

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

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SC Court of Appeals

J. Scott Kunst,

Respondent,

v.

David Loree,

Appellant.

[INITIAL] BRIEF OF RESPONDENT

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STATEMENT OF FACT

The Appellant's Statement of Facts is argumentative and attempts to surmise and impune Kunst's motives for filing this case. The most significant fact not mentioned is that a jury of twelve found David Loree to be a defamer and awarded \$1,000,000 in damages. That is now a fact. This occurred because a *pro se* litigant persevered through nine years of inexcusable delays and trial court errors to bring a case to trial in which the veracity of Loree's statements to others was finally litigated.

This was a serious matter that harmed many good people. We now have the benefit of a decade of hindsight and the resolution of twenty related cases that support the objective facts of this case. Flippant, meaningless conjecture about motives does not serve the legal issues of this appeal.

Loree introduced *Cold and Greedy* at trial and submitted a portion of an ebook preview printed from ColdandGreedy.com into evidence. The full context of *Cold and Greedy* in its final form today is very clear about why it was written and who was individually responsible for the sordid events of the spring of 2006. The *objective* statement of facts relevant to *this* case are as follows:

David Loree is an executive protection administrator (bodyguard) provided by an Amway holding company, *JVA Enterprises*, to protect Barbara VanAndel-Gaby, daughter of the Amway founder. Loree was initially involved with the security aspect of a new resort home the Gabys were building on Lake Keowee designed by Kunst and built by his firm Kunstwerke. Husband Richard Gaby believed that his multi-million dollar lake home was over budget and feared it would not be available for the summer of 2006. Gaby wanted to terminate Kunst and Kunst's design/build firm Kunstwerke and act as his own

builder and scale the project back.

Kunstwerke was an S Corp. created to build Kunst's unusual designs. Kunstwerke/client contracts were unique in the design/build business in that they were *reimbursement* contracts. Contractor and supplier invoiced costs were incurred by Kunstwerke and submitted without mark up in a weekly statement requesting reimbursement. This was a courtesy that had been offered by Kunstwerke for a decade without issue. Kunstwerke's only source of income was a fixed monthly fee.

Loree was asked by Gaby to take over the project and secure the cooperation of those contractors and suppliers in Kunst's organization that were needed to complete the project. Kunst's site manager, Bronson Shepherd, was needed most and, therefore, was targeted most. Kunstwerke and Kunst had five active projects at the time at various stages of completion. If Kunstwerke were terminated from the Gaby project in an open and legal manner, Kunst would have insisted that Shepherd and the other contractors move to other sites where they were needed.

At the time of Kunstwerke's termination on March 3, 2006, the Gabys were in arrears for three weekly statements: 2/16/06, 2/20/06, and 3/3/06 (). Kunstwerke's accounting system can identify the exact reimbursement amount owed on any day of construction. On any day of construction, any Kunstwerke client had sufficient records to conduct a full audit of their account if they suspected anything was awry. On February 16, 2006, the cost of construction incurred by Kunstwerke totalled \$2,656,492 and the Gabys had reimbursed \$2,554,087.() None of these totals, nor the three unpaid statements above, have *ever* been contested by the Gabys or Loree.

In February 2006, Kunstwerke was holding a window and cabinet deposit from Gaby for items not yet ordered or completed. This was known to Gaby. Gaby acknowledged by email the money he owed for the unpaid weekly statements and stated that these deposits would be a "float" to cover that "until we get our hands around where we are at ()."

In late February 2006, David Loree maliciously posed as a "former detective investigating Kunst's financial dealings with his clients" and announced that he had supposedly uncovered financial crimes. The specific seven slanderous quotes litigated at trial are listed in Argument A, page 15 of this brief. Only two of the seven statements have anything to do with the Gabys, and only one of them is exclusively about the Gaby's.

Loree has no financial background nor the intellectual ability to conduct any such investigation. Loree is not a former detective, nor had he uncovered any criminality. Loree acted like a reckless goon. Loree never read the Gaby contract until trial (T. p. 161, l. 12 – p. 162, l. 7), nor has he demonstrated the ability to comprehend what a reimbursement contract is. Richard Gaby did not instruct Loree to "investigate Kunst's financial dealings with his clients" (T. p. 489, ls. 17-19).

At the moment Loree's statements regarding financial crimes spread through the public, all five Kunstwerke clients stopped paying their current weekly statements despite the fact that these projects collectively owed \$539,027 more than had been reimbursed. Two of these clients were attorneys Eugene Covington Jr. and Michael Parham who owed \$137,634 and \$70,906 respectively of the \$539,027 debt owed Kunstwerke. Kunstwerke had processed \$20,000,000 dollars and 10,000 weekly clients statements for a decade without incident. No client had ever missed a payment () prior to February 2006.

In May 2006, Gaby sued Kunst alleging that there were unpaid contractors when he took over the project and that this was due to breach of contract accompanied by fraudulent acts, conversion, and breach of fiduciary duty. Kunst's answer was deemed late and he was found in default. Kunst and Kunstwerke filed counterclaims refuting Gaby's claims and claiming money owed, and fought to have the default removed. The order of default was appealed unsuccessfully to the State Supreme Court.

Loree appeared on behalf of the Gabys in the Gaby action at a default damages hearing in March 2007 and submitted a "default damages computation." Loree had just been sued by Kunst for defamation in December 2006. Loree submitted a damages computation that excluded the credit nature of the contract and the mountain of invoices Gaby never reimbursed (Richard Gaby's float) in order to make it appear that money was actually missing from the Gaby account. The window and cabinet deposits, along with a handful of other line items, appear on the computation as money supposedly used by Kunst on something other than the Gaby project (). The actual Kunstwerke accounting records were complete, accurate, and accounted for every dime the Gabys paid Kunstwerke. All Kunstwerke accounting records were procedurally barred and were specifically objected to by the Gaby's attorney. Kunst was not permitted to testify or call witnesses. The hearing was premised under the assumption that all causes of action were admitted. As the Appeals Court has noted, "Kunst was also not allowed to participate in any discovery on this matter ()."

The Gabys elected to have final judgment entered in the default case under one cause of action: breach of contract accompanied by fraudulent act. Judge Welmaker specifically states that he did not find that Kunst violated SCUTPA. There were no

monetary damages for conversion, defective work, or breach of trust. See page 9 of this brief for a detailed argument and references.

Forensic accountant Bill Larkin wrote a report during discovery for Loree's case and related cases and Loree referred to him repeatedly at trial (T. p. 191, ls. 1-24) (T. p. 266, ls. 15-25) (T. p. 274, ls. 10 - 15), yet neither he nor anyone else appeared on Loree's behalf to contest Kunstwerke's actual records. The actual Kunstwerke billing statements in the possession of both Loree and the Gabys in March 2006 clearly showed the window and cabinet deposits refunded back to Gaby to pay directly (which he did), and clearly showed these items netted against the money owed, as agreed.

In 2007, Kunstwerke sued those clients, including Covington and Parham, who abruptly stopped reimbursing in February 2006 for breach of contract in order to collect the \$539,027 owed. Unlike the Gaby default action, the actual Kunstwerke accounting records were litigated in every case, and every case settled in Kunstwerke's favor (T. pp. 347-349). There was no money missing or taken from any client as alleged in Loree's slander.

On page 5 of his Statement of Facts, Loree alleges that "Kunst, although a former CPA, was unable to keep his company, Kunstwerke, financially solvent." The accounting records submitted at trial showed a company better capitalized and increasingly profitable in 2003, 2004, 2005, and 2006 (). No company withstands the sudden default of \$539,027 () of client debt, slander actionable *per se*, threats, and subsequent lien fraud.

On page 3 of his Statement of Facts, Loree relies on his *own* testimony at trial to support that Kunst "changed invoice amounts" from a company called System Specialties.

There were 12 invoices submitted by System Specialties totaling \$9,088. If Loree is alleging that an invoice was intentionally altered (and he has been found by a jury to be a defamer about such matters), that would cause the System Specialties ledger in Kunstwerke's accounting system to be out of balance. No such thing occurred. Loree testified that people more intelligent than he looked at the accounts (T. p. 269, ls. 5-20). Without a witness from System Specialties or a forensic accountant, this is hardly a statement of fact and the finders of fact agreed.

Seven of the slanderous statements that Loree made to others were litigated at trial and are listed on page 15 of this brief. Only two of these statements have anything to do with the Gabys. These are actual quotes attested to by witnesses who submitted affidavits and were deposed during discovery. These actual quotes are more concise than the allegations in the original complaint. They do not differ from the complaint and were not changed pretrial by Kunst as alleged by Loree.

ARGUMENT

I. The trial court erred in not overturning the verdict when the verdict was an error of law.

A. Loree proved the substantial truth of Kunst's alleged slanderous statements.

Loree begins his brief by stating "This case is Kunst's attempt to retry the Gaby action." Loree apparently forgets that the Appeals Court has already ruled on that false notion. The simple truth of the matter is that Loree's present appeal is nothing more than

an attempt to re-appeal his failed collateral estoppel argument and to avoid what has now become the *actual result* of "actually litigating the veracity of Loree's statements to others" ().

Even after the finders of fact found that David Loree is a defamer and awarded \$1,000,000 in damages, Loree attempted yet again, through a JNOV motion, to have a trial judge summarily determine that a civil default judgment "is a public record that affirms that all of the alleged defamatory statements are true" (Page 7 of Loree's brief).

There is a blatant falsehood in *footnote 5* on page 7 of Loree's brief that needs to be addressed because it exposes the deceptive nature and the fatal flaw of Loree's substantive truth argument. Loree's footnote 5 attempts to have this court believe that Kunst stated on cross-examination that Judge Welmaker's order in the Gaby action of March 26, 2007 "had been overturned by the Court of Appeals" when the trial transcript clearly shows Kunst did not state this.

Loree's attorney Smith submitted Welmaker's order as trial Exhibit 23 () as described on pages 454 and 455 of the trial transcript. At the bottom of page 455, Smith approaches the bench with Judge **Miller's** order of October 19, 2010 in the *present case* () granting summary judgment based solely on the doctrine of collateral estoppel. Page 456 of the transcript could not be more clear. Smith hands **Miller's** order to Kunst who immediately identified the order as having been overturned by the Appeals Court and objected to its use as evidence (T. p. 456 ls. 9-14). The trial judge took judicial notice that it had been overturned by the court (T. p. 456 ls. 15-17) and allowed Kunst to submit the Appellate opinion reversing it (T. p. 456 ls. 21-23). These two became Exhibits 24 and 25 respectively.

Loree's footnote 5 "mistake" is relevant because it exposes how much Loree's substantive truth argument is just a rerun of his failed collateral estoppel attempt. Loree *still* depended on Judge Miller's overturned order to make his substantive truth argument appear credible at trial. So much so that attorney Smith made certain that the jury heard him imply that it wasn't overturned by stating: "if it was overturned by the Court" (T. p. 456 l. 18).

One of the exhibits attached to Kunst's pretrial motions is a letter by Kunstwerke attorneys objecting to Judge Miller's order when it was still just a draft. It is a thorough and well-deserved critique based on law and remains relevant to this appeal (). In direct contravention of Welmaker's order, this outrageous order makes factual findings from the damages hearing that Judge Welmaker did not make. It is broad, argumentative, misstates facts, finds that *criminal* findings were found in another *civil* case, references only out-of-state precedent to grant issue preclusion to a default judgment, and was written by an attorney whose law partner stood to personally gain from its "findings." The judge was made aware of all of these problems while the order was still in draft form, yet he signed it without a single correction. Furthermore, the judge did not rule to deny Kunst's motion to reconsider for an entire year, further delaying this case. This order, which was ultimately overturned by the Court of Appeals, is responsible for a four year delay in this case.

On page 7 of his brief, Loree argues that Judge Welmaker "heard testimony" at the default damages hearing of various things such as "...falsefied invoices, allegedly purchased and then canceled an insurance policy in order to keep the proceeds..." and therefore, the public record of Judge Welmaker's March 26, 2007 order in the Gaby civil default case "affirms that the alleged defamatory statements are true." Loree attempts to

surmise what Judge Welmaker "heard" when his actual order only states: "The Plaintiffs have provided sufficient evidence to establish their claims fully. Of course, the court starts from the premise that all facts relating to the pertinent causes of action are admitted ()." Furthermore, in Loree's present *actual* trial, evidence was permitted to be presented to a jury refuting all of these claims.

What Loree does not reveal on page 7 of his brief is that the Gabys elected to have the court enter *final* judgment under only one cause of action, "breach of contract accompanied by fraudulent act." See Supplemental Notice of Election () and *final* order dated April 23, 2007 (). Judge Welmaker specifically states he did not find that Kunst violated SCUTPA and there was no monetary finding of conversion or breach of fiduciary duty. The public record shows that Kunst has never been charged with or convicted of a criminal misdemeanor of any kind.

Loree argues: "Judge Welmaker's order in the Gaby action and the evidence on the record supports the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law." The present issue for the Appeals Court is not whether the "order in the Gaby action and the evidence" submitted by Loree "supports the truth." The issue is whether a review of the evidence reveals competing inferences. See *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000); see also *Force v. Richland Memorial Hospital*, 322 S.C. at 284, 471 S.E.2d at 715 (stating that if more than one reasonable inference exists, a jury verdict must stand). The only issue is whether the trial judge who heard all of the evidence in the context it was presented at trial erred by not overturning the jury verdict because there was only one possible inference that could have been drawn from

the evidence. The trial judge clearly did not err as revealed below and the jury verdict must not be disturbed.

In his closing argument at trial, Loree's attorney summarized the whole of the Appellant's trial defense well by stating: "When we started this trial Tuesday, I believe it was, I ask you to remember two things. First, that a court of law has determined that Mr. Kunst took \$400,000 from the Gaby's that should have been paid to subcontractors and suppliers. Second, I ask you to remember that you will see absolutely no evidence whatsoever that Dave ever made disparaging remarks about Mr. Kunst design or construction work." (T. p. 519 ls. 15-23) It appears the full extent of Loree's truth defense trial prep was photocopying Judge Welmaker's default judgment order in the Gaby action, Judge Miller's overturned order in this case, and a subpoena to their only called witness, a representative from the SCDOR.

The Appeals Court ruling reversing Judge Miller's application of collateral estoppel () acknowledged that the Gaby action is a default judgment which by South Carolina law is not deemed to have been "actually litigated." The Appeals Court found that Kunst did not have a full and fair opportunity to defend the Gaby action on its merits ():

"Although Kunst participated in the damages hearing by cross-examining witnesses called by the Gabys, it appears he was not afforded the opportunity to testify or to call witnesses to testify on his behalf. Kunst was also not allowed to participate in any discovery on this matter. In addition, because Kunst was in default, the circuit court 'start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted.' Accordingly, we hold Kunst was not presented with a fair opportunity to 'actually litigate' the veracity of Loree's alleged statements to others." ()

Litigating the veracity of specific slanderous words requires all evidence be heard and contested at law. Litigating words that impute serious, indictable financial crimes to another man requires more than just submitting a judgment in a civil default case.

Furthermore, the Gabys are only *one* of five clients Loree specifically named and stated Kunst took money from. Only two of the seven slanderous statements that were litigated at trial (**Statements 1 and 6** below) related to the Gabys in any way. Only one statement (**Statement 6**) involved client Gaby exclusively.

At trial, a full and fair litigation occurred based on actual accounting records and other evidence that was objected to and procedurally barred from the Gaby default damages hearing. It did not take long for the jury to figure out why Loree desperately attempted to obtain issue preclusion from a civil default case in a state that does not grant such, and why Loree fought to avoid actually litigating his statements to others for nine years.

In response to Loree's argument that "a court of law has determined that Mr. Kunst took \$400,000 from the Gabys that should have been paid to subcontractors and suppliers," the jury saw the following evidence that was not part of the default damages hearing. Loree attempted to have the actual accounting records excluded again at trial by objecting to them claiming "its hearsay, not the best evidence" (T. p.323 ls 1-14), but was denied.

1. The jury saw actual Kunstwerke accounting records that accounted for all 908 Gaby contractor and supplier invoices and showed that Kunstwerke had incurred \$2,656,492 in contractor and supplier cost from these 908 invoices and that Gaby had

reimbursed only \$2,554,087 of it. ()

2. The jury heard testimony from Richard Gaby admitting that he had not paid all of his weekly reimbursement billings. (T. p. 489 ls. 7-8)

3. The jury saw the email exchanges between Gaby and Kunst in which Kunst reminds Gaby that he has a reimbursement contract and must reimburse \$90,000+ owed Kunstwerke. ()

4. The jury saw Richard Gaby's email in which he specifically instructs Kunst that the money he had already provided for cabinet deposits, etc. was enough of a "float" to cover Gaby's unreimbursed invoices until "we get our hands around where we are at." ()

5. The Jury heard a witness to a meeting between Kunst and Loree on February 16, 2006 stating that Loree knew about the unpaid weekly statements and said "I think I can get these paid." (They never were.) (T. p. 95 ls. 23-25)

6. The jury saw the final Gaby account billing of March 2006 that refunded such items as the Gaby deposits for windows and cabinets against the stack of invoices Gaby never reimbursed (the float) as per Mr. Gaby's instruction. ()

7. The jury saw how Loree submitted an intentionally deceptive damages computation at the default damages hearing on behalf of his boss Gaby that shockingly showed only one side of the ledger (Gaby's "float" conveniently disappeared). The content of those last three unreimbursed Kunstwerke weekly billings () was shockingly absent from Loree's default damages computation. The actual Kunstwerke accounting records would have easily shown the default damages hearing judge where every dime of

Gaby money went.

8. The jury saw Kunst's reconciliation of Loree's default damages computation to the actual accounting records in a document Kunst provided to those members of the public involved with the Gaby project who had heard Loree's slander. ()

9. The jury heard Loree state that he *still* doesn't know where his alleged missing Gaby money went and that he had washed his hands of it years ago (T. p. 269 ls. 5-20) and left it in the hands of people "much more intelligent" than he "going through accounts."

10. Kunst testified to the accounting system in place and how records were complete, objective, and existed from the moment a transaction occurred. (T. p. 319, ls. 6 - 23)

11. Kunst testified to the circumstances surrounding the Gaby default case and how his response was deemed late (T. p. 331, l. 8 – p. 333 l. 8).

13. The jury saw evidence that Kunst and Kunstwerke filed much more significant counterclaims against the Gabys and fought to have the default removed and have the case actually litigated on its merits. The jury saw how Kunst fought to actually litigate the Gaby case all the way to the State Supreme Court. It was the Gabys who opted not to contest their account fully and spent far more than their "damages computation" avoiding litigation.

14. The jury saw Kunst's draw schedule from his S Corp. Kunstwerke and how it was impossible to use client money for personal things ().

The jury saw Loree to be a maliciously motivated man who falsely imputed serious financial crimes to another man in order to obtain a quick result in 2006 that the truth

would not have otherwise afforded him. The jury also saw a motivated man who lied again in March 2007 (three months *after* being sued for defamation) when he submitted a fraudulent damages computation on his boss's behalf in a default damages hearing (). The jury saw a man whose motives and flippant demeanor toward his slander and the harm it caused had not changed at trial nine years later.

The full and fair actual litigation of the veracity of Loree's statements others

Three witnesses were chosen by Kunst because they represented a cross-section of those Loree spoke to and attempted to influence. These witnesses were specifically chosen from discovery because the statements were blanket statements of "fact" regarding Loree's alleged findings and were spoken after any supposed "investigation" by Loree had occurred. All of the statements imputed criminality and none of them were part of any privileged conversation or occasion. On page 6 of his brief, Loree alleges that the statements were changed pretrial from the original complaint. This is not true. These are simply the more concise statements from discovery.

Bronson Shepherd

The main witness, Bronson Shepherd, passed away in 2011 during the inexcusable delay Kunst endured bringing this case to trial. Bronson provided an affidavit in this case that was served on Loree's counsel and filed on February 3, 2009 (this can be confirmed by a Pickens County Court Record search). Unlike the other two witnesses below, Loree opted not to depose him. Loree objected to the admission of Bronson's affidavit into evidence and the court sustained (T. p. 55). For this reason, **Statement 8**: "Scott is going to jail" spoken by Loree to Bronson Shepherd is not argued below. Due to trial court

errors and the inexcusable delays by Loree, Kunst was placed in the difficult position of conducting a trial in which his main witness, the man whom Loree attempted to influence the most through his slander, was not available.

The jury did, however, hear the testimony of Tracey Hilton as she described who Bronson was and why they were not going to hear from him (T. pp. 101 – 102). Defendant's Exhibit 22, an ebook preview of *Cold and Greedy*, included a chapter on Bronson that Loree's own attorneys provided to the jury. The events described in this chapter placed the testimony of the other two witnesses in even better context for the jury.

Kevin Goad

Kevin Goad is a window supplier who provided an affidavit in this case. The affidavit was served on Loree's counsel and filed on August 27, 2008 (this can be confirmed by a Pickens County Court Record search). Loree's attorneys deposed Goad shortly thereafter.

At trial, Kunst provided Goad a copy of his affidavit in order to refresh his memory regarding what he said Loree specifically told him in the spring of 2006. Goad stated: "I remember some of the details of this. I would trust this paperwork more than my memory now." (T. p. 121, ls. 1-25) Goad read aloud the entirety of his affidavit to the jury (T. pp. 122 - 123).

Statement 1 to Goad. "He stated that Scott Kunst had taken \$400,000 from the Gaby project and had left his other clients in a similar situation." (T. p. 122)

Statement 2 to Goad. "Money was missing from many of Scott Kunst's clients. He

referenced to Parham, Covington, Coco, and Hickey specifically." (T. p. 122)

Statement 3 to Goad. "Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (T. p. 122)

Statement 4 to Goad. " ...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (T. p. 122)

Glenn Alfonso

Glenn Alfonso is a copper trim contractor who provided an affidavit in this case. The affidavit was served on Loree's counsel and filed on July 24, 2008 (this can be confirmed by a Pickens County Court Record search). Loree's attorneys deposed Alfonso shortly thereafter.

At trial, Kunst provided Alfonso a copy of his affidavit in order to refresh his memory regarding what he said Loree told him in the spring of 2006. Alfonso testified as to how the affidavit came about and he read it aloud to the jury (T. pp. 144 - 145, l. 19). In recross at trial, Loree's attorney attempted to discredit Alfonso's affidavit by alleging that Kunst "wrote it." Alfonso gave his oath upon signing the affidavit and gave his oath at his deposition. Kunst is *pro se*, and must type witness statements on affidavits with a case heading in the proper format for signature.

Statement 5 to Alfonso. "I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (T. p. 145)

Statement 6 to Alfonso. "In one particular instance I recall him stating to me that 'I'm not supposed to be telling you this, but to give you an idea of some of the criminal things Scott has been doing...! David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys, and intentionally cancelled the policy the next day so that he could keep the money.'" (T. p. 145)

Statement 7 to Alfonso. "During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was "missing" from these other projects." (T. p. 145)

All 7 statements were litigated and proven a lie as follows

Statement 1

"He stated that Scott Kunst had taken \$400,000 from the Gaby project and had left his other clients in a similar situation." (T. p. 122)

Q. Kunst: "Did you state to Kevin Goad that Scott Kunst had taken \$400,000 from the Gaby project and left his other clients in a similar situation."

A. Loree: "Unknown, sir, nine years ago." (T. p. 204, ls. 2-5)

Because Loree did not deny stating it and because he was permitted to plead a truth defense immediately prior to trial, Kunst asked him what evidence he had:

Q. Kunst: "Did you ever ask to have the Kunstwerke books audited?"

A. Loree: "No, sir."

- Q. Kunst: "Are you in possession of any kind of audit of Kunstwerke records?"
- A. Loree: "No, sir."
- Q. Kunst: "Do you have any evidence that I embezzled money from any other client other than the Gabys?"
- A. Loree: "No, sir."
- Q. Kunst: "Do you have any evidence that I embezzled money from the Gabys?"
- A. Loree: "We have a judgment against you of funds that were unpaid by you to vendors relative to their project" (T. p. 182, ls. 11-23).
- Q. Kunst: "Is it a default judgment?"
- A. Loree: "Unknown sir."
- Q. Kunst: "Do you know what a default judgment is?"
- A. Loree: "No, sir." (T. p. 183, ls. 2-5).
- Q. Kunst: "I understand. Did you take the Gaby family's judgment to a prosecutor?"
- A. Loree: "No, sir."
- Q. Kunst: "Has there been any kind of criminal finding?"
- A. Loree: "Not to my knowledge, sir" (T. p. 183, ls. 16-20).
- Q. Kunst: "Mr. Loree, did I take money from the Gabys and spend it on personal things?"

A. Loree: "Unknown, sir."

Q. Kunst: "Have you ever stated to anyone that?"

A. Loree: "No, sir (T. p. 179, ls. 19-25)."

Q. Kunst: "As you sit here now, do you have any evidence that \$400,000 was taken from the Gabys by me?"

A. Loree: "We actually -- I think the Gaby family has a judgment in the courts here in South Carolina in favor of the Gabys awarding them over \$400,000, so I'd say yes, we have plenty of that, sir."

Q. Kunst: "Do you have evidence of actual theft?"

A. Loree: "It's a civil trial, not a criminal trial. No, Sir (T. p. 197, ls. 19-25)".

The accounting records that Kunst submitted into evidence clearly showed where every dime of Gaby money went (). Loree repeatedly referenced Mr. Larkin, the forensic accountant that supposedly looked at everything (T. p. 191, ls. 1-24) (T. p. 266, ls. 15-25) (T. p. 274, ls. 10 - 15).

A Loree: "That was well beyond -- I washed my hands of that portion of it. There were people much more intelligent than I going through accounts...(T. p. 269, ls. 16 -18)"

Q. Kunst: "Will you have anyone here in the next few days more intelligent than you that can speak to that?"

A. Loree: "If you turn and ask my attorneys, I don't know that (T. p. 269, ls. 21-24)."

In a shocking admission, Loree testified that he *still* has never reviewed or looked at the actual Kunstwerke accounting records (T. p. 267, ls. 2-8).

In a pattern typical of defamers, Loree repeatedly attempted to add credibility to his slander by adding that it wasn't just the Gabys who were victims of a crime. **Statement 1** ends: "and left his other clients in a similar situation." The record shows that Kunst had five other clients at the time, therefore, one may reasonably infer that Loree's \$400,000 slander could exponentially be \$2,400,000. Loree provided no evidence whatsoever that these other clients were in a "similar situation." Put simply, Loree attempted a substantive truth defense for only 1/6th of the impact of **Statement 1** by submitting a copy of a default judgment order in a civil case. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 2

"Money was missing from many of Scott Kunst's clients. He referenced to Parham, Covington, Coco, and Hickey specifically." (T. p. 122)

Loree's attorney asked Goad on Cross-examination:

Q. Wright: "Do you recall Mr. Loree specifically stating to you that Mr. Kunst had taken money from Parham, Covington, Coco, and Hickey?"

A. Goad: "I do."

Q. Wright: "do you recall when that was?"

A. Goad: "When he told me that?"

Q. Wright: "Yes."

A. Goad: "I don't specifically. It was one of the initial meetings where he was introducing himself telling me he was, I guess, taking over the project in Scott's absence (T. p.135, ls. 12-22)."

Loree admitted in direct examination to speaking to each and every one of the clients named above (T. p. 183, l. 21 – p. 184, l. 6). Loree was asked name by name if any of them stated there was a financial problem with their project. Loree responded "Unknown, sir" all four times (T. P184, l. 25 – p. 185, l. 11). On page 8 of his brief, Loree references Covington's testimony. Covington was subpoenaed by Kunst as a hostile witness for two reasons: 1. To testify as to the resolution of the Kunstwerke contract case against him, and 2. To admit that his own firm represented Loree for nine years up until a few weeks before trial. In page 8 of his brief, Loree references "Covington money" that was supposedly used by Kunst to make a personal purchase. The actual accounting records show that on the date that Kunst withdrew his own capital to make this purchase, Covington owed Kunstwerke \$110,080 net cash (Bates Kunst 000288) that Kunstwerke had paid out over what Covington had reimbursed to date. It was definitely not "Covington money." This was desperate, lazy rhetoric by a belligerent attorney who finally admitted that he (Covington) wrote a settlement check mid-trial. That is what the jury was waiting to hear. Kunst did not "disappear" from the Covington project. Covington took advantage of the Loree situation and defaulted on his debt on February 15, 2006 () and threatened legal action if Kunst or anyone filed a lien.

Kunst testified that defendant Coco also settled his contract case mid-trial with a

check and that attorney Parham also settled his contract case with a check (T. p. 347-349).

Loree's own expert witness Larkin was also used by attorney Stern in these contract cases. There were years of actual litigation and discovery of the Kunstwerke records and accounts available to Loree to present to the jury to prove the truth of his statements, if they *were* true.

In his opening statement, Kunst told the jury that this had been a long and difficult event and that there were twenty related cases filed in order to provide them the evidence they needed in this case (T. p. 84, ls. 6-8). It is of significant importance to this appeal to consider that **Statement 2** had absolutely nothing to do with the Gabys or Judge Welmaker's default judgment order, the whole of Loree's apparent substantive truth defense. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 3

"Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (T. p. 122)

This statement was made as a blanket statement claiming Kunst had personally fabricated multiple false companies (plural) and intentionally caused his clients (plural) to pay fraudulent invoices from these companies. This act, if true, would result in multiple criminal charges.

Loree argues in his brief that every statement is substantially true, but when asked about this statement, Loree did not provide any examples of dummy companies or dummy

invoices issued to any of Kunst's clients. Instead, Loree testified that dummy "was certainly not a term I would use (T. p.194, l. 16)." "That is not a statement that I made (T. p. 204, ls. 6-12)."

Q. Kunst: "Is it your testimony that Kevin Goad was not being truthful?"

A. Loree: "No Sir (T. p. 204, L 22-24)."

No one more intelligent or better prepared than Loree appeared on his behalf at trial and provided the jury with a single dummy invoice from a dummy company issued to any client. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 4

"...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (T. p. 122)

This is another bombshell blanket statement that imputed serious financial crimes. Goad did not even provide windows or doors for the Hickey project (see privilege argument, page 31 below).

Q. Kunst: "Did you state to Kevin Goad to contact -- that you had made contact with Hickey and that a lot of money had been taken from Hickey as well?"

A. Loree: "I don't recall that, sir. I talked to multiple clients of yours, yes, but I don't recall that from nine years ago. Is that in deposition testimony somewhere, perhaps (T. p. 205, ls. 5-11)?" Loree does not deny making the statement. Kunst asked Loree if Hickey

told him there was a financial problem with his project. Loree answered: "Unknown, sir (T. p. 185, ls. 9-11)."

One can reasonably infer why Loree would not even attempt to defend the truth of this statement. The reasonable inferences to be drawn from these words spoken to Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 5

"I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (T. p. 145)

Stating that a man is "criminal" to that man's business associates is actionable on its face, especially if that man has never had more than a speeding ticket. The mere usage of the word "Con" has been deemed actionable *per se* and is a matter for the jury. (*Parrish v. Allison*, 656 S.E.2d 382 (S.C. Ct. App. 2007))

Glenn Alfonso stated that the only mistake in his affidavit was that he didn't remember the word "a" being in front of "criminal." He was then asked to read the affidavit again to the jury the way *he* wanted them to hear it, and this became **statement 5** as worded above. (T. P 155, l. 24 – p. 156, l. 7) Alfonso had first noticed his "a" mistake during his deposition in 2008 but also confirmed the corrected statement then.

The reasonable inferences to be drawn from these words spoken to Glen Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 6

"In one particular instance I recall him stating to me that 'I'm not supposed

to be telling you this, but to give you an idea of some of the criminal things Scott has been doing...' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys, and intentionally cancelled the policy the next day so that he could keep the money.." (T. p. 145)

This statement is similar to the "dummy invoice" statement and is a blanket statement claiming criminal intent and theft, that if true, would result in multiple criminal charges. Indeed, Loree was "not supposed to be telling" an absolute lie. He took a simple insurance agency error and imputed criminality and intent to Kunst personally. The jury saw a man motivated to impute any kind of criminality he could fabricate. When asked about it on direct examination, Loree had no evidence whatsoever and stumbled about asking Kunst *again* for a copy of his (Loree's) testimony from the default damages hearing (T. p. 135, l. 13 – p. 197, l. 2). This specific statement and affidavit had been on file in this case for seven years.

Nothing in Judge Welmaker's order specifically addresses the veracity of this statement to Alfonso which has never before been litigated in a contested environment. Witness Tracey Hilton testified as to the underwriting situation involving the policy (T. p. 105, ls. 3-23) and submitted an exhibit proving that Mr. Gaby was fully aware what was going on long before Loree's "investigation" (). Kunst also addressed this item specifically in his letter to those involved in the Gaby project on April 7, 2007 ().

This was the only statement at trial other than **Statement 1** that had anything to do with the Gabys. Alfonso testified that he was not alone when Loree made this statement (T. p.148, ls. 3-9) and recalled from his deposition testimony that other construction

workers were standing around (T. p. 151, ls. 9-19). The reasonable inferences to be drawn from these words spoken to Glenn Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 7

"During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was "missing" from these other projects." (T. p. 145)

When asked at trial if he made this statement to Alfonso, Loree answers: "I don't recall making that statement (T. p. 207, ls. 19-22)."

This is another statement through which Loree attempted to add credibility to his slander by stating the Gabys were not the only victims of the crimes he was alleging. Loree had no proof at the time he said it and offered no proof at trial. This statement is similar to **Statement 2** to Goad above. The reasonable inferences to be drawn from these words spoken to Glenn Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Substantive truth must be proven as to each individual statement made. (Castine v. Castine, Op. No. 5120 (S.C. Ct. App. filed May 1, 2013). Loree's argument that "Judge Welmaker's order in the Gaby action and the evidence on the record supports the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law" is wholly without merit. The trial judge did not err by not concluding that there were no competing inferences for each of the above statements.

Loree did not prove at trial nor in his JNOV motion that only one possible inference could be drawn from the evidence regarding each of the seven *specific* statements referenced above. The finders of fact properly concluded that each statement as made would have a different effect on the mind of a reasonable hearer than whatever evidence Loree submitted to them.

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict (*Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)). When considering JNOV motions, the trial court has no authority to decide credibility issues or to resolve conflicts in the testimony or evidence (*Reiland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)). In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996). When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 320, 585 S.E.2d at 274; *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct.App.1998). The factual findings of the jury must not be disturbed.

B. Loree proved the alleged slanderous statements were protected by qualified privilege.

Loree did not prove that there were no facts in controversy as to the application and abuse of privilege. Conditional privilege usually starts from the premise that there has

been some good faith pursuit of the truth and some acknowledgement as to what the specific falsehood was. From the moment Loree made his first slanderous statement in 2006, and throughout nine exhausting years of civil procedure, Loree has actively avoided the knowable facts and auditable accounting records necessary to prove the veracity of his statements to others. Privilege was plead by Loree for the first time the morning of trial in a pre-trial motion () and was never part of the discovery process that had ended *eight years* earlier. Kunst objected to Loree's pretrial motion citing *Crowley v. Spivey* wherein a moving party's delay of just 16 months before amending an answer was deemed by this Court to be an inexcusable delay (). A nine year delay is an outrage and it was a manifest injustice to Kunst. Loree may set a new extreme judicial benchmark for an inexcusably long delay in amending an answer to plead privilege in a defamation case. The trial court should not have allowed the defense of privilege in the first place. The Appeals Court should dispose of Loree's argument "B" for that reason alone. If *Crowley* is not dispositive of Loree's argument "B," the following is.

On page 13 of his brief, Loree argues: "the jury had absolutely no evidence to determine that Loree was not protected by qualified privilege." Loree asserts that there were no disputed facts as to whether privilege should apply to each and every occasion and statement and the trial court erred as a matter of law by not doing so. The trial record does not support Loree's argument. Not only were facts disputed and in conflict as to whether each occasion gave rise to an application of privilege, Kunst proved at trial that the specific occasions of Loree's slander as evidenced were not privileged occasions.

Conditional privileges arise from the particular occasion during which the statement is made. Loree is not granted blanket immunity by virtue of his relationship with the Gabys alone. The law looks at the particular occasion during which the statement

was made. In this case, the two occasions litigated at trial had little to do with the Gabys and Loree was not “investigating anything on the Gaby's behalf” at the time.

Kunst submitted Anderson's “Additional charge where evidence regarding question of privilege is conflicting” as his preferred charge to the jury. The trial judge opted to use another, similar charge (T. p. 544, l. 16 – p. 545, l. 12). Anderson notes: “*The determination of whether a publication is privileged is a question of law to be decided by the court, at least where the facts are undisputed. However, the question of privilege becomes a mixed question of law and fact, to be determined by the jury, under the court's instructions, where the evidence is conflicting, or where for any other reason different conclusions might reasonably be drawn therefrom. See Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. app. 2001); 50 Am. Jur. 2D Libel and Slander 271 (1995).*” The trial judge in this present case properly instructed the jury to consider the conflicting evidence regarding privilege (T. p. 544, l. 23 – p. 545, l.1).

In *Bell v. Bank of Abbeville*, the South Carolina Supreme Court held: “In general, the question whether an occasion gives rise to qualified or conditional privilege is one of law for the court.” (50 Am.Jur.2d Libel and Slander §276 (1995) (*Bell v. Bank of Abbeville* 208 S.C 490, 38 S.E. 2D 641 (1946)). The trial judge may as a matter of law apply qualified privilege when there are no controversial facts in dispute as to whether it should be applied. This was not the case for either occasion of Loree's slander and the trial court properly denied Loree's motion to have the trial court summarily determine application to each and every statement (T. p. 507, l. 20 – p. 509, l. 3).

Occasion 1, Kevin Goad

Upon the occasion of first meeting Mr. Goad (the occasion of **statements 1-4** above), Loree lied about who he was and why he was there. Goad testified: “David Loree

presented to me that he was a former detective and was in the process of investigating Scott Kunst's financial dealings with his clients (T. p. 122, ls. 9-12). The jury quickly learned that Loree was not employed by the Gabys to be a former detective investigating Kunst's financial dealings with his clients (T. p. 204, ls. 16-21), and was not intelligent enough to investigate anything financial in the first place. In fact, Loree is not employed by the Gabys at all, Loree is a bodyguard (*Executive Protection Administrator*) employed by *JVA Enterprises* (T. p. 159, ls. 1-25).

Loree was a stranger to Goad. Every statement Loree made invoked all of Kunst's clients in order to give his slander greater credibility. All four statements are blanket statements of "factual findings" Loree had already made from this supposed investigation. Investigating Kunst's financial dealings with his clients (which Loree never actually did) and lying to Goad about his supposed criminal findings was wholly outside his employment as *Executive Protection Administrator* for a VanAndel sibling holding company. Goad testified that Loree implied he was in contact with all of Kunst's clients (T. p. 122, ls. 12-14). Mr Gaby testified that he did not instruct Loree to contact Kunst's clients (T. p. 489, ls. 17-19).

Loree was not there to exchange information on behalf of the Gabys, nor was it a fact finding mission of any kind. The Gabys are referenced only once as one of many clients in **statement 1**. Goad testified that Loree provided no document or proof of his statements (T. p. 124, l. 8 – p. 125, l. 4).

Statement 4 (page above) involves a speculative project owned by Kunst and an investor named Hickey. Neither Goad nor his company was involved in the Hickey project in any way. On its face, this outrageous slander imputed the most criminality of the four statements to Goad. Goad testified how Loree spoke at length about what he

supposedly found. Goad testified: "David Loree stated to me that the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's speculative project with an investor named Hickey. He stated that progress on the speculative project with Hickey had stopped because Scott's clients had stopped paying Scott's company altogether and as a result, there was no money to be illegally transferred from his clients to the spec project. He stated that he was in contact with Hickey and that a lot of money had been taken from Hickey as well. David Loree appeared to know a great deal about Hickey and the speculative project (T. p. 122, l. 21 - p. 123, l. 6)." The jury discovered that Loree, who "appeared to know a great deal about Hickey," did not even attempt to defend or prove the truth of **statement 4** at trial. The Jury heard testimony from Goad that he had no involvement or interest in the Hickey project.

Q. Kunst: "Did you provide windows and doors for this Hickey speculative project you reference in your affidavit?"

A. Goad: "We did not."

Q. Kunst: "Was Loree trying to get -- David Loree trying to get information from you about the Hickey project?"

A. Goad: "I don't believe so. I had no interest in that project in any way. We weren't working on it in any way."

Q. Kunst: "Would there be any reason for David Loree to say anything to you regarding the Hickey project?"

A. Goad: "I don't know (T. p. 128, l. 18 - p. 129, l. 2)."

Goad testified that Loree provided no document or proof of his statements (T. p. 124, l. 8 – p. 125, l. 4). There were no actual dummy invoices provided to Goad or any other specifics regarding theft from clients, it was all just thrown out there to damage Kunst's reputation as Loree intended. Loree never contacted Mr. Goad again to correct or modify any statement (T. p. 129, ls. 14-17). All seven statements have been hanging out there for a decade during inexcusable delays and trial court errors which inexplicably allowed them to be argued as “true” without the evidence that such allegations would require. Kunst reminded the jury that Loree had never really stopped defaming him for that reason.

The full objective truth of these statements is readily knowable and Loree never made any good faith effort to properly investigate the truth (T. p. 269 ls. 5-20). Loree has defiantly asserted for a decade that these statements which impute serious financial crimes are so indisputably true that it would be an error of law for a judge or jury to find otherwise. That is absurd. The same standard for application of privilege extends to the question of abuse of privilege: “While abuse of privilege is ordinarily an issue for the jury, in absence of any controversy to the facts, it is for the court to say in a given instance whether or not privilege has been abused or exceeded.: (Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981))

As to the question of abuse, the differentiation of fact versus law lies in the question of malice. Reckless acts include the failure to properly investigate the truth in the matter, to limit the scope of the material, or to publish the materials only to proper parties. No matter how Loree wishes to define the occasion of his conversation with Goad in this appeal, it was not the proper occasion to say **statements 1-4**. For example,

there was no interest or duty to uphold in the statement about Hickey or the other named clients. Loree made no effort to limit his scope. Put simply, Loree spread malicious falsehoods in an attempt to get a result that the truth would not have afforded him.

Occasion 2, Glenn Alfonso

When a slanderer prefaces his tale with: "I am not supposed to be telling you this, but..." it is not a privileged occasion from the start. Alfonso testified: "In one particular instance, I recall him stating to me: 'I'm not supposed to be telling you this, but to give an idea of some of the criminal things Scott has been doing.' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys and intentionally cancelled the policy the next day so that he could keep the money (T. p. 145, ls. 8-15)." Loree acknowledged malice with his first words.

Alfonso was asked to confirm his deposition testimony regarding whether he and Loree were alone on this occasion. "It wasn't just between me and him, there were several others standing around. I can't remember who was standing around, but there were several other workers that were on the job site (T. p. 151, ls. 8-19)." It was random and reckless and Loree reasonably should have known that it would be repeated by those who heard it. As with all seven statements, Loree did not confront Kunst first (T. p. 83, ls. 7-10). Defamers never do.

"During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was 'missing' from these other projects (Statement 7) (T. p. 145, ls. 16-19)." The fake former detective "in the process of investigating Scott Kunst's financial dealings with his clients" spoke freely to random men standing around a construction site similar words he spoke at Kevin Goad's business.

"I recall David Loree referring to Scott Kunst as 'criminal' on more than one

occasion (Statement 5) (T. p. 145, ls. 6-8).” Were *those* occasions privileged as well? Was the trial court required to summarily apply blanket privilege to all occasions when the facts were in dispute? Was the fact the judge denied Loree's request to do so a clear, unrefutable error of law? Of course not. Privilege is applied to the specific facts of each occasion a statement is made. Just as Loree did not argue the affirmative truth of *each* of the seven specific statement quotes at trial, he did not argue privilege for the occasion of each conversation and the specific words said upon each occasion. Loree did not argue what his specific duty was or what obligation he had for all seven statements. Instead, Loree asserts a vague blanket of protection over *any* lie he told while in South Carolina employed as an Executive Protection Administrator by an Amway holding company owned by Barbara VanAndel-Gaby and her siblings.

The jury determined, under the court's instruction, the reasonable inferences to be drawn from the conflicting evidence as to the question of privilege and its abuse. The jury's findings must not be disturbed.

II. The trial court erred in failing to overturn the verdict when there was insufficient evidence to support the jury's findings.

A. Kunst did not prove the elements of slander *per se*.

Loree wrongly asserts that two elements, *unfitness in one's business or profession* and *commission of a crime of moral turpitude*, do not apply in this case.

“Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients (Statement 2) (T. p. 122, ls. 9-20).” is obviously defamatory on its face because it imputes criminality and deems Kunst unfit in his business or profession. All seven statements litigated at trial are defamatory on their

face, impute criminality within the conduct of Kunst's business, and are actionable *per se*. Defamation *per se* was properly plead and charged in this case.

Unfitness in one's business or profession

All of Loree's statements slandered Kunst's conduct while acting solely within his business or profession and were specifically injurious to his ability to conduct that business or profession. This is textbook defamation *per se* in any state that recognizes defamation *per se*, as well as in US Federal Court, or in any other common law tradition.

Loree makes an absurd argument that all inferences of being "unfit in one's business or profession" must be strictly limited to a specific professional skill or product. Loree's logic would conclude that a dentist who is slandered as a molester of all his female clients while they are under anesthesia having dental work done is not slandered as "unfit in one's business" because it was not alleged that there was anything wrong with his work on the female patients' teeth. This would be laughable and absurd. The American Dental Association would agree.

Would the South Carolina LLR allow a builder's license to remain in effect for a builder who has embezzled money from all of his clients and prepared fraudulent billings? Of course not. The statements charged Kunst with unfitness in his particular and unique business and in the specific way he conducted that business: reimbursement contracts. Imputations of conduct incompatible with one's trade is actionable without the pleading of special damages (*Nash v. Sharper*, 22- S.C. 451, 93 S.E. (2d) 457 (1956).

Witness Kevin Goad testified that Loree stated the embezzled amount from client Gaby was \$400,000 and that four other specifically named clients of Kunst were in a "similar situation (T. p. 122, ls. 16-18)." He confirmed the other four named clients again

under redirect by Loree's attorney (T. p. 135, ls. 12-22).

Based on Loree's words, one reasonable inference could be the embezzlement total was \$2,000,000. An allegation of \$400,000 or \$2,000,000 of embezzlement from all of one's clients would not only on its face deem someone unfit in his business, but would also immediately destroy his business. This is the type of financial crime that leads nightly news broadcasts and headlines newspapers. Every client abruptly stopped paying their weekly contractual reimbursement amounts within days of Loree's statements to Goad and others ().

Kunstwerke's accounting ledgers, client account records, original receipts, and invoices were professionally maintained and specifically designed to be readily audited. Kunst testified that he began his career as a CPA for Deloitte and Touche in New York City (T. p. 294, ls. 6-17). For obvious reasons, Loree did not introduce an expert witness, accountant, or auditor to challenge a single Kunstwerke accounting record.

The serious criminal nature of Loree's specific allegations was no secret at trial. Kevin Goad testified that he heard Loree's attorney state that Kunst was going to jail (T. p. 137, ls. 5-11). Goad also testified that he understood the seriousness of the allegation (T. p. 129, ls. 3-13).

It is reasonable that, under the circumstances in which Loree made the statements, the jury could find that the defamatory statements charged Kunst with unfitness in his business. (see *Goodwin v. Kennedy*, 347 S.C 30, 36, 552 S.E.2nd 319, 322-23 (Ct. App. 2001)). It cannot be said that when viewing the evidence the jury could not have inferred that the statements attacked Kunst's fitness to conduct his business. "*How the words were to be understood in the circumstances in which they were uttered was a question for the jury, not the court, to decide.*" (*Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App.

1984))

Loree's strictly limited definition of "unfit in one's business or profession" is found nowhere in the law. The finders of fact properly inferred what it means to be "unfit." Their findings must not be disturbed.

Crimes of Moral Turpitude

Loree's argument regarding crimes of moral turpitude is equally absurd. Loree asserts that none of his statements describe acts that rise to the level of baseness, vileness, or depravity. Loree also argues that these crimes only affected five private clients and not society as a whole, and thus makes Loree's slander not actionable per se.

A crime of moral turpitude is defined by the Supreme Court of South Carolina as: *"...an act of baseness, vileness, or depravity in the private and social duties that a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man"* (State v. Ball, (292 S.C. 71, 73, 354 S.E. 2D 908 (1987)). Perhaps it is no surprise that an Executive Protection Administrator (bodyguard) who is employed by a holding company of a pyramid scheme that was exposed on Dateline NBC as a scam that preys on good people and destroys them would opine that embezzling hundreds of thousands of dollars from all of one's clients and forging "dummy invoices from dummy companies" to steal is not a base, vile, or depraved act. Thankfully, twelve citizens from Pickens County, South Carolina unanimously disagreed and inferred otherwise.

Loree cites *McBride v. School District of Greenville County* as the controlling authority establishing that only embezzlement of public money affecting "society as a whole" can be deemed a crime of moral turpitude. This case established no hard line separating private matters versus society as a whole as a threshold to overcome in order to

reach the level of crimes of moral turpitude. Such a threshold is found nowhere in the law and is not a restriction placed on finders of fact.

Loree confuses public affect with public sentiment in order to create his false threshold. In *State v. Bailey*, 275 S.C. 444, 272 S.E.2d 439 (1980), the South Carolina Supreme Court addressed the general law regarding crimes of moral turpitude: *"...the question of moral turpitude depends not only on the nature of the offense, but also on the attendant circumstances. The standard is public sentiment, and this may change as the moral views and opinions of the public change."*

There is no priority given to harm to "society as a whole" over harm to a single man. A man's personal duty to his fellow man is equally important. If there is any threshold to be found in the law, it pertains to crimes that involve self-destructive behavior versus those that harm others (five clients). In *State v. Ball*, (292 S.C. 71, 73, 354 S.E. 2D 908 (1987)) the Court ruled that *"In determining whether a crime involves moral turpitude, one looks not to instances involving self-destructive behavior but, rather, instances where the duty to society and fellow man ... is breached by the commission of the crime ..."* Society and fellow man is intended to represent all others, other than oneself. A crime of moral turpitude was specifically defined in *State v. Ball* as acts of baseness, vileness, or depravity **in private** and social duties which man owes **to his fellow man** or to society in general.

In South Carolina, larceny of private funds is deemed a crime of moral turpitude. In *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946), the Supreme Court of South Carolina held that an allegation charging larceny or breach of trust, both

specifically identified by the Court as crimes involving moral turpitude, was actionable *per se* and did not require special damages: “*Any oral statement which falsely or maliciously charges another with the commission of a crime is actionable per se if proof of the commission of the act of which the party is accused would subject him to an indictment for a crime of moral turpitude. The alleged slanderous communications set forth in the complaint clearly charged the plaintiff with larceny or breach of trust, and it was not necessary to allege special damages.*” “*The words spoken are actionable if they convey to the minds of the listeners, and would naturally be understood to mean, the plaintiff has committed a crime.*” *Id.* at 377, 6 S.E.2d at 752. Any words actually or impliedly stating the plaintiff’s guilt, or raising a strong suspicion of it in the minds of the hearers, are sufficient. *Porter v. News & Courier Co.*, 237 S.C. 102, 108, 115 S.E.2d 656, 658 (1960). *See Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 235, 72 S.E.2d 453, 455 (1952)

The commission of a crime of moral turpitude such as obtaining property by false pretenses. See S.C. Code Ann. § 16-13-240 (2003) (“A person who by false pretense or representation . . . obtains from another person any . . . money . . . or other property . . . is guilty of a: (1) felony . . . if the value of the property is five thousand dollars or more . . .”). “*Obtaining property under false pretenses is a crime of moral turpitude.*” (*State v. Moore*, 128 S.C. 192, 199, 122 S.E. 672, 674 (1924); *Carruth v. Brown*, 415 S.E.2d 470, 471 (Ga. Ct. App. 1992))

Moreover, South Carolina law allows contemplation of the context and circumstances under which words are spoken when determining if the words have a defamatory meaning or are actionable *per se*. The resolution of conflicting meanings is

reserved for the jury. In *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584, 589 (1940), South Carolina supreme court instructed:

"If words are susceptible of two meanings, one imputing a crime, and the other innocence, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words."

Loree has failed to establish under any law or authority that there was insufficient evidence to support the jury's findings. The jury's findings must not be disturbed.

III. The trial court erred in not overturning the verdict when the verdict was excessive

Loree's argument that the trial judge abused his discretion by not overturning this verdict is unfounded. Loree's argument appears to be conditioned on a false premise that Loree's statements were not actionable *per se*. Loree argues that Kunst was only entitled to special damages and failed to prove any proximate monetary damage. Even though the record does show that Kunst did in fact prove specific, tangible economic or material losses, this was not necessary.

The very essence of an action for defamation is that the plaintiff has suffered damage as a result of the injurious effect of the defamation upon his reputation (*See, Prosser, supra*, p. 737, fn. 5; and 50 Am. Jur. (2d), Libel and Slander, 1 (1970)). Actual proof of damages is not required if the defamation is actionable *per se*. (*See, Swinton*

Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 484, 514 S.E.2d, 133 (1999)

Money damages rewarded for defamation are those that necessarily result from publication of a defamatory statement. General damages are those which arise by interference of law and need not be proved. (*Holtzscheiter, 338 S.C. 308 (Ct. App. 2007)*) (see *Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319*). They include injury to reputation, mental suffering, hurt feelings, and other similar types of injuries which are incapable of definite money valuation. If a defamation is actionable *per se*, then the law presumes the defendant acted with common law actual malice and that the plaintiff suffered general damages. Words actionable *per se* carry with them the presumption that actual damage to reputation and character directly and proximately resulted therefrom, and it is not necessary to allege or prove any actual or special damages.

South Carolina allows the context of the words themselves and the circumstances under which words are spoken to be considered in determining whether there is a defamatory meaning and whether it is actionable *per se* (*Herring v. Lawrence Warehouse Co., 222 S.C. 226, 235, 72 S.E.2d 453-455 (1952)*). In *Herring*, the Court found that the mere statement that an employee was "short" (funds) was clearly defamatory and actionable *per se* because it alleged the commission of a crime, namely theft.

The trial judge properly instructed the jury that damages are presumed under slander *per se* (T. p. 543).

Kunst suggested over \$2,000,000 as guidance to the jury for actual damages and made no recommendation for a punitive amount. Kunst testified about the destruction of his business and livelihood in order to give the jury guidance as to what the presumed damages could be in order to place him in the same position he was before Loree's slander.

Kunst provided examples of his reputation and standing in the community prior to Loree's slander. Kunst described the special trust he had with his clients (T. p. 316, ls. 23-25) (T. p. 317, ls. 1-9). Kunst submitted evidence of magazines he was featured in (T. p. 296, ls. 7-20) (T. p. 299, ls. 1-12). Kunst described his reputation in The Reserve at Lake Keowee (T. pp. 303 – 304). Kunst described how much of his business was dependent on a trusting handshake (T. p. 305, ls. 8-19).

The jury was provided a schedule showing what Kunst's annual income was from his company prior to the week that Loree came to town (). Kunst also submitted into evidence a summary of how much debt every client owed the week that Loree came to town (). Kunst explained how he personally guaranteed much of the \$500,000 listed there (T. p. 339, ls. 6-12) (T. p. 358, ls. 4-8). The jury also heard testimony that Kunst had endured the cost of nine years of litigation and incurred additional legal costs (and yes, pro se litigants have legal costs) from Loree's inexcusable delays and his failed attempt to keep this case from a jury. The jury also heard testimony that damages accrue and should be greater the longer a case is kept from a jury because Loree was free to continue to defame Kunst during litigation (p. 357, ls. 17-22).

The jury found that Loree's slander was actionable *per se* and awarded damages accordingly. A one million dollar verdict for a defamation *per se* case in which the defamer was found to have wrongly imputed financial crimes that immediately destroyed a business and livelihood once spoken is not at all excessive.

Loree's argument is filled with lazy rhetoric such as “The evidence did show that suppliers were unpaid due to Kunst's poor accounting, and not anything Loree allegedly said.” The only reason any contractor or supplier was unpaid on any project in February

2006 was because Kunstwerke was left holding the bag for \$539,027 in contractor and supplier invoices that it had not been reimbursed for. No client was going to pay Kunstwerke another dime, regardless how much was owed, when rumors of embezzlement and arrest became rampant.

Did Loree's alleged "poor accounting" suddenly start in February 2006? There was nothing different about Kunstwerke's accounting or financial health in February 2006 than any other February during the past ten years. The jury saw evidence that Kunstwerke was better capitalized in January 2006 than ever before (T. p. 308, ls. 4-11). The science of accounting is about objectively accounting for things as they occur. Accounts must be complete, finite, balanced, and reported. The jury was given ample evidence at trial of the great detail in which Kunstwerke records were kept and reported (). Kunst had processed \$20,000,000 worth of transactions for sixteen multi-million dollar projects for a decade without issue. Loree provided no evidence of this "poor accounting" and admitted his own lack of intelligence in the matter (T. p. 269, ls. 5-20).

Loree wanted the jury to believe that it was just a coincidence that every client abruptly stopped reimbursing Kunstwerke for monies they already owed during the weeks that his embezzlement slander spread from contractors to clients. Loree ignores the fact that five contract cases were *actually litigated* and resolved in Kunst's favor that proved why contractors and suppliers were unpaid.

The jury heard a detailed explanation as to why there were tax liens (T. p. 350, l. 4 – p. 353, l. 22) (T. p. 356, ls. 19-22). There were no tax liens in 2003 as alleged by Loree nor at anytime prior to Loree's slander. Kunst explained to the jury the amended returns he filed in 2011 and the loss carryback from the destruction of Kunstwerke in 2006 he was

later denied for 2003, and the reporting change that created this lien. A representative from the SCDR was the only witness Loree called at trial. There was no tax evasion (T. p. 478, ls. 15-17).

The jury heard Kunst testify that he refused to declare bankruptcy because he has given his word to the unpaid contractors and vendors who remain unpaid to this day (T. p. 471, ls. 16-20). Loree's attorney argued at trial that Kunst should have filed bankruptcy to mitigate his damages.

Loree wrongly states on page 20 of his brief that the jury exceeded its authority. This is not so. It is a reasonable question for a jury not familiar with the law to ask if they have the ability to direct where general damages go if their award is an attempt to make Kunst whole again. Their note said nothing about Kunst's creditors as Loree alleges. The trial judge instructed the jury that they could not direct funds and that was the end of it. The jury did not exceed its authority nor was the jury's verdict "based on passion, caprice, and prejudice, rather than on the evidence presented at trial." Kunst presented ample evidence of his damages (as described in page 42 of this brief) even though by law, general damages are assumed and need not be proven. (see *Goodwin v. Kennedy*, 347 S.C 30, 36, 552 S.E.2nd 319, 322-23 (Ct. App. 2001)). There was no paucity of evidence. The harm to Kunst was immediate and consuming as would reasonably be expected from this type of slander.

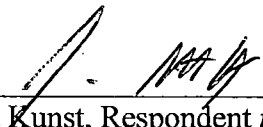
The jury had the benefit of a decade of hindsight and saw all of Loree's tawdry acts in context. The jury also asked during deliberation for a written definition of defamation *per se*. They were thorough. The trial judge properly denied Loree's motion to overturn the verdict of \$1,000,000 in damages and certainly did not abuse his discretion.

Conclusion

The finders of fact found that David Loree slandered Scott Kunst. The finders of fact found that David Loree's slander was actionable *per se* and awarded Kunst appropriate general damages. The record clearly shows that Loree's seven slanderous statements were not privileged statements. The record also shows that Loree did not plead privilege until the morning of trial after a nine year inexcusable delay. This has been a tortured case, harmed by trial court errors and inexcusable delays. The harm done by Loree's slander had been allowed to fester and grow for a decade until these finders of fact finally stopped it. Even without the benefit of Kunst's main witness, Bronson Shepherd, the jury got it right.

The record clearly shows that there has been no error of law, lack of evidence, or abuse of judicial discretion to cause this Court to disturb the jury's findings.

Respectfully Submitted.



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

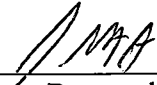
J. Scott Kunst, Respondent,

v.

David Loree, Appellant.

PROOF OF SERVICE

I, J. Scott Kunst, Respondent *pro se*, hereby certify that I have served the **Initial Brief of Respondent** and the **Designation of Matter to be included in the Record on Appeal** on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on January 28, 2016, addressed to the Appellant's counsel of record as follows: V. Elizabeth Wright, V. Elizabeth Wright, P.A., 217 E. Park Avenue, Greenville, SC 29601, and Gregory K. Smith, King & Spaulding, LLP, 1180 Peachtree Street, Atlanta, GA 30309.



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January 28, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *J. Scott Kunst v. David Loree*,
C.A No.: 2006-CP-39-1826

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SC Court of Appeals

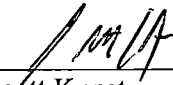
Dear Ms. Kitchings:

Please find enclosed for filing the original of the following items:

1. Initial Brief of Respondent
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service

Please feel free to contact me if you have any questions.

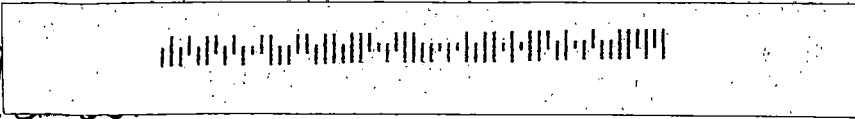
Sincerely,



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cc: V. Wright, Esq.
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