

**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**

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**RECEIVED**

**Appellate Case No.: 2015-000613**

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OCT 07 2015

SC Court of Appeals

Jeffrey Kennedy ..... Respondent,

v.

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

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**APPELLANTS' RETURN TO RESPONDENT'S MOTION  
TO SUPPLEMENT RECORD ON APPEAL**

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Pursuant to Rule 240(e) of the Rules of Appellate Procedure, Appellants, Chuck Earles, Eric Barnes, and Richland School District Two hereby timely respond to Respondent's motion to supplement the record on appeal filed September 23, 2015.

Respondent's motion should be denied. Rule 210, SCACR, regarding matters which may be included in the record on appeal, clearly provides:

The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. SCACR 210.

*See also Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004)

First, it is undisputed that none of the proposed supplement to the record has ever been presented to the Trial Court. The proposed supplement pertains to events subsequent to both the trial at issue in the appeal and the Trial Court's rulings on Appellants' post-trial motions.

Second, Respondent offers no legal authority for the proposition that events subsequent to a trial could render erroneous evidentiary rulings by the trial court on his defamation claims "harmless error." Appellants do not dispute that Mr. Kennedy was found not guilty in April 2015 of petty theft charges arising from his night shift security guard employment at SCANA, where he was employed immediately following his separation from Richland School District Two. However, the accusations, pending charges, and his separation from his SCANA/Allied Barton for that alleged theft were and still are highly pertinent and relevant for evidentiary reasons regarding several aspects of the defamation claim he pursued at trial.

As set forth in their Initial Brief, pp. 19-25, Appellants sought to offer evidence of Mr. Kennedy's strikingly similar theft accusation and termination from his immediate subsequent employer not just in support of their truth defense, but also to counter Mr. Kennedy's proof of damages, causation of damages, and to show his failure to mitigate damages. (Tr. pp. 40-46, 163-173.) Accordingly, Mr. Kennedy's ultimate acquittal of the criminal charges arising from the SCANA thefts does not erase the fact that he was charged with the theft during his employment at SCANA and lost that employment because of the alleged theft. Moreover, evidence of Mr. Kennedy's 2015 acquittal likely would not even be admissible in a retrial as to the issue of whether he committed thefts at SCANA. See *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67, 79 n. 5 (Ct. App. 1996); *McSweeney v. Utica Fire Ins. Co. of Oneida Cnty., N. Y.*, 224 F.2d 327 (4th Cir. 1955). In *McSweeney*, a civil action to recover fire

insurance proceeds, the Fourth Circuit applied South Carolina law and upheld the District Court's ruling regarding the inadmissibility of plaintiff's trial and acquittal in her criminal arson case, noting:

Since the burden of proof on the moving party to establish the crucial facts is heavier in a criminal than in a civil case, and there is a dissimilarity of parties, it has generally been held that an acquittal in a criminal case is not admissible in a civil action as evidence of the innocence of the accused.

*McSweeney*, 224 F.2d at 328.

In the trial underlying this appeal, as argued in Appellants' Initial Brief pp. 18-31, the Trial Court unfairly hamstrung the defense by excluding evidence of Mr. Kennedy's subsequent SCANA theft accusation and termination of his employment from SCANA for the alleged thefts. At the same time, the Trial Court placed no limits on Mr. Kennedy's ability to argue that the sole potential cause of any alleged reputational injury, at the time of trial and into the future, was his denial of a promotion and reassignment to a desk position at Richland Two. Because Mr. Kennedy directly placed his character and reputation squarely in issue, he opened the door to other evidence that would suggest other more obvious and more recent sources of reputational injury.

In summary, Mr. Kennedy's subsequent acquittal in April 2015 of the theft charges that led to the termination of his SCANA employment was not part of the record before the Trial Court and there are no compelling reasons the proposed supplement should be made part of the record on appeal. Accordingly, Respondent's motion should be denied.

Respectfully submitted,

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October 7, 2015

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**PROOF OF SERVICE**

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I certify that I have served a copy of the aforementioned Appellants' Return to Respondent's Motion to Supplement Record On Appeal by depositing a copy of it in the United States Mail, postage prepaid, on October 7, 2015, addressed to T. Jeff Goodwyn, Jr., Esq. and Rachel G. Peavy, Esq., Goodwyn Law Firm, 2519 Devine Street, Suite A, Columbia, SC 29205.

Respectfully submitted,

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