IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No.: 2014-001196

Lydia Cook, ... Respondent,

-v-

Regions Bank and Robyn Clevinger, ... Appellants.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This defamation action arises out of the actions of Robyn Clevinger ("Clevinger") and Regions Bank ("Regions") (collectively "Appellants") in falsely accusing Respondent, Lydia Cook ("Cook") of physically assaulting Clevinger in a workplace violence incident and terminating Cook based on those false accusations. Cook filed a Complaint against Clevinger, who was Cook's manager, and Regions on August 25, 2011,[1] in the Hampton County Court of Common Pleas. (Compl.). Cook alleges that on May 9, 2011, she was employed by Regions at the Hampton branch. (Compl. ¶ 4). On May 10, 2011, Clevinger falsely accused Cook of physically assaulting her, and published the false accusations to others. (Compl. ¶ 5). The Complaint alleges that Clevinger falsely accused Cook of physically assaulting her in retaliation for Cook reporting Clevinger's misconduct to Regions' management. (Compl. ¶ 5). The Complaint sets forth that, at the time of the events giving rise to this action, Clevinger was "an agent and/or employee of Regions Bank acting within the scope of her employment and/or agency." (Compl. ¶ 3).[2]

Clevinger falsely accused Cook of a crime and being unfit in her trade, business, and profession. (Compl. ¶ 6). Regions terminated Cook from her position with the bank and thereby adopted Clevinger's false accusations. (Compl. ¶ 8). The false and defamatory statements published about Cook damaged her personal and professional reputation. (Compl. ¶ 9). Regions and Clevinger's actions were malicious and

[1] Cook filed an Amended Complaint on November 14, 2012. (Amd. Compl.)

[2] Regions and Clevinger admitted in their Answer that Clevinger was acting within the course and scope of her employment at the time of the events alleged in the Complaint. (Ans. ¶ 2).

consciously disregarded Cook's rights, thereby entitling Cook to actual and punitive damages. (Compl. ¶ 10).

Regions and Clevinger served their Answer on November 4, 2011. (Ans.). The Answer generally denied the allegations in the Complaint and alleged that Clevinger's statements were true or protected by a qualified or conditional privilege. (Ans. ¶¶ 7, 8).

The case was tried in Hampton County from January 13, 2014, to January 16, 2014, before the Honorable Brooks P. Goldsmith. (Verdict Forms; Judgment 6/22/2010). At the conclusion of the four-day trial, the jury returned a verdict in Cook's favor, awarding $375,000.00 in actual damages and $125,000.00 in punitive damages. (Verdict Form; Tr. p. 853, ll. 1-4). The evidence warrants affirmance of the trial court's denial of Appellants' request for judgment as a matter of law.

FACTS

Given that this appeal is before the Court on Appellant's denial of a directed verdict and JNOV motion, the facts below are to be viewed in a light most favorable to Cook as the non-moving party. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

I. ROBYN CLEVINGER'S BACKGROUND AND REPEATED BEHAVIOR OF FALSELY ACCUSING OTHERS OF PHYSICAL ASSAULT

Clevinger has lived in Beaufort since 1991. (Tr. p. 386, ll. 2-3). Since that time she's had two marriages, one to Kevin Clevinger and the next to John Blackwell. (Tr. p. 386, ll. 4-11).

Clevinger went to work with Regions on March 1, 2008. (Tr. p. 386, ll. 15-17). She was previously employed by First National Bank and South Carolina Bank and Trust. (Tr. p. 386, ll. 20-22). She started out with Regions as an Assistant Branch Manager in

Beaufort. (Tr. p. 387, ll. 5-17). In August 2010, an opening arose to be the Branch Manager in Hampton, and Clevinger filled the position. (Tr. p. 387, l. 18 – p. 388, l. 18).

Clevinger has a history of falsely accusing others of physically assaulting her. She denied this history in her deposition and at trial. However, police reports and other testimony confirmed her history for dishonesty.

With the exception of a schoolyard fight, Clevinger testified during her deposition that she has never been physically attacked. (Tr. p. 326, l. 14 – p. 328, l. 15). Clevinger testified at trial she has "never accused anyone of physically attacking [her]. That was true in my deposition then and that is true today." (Tr. p. 328, ll. 17-19). Throughout her adult life, however, Clevinger has, on numerous occasions, accused others of physically assaulting her.

John Blackwell met Clevinger in 2005 over an internet dating service. (Blackwell Depo. p. 6, ll. 16-25).[3] After dating for a while, they married on September 27, 2008. (Blackwell Depo. p. 7, l. 21 – p. 8, l. 10). During their marriage, Blackwell worked in Louisiana while Clevinger was still in Beaufort. Blackwell described their long-distance marriage as rocky. (Blackwell Depo. p. 9, ll. 13-15). One incident occurred on April 24, 2010 that's reflected in a Port Royal Police Department report. (Blackwell Depo. p. 11, ll. 9-13). Blackwell described the event that occurred on a Saturday morning:

> I was sitting there eating some breakfast, and she had come in, had my cell phone, and was screaming about Facebook or a text or something on my phone. And I – I had made up my mind, if she fussed one more time I was – I was leaving for good, and I got up and said "Robyn, I'm leaving," and she got angry and started slapping at me and I started to walk on out. She said, "I'll show you leaving," and she dialed the phone – on her phone and she started in her little theatrics and she says, "He – he

[3] Since Mr. Blackwell lives in Texas, his testimony was published at trial through his video deposition.

> struck me," and I walked on out to my truck, got in my truck and commenced to leave.

(Blackwell Depo. p. 11, l. 22 – p. 12, l. 7).

The investigating police officer observed red marks on the inside of both of Clevinger's arms. (Blackwell Depo. p. 13, ll. 17-25; Pl. Ex. 38). Blackwell testified he did not put those marks on Clevinger's arms and never struck Clevinger. (Blackwell Depo. p. 13, ll. 17-25; p. 12, ll. 20-25). On September 7, 2010, Clevinger filed for divorce against Blackwell. (Blackwell Depo. p. 16, ll. 15-20; Pl. Ex. 37). The first ground for divorce was physical abuse. (Blackwell Depo. p. 17, ll. 1-7; Pl. Ex. 37). The allegations Clevinger set forth in the divorce complaint were not true and the ground for divorce was one year separation, not physical abuse. (Blackwell Depo. p. 16, ll. 21-25; p. 18, ll. 1-3; Pl. Ex. 36). Clevinger denied accusing Blackwell of physically attacking her, and testified she did not accuse Blackwell in the divorce complaint of physically attacking her. (Tr. p. 329, ll. 8-10; p. 345, ll. 5-8).

Blackwell knew of another individual[4], Lewis Bayne,[5] who Clevinger made false reports about to the police. (Blackwell Depo. p. 18, l. 24 – p. 19, l. 4). Bayne's incident with Clevinger occurred before she married Blackwell. (Blackwell Depo. p. 19, ll. 17-

[4] Clevinger testified in her deposition about a slightly abusive marriage with her ex-husband, Kevin Clevinger, where the Beaufort County Sheriff's Office became involved. (Tr. p. 337, ll. 1-6). The trial court granted Appellants' motion in limine to exclude the testimony of Kevin Clevinger where he testified her accusations were fabricated. (Tr. pp. 53-56; 58-61; 482-485).

[5] Clevinger and Bayne had a romantic relationship. (Tr. p. 328, l. 20 – p. 329, l. 7). Clevinger denied throwing brake fluid on Mr. Bayne's car even though a police report reflected that the police found a bottle of brake fluid partially covered in her vehicle. (Tr. p. 333, l. 8 – p. 336, l. 14).

19). Blackwell testified about his observations of Clevinger following the accusations toward Bayne:

> She came out of the Hunting Club one time. She had a – this bandage and sling on her arm supposedly that, you know, he had manhandled her, and she spent three days with me. She cooked. She did everything in the world. There wasn't nothing wrong. I saw her naked morning and night for three days. There wasn't a mark on her.

(Blackwell Depo. p. 19, ll. 10-16).

Although denying she'd been physically attacked as an adult, police reports revealed that Clevinger accused her mother of slapping her because she allegedly stole money from her mother. (Tr. p. 330, ll. 4-23).

II. LYDIA COOK'S COMPLAINT AND BACKGROUND

Lydia Cook was born in Hampton and lived with her twin sister, Libby, and their aunt and uncle, who had custody of them. (Tr. p. 211, l. 25 – p. 212, l. 16). After marrying Mike, her husband of forty years, Cook moved around the country working for various banks before moving back to Hampton to help take care of her mother-in-law that was diagnosed with pancreatic cancer. (Tr. p. 212, l. 19 – p. 214, l. 17). Regions hired Cook in December 2007 after her mother-in-law passed away and she was able to return to work. (Tr. p. 215, l. 21 – p. 216, l. 1).

After Regions hired Clevinger to fill the Branch Manager position in August 2010, things at the Hampton branch began to deteriorate. (Tr. p. 224, l. 21 – p. 225, l. 1). Clevinger's rudeness to the customers resulted in some of the customers closing their accounts. (Tr. p. 217, l. 19 – p. 218, l. 1). In addition, Clevinger also had problems as a manager. One of Regions' employees quit because Clevinger granted her vacation time

to go to a wedding and then the day before her vacation, Clevinger told the employee she could not go. (Tr. p. 225, l. 19 – p. 226, l. 12).

On March 30, 2011, as part of a job performance review, Clevinger gave Cook a positive review. (Tr. p. 228, l. 5 – p. 229, l. 6; Pl. Ex. 28). Cook contacted Shannon Turner with Regions' Human Resources department on April 6, 2011, regarding Clevinger's management, comments regarding a minority male that applied for a position, Clevinger's numerous issues with Regions' Hampton customers, and vacation issues. (Tr. p. 231, l. 7 – p. 234, l. 10; Pl. Ex. 15). Cook, in an email to Turner dated April 7, 2011, confirmed this conversation, detailing three instances where Clevinger verbally told Cook she could have time off to visit friends and after making plans, Clevinger told Cook she could not have those days off. (Tr. p. 229, l. 11 – p. 230, l. 13; Pl. Ex. 13). In one instance, Cook had already made reservations based on Clevinger's approval and, in another instance, her husband had already taken vacation time after Cook received Clevinger's approval. (Pl. Ex. 13). Turner detailed these issues in a memo to Holly Johnson, Regions' Executive Vice President of human resources. (Tr. 488, ll. 6-21; Pl. Ex. 15).

Later on April 7, 2011, Clevinger confronted Cook about her conversation with human resources from the day before. (Tr. p. 235, l. 13 – p. 239, l. 1; Pl. Ex. 14). During that conversation Clevinger asked Cook about "whom she had been talking to . . . ." (Pl. Ex. 14). Although Clevinger and Cook had a good relationship prior to April 7, 2011, things went downhill and, thereafter, Cook could do nothing right. (Tr. p. 237, l. 17 – p. 239, l. 1).

On May 9, 2011, Cook had an outage when her books did not balance for the day. (Tr. p. 239, ll. 2-13). Cook was going through her drawer counting the money and could not find the outage. (Tr. p. 239, ll. 7-10). Fellow Regions employee, Suzanne Freeman, was also present during the outage. (Tr. p. 240, ll. 4-14). Clevinger came over and found Cook's outage. (Tr. p. 239, ll. 6-17). Cook hugged Clevinger and said "thank you, thank you, thank you . . . ." (Tr. p. 240, ll. 10-12). Freeman asked what were Cook and Clevinger doing. (Tr. p. 240, ll. 7-8). Clevinger replied Cook was happy because Clevinger found Cook's outage. (Tr. p. 240, ll. 8-9). Freeman also testified Cook was happy. (Tr. p. 675, ll. 18-22). Freeman did not think anything about Cook's hug because it was an ordinary event. (Tr. p. 687, l. 16 – p. 688, l. 4). Cook has hugged Freeman in a similar manner. (Tr. p. 688, ll. 2-10). Cook heard nothing about the events of May 9 for a period of time. (Tr. p. 240, ll. 12 – p. 241, l. 3). When she got home that night, Clevinger told her husband about the events at work. (Tr. p. 418, ll. 16-19).

III. ACCUSATIONS OF WORKPLACE VIOLENCE

The next day, Clevinger asked Freeman to come in her office and discuss the events from the day before. (Tr. p. 687, ll. 7-10). Clevinger did not show Freeman any bruises, tell Freeman about any bruises, or tell Freeman that she had taken pictures of any bruises. (Tr. p. 687, ll. 7-15). After talking with her on May 10, Clevinger talked several more times with Freeman regarding the events of May 9th. (Tr. p. 689, ll. 8-10). Also, on May 10, 2011, at approximately 4:45 p.m., nearly 24 hours later, Clevinger told Regions' management employee, Barbara Simpkins, about Cook's hug. (Pl. Ex. 11). Clevinger advised Simpkins that Cook's hug seemed like vicious aggression and that she went home on May 9, 2011, and took 12 Motrin because she was hurting so badly. (Pl.

Ex. 11). Clevinger felt it may have been "a little hostile ***after she thought about it.***" (Pl. Ex. 11) (emphasis added).

Andree Lloyd, who worked for Regions for seven years managing the branches located in Hilton Head, Beaufort, Savannah, Charleston, Hampton, and Ridgeland, testified that Clevinger had a difficult transition from being an assistant branch manager to being a permanent manager. (Tr. p. 423, l. 12 – p. 424, l. 10; p. 424, l. 22 – p. 425, l. 4). Lloyd received many complaints about Clevinger from customers and employees. (Tr. p. 425, ll. 1-4). On November 23, 2010, Lloyd authored a memo detailing three complaints from customers about Clevinger that Lloyd received over the previous two weeks. (Tr. p. 425, l. 20 – p. 426, l. 2). The complaints about Clevinger noted she was disrespectful, uncaring, and insulting to the tellers.[6] (Tr. p. 426, ll. 1-3). Despite Regions' management discussing the treatment of customers with Clevinger, the same kind of complaints kept occurring from both the customers and employees. (Tr. p. 426, ll. 13-19).

Clevinger informed Lloyd of the events with Cook during a branch manager's meeting in Charleston on May 26, 2011. (Tr. p. 427, l. 3 – p. 428, l. 5). Upon learning of the accusations, Lloyd did not believe Clevinger. (Tr. p. 428, ll. 3-11). From the time Clevinger was hired, Lloyd had trust issues with Clevinger as Lloyd felt Clevinger was not a person who told the truth. (Tr. p. 428, l. 10 – p. 429, l. 4). Lloyd informed Patty Austin, Regions' Consumer Service and Operations Manager for South Carolina, and Holly Johnson about her disbelief in Clevinger's story. (Tr. p. 428, ll. 6-8; p. 429, ll. 5-

[6] The trial court excluded the testimony of three witnesses Cook anticipated offering to confirm Clevinger's poor treatment of customers. This also would have confirmed the basis of Cook's complaint about Clevinger to Shannon Turner on April 6, 2011. (Tr. pp. 308-313).

17). Despite seeing photos of the alleged bruises on Clevinger's phone, Lloyd felt that Clevinger and her husband staged the photographs. (Tr. p. 455 ll. 2-8). Lloyd and Austin were careful with Clevinger as they felt she was mentally unstable. (Tr. p. 429, ll. 8-13).

Clevinger relayed to Johnson on May 27th that she was in tears after being hugged by Cook. (Tr. p. 527, l. 2 – p. 529, l. 4). On that same day, Clevinger told Johnson that she could not continue working with Cook. (Tr. p. 511, ll. 1-24; Pl. Ex. 19). Clevinger denied telling Regions' management that she could no longer work with Cook. (Tr. p. 341, ll. 12-14). Johnson and Lloyd met with Clevinger on May 31, 2011, and removed her from the Hampton branch manager position. (Tr. p. 523, ll. 1-18; Pl. Ex. 30). This was based on Clevinger's leadership style, communication, and possible retaliatory behavior with fellow Regions employees. (Tr. p. 523, ll. 10-18; p. 505, l. 14 – p. 506, l. 21; Pl. Ex. 16; Pl. Ex. 30). On June 1, 2011, a day after being demoted from the branch manager position, Clevinger forwarded Johnson pictures of the bruises on her arms allegedly inflicted by Cook. (Tr. p. 523, l. 19 – p. 524, l. 7; Pl. Ex. 49). Despite having the digital photos of Clevinger's arms in email form and Regions' legal department involvement, neither Regions nor Clevinger preserved the original digital images that would have contained the date and time the photos were taken. (Tr. p. 524, l. 8 – p. 525, l. 22).

Around Memorial Day weekend, Regions management told Cook that she was going to be placed on administrative leave because of workplace violence. (Tr. p. 246, ll. 13-22). When Johnson informed Cook of Clevinger's accusations, Cook was shocked. (Tr. p. 502, ll. 14-17). Cook admitted that she hugged Clevinger. (Tr. p. 502, ll. 18-21; Pl. Ex. 10). Cook told Regions' management during this meeting that Clevinger was

making up these allegations. (Tr. p. 252, ll. 5-13). Cook also expressed to Holly Johnson that she felt like Clevinger was retaliating against her for filing the complaint as there was no way Cook could have injured Clevinger. (Tr. p. 247, ll. 1-4; p. 252, ll. 14-18; p. 307, ll. 4-11).

IV. REGIONS' INVESTIGATION FOUND CLEVINGER UNTRUTHFUL

Johnson investigated Clevinger for events that occurred on June 1st, the day after Regions removed Clevinger from the branch manager position, when she removed boxes from the Hampton branch without authorization. (Tr. p. 490, 16-22). On June 10, 2011, Dennis Coleman, Regions' Senior Area Security Manager, in an email to Johnson, noted that Clevinger has lied on three occasions about the contents of the boxes Clevinger loaded into her car. (Tr. p. 513, l. 21 – p. 514, l. 6; Pl. Ex. 25). Coleman also sought to review the security camera footage for May 9, 2011, but it did not reveal "evidence of hugging/inappropriate touching . . . ." (Pl. Ex. 12). During the investigation, Cook's interview indicated no visual signs of deception as she was forthright in her responses and requested that she be given a polygraph test. (Pl. Ex. 1). Although Clevinger's interview was inconclusive, Coleman noted there were times she projected signs of deception. (Pl. Ex. 1). Regions knew Clevinger's statements accused Cook of a crime and contemplated having Clevinger file a police report regarding the alleged workplace violence incident. (Pl. Ex. 26).

Prior to Regions termination of Cook, and while she was on administrative leave, Regions terminated Clevinger for deceptive and untruthful behavior because of the events of June 1, 2011, when Clevinger removed boxes from the Hampton branch without authorization. (Tr. p. 434, ll. 12-15). Johnson noted that Clevinger's actions on June 1st

"clearly elevated our concerns over your level of judgment and our ability to trust you." (Pl. Ex. 28). "Unfortunately we've lost confidence in your veracity and your judgment . . . ." (Pl. Ex. 28). Regions terminated Clevinger retroactive to June 16, 2011. (Pl. Ex. 28). After her termination, Clevinger voiced her concerns with Johnson over fellow Regions employees, Vicki Sweat and Andree Lloyd. (Tr. p. 521, ll. 5-21; Pl. Ex. 29).

V. COOK'S MEDICAL CONDITION

Glenn Welcker, M.D., served as Cook's family physician while he was in private practice in Hampton. (Tr. p. 192, ll. 22-24). Dr. Welcker had his own practice until 2011, at which time he went to work for the Hampton Regional Medical Center as a hospitalist and emergency room physician. (Tr. p. 191, ll. 8-20). Prior to May 2011, Dr. Welcker treated Cook for numerous medical issues. (Tr. p. 193, ll. 8-16). Cook had osteoarthritis in her extremities, torn meniscus in her right knee, degenerative disc disease with pinched nerves in her back, and arthritis in her hands. (Tr. p. 193, ll. 8-16). Dr. Welcker referred Cook to a rheumatologist to treat these conditions. (Tr. p. 194, ll. 1-8). Cook had Heverdens nodes on her fingers, which are small little hard knots on the joints of the fingers. (Tr. p. 194, ll. 10-14). On November 10, 2010, Cook had an x-ray of her thumb that revealed moderate degenerative changes of the bilateral first carpal phalangeal joint in both thumbs. (Tr. p. 194, ll. 15-23). This condition resulted in a decrease of Cook's grip strength in her hand. (Tr. p. 195, ll. 1-3).

While on administrative leave during a June 2, 2011 appointment, Cook relayed to Dr. Welcker about Clevinger's accusations. (Tr. p. 196, ll. 4-16). Cook became very tearful about the situation at Regions as she had been placed on administrative leave. (Tr. p. 196, ll. 12-19). Cook did not want to go anywhere or talk to anybody following her

termination. (Tr. p. 572, ll. 7-15). Even when Cook went somewhere in Hampton, Regions' customers would stop her, tell her they were sorry she was not at Regions, and asked what happened. (Tr. p. 249, ll. 3-16). One customer actually called Cook's house. (Tr. p. 249, ll. 3-16). Dr. Welcker noted that Cook has always been a very affectionate and compassionate person and often hugs Dr. Welcker and his staff during appointments.[7] (Tr. p. 196, ll. 16-19). Upon learning of the accusations against Cook, Dr. Welcker laughed and thought it was absurd because due to her physical condition it would be very difficult for Cook to physically harm someone.[8] (Tr. p. 196, l. 20 – p. 197, l. 7). Although Dr. Welcker had treated her for anxiety, it was exacerabated as a result of the false accusations, administrative leave, and ultimate termination. (Tr. p. 198, ll. 2-19; p. 199, ll. 23-24). Upon learning of Cook's administrative leave and prior to her termination, Regions received a letter from Dr. Welcker stating that he found it "virtually impossible for Ms. Cook to injure anyone in this manner. Pain aside, she also lacks physical strength to harm anyone." (Tr. p. 198, l. 20 – p. 199, l. 24; Pl. Ex. 7).

VI. REGIONS DECISION TO FIRE COOK

Patty Austin supervises 166 Regions branches and has been employed with Regions since 1981. (Tr. p. 621, ll. 21-23; p. 628, l. 20 – p. 629, l. 3). Patty Austin and Holly Johnson met with Cook to inform her that she was being terminated for workplace violence based on Clevinger's accusations. (Tr. 251, ll. 7-10; Pl. Ex. 22). Regions terminated Clevinger the day before based on her unauthorized removal of boxes and

[7] Cook also hugged Holly Johnson without being fired. (Tr. p. 500, ll. 11-14).

[8] Specifically, Dr. Welcker noted that Cook does not get around very well, has used a walker at times, and had decreased grasp strength with notable fibromyalgia and was not able to do daily activities of daily living. (Tr. p. 197, ll. 1-7).

subsequently lying about the contents. (Tr. p. 434, ll. 12-15). Cook's termination was Austin's first time firing an employee for workplace violence. (Tr. p. 629, ll. 4-6).

Regions terminated Cook on June 30, 2011. (Tr. p. 253, ll. 3-5). Following her termination, Cook applied for unemployment, which Regions denied. (Tr. p. 255, ll. 9-13). During a call with Holly Johnson, Cook, and a gentleman with the unemployment office, Johnson said that Regions had no proof of a workplace violence incident. (Tr. p. 255, ll. 9-20). Cook received unemployment benefits after a determination that she was terminated without cause. (Tr. p. 257, ll. 4-10). After being terminated from Regions, Cook attempted to find employment but had a very difficult time. (Tr. p. 253, l. 6 – p. 254, l. 10). She found temporary employment in November 2011 with Ellis Realty and Insurance in Hampton while an Ellis employee's husband had surgery. (Tr. p. 254, l. 11 – p. 255, l. 1). Cook eventually lost that job once the employee returned to work. (Tr. p. 255, ll. 2-5). Cook found employment in 2012 with the South Carolina Department of Corrections prison in Fairfax working in the business office. (Tr. p. 257, l. 17 – p. 258, l. 6; Pl. Ex. 45). Although she likes her job, it is not as fulfilling as her career in banking. (Tr. p. 257, ll. 4-13). Cook makes approximately $10,600.00 less working for the prison than what she made while employed with Regions. (Pl. Ex. 45). Cook plans to work until age 66 ½, at which point she will be eligible for full social security benefits. (Tr. p. 260, l. 17 – p. 261, l. 9). By this reduced salary, Regions' termination caused Cook to lose $123,002.57 in income. (Tr. p. 260, ll. 11-19).

Andree Lloyd testified that she regrets Regions terminated Cook because she believes Clevinger's accusations of harassment and violence in the workplace are false. (Tr. p. 433, ll. 8-12).

STANDARD OF REVIEW

The standard governing review of the denial of a motion for directed verdict and JNOV is well established, and appellate courts apply the same standard as the trial court. "If more than one reasonable inference can be drawn from the evidence, the court must submit the case to the jury." *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 534, 462 S.E.2d 321, 323 (Ct. App. 1995). "When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court." *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct. App. 2011) (citing *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004)). "The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party." *Id.* (citing *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002)). "An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law." *Id.* (citing *Steinke v. S.C. Dept. of Labor, Licensing, & Regulation*, 336 S.C. 373, 386 520 S.E.2d 142, 148 (1999)).

ARGUMENT

Appellants appeal four issues based on the denial of the directed verdict and JNOV motions. Appellants do not appeal any evidentiary ruling, jury charge, or any other issue. Therefore, the sole issue before the Court is whether the evidence, when viewed in a light most favorable to Cook, supports the jury's verdict. Appellants failed to preserve these issues for appellate review by failing to move for a directed verdict at the conclusion of all the evidence. Even assuming Appellants properly moved for a directed verdict, the evidence supports an inference that the false statements were published to a

third-party, any qualified privilege was abused as the jury properly found, and, since defamation cases necessarily involve malice, the evidence warrants punitive damages.

I. APPELLANTS FAILED TO PRESERVE THESE ISSUES FOR APPELLATE REVIEW BY FAILING TO MOVE FOR A DIRECTED VERDICT AT THE CONCLUSION OF ALL THE EVIDENCE

By failing to move for a directed verdict at the close of all evidence, Appellants are precluded from being granted a JNOV because they failed to preserve these issues for appellate review. Prior to resting, Cook sought to publish Regions' net worth. (Tr. p. 618, l. 20 – p. 619, l. 20). The trial court prohibited Cook from publishing Regions' net worth until ruling on whether to submit punitive damages to the jury. (Tr. p. 618, l. 20 – p. 619, l. 20; p. 759, ll. 6-12). The trial court denied Appellant's directed verdict motion and charged punitive damages. (Tr. p. 756, ll. 4-6). When the jury was brought in for closing argument, the trial court stated that "[w]e're going to have one more document introduced into evidence." (Tr. p. 763, ll. 19-21). Cook published the net worth stipulation. (Tr. p.763, l. 25 – p. 764, l. 7). After the additional evidence, Appellants did not move for a directed verdict.

On identical facts, in *Stephens v. CSX Transp, Inc.*, Opinion No. 27587 (S.C. Sup. Ct. filed Nov. 4, 2015) (Shearouse Adv. Sh. No. 43 at 47), the Supreme Court held that failing to move for a directed verdict at the close of all evidence, as required by Rule 50, SCRCP, fails to preserve for appellate review the denial of a motion for directed verdict or JNOV. *Id.* at 54. As a result of their failure to move for a directed verdict at the close of all the evidence, Appellants' appeal should be dismissed. In *Stephens*, counsel moved for a directed verdict at the conclusion of the defendants' case. *Id.* at 50. Following the

denial of the motion, counsel published a stipulation regarding data from the train's event recorder. *Id.* Stephens then failed to move for a directed verdict. *Id.*

On appeal, the Court of Appeals "unanimously affirmed the trial judge's denial of Petitioner's motions for directed verdict and JNOV on the ground the issue was not preserved for appellate review." *Id.* at 51. The Supreme Court affirmed, holding that this Court correctly ruled Stephens was precluded from requesting JNOV because he failed to renew his motion for a directed verdict. *Id.* at 54-55. Rule 50(b), SCRCP, mandates that a motion for directed verdict be made at the close of all the evidence. "The text of Rule 50(b) clearly requires renewal of a directed verdict motion as it states the motion should be made after 'all' the evidence, which necessarily includes that presented in rebuttal." *Id.* at 54; s*ee also*, *RFT Mgmt. Co. v. Tinsely & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) ("'When a party fails to renew a motion for directed verdict at the close of all evidence, he waives his right to move for JNOV'").

Stephens argued that a directed verdict was only required at the close of the opposing party's case since the rebuttal evidence presumably benefited Stephens similar to how a plaintiff cannot move for a directed verdict at the end of his or her case. *Id.* at 54. However, the Supreme Court denied this specific argument and noted that a directed verdict motion had to be made at the conclusion of ***all evidence***. *Id.* at 54, n.4. Since Appellants failed to move for directed verdict at the close of all evidence, they cannot request judgment as a matter of law and failed to preserve these issues for appellate review.

II. BASED ON THE EVIDENCE THAT THE ACCUSATIONS WERE FALSE AND ACCUSED COOK OF A CRIME AND BEING UNFIT IN HER BUSINESS, THE TRIAL COURT PROPERLY SUBMITTED APPELLANTS' AFFIRMATIVE DEFENSE OF TRUTH TO THE JURY

Even if Appellants preserved these issues for appellate review, the evidence, when viewed in a light most favorable to Cook, established that the statements were false and defamatory. The jury by its verdict found Appellants did not satisfy their burden of proving the affirmative defense of truth. Despite the overwhelming evidence to the contrary, Appellants contend JNOV is warranted as the false statements were true or substantially true. (App. Br. pp. 6-19).

Under common law, "a defamatory communication was presumed to be false, but truth could be asserted as an affirmative defense." *Parrish v. Allison*, 376 S.C. 308, 326, 656 S.E.2d 382, 391 (Ct. App. 2007) (citing *Beckham v. Sun News*, 289 S.C. 28, 30, 344 S.E.2d 603, 604 (1986)). In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69 (1986), the United States Supreme Court modified the common law rule and held that "when a newspaper publishes speech of public concern, a private figure plaintiff cannot recover damages without showing the statements are false." If the statements are a matter of private concern, which is the case here, "the plaintiff is not required to prove falsity." *Parrish*, 376 S.C. at 327, 656 S.E.2d at 391. Truth is an affirmative defense that Appellants have the burden to plead and prove. *Id.* at 327, 656 S.E.2d at 392. "Ordinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a prima facie case of malice in the author." *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946). The trial court charged the jury on the truth defense. (Tr. p. 840, ll. 16-24).[9]

Appellants ask the Court to find in their favor as a matter of law on their affirmative defense of truth despite the existence of substantial evidence that Clevinger's

[9] Appellants do not appeal any of the trial court's jury charges.

statements that Cook hurt her were false. While Cook acknowledged hugging Clevinger, Cook did not injure her. (Tr. p. 247, ll. 1-4; p. 307, ll. 4-11; p. 502, ll. 18-21; Pl. Ex. 10). After May 9th, Cook did not hear anything about her hug for a period of time. (Tr. p. 240, ll. 12 – p. 241, l. 3). Learning of Clevinger's accusations shocked Cook. (Tr. p. 502, ll. 14-17). Cook told Regions' management that Clevinger made up the allegations in an effort to retaliate against Cook for filing a complaint against Clevinger. (Tr. p. 252, ll. 5-18). Clevinger in essence confirmed this when she stated to Barbara Simpkins on May 10th that, after having time to think about it, the hug may have been "a little hostile." (Pl. Ex. 11). Suzanne Freeman did not think anything about Cook's hug because it was an ordinary event as Cook had hugged her in a similar manner. (Tr. p. 687, l. 16 – p. 688, l. 10). On May 10th, Clevinger did not show Freeman any bruises, tell Freeman about any bruises, or tell Freeman that she had taken pictures of any bruises. (Tr. p. 687, ll. 7-15). Regions' investigation determined Clevinger was untruthful as she lacked veracity. (Pl. Ex. 28). It is counter-intuitive that Cook would be happy Clevinger found her outage, expressed her gratitude toward Clevinger, all while allegedly shaking Clevinger in a rage of vicious aggression that required Clevinger to take 12 Motrin on the night of May 9th because she was hurting so badly. (Tr. p. 240, ll. 8-9; Pl. Ex. 11).

Prior to Cook's termination, Andree Lloyd informed Patty Austin and Holly Johnson her disbelief in Clevinger's story. (Tr. p. 428, ll. 6-8; p. 429, ll. 5-17). Despite seeing photos of the alleged bruises on Clevinger's phone, Lloyd felt that Clevinger and her husband staged the photographs. (Tr. p. 455 ll. 2-8). These photos were not emailed to Regions until June 1st, over three weeks later. Importantly, Appellants did not preserve the digital photos that would have contained the date and time the photos were

taken.[10] Prior to the photos being emailed, on May 27th, Clevinger expressed to Johnson that she could not continue working with Cook.

The evidence proved that Clevinger falsely accused others of physical assault in the past. John Blackwell testified the allegations of physical abuse that Clevinger set forth in the divorce complaint were false. (Blackwell Depo. p. 13, ll. 17-25; p. 12, ll. 20-25). The grounds for divorce were based on one year separation despite the allegation of physical abuse in the complaint. (Pl. Ex. 36). Blackwell also denied physically assaulting Clevinger as she alleged in the police report. (Blackwell Depo. p. 13, ll. 17-25; p. 12, ll. 20-25). Blackwell denied these allegations and the evidence supports an inference that Clevinger put the marks on herself as evidence for the police against Blackwell. This is consistent with Lloyd's suspicions that Clevinger and her husband staged the photos to provide evidence against Cook. Blackwell also testified that Clevinger falsely accused Lewis Bayne of physically assaulting Clevinger as he did not see any marks on her. (Blackwell Depo. p. 19, ll. 10-16). The evidence, when viewed in a light most favorable to Cook, establishes that the statements made by Appellants were false. As a result, the trial court properly submitted Appellants' affirmative defense of truth to the jury. Appellants' motion for JNOV on this ground should be denied.

III. THE FALSE AND DEFAMATORY STATEMENTS WERE PUBLISHED TO THIRD PARTIES OTHER THAN COOK

Appellants contend that they are entitled to JNOV on the basis that the publication was not made to a third party. As the evidence establishes that Clevinger published the

[10] Cook requested the jury be charged on spoliation of evidence but the trial court denied this request. (Tr. pp. 724-728; 755-756; 849).

accusations to several individuals other than Cook, Appellants JNOV motion should be denied.

"The second major element of defamation is an unprivileged publication to a third party." *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 520, 506 S.E.2d 497, 507 (1998) (Toal, J. concurring) (citing *Riley v. Askin & Marine Co.*, 134 S.C. 198, 132 S.E. 584 (1926)). "No matter what a person may write, if it is not published, there is of course no liability, since no one is injured." *Id.* (quoting *Carver v. Morrow*, 213 S.C. 199, 202, 48 S.E.2d 814, 816 (1948)). "The publication of defamatory matter is its communication, intentionally or by a negligent act, to a third party -- ***someone other than the person defamed***." *Id.* (emphasis added). If the false and defamatory statements were published to someone other than Cook, Appellants motion for JNOV should be denied.

A. Clevinger Published the False Allegations to Suzanne Freeman

Appellants' motion for JNOV was properly denied because the evidence established that Clevinger published the accusations to fellow Regions' employee, Suzanne Freeman. Freeman was present in the bank on May 9th when Cook hugged Clevinger. At that time, Freeman did not think anything about Cook's hug because it was an ordinary event. (Tr. p. 687, l. 16 – p. 688, l. 4). The next day, Clevinger asked Freeman to come in the her office and discuss the events from the day before. (Tr. p. 687, ll. 7-10). Clevinger told Freeman that Cook had hurt her the day before. (Tr. p. 682, ll. 8-10; Def. Ex. 3). Clevinger did not show Freeman any bruises, tell Freeman about any bruises, nor tell Freeman that she had taken pictures of any bruises. (Tr. p. 687, ll. 7-15). Clevinger made the events of May 9th into a bigger deal than what Freeman saw. (Tr. p. 689, ll. 20-24).

By telling Freeman on May 10th that Cook hurt her the day before, Clevinger published false and defamatory statements to someone other than Cook. Appellants contend that Freeman does not constitute a third-party as she had first-hand knowledge of the event. (App. Br. pp. 24-25). Interestingly, Appellants do not cite a case that holds the statement must be published to someone that does not have knowledge. By arguing in this manner, Appellants place a burden on Cook that is not required by South Carolina law. Chief Justice Toal's concurrence in *Holtzscheiter* only requires that the statement be published to someone other than the person defamed. *Id. Erickson v. Jones St. Publrs., LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006) and *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002), the two cases cited by Appellants in arguing Freeman is not a publication, merely recite the defamation element of "an unprivileged publication to a third party", and do not hold or require the statement must be published to someone that does not have knowledge. (App. Br. pp. 24-24). Clevinger published the false statement to Freeman by telling her on May 10th that Cook hurt her the day before. (Tr. p. 682, ll. 8-10; Def. Ex. 3).

The evidence in this case, when viewed in a light most favorable to Cook as the non-moving party, also supports an inference that Clevinger tried to use Freeman to corroborate her false accusations of work place violence. On May 9, 2011, Freeman did not think anything about Clevinger's hug as it was an ordinary event. (Tr. p. 687, l. 16 – p. 688, l. 4). Following that day, however, Clevinger called Freeman in her office to discuss Cook's hug and then talked with Freeman several more times after May 10th. (Tr. p. 689, ll. 8-10). Freeman thought Clevinger made the events of May 9th out into a bigger deal than what Freeman saw. (Tr. p. 689, ll. 20-24). Although Freeman may have

witnessed these events, she did not think anything about Cook's hug until meeting with Clevinger the following day when Clevinger informed her that Cook hurt her. By telling the false statements to Freeman, Clevinger published the statements to a third party. Appellants request for JNOV on the basis of no publication should be denied on this basis alone.

B. Clevinger Published the False and Defamatory Statements to Multiple People in Regions' Management in an Effort to Get Cook Terminated

Even if Freeman does not constitute a publication, Appellants' motion for JNOV should still be denied as Clevinger published the false statements to Regions' management in an effort to get Cook fired. As the trial court correctly found, the false statements were published to Andree Lloyd, Patty Austin, Barbara Simpkins, and Holly Johnson. (Order Denying JNOV). On May 10, 2011, Clevinger told Barbara Simpkins about Cook's alleged workplace violence. (Pl. Ex. 11). Clevinger told Andree Lloyd of the events with Cook during a branch manager's meeting in Charleston on May 26, 2011. (Tr. p. 427, l. 3 – p. 428, l. 5). On May 26, 2011 at the branch manager's meeting in Charleston, Lloyd told Patty Austin about Clevinger's accusations, (Tr. p. 624, l. 4 – p. 625, l. 12). On May 27th Clevinger relayed to Holly Johnson the events of May 9th. (Tr. p. 527, l. 2 – p. 529, l. 4). Clevinger also told Johnson that she could not continue working with Cook. (Tr. p. 511, ll. 1-24; Pl. Ex. 19). This evidence is sufficient to deny Appellants' JNOV motion as these are publications to third parties other than Cook. Appellants' request for JNOV should be denied on this basis alone.

Similar to the argument that Freeman is not a publication because she had first-hand knowledge, Appellants again seek to impose a requirement not required by South Carolina law. Appellants contend that telling Regions' management is not a sufficient

publication. Appellants' arguments on this point are that as a result of being privileged there is no publication. *Holtzscheiter*, *Erickson*, and *Fleming* require that unprivileged publication be made to a third party, in essence requiring a two prong inquiry. First, was the statement published to someone other than the person defamed as noted in *Holtzscheiter*. If so, the second prong is whether the statement is protected by a qualified privilege. In this case, Regions' management employees are third parties that satisfy the publication requirement. Whether the statement is protected by a qualified or conditional privilege is a separate question.

Appellants rely on two South Carolina cases, *Watson v. Wannamaker*, 216 S.C. 295, 57 S.E.2d 477 (1950), and *Rogers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940), for the proposition that communications between employees does not constitute a publication. Watson involved an action for libel and slander as a result of a letter being dictated to a stenographer, who typed the letter. *Watson*, 216 S.C. at 296, 57 S.E.2d at 477. There was no evidence that the letter was communicated to any other person. *Id.* The narrow issue addressed by the Court was "whether the dictation of a letter containing defamatory matter by a business man to his private stenographer or secretary, in the ordinary course of business, constitutes a publication so as to afford the basis for an action for libel or slander." *Id.* at 297, 57 S.E.2d at 477. Relying on *Rogers* and distinguishing *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946), the Court held dictating to a stenographer did not constitute a publication. *Watson*, 216 S.C. at 299, 57 S.E.2d at 478.

Rogers involved an allegedly libelous and slanderous statement written from an attorney in Columbia, SC, to an attorney in Washington, DC, about a lawsuit in which they were mutually involved. 193 S.C. at 5, 7 S.E.2d at 517. The trial court, which the

Supreme Court affirmed in a short opinion, noted that "[c]ertainly such a letter must be privileged and, in my judgment, such a communication between attorneys does not amount, as a matter of law, to a publication . . . ." *Id.*

This Court distinguished *Watson* in *McBride v. Sch. Dist. Of Greenville County*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010), and relying on *Bell*, held that a statement to another employee is a publication when the privilege has been abused and not made in good faith. 389 S.C. at 562, 698 S.E.2d at 853. McBride involved a teacher that was accused of stealing school property and some of the publications were to other district employees. *Id.* at 559, 698 S.E.2d at 851. The trial court granted the school district's motion for directed verdict on the defamation cause of action. *Id.* In reversing the defamation cause of action, this Court rejected the identical argument Appellants make here regarding the lack of publication:

> Both Roach and the teacher's aide were District employees. Therefore, one might conclude that Roach's statement was not published to a "third party" as is required to prove defamation. However, ***in South Carolina, an employee's statement to another is a "publication" when the privilege of the employees' common interest is abused.***

Id. at 562-63, 698 S.E.2d at 853 (citing *Bell*, 308 S.C. at 493-94, 38 S.E.2d at 643) (emphasis added). Other cases note that "communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001); *Conwell v. Spur Oil Co.*, 240 S.C. 170, 179, 125 S.E.2d 270, 275 (1962) ("It appears to be generally recognized that communications between officers and employees of a corporation, whether operating in the same office or in different and

distinct offices, are qualifiedly privileged *if* made in good faith and in the usual course of business.") (emphasis added).

The evidence in this case, when viewed in a light most favorable to Cook as the non-moving party, establishes that Clevinger published the false and defamatory statements to fellow Regions employees in an effort to get Cook fired. On March 30, 2011, Clevinger gave Cook a positive performance review. (Tr. p. 228, l. 5 – p. 229, l. 6; Pl. Ex. 28). Cook and Turner spoke on April 6, 2011, regarding Clevinger's management, comments regarding a minority male that applied for a position, Clevinger's numerous issues with Regions' Hampton customers, and three separate instances where Clevinger granted Cook's vacation requests only to subsequently withdraw her approval. (Tr. p. 231, l. 7 – p. 234, l. 10; Pl. Ex. 15).

The next day on April 7, 2011, Clevinger confronted Cook about Cook's conversation with human resources. (Tr. p. 235, l. 13 – p. 239, l. 1; Pl. Ex. 14). Despite having a good relationship prior to April 7, 2011, things went downhill and Cook could do nothing right. (Tr. p. 237, l. 17 – p. 239, l. 1). Following the events of May 9th and subsequent investigation by Dennis Coleman, Clevinger at times exhibited signs of deception although her interview was inconclusive. Cook's interview indicated no visual signs of deception as she was forthright in her responses and requested that she be given a polygraph test. (Pl. Ex. 1). Johnson and Lloyd met with Clevinger on May 31, 2011, to remove her from the Hampton branch manager position based on Clevinger's style of leadership, communication, and possible retaliatory behavior with fellow Regions employees. (Tr. p. 523, ll. 10-18; p. 505, l. 14 – p. 506, l. 21; Pl. Ex. 16; Pl. Ex. 30).

Cook also expressed to Holly Johnson that she felt like Clevinger was retaliating against her for filing the complaint. (Tr. p. 252, ll. 14-18).

The publications to each of the Regions employees are sufficient as they are not the person defamed. Whether the publication is protected by a qualified privilege is another issue, addressed below. Publishing false and defamatory statements to employees within a company constitutes publication to third-parties. A holding to the contrary would have the perverse effect of allowing an employee to fabricate an allegation about another employee in a retaliatory effort and get that person terminated from their position without recourse for the injured employee. Depending on the defamed person's notoriety or community in which they live, they will be significantly damaged as reporting solely to fellow employees does not happen in a vacuum isolated from everyday human interactions. After being terminated when Cook went somewhere in Hampton, Regions' customers would stop her, tell her they were sorry she was not at Regions, and ask what happened. (Tr. p. 249, ll. 3-16). One customer actually called Cook's house. (Tr. p. 249, ll. 3-16). While there may be an issue in some cases of whether the person was acting within the course and scope of their employment at the time of the alleged defamation, Appellants in this case admitted Clevinger was in the course and scope of her employment. Publishing the false and defamatory statements to Regions' management is a sufficient publication. Appellants request for JNOV on this ground should be denied.

C. Clevinger Published the False and Defamatory Statements to Her Husband

The evidence also supports an inference that Clevinger published the false and defamatory statements to her husband. Clevinger acknowledged that she discussed the

incident of May 9th with her husband, Greg Valentine. The following exchange took place regarding Clevinger's publication to her husband:

> Q: Yeah, but you don't talk to your husband like that. I'm not going to tell you what happened, I had an incident with a coworker.
>
> A: Sir, you –
>
> Q: That's how you would talk to him?
>
> A: (No response).
>
> Q: Is that a yes?
>
> A: Sir, are you trying to tell me how I do and don't talk to my husband. I'm just telling you that originally I discussed the incident with him.
>
> Q: He was up in the night –
>
> A: The early morning, he asked me what is going on. He asked me about the bruises. When I told him, he said what is going on over there. I told him that I was shaken at work . . . . He asked me did I report it and I said yes.

(Tr. p. 419, l. 11 – p. 420, l. 3).

Appellants contend that Clevinger's statements to her husband do not amount to a publication because "Clevinger never published Cook's identity to her husband." (App. Br. p. 22). To support a defamation action, according to Appellants, Clevinger would have had to publish Cook's name. This is not required under South Carolina law to support a defamation action. It is sufficient that the person defamed be identified either by name or implication. *Burns v. Gardner*, 328 S.C. 608, 615, 493 S.E.2d 356, 360 (Ct. App. 1997) ("In this case, the appellants are not mentioned, either by name or implication, in the position paper."). A requirement that the defamed person be identified by name would allow defamatory remarks to be made when the person is not specifically

named. For example, the person making the statement could be the president of a company, police chief of a city, or principal of a particular high school. In each of these cases, the individual would not be able to maintain a defamation action because they were not specifically named, despite the fact they were readily identifiable. Based on the evidence, when viewed in a light most favorable to Cook, Clevinger published the false statements to her husband. As the false statements were also published to Freeman, Austin, Johnson, Lloyd, and Simpkins, Appellants motion for JNOV on this ground should be denied.

IV. APPELLANTS ABUSED THE QUALIFIED PRIVILEGE BY NOT ACTING IN GOOD FAITH

Since the false and defamatory statements were published to a third party, Appellants contend that they were protected by a qualified privilege. Cook asserts that the qualified privilege may only extend to the statements published to Regions' management, not Suzanne Freeman or Clevinger's husband. In defamation cases, the defendant may assert conditional or qualified privilege as an affirmative defense. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 133 (1999). Under this defense, one who publishes a defamatory matter concerning another is not liable for the publication if two conditions are proven. *Id.* First, "the matter is published upon an occasion that makes it conditionally privileged." *Id.* Second, the privilege cannot be abused. *Id.* The Supreme Court in *Swinton Creek Nursery* quoted *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946) for the analysis of when a qualified privilege has been exceeded:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and the relationship of the parties. When one has an interest in the subject matter of a

> communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Swinton Creek Nursery, 334 S.C. at 484, 514 S.E.2d at 134 (quoting *Bell*, 208 S.C. at 493-94, 38 S.E.2d at 643).

"In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court." *Id.* at 485, 514 S.E.2d at 134. "However, the question of whether the privilege has been abused is one for the jury." *Id.* "[C]ommunications between officers and employees of a corporation are qualifiedly privileged ***if*** made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) (emphasis added) (citing *Conwell v. Spur Oil Co.*, 240 S.C. 170, 125 S.E.2d 270 (1962)).

Bell v. Bank of Abbeville also supports denial of Appellants' motion for JNOV on the basis of privilege. It holds a publication to another co-employee may be the basis of a defamation action if a qualified privilege was abused. *Id.* at 493-94, 38 S.E.2d at 643. In that case, Bell filed a slander action against the Bank of Abbeville after being accused of stealing. *Id.* at 492, 38 S.E.2d at 642. The allegedly slanderous remarks took place in a meeting with J.M. Mars, president of the bank, J.A. Verchot, vice president of the bank and a director, and T.A. Sherard, cashier at the bank. *Id.* The trial court sustained the Bank of Abbeville's demurrer on Bell's defamation cause of action. *Id.* at 493. In overturning the trial court's demurrer, the Supreme Court noted that "[o]rdinarily, proof of a defamatory publication, charging another with the commission of a crime, makes out a prima facie case of malice in the author." *Id.* at 494, 38 S.E.2d at 643. The Supreme

Court also stated that the trial court "held that publication of the alleged defamatory communications . . . was not sufficiently alleged, for the reason that the only persons alleged to have been present with the plaintiff were the three officers of the defendant bank . . . ." *Id.* at 495, 38 S.E.2d at 643. According to the Court, "[t]his ruling overlooks the principle which we have already averted to, and that is, if actual malice is shown, the protection of the privilege is destroyed." *Id.*

In this case, the trial court properly denied Appellants' motion for directed verdict and submitted the issue of whether the privilege was abused based on the evidence that Clevinger was not acting in good faith by attempting to get Cook terminated. Prior to March 30, 2011, Clevinger and Cook had a good working relationship after Clevinger gave Cook a positive performance evaluation. That changed on April 6, 2011, when Cook made a complaint to human resources about various issues involving Clevinger. The next day Clevinger confronted Cook about Cook's conversation with human resources. (Tr. p. 235, l. 13 – p. 239, l. 1; Pl. Ex. 14). Despite having a good relationship prior to April 7, 2011, things went downhill and Cook could do nothing right. (Tr. p. 237, l. 17 – p. 239, l. 1). On May 27th, Clevinger told Holly Johnson that she could not continue working with Cook. (Tr. p. 511, ll. 1-24; Pl. Ex. 19). Johnson and Andree Lloyd met with Clevinger on May 31, 2011, to remove her from the Hampton branch manager position based on Clevinger's style of leadership, communication, and possible retaliatory behavior with fellow Regions employees. (Tr. p. 523, ll. 10-18; p. 505, l. 14 – p. 506, l. 21; Pl. Ex. 16; Pl. Ex. 30). Cook also expressed to Holly Johnson that she felt like Clevinger was retaliating against her for filing the complaint. (Tr. p. 252, ll. 14-18). Despite the evidence that Clevinger was retaliatory against fellow Regions' employees

and directly told Johnson she could no longer work with Cook, it adopted Clevinger's statements as their own by terminating Cook for workplace violence. The evidence before the Court, when viewed in a light most favorable to Cook as the non-moving party, establishes that Appellants were not acting in good faith and exceeded the scope of the qualified privilege at the time the statements were made.

A qualified privilege does not protect statements that are fabricated in an effort to get another employee fired because obviously the statement would not be made in good faith. The jury found the Appellants were not acting in good faith at the time the false and defamatory statements were made. Based on the evidence, the Court should affirm the trial court's denial of Appellants' request for judgment as a matter of law on the basis of a qualified privilege.

Appellants incorrectly cite the trial court's order denying the JNOV motion on the basis that a "factual issue existed as to the truth of the statement that warranted submission of whether Appellants abused the privilege to the jury." (App. Br. p. 25). According to Appellants this constituted reversible error. (App. Br. p. 25). Appellants incorrectly cite the Order denying JNOV to argue the trial court conflated the issues regarding truth and privilege. However, the following discussion from Appellants motion for directed verdict is important on the issue of whether there's sufficient evidence that Appellants abused the privilege:

> The Court: Let me ask you, Mr. Tiller. What about the evidence that the plaintiff has produced indicating that there may have been a motive, may have been a motive for the defendant Clevinger to falsely report. Is there some evidence that there may have been a motive on her part?
>
> Mr. Tiller: ***I think in fairness to the court, I would say that there is some evidence of that.***

(Tr. p. 614, ll. 12-21) (emphasis added).

In denying Appellants' directed verdict motion, the trial court ruled that "[t]he question of whether [the] communication was honestly made and made in good [faith] is a question for the jury. The question of whether or not privilege was abused is a case for jury." (Tr. p. 703, ll. 19-23). If, as Regions conceded at trial, there is evidence of motive for Clevinger to retaliate against Cook, then the trial court properly denied Appellants' directed verdict motion as the evidence supports an inference that the privilege was abused and not made in good faith.

Regions contends Clevinger was required to report Cook's alleged workplace violence pursuant to Regions' policy therefore protecting it as a qualified privilege. (App. Br. pp. 20-22). The policy states that Regions' associates should report violent behavior to their immediate supervisor and the respective HR manager. (Def. Ex. 1). The events of May 9th were uneventful. Suzanne Freeman did not think anything about Cook's hug because it was an ordinary event. (Tr. p. 687, l. 16 – p. 688, l. 4). Cook heard nothing about the events of May 9th until the end of May when she was shocked upon learning of the allegations from Holly Johnson. (Tr. p. 240, ll. 12 – p. 241, l. 3). It was not until Clevinger turned a hug into a workplace violence incident in an effort to get Cook fired. Cook did not violate Regions policy by hugging Clevinger as Regions does not have a policy against hugging. (Tr. p. 500, l. 7). The policy also does not allow employees to fabricate lies in an effort to get a fellow employee fired. The policy may indeed serve as a qualified privilege if exercised in good faith and not abused. However, given the extensive evidence and acknowledgment that there may be a motive for Clevinger to

falsely report, the trial court did not err denying Appellants' motion for directed verdict and JNOV.

Regions contends that there's no evidence that it acted outside the scope of the privilege. Cook contends there was a vast amount of evidence of Regions abusing the privilege. Regions admitted in its answer that is was vicariously liable for Clevinger as she was acting within the course and scope of her employment. (Ans. ¶ 2). Regions knew of the complaint Cook made against Clevinger in April 2011 and the issues that arose the next day when Clevinger confronted Cook. On May 27th, after the events of May 9th occurred, Clevinger told Holly Johnson that she could not continue working with Cook. (Tr. p. 511, ll. 1-24; Pl. Ex. 19). Johnson and Andree Lloyd met with Clevinger on May 31, 2011, to remove her from the Hampton branch manager position based on, among other things, retaliatory behavior with fellow Regions employees. (Tr. p. 523, ll. 10-18; p. 505, l. 14 – p. 506, l. 21; Pl. Ex. 16; Pl. Ex. 30). Cook also expressed to Holly Johnson that she felt like Clevinger was retaliating against her for filing the complaint. (Tr. p. 252, ll. 14-18). Regions also terminated Clevinger for her actions on June 1st as it "lost confidence in [Clevinger's] veracity and [Clevinger's] judgment . . . ." (Pl. Ex. 28). Despite this evidence of Clevinger's dishonesty, Regions terminated Cook for workplace violence.

As a result, the evidence supports an inference that the privilege was abused and not made in good faith.

V. THE TRIAL COURT PROPERLY SUBMITTED PUNITIVE DAMAGES TO THE JURY BASED ON CLEAR AND CONVINCING EVIDENCE

Finally, Appellants ask this Court to determine as a matter of law that there is no clear and convincing evidence warranting punitive damages. Appellants do not appeal

the amount of the punitive damage verdict or the trial court's post-trial review of punitive damages. Therefore, the sole issue for the Court is whether the evidence, when viewed in a light most favorable to Cook, warrants an award of punitive damages. To warrant punitive damages in a defamation action, the plaintiff must prove actual malice. *Deloach v. Beaufort Gazette*, 281 S.C. 474, 480, 316 S.E.2d 139, 143 (1984). Actual malice consists of recklessness and ill will with a design to wantonly injure the plaintiff without cause. *Jones v. Garner*, 250 S.C. 479, 488, 159 S.E.2d 909, 913-14 (1968).

In this case, the evidence indicates the trial court properly submitted the issue of punitive damages to the jury. Prior to terminating Cook, Regions knew that Clevinger exhibited retaliatory behavior to fellow Regions employees. On May 27th, Clevinger told Johnson that she could not continue working with Cook. (Tr. p. 511, ll. 1-24; Pl. Ex. 19). Johnson and Lloyd met with Clevinger on May 31, 2011, to remove her from the Hampton branch manager position based on Clevinger's style of leadership, communication, and ***possible retaliatory behavior*** with fellow Regions employees. (Tr. p. 523, ll. 10-18; p. 505, l. 14 – p. 506, l. 21; Pl. Ex. 16; Pl. Ex. 30). Cook also expressed to Holly Johnson that she felt Clevinger was retaliating against her for filing the complaint, and Cook knew that Clevinger was making up the allegations. (Tr. p. 252, ll. 5-13; p. 252, ll. 14-18).

Regions also suspected deception from Clevinger, which was confirmed when she removed boxes from the Hampton branch without authorization. During Dennis Coleman's investigation, Cook welcomed a polygraph test and indicated no visual signs of deception as she was forthright in her responses. (Pl. Ex. 1). Although Clevinger's interview was inconclusive, Coleman noted there were times she projected signs of

deception. (Pl. Ex. 1). Clevinger's actions on June 1st in removing boxes from the Hampton branch "clearly elevated [Regions'] concerns over your level of judgment and our ability to trust you." (Pl. Ex. 28). As a result, Regions lost confidence in Clevinger's veracity and judgment. (Pl. Ex. 28). Even after being terminated, Clevinger voiced her concerns with Johnson over fellow Regions employees, Vicki Sweat and Andree Lloyd, additional evidence that Clevinger attempted to retaliate against them. (Tr. p. 521, ll. 5-21; Pl. Ex. 29).

Upon learning of Clevinger's allegations on May 26th, Andree Lloyd did not believe Clevinger. (Tr. p. 428, ll. 3-11). From the time Clevinger was hired, Lloyd felt Clevinger was not a person who told the truth. (Tr. p. 428, l. 10 – p. 429, l. 4). Lloyd informed Patty Austin and Holly Johnson, Regions' South Carolina head and Regions' vice president of human resources, respectively, about her disbelief in Clevinger's story. (Tr. p. 428, ll. 6-8; p. 429, ll. 5-17). Despite seeing photos of the alleged bruises on Clevinger's phone, Lloyd felt that Clevinger and her husband staged the photographs. (Tr. p. 455 ll. 2-8).

While Cook was on administrative leave, Regions received a letter from Dr. Welcker advising the bank that he found it "virtually impossible for Ms. Cook to injure anyone in this manner. Pain aside, she also lacks physical strength to harm anyone." (Tr. p. 198, l. 20 – p. 199, l. 24; Pl. Ex. 7). The letter detailed Cook's extensive medical conditions. Regions also conceded at trial that there was some evidence of a motive for Clevinger to falsely report. (Tr. p. 614, ll. 12-21). Despite the issues surrounding retaliatory behavior, losing trust in Clevinger's veracity and judgment, doubts from Lloyd regarding Clevinger's story, and letter from Dr. Welcker regarding the implausibility of

these events, Regions terminated Cook for violating its workplace violence policy. Following her termination, Johnson stated on a call about Cook's unemployment benefits that Regions had no proof of a workplace violence incident. (Tr. p. 255, ll. 9-20).

In addition, punitive damages were warranted because Clevinger fabricated the allegations against Cook, and as a result, Appellants are vicariously liable for Clevinger's conduct as it admitted in its answer that Clevinger was acting within the course and scope of her employment. (Ans. ¶ 2). The trial court granted Cook's motion for directed verdict on the issue of agency based on this admission and charged the jury as a matter of law that Regions would be liable for Clevinger's acts. (Tr. p. 749, l. 20 – p. 750, l. 16; p. 838, l. 21 – p. 839, l. 6). Appellants do not appeal the granting of this directed verdict on the issue of vicarious liability or the trial court's jury charge.

The evidence, when viewed in a light most favorable to Cook, indicates that the trial court properly submitted punitive damages to the jury based on clear and convincing evidence of actual malice. As a result, Appellants request for judgment as a matter of law on the issue of punitive damages should be denied.

CONCLUSION

The evidence in this case establishes that Clevinger had a motive to falsely report the alleged workplace violence incident in an effort to retaliate against Cook and have her terminated. Clevinger published the statements to third parties other than Cook. In an effort to retaliate against Cook, Appellants abused its qualified privilege by not acting in good faith. All the evidence, when taken together, warranted the submission of punitive damages to the jury. The trial court's denial of Appellants' motion for directed verdict and JNOV should be affirmed.

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

November 16, 2015
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No.: 2014-001196

Lydia Cook, ... Respondent,

-v-

Regions Bank and Robyn Clevinger, ... Appellants.

PROOF OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **RESPONDENT'S INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to:

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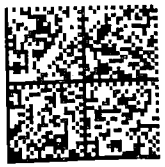

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