. Mr. Barnes was familiar with this Change of Culture memorandum, Tr. p. 276, l. 19-24, and also believed that gossip and rumor were a problem in the Security Division. Tr. p. 277.

In or around February 2011, Mr. Kennedy applied for a supervisor's job as a lieutenant within the security division. If he was hired, the position would pay more and would allow him to work "second shift", allowing for more family- friendly hours. Tr. p. 123, l.24 – 124, l. 20. Other than a few letters in his personnel file concerning tardiness or absences, Mr. Kennedy had been a good employee. Tr. p. 213, l. 23 – 214, l. 22, 205.

Appellants interviewed Mr. Kennedy and ultimately decided he was the best candidate for the job. Tr. p. 124, l. 20 – 125, l. 15. On February 28, 2011, Mr. Earles

recommended him for the promotion and sent his recommendation up to the human resources department, which would run background checks, etc. Tr. pp. 125, l. 16 – 126, l. 10. Sometime after being recommended for the promotion (but before HR formally approved it), Mr. Kennedy was invited to the regular supervisor's meeting and introduced as the new lieutenant. Tr. p. 273, l. 3-24. It was known among the rank and file that Mr. Kennedy was getting the promotion.[1] Tr. p. 126, l. 12-22, pp. 197, l. 25 – 198, l. 8, p. 240, l. 13-20.

On March 4, 2011, Spring Valley's athletic director, Tim Hunter, alleged that he left $1,000 in some cash boxes under his desk, in his office, the night before and that he discovered the money was missing the next morning when he arrived at his office. Tr. p. 291, l. 21 – 292, l. 2, Def. Ex. 4, Tr. p. 580, l. 14 -583, l. 18. Hunter's office is located in the athletic department (AD) building at Spring Valley, also known as Bates Hall.

Mr. Hunter has a safe in his office where he usually locks up money received from tournaments; however, he alleged that he felt sick the evening of March 3rd and wanted to leave the cash boxes out, in case a staff member needed to access the cash for an event the next day.[2] This was not his standard practice. Tr. p. 583, l. 19- 584, l. 6. Mr. Hunter testified he put the black cash boxes under his desk and someone would have had to have physically gotten down on the ground to find them – they were not visible to someone just walking through. Tr. p. 605, l. 2-9.

Mr. Hunter's actions were deemed "odd" and "suspicious" by some employees, especially since other administration employees had the combination to the safe and could have released the cash drawers from the safe in the morning. Tr. pp. 198, 334,

[1] Announcing a promotion before HR approval was against Earles's policy. Tr. p. 389, l. 6-23.
[2] Obviously, Mr. Hunter did end up coming to work the following day.

pp.406-407. However, Mr. Hunter was a longtime, valued Spring Valley employee and was never considered a suspect by Appellants, nor did he feel he was ever treated as one. Tr. pp. 362, 601.

None of the security cameras at Bates Hall were pointed at Mr. Hunter's office door. As a result, there was no video of anyone entering or exiting Mr. Hunter's office on the night in question.

Mr. Kennedy was on duty the evening of March 3rd and, as part of his rounds, turned on the alarm in the Athletic Department building with another security officer, John Reid, around 11:00 p.m., and came back and disarmed it by himself sometime around 5:55 a.m. on March 4th. Tr. p. 131, l. 1-14. At the time when he disarmed the alarm, and other nights in question, Mr. Kennedy told Respondents that he had spent time in the weight room, playing with his phone and by his own admission was "wasting time" and "killing time". Tr. pp. 487, l. 15 – p. 489, l0. During that time in the weight room, he received a call from his shift supervisor, Lt. Gerome Young, informing him that Mr. Kennedy needed to go open a gate at another school. Tr. pp. 133 – 135, l. 16. Kennedy testified he never went into Hunter's office on the night in question or checked the door. Tr. p. 136, l. 1-13.

During the evening hours between when the alarm was first set by Mr. Kennedy and John Reid late on March 3rd and when Kennedy returned around 5:55 a.m. on March 4th, the Spring Valley baseball team returned to campus after a late game and set off the alarm. When the alarm went off, Mr. Kennedy was instructed by Lt. Young to drive over to Bates Hall to check on things. Tr. pp. 131, l. 17 – 133, l. 12. By the time Kennedy arrived, the baseball coach was already turning the alarm off himself and Kennedy did

not re-enter the building. However, while sitting in his vehicle outside, Mr. Kennedy observed numerous players and coaches through the plate glass windows up in the hallway by Mr. Hunter's office; additionally, there were numerous players and coaches observed on the videotape from the security camera in the Athletic Department building. Tr. pp. 131-133. Tim Hunter testified that in his review of security video, he did not recall seeing players near his office, nor did he recall whether the baseball coach came back down the to turn the alarm back on, so the alarm could have been off the rest of the night. Tr. p. 595, l. 10-15.

Custodians had keys to the athletic department offices, as did athletic coaches. Tr. p. 244, l. 1-10, Tr. p. 725. Mr. Hunter's right hand man, Sonny Uker, knew that he had placed the cash in his office, however Mr. Uker was never considered a suspect. Tr. p. 727. The video camera footage from Bates Hall was taped over by Richland Two except for a few camera views. While some witnesses testified that they saw the baseball team on the video footage from the evening in question, Chuck Earles did not recall seeing the team, Tr. p. 531, l. 24 – 532, l. 18; however, he did see Mr. Kennedy on the phone as Kennedy exited Bates Hall around 5:55 a.m. Earles never followed up to see who Kennedy was speaking with, or to confirm the length of the conversation, even though the school district provides phones to the security staff and could access that data. Tr. pp. 515, l. 9-518, l. 2. Earles refused to testify as to whether "it would be highly unlikely that [Kennedy] would be in the process of robbing something while he is talking to somebody else." Tr. p. 517, l. 24- 518, l. 2. Earles did not save any video from the night in question which showed Tim Hunter leaving Bates Hall or arriving the next morning, nor did Earles save the video from the period of time after Kennedy disabled

the alarm around 5:55 a.m. Tr. pp. 532, l. 19- 533, l. 25. Assistant Principal Jim Childers, who also reviewed video, did not save it. Tr. p. 735.

Tim Hunter testified that the video showed that only the baseball coach came up the hallway near his office and that the other players stayed down the hall, Tr. p. 588, l. 3-590, l.19; however, Kennedy testified that, when he responded to the alarm call, he observed the baseball players up by Hunter's office where the cash had allegedly been left out. Tr. p. 131 – 135, l. 5.

The Richland Two HR department, which interviewed Kennedy as part of their investigation, found that others had "access and opportunity" to the office. Pl. Tr. Ex. 5. The video camera security system in place at the time when the relevant incidents occurred has since been replaced and the District no longer uses the system from 2011 due to certain deficiencies in the software. Tr. p. 476, l. 19-24. There was evidence that the video would tape over itself and that when school is in session, images are recorded over fairly often. Tr. p. 542, l. 25 – 543, l. 10.

Despite no one ever observing Kennedy – during the three years he had been a night watchman - entering or exiting any office where he was not supposed to be,[3] and despite others having had "access and opportunity" and keys, Mr. Kennedy was the sole focus of the Appellant's investigation. Tr. p. 244, l. 11-17, pp. 323, l. 15 – 324, l. 2. Appellants never interviewed the baseball team, baseball coach, the custodial staff or Sonny Uker and never considered them to be suspects. Tr. pp. 295 - 297, pp. 156, l. 18 – 158, l.23 , Tr. pp. 303-304.

[3] Testimony at trial was that security guards always know they may be recorded on camera at any given time, and that someone might be watching or recording their movements, even if they don't know where the cameras are pointed. Tr. pp. 245, 254.

Mr. Earles and Mr. Barnes alternately testified that they did not really perform an investigation, Tr. pp. 291-292, 301, but merely handed it over to the Richland County Sheriff's Department for investigation and acted as "liasons". Tr. p. 291-294. However, both Appellants reviewed video tape of the nights in question, Tr. pp. 295-297; met with human resources staff and with Mr. Kennedy; and reviewed instances of other petty thefts at Spring Valley High School and sought to "catch" the thief by placing "bait money" in a certain location. Tr. pp. 454 – 455. Earles never sought to learn what training Kennedy had received to perform the third shift duties. Tr. pp. 505-506. Earles testified he only saved 2 out of 16 camera views from Bates Hall. Tr. p. 414.

In February/March 2011, a check, some cash, and a ring were reported stolen by some staff in the administrative offices of Spring Valley. Tr. pp. 358 - 360; 709 -712. However, some of the staff members could not say when the items had gone missing, as they were kept in drawers and not something that was checked on regularly. Tr. pp. 708-711.

Mr. Kennedy was questioned about his actions in the administration building as well, because he was deemed to have taken "excessive time" in the break room there and gone through a back door instead of a front door. Barnes didn't save all of the video he reviewed. Again, there was no video footage showing Kennedy entering locked offices, Tr. pp. 372, 523, l. 1-21. No one followed up to see if the stolen check had ever been cashed, and no fingerprints were collected from the offices. Tr. pp. 746, 761. Finally, neither Appellants questioned Mr. Kennedy about what his training had been, or what his habits and routines were, Tr. p. 286, pp. 505, l. 10 – 507, or reviewed videotape from months past to find out what his habits or routines were. Tr. pp. 378. Kennedy told them

it was his habit to take breaks. Tr. p. 310. They also did not speak with his supervising lieutenants, who could presumably attest to the training Kennedy received and his habits. Tr. p. 536, l. 18-20.

During the period of investigation beginning with Tim Hunter's report on March 4th, Mr. Kennedy was placed on paid administrative leave. Roosevelt Garrick, the Chief HR Officer of Richland Two who oversees human resources, was extremely disappointed when, in his interviews with Mr. Kennedy in the months following the thefts, Mr. Kennedy repeatedly professed to "wasting time" during his night shift, as he did not consider that to be an appropriate use of district resources. Tr. pp. 830, l. 21- 831, l.7, pp. 833, l. 19- 835, l.6. Garrick was also concerned that Mr. Kennedy's recollection of his movements on the nights in question revealed some inconsistencies. Tr. p. 142, l. 9 – p. 145, l. 4; pp. 833, l. 19- 835, l.6.

Mr. Kennedy was not surprised that he was investigated, given that security guards on duty always are questioned. However, from the beginning, Kennedy vehemently denied stealing anything and informed the HR department during their investigation that he had been "doing the same things" on his shift for 4 years. He admitted to Tracy Batchelder, the HR director and a longtime Richland Two employee, that during the times when he was "off camera" in buildings, he was wasting time and taking breaks. Kennedy further stated that he had a wife and mortgage and was up for a promotion – why would he steal? Def. Tr. Ex. 7 & 8; Tr. p. 137; Tr. pp. 794, l.2 – 797, l.11.

The Richland County Sheriff's Department investigated the alleged theft of the $1,000 and declined to charge anyone – including Kennedy. Their investigation included

Richland County deputies showing up with "carloads of police" at the home of Mr. Kennedy's elderly mother, with Eric Barnes along for the ride. Tr. pp. 129, l. 19 – 130, l. 9. Batchelder testified that she would have liked for the Sheriff's Department to have taken fingerprints from the administrative offices and checked Kennedy's phone records. Tr. p. 801, l. 23 – 802, l. 4.

Despite the Sheriff's Department decision not to charge anyone, Appellants both believed that Jeffery Kennedy was the thief, Tr. pp. 323-324, pp.416-417, and withdrew the recommendation for the promotion – an action which Mr. Garrick approved of, given his tremendous disappointment with Kennedy's "wasting time".

Mr. Garrick informed Mr. Kennedy that he would need to restore Richland Two's trust and confidence in him. Pl. Tr. Ex. 5; Tr. p. 842. Despite acknowledging that others had "access and opportunity" to the money, Tr. p. 145, l. 5-23, neither Mr. Garrick (nor anyone else) ever met with the other employees who had "access and opportunity". Tr. pp. 227, l. 20 – 228, l. 6; Tr. pp. 853-854. Mr. Barnes was "very frustrated" and simply could not believe that Mr. Kennedy was not fired, and characterized Richland Two, his voice dripping with sarcasm at trial, as a "beautiful place to work". Tr. pp., 300, l. 21-23; pp. 338-339; Tr. p. 855, l. 19-24.

Mr. Kennedy returned to work at the security division in June 2011; however, Chuck Earles decided that Mr. Kennedy was not to have keys and was to be assigned to desk duty only, with no access to keys. Tr. p. 394, l. 25 – p. 395, l. 12. Ultimately, the promotion to lieutenant was given to John Reid, a fellow Richland Two employee. Kennedy testified that these adverse actions against him led to a reduction in Mr. Kennedy's take home pay, as he was unable to garner as many overtime hours. Barnes

had no reason to doubt that assessment. Tr. p. 345, l. 3-6. Additionally, he did not receive the raise that would have come with the promotion to lieutenant. Tr. p. 841, l. 20-24.

In order to implement his decision, Mr. Earles sent out an e-mail, Pl. Tr. Ex. 4, marked confidential, to the supervisors within the security division, along with his deputy, Mr. Barnes. The e-mail states explicitly that Mr. Kennedy is returning to work on desk duty and is "NOT to be given any assignment that involves having keys to any District facility." The e-mail was printed out and left out for the rank & file employees to see in both the security division office and their vehicles. Tr. p. 140, l. 11 – p. 141, l.22. Appellants denied printing it out or leaving it out, Tr. pp. 280, l. 25 – 281, l. 4, 364. Appellants admitted that the e-mail would have harmed Kennedy if it had gone beyond the recipients. Tr. pp. 331-332, 395-396. Kennedy testified that he heard that Appellants said he was thief. Tr. p. 140, l. 8-10. He testified it was upsetting and stressful, but he needed the job and stayed on because it was a good job with benefits, state retirement, etc. Tr. pp. 146, l. 15 – p. 147, l. 8.

Current and former Richland Two security employees testified that they saw the memo lying out and knew what it meant – that Earles and Barnes considered Kennedy to be the thief and that he could not be trusted. Tr. pp. 246-248. These same witnesses testified that you can "put two and two together", and that it was "obvious" that Appellants thought Jeffery had stolen the $1,000 and could not be trusted. It was undisputed that a security guard without keys was worthless. Tr. pp. 199, l. 23- p. 203, l. 1. Barnes communicated to the rank and file that Kennedy was not to have keys. Tr. pp 221, l. 16 – 222, l. 16.

The fact that Mr. Kennedy was considered a thief by his employers got around to his fellow church members and also to students. Upon learning that the supposedly "confidential" email had been printed out and left out for all to see, neither Barnes nor Earles followed up with their supervisory staff to find out who had left the memo out or why the confidentiality directive was ignored. Mr. Kennedy testified that as a result of the actions of Appellants, he was humiliated, embarrassed, and faced financial problems. Additionally, he and his wife were put under significant stress and eventually split up. Tr. p. 152, l. 16-21. He also testified that church members found out about the theft accusation and he lost his stature and position within the church community, including with the Godly Men's Program, and was barred from assisting with the collection plate. Tr. p. 152, l. 22 – 154, l. 10. Kennedy testified that recently while he was at Wal-Mart, he overheard Spring Valley students that he recognized laughing and snickering about him being a thief. Tr. p. 156, l. 3-13.

During the same time that the Athletic Department theft was reported in March 2011, the Spring Valley Assistant Principal, Jim Childers, took away the master key from the night shift custodian, Ms. Jackson, after a report of a theft on February 25th. Tr. p. 715, l. 15 – 25. Richland Two's cleaning crews are subcontracted out through Service Solutions and there is significant turnover of cleaning crew staff. Tr. pp. 655, l. 8 – 656, l. 16. Richland Two relies on Service Solutions to perform background checks and screen individuals. Tr. p. 740, l. 2 – 21.

Mr. Childers took this action because he wanted to rule out Ms. Jackson as a suspect, as he had the utmost trust for her. Tr. p. 744, l. 4-13. In order to avoid having her placed under a cloud of suspicion and to protect her reputation, Mr. Childers told her

directly that he was taking her key away – he also told one or two other people on a "need to know" basis that he was taking away Ms. Jackson's key. Tr. pp.763, l. 16 -764, l. 16. He did not send out an e-mail or other written correspondence; his communications were verbal. Tr. p. 716, l. 6 -23. He did not inform Earles or Barnes of his decision. Tr. p. 276, l. 8-13, Tr. p. 749, l. 9 - 21. Ms. Jackson's key was subsequently returned to her and she remains employed at Richland Two. There was no evidence that Mr. Childers's action was made known to Ms. Jackson's fellow employees, nor was there any evidence that fellow employees learned that she was under suspicion for theft.

Mr. Childers's treatment of Ms. Jackson was characterized as the "gold standard" by Richland Two's HR director, Roosevelt Garrick. Tr. pp. 857-859. Richland Two strives for a "culture of excellence" and Mr. Childers met that standard when he discreetly dealt with Ms. Jackson, in Mr. Garrick's opinion. Tr. pp. 857-589. A confidential memo being left out about Mr. Kennedy did not reflect the "culture of excellence", nor does the dissemination of sensitive employee information to fellow employees. It is not indicative of "best practices" in the HR field. Tr. pp. 864-866. Garrick was disheartened to hear that the "confidential" e-mail memo about Kennedy had gotten out to the rank and file employees. Tr. p. 860, l. 1-20.

In January 2012, Mr. Kennedy hired an attorney, Franchot Brown, to write a letter to Mr. Garrick requesting that he be given the promotion. Mr. Garrick refused to reinstate the promotion. Tr. p. 145, l. 24 – p. 146, l. 10. In October 2012, Mr. Kennedy was accused of showing a security video to a fellow employee, Kim Jones. Tr. p. 149, l. 12-16. Ms. Jones was also a Richland Two parent, and she was concerned about allegations of improper behavior by her son at school. Tr. p. 147, l. 13-22. If the video

was shown to Ms. Jones, this would have been a violation of District policy. Tr. p. 151, l. 8-11. Mr. Kennedy was subsequently accused by the employee of threatening her if she identified him as having shown her the video. Mr. Kennedy denied having threatened his co-worker, and denied showing her the videotape or knowledge of the policy. Tr. p. 148, l. 12-13. Richland Two did not find him credible, and subsequently terminated him after he refused to resign. Tr. p. 152. Ms. Jones received only a letter of caution reiterating the District policy on security videos and remained employed by District Two.

Following his termination, Mr. Kennedy subsequently obtained employment as a security guard at other firms after a period of unemployment, during which time he was evicted and cashed out his state retirement.

ARGUMENT

I. There was No Error and Sufficient Evidence of Defamation Was Presented to Support the Denial of the JNOV/Directed Verdict Motions

In response to arguments A. and B. of the Initial Brief of the Appellants, Respondent replies as follows. This case went to the jury on the sole cause of action for defamation, after the trial judge properly denied the motion for directed verdict on that claim after a lengthy hearing. Tr. pp. 547, l. 22 – 558, l. 5; 571, l. 24 – 573, l. 5, pp. 918, l. 3 -921, l.18, p.923, l. 22 – 927, l.13, p. 930, l. 24- 936, l. 10, pp. 937, l. 11 -945, l.7, 950, l. 3- 14.

"The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant's communications to others of a false message about the plaintiff. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497, 501 (1998). "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Id. at 506. 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." McBride v. School District of Greenville, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010). "Defamation need not be accomplished in a direct manner. A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning was clear." Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987).

"When reviewing the denial of a motion for directed verdict or JNOV, [the Court of Appeals] must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. **[The Court of Appeals] will reverse the trial court only when there is no evidence to support the ruling below.** When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or resolve conflicts in the testimony or evidence." Tucker v. Doe, Op. 2014-000134 (S.C. Ct. App. Filed Aug. 5, 2015) (emphasis added) (citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (emphasis added); See also Clark v. S.C. Dept. of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) (noting that the appellate court will reverse the trial court's ruling only where there is no evidence to support the ruling or where the ruling is controlled by a clear error.") "The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." Erickson v. Jones St. Publishers, 368 S.C. 444, 629 S.E.2d 653 (2006) (cited in Donevant v. Town of Surfside Beach, Op. 5345 (S.C. Ct. App. Aug. 26, 2015)).

Mr. Kennedy met his burden of proving each element of his defamation claim. At trial, the undisputed testimony was that the email marked "confidential" was printed out and left in the open in the office and in vehicles for Richland Two employees to see. See Testimony of Messrs. Kennedy, Mitchell, and Permenter.

Both Appellants testified that they did not print the e-mail out and leave it lying around; however, the credibility of these men was for the jury to weigh.[4] The jury could have concluded that since Appellants considered Kennedy to be the thief, they left the memo out in hopes of harming him, given that the District declined to fire him and the Sheriff's Department declined to charge him. This was a permissible inference for the jury to make. The testimony suggests either verbal or written communication to other staff members regarding the contents of the email. Respondents acknowledged that if the information in the memo got out to the rank and file, it would hurt Kennedy. Tr. pp. 330 – 331, 337.

Incredibly, the Appellants argue that "Plaintiff offered no evidence to suggest that any of the addressees [of the email] were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential." App. Init. Br. at p. ____. **This statement is in direct conflict with the evidence presented at trial – that Chuck Earles considered Richland Two's security division to be a rumor mill and both he and Eric Barnes required employees to sign a "Change of Culture" memorandum stating that they would not gossip, among other things.**

Because there was testimony in the record from which the jury could have found that, by either the words or a combination of words and conduct, it was communicated to Richland Two employees that Barnes and Earles considered Jeffery Kennedy to be a thief and unfit for his job, there was sufficient evidence to constitute proof of publication and directed verdict was properly denied. See Mains v. K-Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (holding that the jury could have found that "words or

[4] For instance, Barnes testified in October 2014 that there had been no thefts reported at Spring Valley HS before the March 4th Tim Hunter theft. Tr. p. 333. The jury could have found his testimony absurd, given that Assistant Principal Childers testified that on average he sees 100+ thefts per year at Spring Valley.

conduct or the combination of words and conduct can communicate defamation" and therefore there was no error in the denial of defendant's motion for directed verdict or JNOV) (citing Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980)).

The trial court correctly charged the jury that the memo at issue was a qualifiedly privileged communication to supervisory staff, and that it was a question of fact for the jury as to whether such qualified privilege was exceeded (or "lost") when the memorandum was left out in the open for rank and file Richland Two employees to observe. Tr. pp. 944-945; See also Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) (noting that whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, was properly for the jury); See also Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

Appellants incorrectly assert that Kennedy had to show actual malice in order to show that the privilege was destroyed. App. Init. Br. at pp. 11-12. This is not the law in South Carolina, which provides that "where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice **or** that the scope of the privilege has been exceeded." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (S.C. 1999) (emphasis added). "The question whether the privilege had been abused is one for the jury. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id at 134.

In Swinton, the Supreme Court held that when the defamatory communication took the form of libel (i.e. a written communication), "malice was presumed" and it was a "defendant's burden to establish that a privilege existed in order to rebut this presumption." The Court held that it was error for the trial court to grant a motion for directed verdict on the plaintiff's defamation claim because it was for the jury to decide whether the privilege was exceeded and, further, there was evidence suggesting reckless disregard which could constitute actual malice. Id. at 134-135.

Here, the undisputed testimony at trial was that the security division was such a "rumor mill" that under the leadership of Earles and Barnes, employees were required to read and sign the "Change of Culture" memo. The undisputed evidence was that a "confidential" email was printed out and left out in vehicles and in Richland Two offices for employees other than the recipients of the e-mail to see. Accordingly, directed verdict and JNOV motions were properly denied and the Court should affirm such denial on these grounds and any other grounds found in the record pursuant to Rule 220(c), SCACR. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

The jury heard the following testimony from Earles and Barnes: that they thought Jeffrey Kennedy stole the money; that they had no idea who had keys to what buildings; and that they didn't bother to interview other individuals who were in the AD building on the night in question. Earles testified explicitly that he formed his opinion that Kennedy was a thief based on a "very limited set of facts" and that he was still comfortable with that opinion. Tr. p. 541, l. 10-25. Finally, it heard testimony that Appellants knew that the security division was a "rumor mill" and had a rumor problem, but that Respondents did nothing to ensure that the memo be kept confidential. Tr. pp. 283, l. 10- 284, l. 4.

Appellants' reliance on Williams v. Lancaster County School District 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006) is misplaced. Unlike the instant case, Williams concerned a cause of action for slander – a spoken defamation. In Williams, a husband and wife who were both high school teachers brought an action for slander against the school principal, alleging that the principal accused the husband of committing adultery with a school secretary during meetings which the principal had with both of them (and the secretary), and that thereafter rumors of adultery immediately spread throughout the school community.

The trial court granted summary judgment, holding that the record was devoid of any evidence of any publication of a slanderous statement by the principal. The Court of Appeals affirmed, noting that several employees, and possibly parents and students, were in the immediate area after the husband and school secretary were discovered locked in a bathroom together. Additionally, **the deposition testimony confirmed that rumors had been circulating for some time prior to the bathroom incident about a possible romantic relationship between the two.** Id. at 292-293 (emphasis added).

Unlike the situation in Williams v. Lancaster County, here the evidence was that there were no negative rumors circulating, or innuendo surrounding, Mr. Kennedy reputation as of March 2011—rather, the testimony was that he was a valued part of the security division who had just been recommended for a promotion and was introduced as a new supervisor at the lieutenant's meeting. Clearly, Kennedy had a good reputation until Earles and Barnes decided to label him as untrustworthy and unfit for his profession, and disseminate that information to his fellow employees. There was sufficient evidence for the jury to decide that Earles and Barnes left the "confidential" memo out for all to

see in the office and the vehicles, given that they were the author and recipient respectively and clearly had opportunity and motive.

The jury could have reasonably concluded that the Appellants acted with actual malice and left the memo sitting out in order to punish Kennedy and ruin his reputation - because Appellants were angry that he wasn't charged with the theft by the Sheriff's Department or fired by Richland Two. The trial court carefully considered these exact same arguments of the Appellants – both at the directed verdict stage and at the JNOV stage – See Tr. at pp. 916-921, Def. Post-Trial Motion, and properly found that there was sufficient evidence for the jury to consider whether the qualified privilege was exceeded and whether the Appellants acted with actual malice.

Appellants assert that there is only "one inference" that can be drawn from the evidence before the Court; however, a plain reading of the transcript shows that the jury could reasonably have found Messrs. Earles and Barnes to be callous, careless, and recklessly deficient in their handling of this matter. The juxtaposition between the way in which Assistant Principal Childers discretely handled the situation with the custodian – referred to as the "gold standard" by Richland Two's HR director – and the public humiliation of Kennedy could not have been more clear. Accordingly, the denial of the directed verdict motion and the denial of the JNOV was proper and the Appellant requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220, SCACR. See, e.g., cases cited herein; See also Constant v. Spartanburg Steel Products, Inc., 447 S.E.2d 194, 316 S.C. 86 (1994); Mains v. KMART, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988);

Lynch v. Toys R Us, 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007); McBride v. School Dist. of Greenville, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010).

The Court Correctly Found That A Question of Fact Existed As To Whether the Respondents Acted with Actual Malice and Denial of the JNOV Was Proper.

Appellants appeal from the denial of their directed verdict and JNOV motion as to the claims against them individually (i.e. outside their official capacities) under the Tort Claims Act. Tr. pp. 923-926. The Court correctly held that whether there was evidence of actual malice – such that immunity would be lost - was properly for the jury. Tr. at pp. 938-939, 950 (Judge Lee noting as it relates to the SCTCA that "there would have to be some finding and maybe some interrogatory to the jury that talks about if there is a recovery against the defendants, whether they acted with actual malice").

In fact, the Appellants specifically agreed to a special interrogatory on the verdict form to address this issue. Tr. pp. 964-972; Verdict Form. Finally, the judge charged the jury the following: *"you have to decide whether the defendant exceeded the privilege by communications or publication with actual malice. That is again with knowledge that it was false or with reckless disregard of whether it was true or false or that it was not made at the proper time or to the proper parties or in the proper manner."* Tr. pp. 1014-1015.

Section 15-78-80(b) of the Tort Claims Act provides that "nothing in the chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011).

In Pridgen, the defendants were supervisors who were tasked with investigating alleged infractions at the prison where the plaintiff also worked. The Court of Appeals held that the denial of defendants' motions for directed verdict and JNOV as to immunity under the SCTCA was proper. The Court of Appeals held that because the plaintiff alleged personal motives and bias on the part of the defendants, "there was at least circumstantial evidence that the defendants acted outside the scope of their employment and with the intent to harm the plaintiff . . . [and] [t]he jury could infer from . . . the nature of their actions that they intended to harm [the plaintiff]." 705 S.E.2d at 64.

"Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) "Malice may be proved by direct or circumstantial evidence . . . Whether malice is the incentive for a publication is ordinarily for the jury to decide. Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury." Id. at 750-751.

Appellants argue that the Court erred in failing to grant JNOV because of a failure by Kennedy to prove "constitutional malice". The case upon which Appellants rely, Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), is inapplicable because it concerns the standard applicable where the case involves defamation of a public official.[5] See also Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (holding that defendant was not entitled to a "constitutional malice" charge because the plaintiff, an assistant school principal, was not a public official).

[5] No evidence was presented at trial the Mr. Kennedy was a public figure.

This argument also fails because the Appellants never argued or requested a charge on "constitutional malice" at the trial stage. The trial judge did, in fact, charge the jury with language from the Gause case, as evidenced by the charge excerpted above. For the reasons previously cited, the jury could certainly have found that the Appellants acted with "actual malice" when the memo was left out for all to see and they clearly communicated that they considered Kennedy to be a thief. The jury could have concluded, based on the evidence, that Earles and/or Barnes printed out the memo and left it out and that they lied on the stand when they denied doing so. The trial court's rulings were proper and therefore Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

II. The Trial Court's Denial of Respondents' Motions for JNOV, New Trial Absolute, New Trial Nisi Remittitur Was Proper and Not in Error.

In response to arguments C., F., G., and H. contained in the Initial Brief of Appellants, Respondent replies as follows.

Denial of the JNOV as to Punitive Damages Was Not An Abuse of Discretion As There Was Clear and Convincing Evidence of Recklessness and Malice

The trial court, in upholding the award of punitive damages in this case, conducted a post-trial review to ensure that the punitive damage award was proper, relying upon the cases of BMW of North America v. Gore, State Farm v. Campbell, and Mitchell, Jr. v. Fortis Ins. Co.. See Feb. 24, 2015 Order of Judge Lee. R. p. ___. In the instant case, this Court must review the denial of JNOV under an abuse of discretion standard. See McAlhaney v. McElveen, Op. 5328 (S.C. Ct. App. July 15, 2015).

In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Cody P. v. Bank of America, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011). In Bank of America, the Court of Appeals found that the trial court properly denied the bank's motion for JNOV on punitive damages when it found that the evidence, viewed in the light most favorable to the plaintiff, showed that a person of ordinary reason and prudence would have known that he or she was acting in contravention to the bank's policies and procedures and, further, had acted recklessly when he or she opened bank accounts carelessly. Id. at 482.

Similarly, here the evidence, viewed in the light most favorable to Mr. Kennedy, showed that Appellants knew there was a rumor and gossip problem in the security division, but chose to disseminate false and harmful information about Kennedy in writing and otherwise, and failed to ensure that it was kept confidential among supervisors or not printed out. This was in stark contrast to the "gold standard" exemplified by Assistant Principal Childers's treatment of the custodian, and in direct contravention to Richland Two's "best practices", which seek to keep potentially damaging employee information confidential. Given that the Appellants clearly believed Kennedy was a thief, and were frustrated that he was not fired and charged criminally by the Sheriff's Department, there was sufficient evidence for the jury to consider awarding punitive damages.

Denial of the Motion for New Trial Absolute Was Not an Abuse of Discretion

Respondents argue that the verdict is so "grossly excessive" so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." Init. Br. At

p. 27. The Court "may not reverse the decision [denying a motion for new trial absolute] unless the trial court committed an abuse of discretion." McAlhaney v. McElveen, supra. In Rush, the Supreme Court, affirming the trial court's denial of a new trial absolute, held that **the decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal**. 426 S.E.2d at 805 (emphasis added); See also RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (finding the trial cout's decision to deny a motion for a new trial absolute on the basis of excessive punitive damages was within its discretion).

"A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." Smalls v. SC Dept. of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (internal citations omitted).

As previously discussed, the evidence in the record was that the investigation conducted by the Appellants – two longtime law enforcement employees - was minimal at best, exceeding sloppy at worst; that the security division was a "rumor mill"; and that no one else who had access to the Athletic Director's office on the night in question was ever even questioned and that Kennedy was never charged or convicted of a crime. The jury heard undisputed testimony that "everyone had keys" at Spring Valley; that Earles and Barnes did not even know who had keys to which offices on the dates in question; and that no one had even saved the majority of the video footage which was apparently so crucial in their targeting of Mr. Kennedy. The jury also heard testimony that the Appellants did not even speak with the shift supervisor, Lt. Gerome Young, who was on

duty on the night in question. The jury heard testimony that others had "access and opportunity", but only Mr. Kennedy was targeted.

Finally, there was evidence that there was a "right" way to conduct such a sensitive investigation, as demonstrated by the testimony of Assistant Principal Jim Childers. Human Resources Director Roosevelt Garrick testified that Richland Two strived for a "culture of excellence" which was demonstrated by the discretion and sensitivity of Mr. Childers. Taken together, the glaring contrast between the actions of Messrs. Earles and Barnes and Assistant Principal Childers was certainly sufficient to show recklessness and malice. Messrs. Earles and Barnes let it be known that they thought Mr. Kennedy was a thief and could not be trusted, regardless of the fact that he was never arrested or convicted of any crime.

Furthermore, Mr. Kennedy's own testimony, which was apparently believed by the jury, could be described as heartbreaking and certainly sufficient to support an award of punitive damages. Mr. Kennedy testified that because of the smear on his reputation he suffered stress and humiliation and loss of income; that this stress and humiliation adversely affected his marriage; and that he was essentially shunned at church. Furthermore, he testified that he was the subject of stares and gossip. This testimony and supporting exhibits were entered without objection from the defense. The trial court rightly concluded that there was "repetitive conduct of rumors being spread in general in the department" and that "Plaintiff argued, and the jury could have inferred from the evidence presented that the harm was the result of intentional malice, trickery or deceit". Order of Judge Lee at p. 3. R., p. ___.

Finally, in the instant case, the multiplier for punitive damages is low – 1.5 for Barnes and 2.0 for Earles, and the lower court properly found that the award was proper. See Cody P. v. Bank of America, 720 S.E.2d at 483 ("while there is no concrete constitutional limit on the ration between actual and punitive damages, few awards exceeding a single digit ration between punitive and compensatory damages will satisfy due process.)

Respondent's counsel, in closing and without objection from defense counsel, asked the jury to return a verdict that would send a message: that it believed that the Defendants were wrong and that Jeffery Kennedy had been unfairly slandered. Counsel asked the jury to look back at the evidence, to look back at Jeffery Kennedy's tearful testimony, when it considered whether to award a verdict. Counsel also asked that the jury consider what would be a reasonable amount, an amount that sent a message that would deter this type of conduct in the future. Tr. pp. 976-991. Deterrence is one of the factors considered in Gamble v. Stevenson.

To assist the jury in its calculations, counsel suggested a figure of $400,000, and to help them put this amount in perspective, suggested that they could view it in terms of being approximately 10 years of Kennedy's salary at Richland Two. Mr. Kennedy testified that he was earning approximately $1,700 to $1,800 every pay period. This suggested amount was certainly reasonable in light of the evidence before the jury. Additionally, defense counsel did not object to Respondent's closing. The general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver. Varnadore v. Nationwide Mutual Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986). Without a contemporaneous objection, the defendant must also show that the argument

was a flagrant violation and the vicious or inflammatory nature of the argument resulted in clear prejudice. South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977). The argument made by Plaintiff's counsel in this case was neither vicious nor inflammatory. Tr. pp. 976-991.

Just because Appellants did not believe that Kennedy had been harmed and had only been subjected to a "minor indignity", Init. Br. at p. 27, and further argued in closing that Kennedy "basically got a four month paid vacation" when he was on leave, Tr. at p. 1001, **does not mean that the members of the jury saw it that way**. In fact, defense counsel specifically noted in closing that "[t]hey want you to believe that there's some secret message in that email . . . that really says that Chuck Earles is sending mind vibes to these people to say, "print this out. Make sure we can get Jeffery Kennedy and embarrass him by doing this." Tr. pp. 1001-1002.

The jury found exactly that – that Earles and Barnes had wanted to defame and humiliate Mr. Kennedy and did so. Finding the conduct of the Appellants reprehensible, the jury chose to award Mr. Kennedy $550,000. This was entirely proper.

The size of the verdict did not demonstrate improper motive. Kennedy testified that he suffered shame and humiliation, lost his marriage, his standing at Church, and his position with a youth mentor group, among other damages, when he was defamed by Mr. Barnes and Mr. Earles.

The credibility of the witnesses was for the jurors to consider: the jurors sat and listened as Mr. Barnes became quite distraught over what he believed to be Richland Two's deficiencies in failing to immediately fire Mr. Kennedy. The jurors sat and listened as Chuck Earles stated that he never interviewed anyone else about the AD

department theft, despite there being other people with "access and opportunity" (to quote the Richland Two HR director, Roosevelt Garrick). Perhaps the jurors thought Mr. Earles and Mr. Barnes were smug. Perhaps the jurors thought that their "investigation" was a sham and conducted maliciously. Perhaps the jury thought the Appellants printed out the email and posted it themselves for all to see because they were angry that Mr. Garrick chose not to fire Mr. Kennedy. Whatever the reason, the jury chose to award an amount which spoke to the seriousness of the claim and their perception of the wrongdoing perpetrated by Appellants. Case law abounds of $500,000 + verdicts in defamation lawsuits which were upheld on appeal. See, e.g., Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding award of $250,000 actual damages and $500,000 in punitive damages); Constant v. Spartanburg Steel Prods., 316 S.C. 86, 447 S.E.2d 194 (upholding jury verdict of $400,000 in actual damages and $100,000 in punitive damages); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987) (upholding an award of $1 million in actual damages and $45,000 in punitive damages).

Furthermore, the jury clearly wanted to send a message to the Appellants to deter similar conduct in the future and implement more effective methods for dealing with sensitive employee situations involving serious allegations. See Cody P. v. Bank of America, supra. For these reasons, the award of damages was proper under South Carolina law and the Court should affirm the trial court's rulings for the reasons stated above, or for anything other reason found in the record pursuant to Rule 220(c), SCACR.

Denial of the Motion for New Trial Nisi Remittitur Was Proper

"There is no formula or standard that can be used as a measure for assessing punitive damages." Austin v. Specialty Transportation Svs., Inc., 358 S.C. 298, 594 S.E.2d 867, 875 (Ct. App. 2004). Addressing the suggested factors for the Court to consider – as outlined in Gamble v. Stevenson and BMW v. Gore and relied upon by the Appellants - Kennedy again submits that there was clear evidence of the reprehensibility of the Appellants' conduct and of the Mr. Kennedy's damages for the jury to consider.[6] Furthermore, the the ratio of actual damages to punitive damages in this case is well within the "single digit multiplier" espoused by both State and Federal Courts. See Austin, supra at p. 877 – 878 (and cases cited therein) (noting that single-digit multipliers, while not binding, are more likely to comport with due process and finding that a punitive damages award of 2.5 times actual damages was not excessive).

While the Appellants asserted that their actions were neither serious or harmful, the evidence before the jury was that Mr. Kennedy suffered greatly as a result of being labeled a "thief" in a workplace environment that was best described as a "rumor mill" according to the trial testimony and "Change of Culture" memo. Mr. Kennedy testified that his marriage broke down; he lost his position as a youth mentor at his church; he lost the trust and faith of his fellow parishioners; and he was subject to rumor and innuendo. In short, just because the Appellants apparently never took the case seriously does not mean that the jury was not free to do so. See Wilhoit v. WCSC, Inc., 293 S.C. 397, 358 S.E.2d 397 (Ct. App. 1987) (holding that the trial judge properly refused to set aside the award of $1 actual damages and $45,000 punitive damages where there was no evidence

[6] The South Carolina Supreme Court has characterized the *Gamble* factors as factors to "provide guidance" and are not to be considered "hard and fast" requirements. See Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587, 5963 (2004).

that the jury was motivated by passion, caprice, or prejudice and, in fact, the evidence showed that the defendants falsely implied that plaintiff committed a crime).

The facts in the instant case were essentially undisputed at trial: the Appellants focused their investigation solely on Mr. Kennedy to the exclusion of all other suspects from day one, and, when law enforcement declined to press charges and HR refused to fire him, chose to go ahead and let everyone know that they considered Kennedy guilty regardless. They failed to safeguard confidential information and they failed to control the very "rumor mill" that they acknowledged existed at Richland Two. Furthermore, the argument that the Appellants' conduct was not reprehensible because "Plaintiff continued in his job without complaint or incident for another fourteen months after reinstatement" is not supported by the evidence. See Init. Br. at p. 30. In fact, Mr. Kennedy tried to get his promotion reinstated and had his lawyer write a letter to Roosevelt Garrick to that effect.

Finally, the jury heard testimony that the night custodian, Ms. Jackson, was also subject to an investigation due to having opportunity and access, but her investigation was kept strictly confidential and her reputation survived intact. The jury could have compared and contrasted the actions of Jim Childers with the actions of Barnes and Earles.

Furthermore, there is substantial precedent for large verdicts in defamation lawsuits, including punitive damages, given that one's reputation can be damaged irrevocably through a single action that reverberates for years. See, e.g., Lynch v. Toys R Us, 375 S.C. 654 S.E.2d 541 (Ct. App. 2007) (upholding jury award of $50,000 in actual damages and $250,000 in punitive damages); Miller v. City of West Columbia, 322 S.C.

224, 471 S.E.2d 683 (1996) (upholding verdict in the amount of $250,000 actual damages and $500,000 punitive damages as appropriate where defamatory (and unsupported) statement that police officer had sexually harassed a co-worker effectively destroyed his reputation and ended his career); King v. Santee Resort Condominium Association, et al., 2013 WL 8691349 (S.C. Com. Pl. Clarendon County Dec. 5, 2013) ($890,000 verdict on defamation claim arising out of defendants' erroneous, and repeated, identification of plaintiff as a registered sex offender)[7].

In Lynch v. Toys R Us, the Court of Appeals upheld the trial court's denial of Toys R Us's motion for JNOV or *nisi remittitur* based on the jury's award of $50,000 in actual damages and $250,000 in punitive damages. The Court of Appeals noted that the plaintiff was arrested without justification and in full view of customers, and the combination led to humiliation, sleeplessness, and emotional pain, which constituted actual damages. Further, the punitive damages award was upheld "as a warning and example to deter the wrongdoer and others from committing like offenses in the future." 654 S.E.2d at 552. In the instant case, the jury may have wanted the punitive damages award to send a message that the Appellants needed to be much more careful in the future when handling sensitive information related to their employees.

Similarly, in Miller v. City of West Columbia, the Court of Appeals held that the trial court properly denied the defendants' motion for a new trial and to strike the punitive damages award where the evidence showed that the city administrator carelessly investigated a dispatcher's claims of sexual harassment against the plaintiff, a longtime city police officer, and furthermore made a statement, not based on evidence and in the presence of others, that the plaintiff had, in fact, harassed the dispatcher. Based upon the

[7] The Santee Resort case was subsequently settled by the parties prior to appeal.

evidence, the Court held that the jury award in the amount of $250,000 actual damages and $500,000 punitive damages was "appropriate and necessary" under Gamble.

Here, the jury awarded actual damages of $200,000 and punitive damages of $350,000. This is well within the bounds of constitutionality, is reasonable given the evidence, and is in line with other jury awards for defamation.

As to Appellants' argument that no evidence was offered as to their ability to pay, the Appellants are successful professionals who were ably represented by counsel. Both men testified to stable employment histories and successful personal lives. There was no evidence presented that would indicate that the Appellants could not pay the award; furthermore, Barnes and Earles did not engage separate counsel from their employer. All were ably represented by the same law firm. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

III. The Trial Court Correctly Respondent to the Jury's Request to Clarify the Terms "Actual" and "Punitive" and, furthermore, Defense Counsel Failed to Preserve This Argument of Review.

In response to Argument E contained in Appellants' Initial Brief, Kennedy responds as follows.

At the Charge Conference, Tr. pp. 950-972, the Appellants did not object to the trial judge's charge and did not proffer a proposed charge on the issue of wrongful termination or whether the termination was grounds for damages. Accordingly, this argument is not properly preserved for review. See Rule 51, SCRCP; See also Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005). Given that the sole claim before the

jury was for defamation, it can be reasonably presumed that defense counsel did not wish to confuse the jury by charging the law of termination.

Defense counsel did object to Kennedy's proposed charge on the mortality tables on the grounds that "the termination is not to be part of the damages in the case" and that it would not be "fair to charge that he can recover future defamation damages." Tr. at p. 960. The trial judge agreed with defense counsel and declined to charge the mortality tables. Tr. at p. 961. The trial judge proceeded to charge the jury, Tr. pp. 1006-1025, and when asked if "there were any exceptions from the defense", defense counsel responded "no". Tr. at p. 1025. Accordingly, having failed to request a charge on termination, and having failed to note an objection to the judge's charge to the jury, the issue is not preserved for review. See Rule 51, SCRCP; See also Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005). Appellants also did not raise this alleged "failure to charge" in their post-trial motions. In short, Appellants' argument is not preserved for review and was waived.

Appellants seek to "revive" this issue by pointing to a note that the jury sent out during its deliberations which stated as follows:

> *"We are a little confused. Question one, we are seeking clarity from you on terms actual, punitive, and malice. Question two, is there a percentage chart to use or do we break the amount into a rounded number to the best of our ability?"*
>
> Tr. at pp. 1022, Court's Ex. 2, R., p. __.

After the trial judge indicated how she intended to respond, the following exchange occurred:

Mr. Barlow: Would there be any way to clarify that that this is not a termination case?

Mr. Goodwyn: I would object to that since that was not charged.

The Court: I don't know that there is anything in here that relates to termination.

Mr. Barlow: Well, damages.

The Court: Well, there are damages for slander. So, you know, I mean, that's a cause of action for defamation.

Mr. Barlow: All right.

Mr. Goodwyn: You're just going to recharge them basically on the damages?

The Court: I'm not giving them any new instructions. I'm not doing anything different.

Tr. p. 1034.

The trial judge proceeded to call the jury back in and ask them to clarify their questions and the foreman replied that "I just want actual and punitive damages". Tr. p. 1036. The Court proceeded to re-charge the jury on the elements of damages for a defamation claim. Tr. pp. 1036-1040.

Appellants argue that the "ultimate termination of Plaintiff's employment for reasons not attributable to the theft investigation, or to Barnes or Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages." Init. Br.

Again, the Appellants ignore the evidence which showed that Mr. Kennedy was defamed in 2011 and damaged by the malicious actions of Appellants when they took away his keys, let people know they considered him a thief, and denied him the promotion after letting everyone know that he had been promoted. Accordingly, as recounted in great detail in Respondent's prior arguments, there was plenty of evidence

for the jury to consider which supports the award. Simply because Kennedy, many months later, was eventually terminated does not mean the jury relied on the termination in awarding its damages. After all, Kennedy testified that despite a few rough months following his termination, he had been gainfully employed since. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220, SCACR.

IV. The Exclusion of Evidence of Another Accusation of Theft Against Kennedy Which Occurred Three Years After the Spring Valley Theft Was Not Prejudicial Error.

In response to Argument D contained in the Appellants' Initial Brief, Kennedy responds as follows.

"The grant or denial of a new trial motion rests within the discretion of the trial judge and will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (upholding denial of motion for a new trial because the jury's verdict was not against the greater weight of the evidence presented at trial, and nothing in the record suggested the trial court's denial of the motion for a new trial was an abuse of discretion.) (citing Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App.1989)).

The decision whether or not to admit testimony into evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that

discretion. Am. Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); See also Arthur v. Sexton Dental Clinic, 628 S.E.2d 894, 368 S.C. 326 (Ct. App. 2000) (no abuse of discretion by trial judge in excluding witnesses at trial). "No error in either the admission of the exclusion of evidence . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Rule 61, SCRCP.

On March 25, 2014 – over 3 years after the alleged theft at the AD's office – Mr. Kennedy was arrested and charged with a misdemeanor petty larceny charge relating to his employment by Allied Barton as a security guard at the SCANA plant. At the time of the trial, the charges were pending.[8]

The incident occurred while Kennedy was employed by Allied Barton as a security officer, working under its contract with SCANA. The charges alleged that Mr. Kennedy stole a pair of safety glasses (valued at $5.00) and $10.00 in cash from a room at a SCANA location. On the eve of trial, defense counsel informed plaintiff's counsel of the pending charges and identified Bill Simpson, the head of SCANA security as witness whom they intended to call to offer evidence of the alleged theft, pending charges, and Kennedy's dismissal from the SCANA jobsite.

Kennedy filed a *Motion in Limine* seeking to exclude evidence of the alleged SCANA theft and the testimony of Bill Simpson, arguing that the any mention of the

[8] Appellant's counsel has filed a motion to enlarge the record on appeal, pursuant to Rule 212, SCACR, to include the Richland County Summary Court record reflecting the jury's verdict on the petty larceny charges as of April 8, 2015. Included in the motion is an argument as to harmless error under Rule 61, SCRCP, which Appellant specifically reserves the right to argue, among other grounds, in the event the motion to enlarge the record on appeal is granted.

pending SCANA incident and pending charges would result in extreme prejudice and, further, were irrelevant as they concerned future events – three years down the road – that were not in existence at the time this defamation action arose. Plaintiff's counsel further argued that Appellants were trying to prove what they were unable to prove (or even charge) over three years ago at Spring Valley HS, and that these were mere accusations. See Pl. Mot. In Limine; See Tr. pp. 22, l. 12 – 51, l. 9

After lengthy review, the trial judge granted the motion and excluded the SCANA evidence and testimony. Tr. pp. 165, l. 11 – p. 173, l. 25. The trial court ruled that defense counsel could cross-examine Mr. Kennedy as to whether he had been terminated from Allied Barton or SCANA. Tr. pp. 168, l. 21 – 169, l. 9, pp. 170, l. 17 – p. 173, l. 25. Appellants assert this was prejudicial error and seek a new trial.

The Trial Court Properly Considered the Rules of Evidence and South Carolina Case Law in Granting the Motion in Limine to Exclude the SCANA Evidence

The trial court heard extensive oral argument and reviewed the relevant case law and South Carolina Rules of Evidence during the hearing on the Motion *in Limine* and subsequent ruling granting the motion. Tr. pp. 33-51, pp. 165-174.

During the hearing on the Motion *in Limine*, the following exchange occurred:

Mr. Barlow: "We have a truth defense. We should be entitled to prove that this gentleman is not trustworthy. He has put his character directly in issue in this case, as all the cases we have cited, cite Rules 405 to 7."

The Court: "So basically what you're saying is that because something happened two years later, it should refer back to what happened in March of 2011 and therefore he should not be able to ask for damages?"

Mr. Barlow: Certainly.

Tr. at pp. 44.

The Court Properly Ruled the SCANA Evidence Was Unfairly Prejudicial

"As a threshold matter, the trial court must determine whether the proferred evidence is relevant as required under Rule 401, SCRE." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). The trial court held that while the information related to SCANA may have been relevant, it was unfairly prejudicial and not admissible under the Rules of Evidence, including Rules 404 and 405. Tr. p. 165.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; See also State v. Gilchrist, 496 S.E.2d 424, 329 S.C. 621 (Ct. App. 1998) (evidence of defendant's statement was relevant as it showed his statement of mind when such statement was made in close proximity to the commission of the crime in question.)

Even if evidence is deemed relevant under Rule 401, SCRE, such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Rule 403, SCRE. "Evidence of similar acts has the potential to be exceedingly prejudicial." Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). The trial court correctly concluded that even if the Court were to have instructed the jury otherwise, the evidence was so prejudicial as to deem pointless the Mr. Kennedy's defamation case against the Appellants. Tr. pp. 165-168. The trial court noted that **"let's just say even if the higher court were to determine that it would be relevant and probative, I think the prejudicial value outweighs the probative value for this reason."** Tr. pp. 167, l. 23 – p. 168, l. 2. In short, the trial judge correctly concluded that a jury could not be expected

to ignore the 2014 SCANA allegation as evidence of Mr. Kennedy's guilt in the 2011 incident.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003). In Griffin, the Court held it was error for evidence to be admitted that the plaintiff tested positive for marijuana at the time of the accident because there was no correlation between the between the marijuana and the accident. The Court held that the marijuana evidence was more prejudicial than probative, given that the test did not measure the quantity of marijuana in the plaintiff's system or how recently he had been exposed to it. 595 S.E.2d at 251. See also USA v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) (**"noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses".)** (emphasis added).

In State v. Lyle, the Supreme Court considered the exclusion of evidence which was from 10 days to 7 weeks removed from the crime charged. The Court asked, "what is there in the alleged passing of forged checks at widely separated points . . . prior to the commission of the crime charged that tends, in a legal sense, to identify the defendant as the man who uttered the forged paper....? **True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter, but that is the precise inference the general rule was wisely designed to exclude . . . There is no connection of time and place . . ."** 118 S.E. at 808 (holding evidence was improperly allowed) (emphasis added). Similarly, there was no connection as to time and place between the SCANA incident and the Spring Valley incident three years prior.

The SCANA Evidence Was Properly Excluded As Not Sufficiently Similar

Furthermore, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within [this] exception in Rule 404(b)." Id. In Cope, the Supreme Court held that there was no abuse of discretion in the trial judge's exclusion of evidence of other crimes under Rule 404(b) where the other crimes occurred subsequent to the murder at issue and there were "many distinctions" as well, although there were also some similarities. Furthermore, the subsequent crimes at issue in Cope occurred within 6 weeks of the underlying murder.

The trial court correctly found that the SCANA evidence also did not meet the "common scheme or plan" requirement – a/k/a "Lyle-type" evidence. Tr. pp. 165-167. Here, the subsequent "act" – really an unproven allegation[9] - was 3 years removed from the Spring Valley incident. Furthermore, the difference in the amount of money alleged to have been stolen from SCANA ($10 and plastic safety glasses vs. $1,000 cash) is considerable. Finally, the Court specifically considered the cases which Appellants rely upon in their brief and found each to be unpersuasive because they concerned prior bad acts. Tr. pp. 169-170.

Finally, the Court held that the SCANA evidence was not admissible under Rule 405, SCRE, which allows that on cross-examination of the character witness as to

[9] See Footnote 6.

reputation, "the court may allow an inquiry into **relevant** specific instances of the person's conduct." Accordingly, before inquiry can be made, the specific instances of conduct must still be found to be **relevant (and not unfairly prejudicial)** under Rules 401 and 404, SCRE. For the reasons previously cited herein, the Court correctly ruled that the pending SCANA charges, while perhaps relevant, were unfairly prejudicial. Kennedy alleged that he was defamed in 2011 when he was deemed a thief by Appellants, and his fellow employees were subsequently made aware of their opinion through the malicious publication of their opinion. The evidence, outlined exhaustively in the Statement of Facts herein, shows that the Messrs. Earles and Barnes willfully and recklessly defamed Mr. Kennedy by letting everyone know that he was not to have keys, and then did nothing when they discovered that their supposed "confidential" memo was left out for all to see.

Appellants argue that Rule 405 draws no distinction between "prior bad acts" and "subsequent bad acts", relying upon State v. Weaverling, 523 S.E.2d 787, 337 S.C. 460 (Ct. App. 1999). Init. Br. at p. 17-18. However, Weaverling is unpersuasive given that it concerns the "common scheme or plan exception" to the prior bad acts exclusion, which the Court of Appeals noted is "generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged . . . is held admissible as tending to show continued illicit intercourse between the same parties." Rule 405 does not exist in a vacuum, and the Court properly considered all the rules relating to the admissibility of evidence when it granted the Motion *in Limine*.

Furthermore, upon information and belief, Appellants can point to no South Carolina case law which provides that the admission of other acts or instances of conduct,

under either Rule 404 or Rule 405, is not subject to an evaluation of relevancy and prejudice under South Carolina law. Appellants cannot circumvent the plain language of Rules 403 and 404, SCRE, in arguing for the primacy of Rule 405. Appellants cite to various out of state cases in support of their position, along with several pre-rule cases; however, none of these cases can be considered to have precedential value in South Carolina. Init. Br. at pp. 20-22. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR

Evidence of Prior Petty Thefts at Spring Valley High School in 2010 Was Properly Excluded And Was Not Prejudicial Error.

On February 28, 2011, Mr. Kennedy was recommended for a promotion. Appellants sought to introduce evidence at trial related to petty thefts which occurred at Spring Valley High School prior to the March 4th theft reported by Tim Hunter. Specifically, they sought to introduce evidence that in the Fall of 2010, cans of air freshener went missing from a bathroom. They also sought to introduce evidence that other employees reported thefts in Spring 2010, and items missing around the same time as the Tim Hunter allegation by way of written statements prepared on March 24, 2011.

Plaintiff's counsel filed a motion *in limine* to exclude evidence of reports of other thefts at Spring Valley and the Court heard lengthy arguments from counsel on this Motion. Tr. pp. 51, l. 13- 65, l. 11. Counsel argued that because Appellants were recommending Kennedy for a promotion in February 2011, they obviously did not believe he was responsible for the 2010 thefts.

The trial court allowed the admission of evidence of other petty thefts at Spring Valley that it deemed were contemporaneous and related temporally with the March 4th

incident – specifically reports by staff in the administrative office that they had discovered that a ring, check, and cash were missing around the same time as the Hunter theft (although they could not say when the items went missing); however, the trial court excluded evidence related to the missing air fresheners in Fall 2010, as well as reports of petty theft from Spring 2010. Tr. pp. 66, l. 12 -69, l. 25. Furthermore, defense counsel specifically agreed to this limitation on its evidence – specifically the redaction of Defendants' trial exhibit #1 as it referenced the air fresheners and other alleged 2010 thefts, and any related testimony, and therefore Respondent submits the issue is not properly preserved for review. Tr. pp. 350, l. 6 – 356, l. 11.

Defense counsel presented evidence that Mr. Kennedy was in the administration building at the time these alleged other thefts occurred in February/March 2011, and elicited sustained testimony from Appellants and other witnesses as to what they deemed "suspicious" behavior on the part of Mr. Kennedy. Accordingly, Appellants were certainly able to present evidence of other thefts at Spring Valley; however, the trial court, for the reasons addressed *supra*, properly excluded any evidence of the 2010 thefts and defense counsel agreed to the exclusion. Tr. pp. 350-356.

Plaintiff's counsel argued that Spring Valley High School was a huge physical campus, covering many acres, with thousands of people going in and out of its doors every day.[10] The allegations of these other petty thefts in 2010 were unproven, were never investigated by law enforcement, and were never proved (i.e. no charges were ever brought, no conviction ever secured). Accordingly, they were not relevant to whether Mr. Kennedy was, in fact, a thief or was properly the focus of the District's

[10] Indeed, at trial, Jim Childers estimated there were probably 100 thefts a year at Spring Valley.

"investigation" into the allegedly missing money from the Athletic Director's Office in March 2011.

Furthermore, even if deemed relevant by the Court, they were highly prejudicial as they "muddy the proverbial waters" by injecting further, unproven allegations into the jurors' minds. Finally, the 2010 thefts all occurred before Kennedy was recommended for the promotion to supervisor; therefore, Kennedy must **not** have been considered a suspect in the eyes of Richland Two at that time, otherwise he wouldn't have been promoted. Counsel argued that by using these allegations now, the defense was seeking to prove Jeffery Kennedy was a habitual thief even while they were promoting him in February 2011.

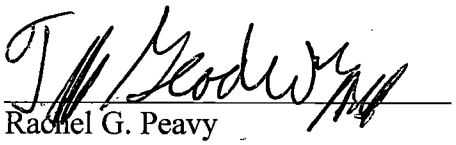
Furthermore, this "prior bad act" evidence does not fit within an exception in Rule 404(b). First, "if the [party] was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). "The connection between the prior bad act and the crime must be more than just a general similarity." State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005). It must fall within the purview of the "common scheme and plan" exception under Rule 404(b). Id. at 583. Furthermore, the timing of the prior bad acts is crucial. Here, the District sought to present a laundry list of reported petty thefts that began in Spring 2010 – almost a full year prior to the Athletic Director's report. See, e.g., State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (finding that the space of one year made evidence of prior act inadmissible under the common scheme or plan exception). As a result, the exclusion of the 2010 thefts was not prejudicial error and the ruling of the trial court should be upheld. Respondent requests that the Court affirm the holding of the lower

court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

CONCLUSION

For the foregoing reasons, and for any reason found in the record pursuant to Rule 220(c), SCACR, the Respondent Jeffrey Kennedy respectfully requests that the jury award and trial court's rulings be affirmed.

GOODWYN LAW FIRM, LLC



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Dated: September 23, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2015-000613

Jeffrey Kennedy.....Respondent,

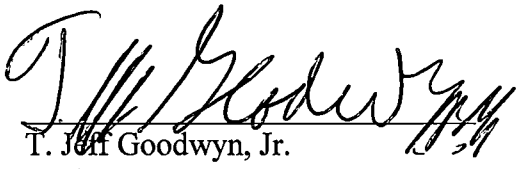
v.

Richland County School District Two, Eric Barnes and Chuck Earles.....Appellants.

PROOF OF SERVICE

I certify that I have served the **Respondent's Initial** along with **Respondent's Designation of Matter to be Included in the Record on Appeal** on Thomas K. Barlow, Esquire and Kathryn Long Mahoney, Esquire, Attorneys for the Appellants, at the address listed below by depositing a copy of same in the United States Mail, postage prepaid, on September 23, 2015.

Thomas K. Barlow
Kathryn Long Mahoney
Childs & Halligan, PA
P.O. Box 11367
Columbia, SC 29211-1367



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September 23, 2015

VIA HAND DELIVERY
Jenny Abbott Kitchings, Clerk of Court
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: ***Jeffrey Kennedy v. Richland County School District Two, Eric Barnes and Chuck Earles***
Appellate Case No.: 2015-000613
Our File No.: 3000-0106

Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of Respondent and Designation of Matter to Be Included in the Record on Appeal, along with the Proof of Service, in regard to the above-referenced matter.

Also, please find enclosed for filing an original and one copy of Respondent's Motion to Supplement Record on Appeal along with a check in the amount of $25.00 for the filing fee. Please return a clocked-in copy of each of these filings with the courier.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Initial Brief and Designation of Matter along with a copy of Respondent's Motion to Supplement Record on Appeal, on Thomas K. Barlow, Esquire, and Kathryn Long Mahoney, Esquire, attorneys for the Appellants.

Please accept my highest regards.

Sincerely,

T. Jeff Goodwyn, Jr.

TJG/ms
Enclosures
cc: Thomas K. Barlow, Esquire
Kathryn Long Mahoney, Esquire
Jeffrey Kennedy