THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

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SC Court of Appeals

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-25-343
Appellate Case No. 2014-001196

Lydia Cook, ... Respondent,

v.

Regions Bank and Robyn Clevinger,.......................... Appellants.

Final Brief of Appellants

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Statement of Issues on Appeal

1. **Did the circuit court err in denying Appellants' motion for directed verdict and JNOV because the statement at issue was true or, at a minimum, substantially true?**

2. **Did the circuit court err in denying Appellants' motion for directed verdict and JNOV because Cook failed to present any evidence that the statement was published to any third-party?**

3. **Did the circuit court err in failing to grant directed verdict or JNOV to Appellants because even if the statement at issue was defamatory, Appellants were not liable because the statement was subject to a qualified privilege, and Appellants did not abuse the privilege?**

4. **Did the circuit court err in submitting punitive damages to the jury because Cook failed to present any clear and convincing evidence of actual malice?**

Statement of the Case

On May 31, 2011, Appellant Regions Bank terminated Respondent Lydia Cook from her job at the Hampton, South Carolina branch office for violating Regions Bank's zero-tolerance policy for workplace violence. {Trans. p. 497-99, 657-58, R. 349-51, 496-97; Termination Notice dated July 1, 2011, R. 675}. Cook then initiated this defamation action against Regions Bank and her former manager, Appellant Robyn Clevinger.[1] {Amended Complaint, R. 17-18}. Cook claimed that Clevinger falsely accused Cook of assaulting her in the work place in an attempt to get her fired. {Id., R. 17-18}. Appellants denied the allegations, asserting (1) that the statement was true, (2) that the statement was not published to a third-party, and (3) that even if the statement was defamatory, a qualified privilege applied. {Answer to Amended Complaint, R. 19-20}.

Appellants moved for summary judgment on those same grounds. {Motion for Summary Judgment and Memorandum in Support, R. 732, 745-54}. The circuit court denied the motion. {Order denying Appellants' Motion for Summary Judgment, R. 1-6}. The matter proceeded to trial.

Appellants moved for directed verdict at the close of Cook's case and the close of all the evidence. {Motions for Directed Verdict, Trans. p. 599-619, 700-711, R. 438-58, 539-50}. Appellants argued the statement of Clevinger was true or substantially true, that the statement was not published to any third-party, and that any

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[1] Regions Bank and Clevinger will be referred to collectively as Appellants or individually by name herein.

defamatory statement was, regardless, subject to a qualified privilege. {Id., R. 438-58, 539-50}. The circuit court denied both motions.

The jury returned a verdict against Appellants for $375,000 in actual damages and $125,000 in punitive damages. {Verdict Form, R. 10}. Appellants moved for judgment notwithstanding the verdict (JNOV) on the same grounds as previously asserted for directed verdict. {Appellants' Motion for JNOV and Memorandum in Support, R. 762-73}. The circuit court denied the motion. {Order denying Appellants' Motion for JNOV, R. 7}. This appeal followed. {Notice of Appeal, R. 774}.

Statement of Facts

On May 9, 2011, Cook bore responsibility as the vault teller for the Hampton branch of Regions Bank. {Trans. p. 239-40, 241-42, R. 109-10, 111-12}. That role required an end-of-day accounting to ensure that the vault balanced after reconciling the daily flow on money in and out of the vault. {Trans. p. 239, R. 109}. An "outage" occurred when the accounting revealed a shortage in funds at the end of the day. {Trans. p. 239, R. 109}. On May 9, 2011, an outage existed in the amount of $2,000.00. {Trans. p. 241-42, R. 111-12}. Such an outage warranted termination of the responsible employee from Regions Bank if not corrected. {Trans. p. 655-56, R. 494-95}.

Cook could not account for the source of the outage so she requested her manager, Clevinger, to assist with the review.[2] {Trans. p. 299, R. 169}. Clevinger, Cook, and a fellow employee, Suzanne Freeman, were the only people in the branch

[2] This was not the first time Cook had an outage at her station. While working as a teller in February 2011, Cook's teller station was out of balance at the end of the day. {Trans. p. 654-56, R. 493-95}. Clevinger was able to locate the shortage amount. {Trans. p. 656, R. 495}.

office at the time of the discovery of the outage and assistance by Clevinger. {Trans. p. 264-65, R. 134-35}. Clevinger located the source of the outage and determined that no money was missing from the vault. {Trans. p. 656, R. 495}.

After Clevinger located the source of the outage, Cook agreed that she initiated physical contact with Clevinger. {Trans. p. 273, 301, R. 143, 171}. Clevinger stated she perceived the contact as an "aggressive" and "violent shake." {Trans. p. 366, 408, R. 230, 272}. Freeman witnessed the incident. {Trans. p. 301, 497-99, 500, 555-57, R. 171, 349-51, 352, 407-09}. Freeman corroborated Clevinger's perception and described the incident as follows:

> [Clevinger] came over to count [Cook's] drawer and found the money. [Cook] grabbed [Clevinger] from the side and wrapped her arms[3] around her and began shaking her. When [Cook] was shaking her, she, [Cook] was saying thank you, thank you, thank you.
>
> When I looked over and saw her shaking [Clevinger], [Clevinger's] head was going in the opposite direction as her body. I said [Cook] what are you doing. She just laughed and didn't say anything. [Clevinger] never said anything to [Cook]. [Clevinger] just stood there for a moment and then walked away. When [Cook] shook her, it did not seem like a friendly shake or a normal pat on the back that you would give someone. It seemed very aggressive.

{Trans. p. 555-56, R. 407-08}. Freeman further perceived the incident as violent enough to move Clevinger "like a rag doll and her head was going to come off."

[3] Throughout trial, Cook introduced and relied on testimony that she was incapable of shaking Clevinger due to the conditions of her hands. However, the condition of her hands was immaterial because, as noted by Freeman, Cook "wrapped her **arms** around" and use the **arms** to begin "shaking [Clevinger]." {Trans. p. 555-56, R. 407-08 (emphasis added)}. There is no evidence in the record that Cook used her hands during the incident.

{Trans. p. 441 ("Cook was seen shaking her manager with intent to harm"), 442; R. 305, 306}.

At the time of the incident, Regions Bank required its employees "to report behavior that is **perceived** as threatening, violent, or potentially violent to their immediate supervisor and the respective Human Resources Manager." {Regions Bank's Threatening Conduct and Workplace Violence policy at p. 1, R. 720 (emphasis added); Trans. p. 637-38, R. 476-77}. How the employee perceived the conduct triggered the obligation to report the incident to Regions Bank. {Trans. p. 639, R. 478}.

As a result, Clevinger reported the incident as required by Regions Bank's employee chain of command and policies. {Trans. p. 402-07, R. 266-71}. Clevinger disclosed the incident to her superiors, Andree Lloyd and Patty Austin, and to the human resource employees, Barbara Simpkins and Holly Johnson, who handled such matters. {Id., R. 266-71}.

Regions Bank initiated an investigation into the incident. {Trans. p. 498, R. 350}. Lloyd handled the initial interviews with Clevinger and Freeman. {Trans. p. 436, R. 300}. Freeman, the sole witness to the incident, confirmed the incident appeared as a "very aggressive" and "hostile" shake that caused Clevinger's head to move "like a rag doll." {Trans. p. 442, 452-54, 555-56, R. 306, 316-18, 407-08}. Freeman further confirmed that "it was a hurtful event, that it was not just a hug and kiss. It was not normal. Her perception was that it was intimidating and hurtful." {Trans. p. 556-57, R. 408-09}.

Lloyd and Johnson's investigation also established that the incident caused Freeman to physically turn, which allowed her to observe the incident. {Trans. p. 452-54, R. 316-18}. Johnson also reviewed the video footage of the branch office to determine the accuracy of the statement. {Trans. p. 545-56, R. 397-408}. The video confirmed Freeman's account of turning to see the incident in the location where she described it to have occurred. {Id., R. 397-408}.

The investigation also confirmed that Cook admitted to contact with Clevinger during the incident. {Trans. p. 273, 301-02, 497-99, 500, 501, 502, 509, 556-57, R. 143, 171-72, 349-51, 352, 353, 354, 361, 408-09}. Lloyd and Johnson determined that Freeman provided a true and accurate account of the incident and that such account corroborated Clevinger's perception of the incident. {Trans. p. 450-51, 549-50, 657-58, R. 314-15, 401-02, 496-97}.

After verifying that Freeman's account was accurate and upon completion of the investigation, Regions Bank determined that Cook violated Regions Bank's zero-tolerance workplace violence policy. {Trans. p. 453-54, R. 317-18}. Lloyd signed the notice terminating Cook for that violation. {Trans. p. 453-54, R. 317-18}. Regions Bank terminated Cook on May 31, 2011. {Termination Notice dated July 1, 2011; R. 675}.

Argument

I. The circuit court erred in denying Appellants' motion for directed verdict and JNOV because the statement at issue was true or, at a minimum, substantially true.

This matter stems from Clevinger's reporting of an "aggressive . . . violent shaking" by Cook to Clevinger's superiors and Regions Bank human resources. While

Cook admitted that some contact occurred, she denied the severity of the incident. Cook alleged the statement was improperly reported as an assault and, therefore, was defamatory. Cook's position lacks merit. The issue before the circuit court was whether Clevinger properly reported her perception of the incident with Cook as required by the applicable Regions Bank policy.

"Truth of the matter published is, of course, a complete defense to an action based on defamation." Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976) (citation omitted). Moreover, "a sufficient defense is made out where the evidence establishes that a statement was substantially true." Id.; see also Haulbrooks v. Overton, 295 S.C. 380, 383, 368 S.E.2d 676, 678 (Ct. App. 1988) ("The truth of the matter is a complete defense to an action based on defamation and evidence establishing [a] statement is substantially true is a sufficient defense.") (citation omitted).

The evidence in the record established that Clevinger perceived Cook's admitted contact as aggressive and threatening. Clevinger reported it as such. The sole eye-witness to the incident construed the contact as violent, intimidating, and hostile. Therefore, Clevinger's report not only complied with Regions Bank policy but also was substantially true as a matter of law. As a result, the circuit court erred in denying Appellants' motions for directed verdict and JNOV. This Court should reverse and enter judgment in favor of Appellants.

a. The evidence established that Clevinger accurately reported an incident that she perceived as hostile and not as an "assault" as claimed by Cook.

The evidence presented at trial is susceptible to only one reasonable inference—that Clevinger reported a truthful account of what she perceived to be threatening behavior pursuant to Regions Bank's applicable employee policy. Pursuant to that policy, it "is the responsibility of all associates to report behavior that is **perceived** as threatening, violent, or potentially violent to their immediate supervisor and the respective Human Resources Manager." {Regions Bank's Threatening Conduct and Workplace Violence policy at p. 1, R. 720 (emphasis added)}. Moreover, Regions Bank required all employees to report any conduct that may violate this policy.

> Q: What does [the policy] say in relation to the requirement of employees to report incidents?
> A: It very clearly states you must report any incident if they involve a violation of this policy. They have an obligation to report this.
>
> Q: Right . . . . is it your belief that Ms. Clevinger had the duty to report this May 9th incident?
> A: Yes. She did.
>
> Q: Could you tell the jury what it indicates in terms of the section under violence prohibited?
> A: It lists numerous things. It says basically we maintain a zero tolerance for violence environment. Violence includes but is not necessarily limited to the following.
>
> Q: That following includes pushing, shoving, physical harm?
> A: Correct.
>
> . . .
>
> Q: Under the next section under Notification Obligations and Immediate Contacts, do you see that section?
> A: Yes, sir.

> Q: What does it say in terms of the responsibility of the employees?
> A: It is the responsibility of all associates to report behavior that is **perceived** as threatening, violent, potentially violent to their immediate supervisor and the respective Human Resources manager.

{Trans. p. 637-38, R. 476-77 (emphasis added)}. How the employee perceived the conduct triggered the obligation to report the incident to Regions Bank, as established by the uncontroverted testimony of Holly Johnson.

> Q: What is meant by the term perceived there in that Regions document?
> A: If it is your feeling. If your own personal feeling is such that you feel that you have been intimidated, threatened, harmed, harassed, it is your own feeling that is occurring to you. Not from my perspective from your own perspective.

{Trans. p. 639, R. 478}.

Clevinger's testimony at trial established that she complied with this mandatory policy and reported what she perceived to be an intimidating and threatening encounter with Cook. Clevinger, in response to questioning from Cook's counsel, characterized her perception of the incident with Cook as:

> A: Sir, when I was touched by Ms. Cook initially, it was an awkward touching. But when she began to shake me, it got worse each shake. It felt like there was rage. It felt violent and it felt aggressive to me. You could feel anger in it.
>
> ...
>
> Q: Did you tell [Regions Bank] that it was aggressive?
> A: Yes, I did.
>
> Q: Did you feel intimidated by it?
> A: Yes, I did. [Cook] is a lot bigger than me.

{Trans. p. 366, 408, R. 230, 272}.

The evidence also refuted Cook's claim that Clevinger reported the event as an "assault" to Regions Bank. {Trans. p. 408, R. 272 ("Q: At any time when you talk[ed] to [these] people, did you call this an assault? A: No, sir.")}. Regions Bank's investigation further belied Cook's claims in this regard:

> A: [Clevinger] never once alluded to a crime. We were dealing with this as a violation of our internal policy and that was our workplace violence policy. It talks in terms of the person's perception of intimidating or harmful behavior. [Clevinger] never once alluded to a crime. Never once in my mind alluded to an assault and battery. She did not bring that up to me.
>
> ...
>
> Q: The complaint indicates that Robyn Clevinger accused [Cook] of physically assaulting her. Has [Clevinger] ever used the word assault?
> A: I don't recall her ever using the word assault.

{Trans. p. 517-518, 552, R. 369-70, 404}. Cook failed to present any evidence that Clevinger reported the incident as an assault or other crime. The evidence adduced at trial established that Clevinger reported what she perceived to be an aggressive, violent, and intimidating shaking by Cook.

b. An independent eye-witness corroborated Clevinger's perception of the incident with Cook as violent, aggressive, and intimidating.

In addition, the testimony of Freeman, the sole witness to the incident, confirmed Clevinger's perception of the incident with Cook. During the Regions Bank investigation of the incident, Freeman confirmed that:

> A: [Clevinger] came over to count [Cook's] drawer and found the money. [Cook] grabbed [Clevinger] from the side and wrapped her arms around her and began shaking her. When [Cook] was shaking her, she, [Cook] was saying thank you, thank you, thank you.

> When I looked over and saw her shaking [Clevinger], [Clevinger's] head was going in the opposite direction as her body. I said [Cook] what are you doing. She just laughed and didn't say anything. [Clevinger] never said anything to [Cook]. [Clevinger] just stood there for a moment and then walked away. When [Cook] shook her, it did not seem like a friendly shake or a normal pat on the back that you would give someone. It seemed very aggressive.

{Trans. p. 555-56, R. 407-08}. Lloyd's investigation report included the fact that Freeman's perception of the incident matched that of Clevinger:

> Q: [Freeman] told you that in terms of her observation of the incident that Ms. Clevinger looked like a rag doll and her head was going to come off. You put that in quotations, did you not?
> A: I did.

{Trans. p. 442, R. 306}. Lloyd also verified that Freeman's account was accurate and believable, testifying that:

> Q: Well, let me ask you then, did Ms. Freeman tell you in your fact-finding investigation that, uh, [Cook] grabbed [Clevinger] from the side and wrapped her arms around her and began shaking her?
> A: Yes.
>
> Q: Did she tell you when she was shaking her that she, [Cook], was saying thank you, thank you, thank you? Do you remember that?
> A: I do.
>
> Q: And did Ms. Freeman also tell you when I looked over and saw her shaking [Clevinger], [Clevinger's] head was going in the opposite direction of her body?
> A: I do remember that.
>
> Q: Consistent with what you had in your notes?
> A: Yes.
>
> Q: Did she also say to [Cook] what are you doing?
> A: She did say that.
>
> ...

> A: What she told me is that [Clevinger] looked like a rag doll which is what I have written in my notes.
> Q: And then on the termination notice of Ms. Cook, you were the employee that signed off on that, is that correct?
> A: I am.
>
> Q: Thank you. Nowhere on that did you notate I disagree with this?
> A: No, I didn't.

{Trans. p. 453-54, R. 317-18}. Moreover, Freeman verified Clevinger's perception of the incident and advised Regions Bank that her perception matched that of Clevinger:

> Q: Did Ms. Freeman indicate that it was a hug and a kiss?
> A: She indicated that it was a hurtful event, that it was not just a hug and kiss. It was not normal. Her perception was that it was intimidating and hurtful.

{Trans. p. 556-57, R. 408-09}. Freeman perceived the incident as "hostile" and threatening and confirmed that fact to Regions Bank. {Trans. p. 547, 556-57, 642, 650; R. 399, 408-09, 481, 489}. Thus, this evidence confirms that Clevinger reported a truthful account of what she perceived to be threatening behavior pursuant to Regions Bank's policy.

c. Regions Bank's internal investigation established that Clevinger accurately reported the incident with Cook.

The investigation into the incident conducted by Regions Bank confirmed Clevinger's perception of the incident through the account of Freeman's independent witnessing of the incident and through a review of security camera footage, which corroborated Clevinger's account. Lloyd and Johnson initiated an investigation into Clevinger's statement immediately. The evidence at trial verified that independent

evidence existed to confirm the accuracy of Clevinger's statement regarding the incident.

Lloyd interviewed Freeman and included comments in her report that revealed "Cook was seen shaking her manager with intent to harm." {Trans. p. 441, R. 305}. Lloyd's investigation also established that Freeman had to turn to observe the incident and witnessed Cook wrap her arms around Clevinger which caused Clevinger's head to move "in the opposite direction of her body" like a "rag doll." {Trans. p. 452-54, R. 316-18}.

Moreover, Regions Bank reviewed the video footage of the branch office to confirm Freeman's account of the incident. {Trans. p. 545-56, R. 397-99}. Johnson testified as to the review, noting:

> A: . . . . I checked the videotapes. I looked at the videotapes myself. . . .
>
> Q: All right. As I understood, you indicated that when the camera, the video that you reviewed, it did show [Freeman] turning in the direction she described?
> A: I was able at first to—yes. I can see Suzanne Freeman turn around to what appeared to be toward someone else and they were off the camera. I previously seen Clevinger in that window and Cook in the window. The next clip, I saw Suzanne Freeman turn around as though addressing them.
>
> Q: Did that corroborate what [Freeman] had told you?
> A: Yes, it did.
>
> Q: In your investigation?
> A: Yes, it did. As I investigated, I felt like that was completely corroborating that.

{Id., R. 397-99}.

Notably, Cook admitted in the course of the investigation that contact with Clevinger occurred during the incident. {Trans. p. 273, 301-02, 497-99, 500, 501, 502, 509, 556-57, R. 143, 171-72, 349-51, 352, 353, 354, 361, 408-09}. Johnson testified that: "I believe that contact occurred. [Cook] herself stated that she had hugged [Clevinger]. All three parties agree on the contact." {Trans. p. 501, R. 353}. The investigation further revealed:

> Q: Did Ms. Cook admit that she touched Ms. Clevinger?
> A: Yes, she did.
>
> Q: Did Ms. Freeman indicate that it was a hug and a kiss?
> A: She indicated that it was a hurtful event, that it was not just a hug and kiss. It was not normal. Her perception was that it was intimidating and hurtful.
> . . .
> Q: Was Ms. Cook's statement corroborated by Ms. Freeman in any fashion?
> A: No.
>
> Q: Was it, in fact, inconsistent with Ms. Freeman's statement?
> A: Yes, it was.

{Trans. p. 556-57, R. 408-09}. Johnson also testified she believed Ms. Freeman's statement to be truthful:

> Q: In the course of your investigation, you took Ms. Freeman's statement to be true?
> A: Absolutely.
>
> Q: Why is that?
> A. She sat in front of me and gave a very detailed account. I was able to see it on the security cameras that she turned around. Even through I could not hear what was being said, Andree Lloyd was with me and heard that. There was no indication that there was any disbelief at the time. Then, she also provided a written statement, a signed written statement.

> Q. In those meetings of May 31st, 2011 with Ms. Lloyd, did she indicate to you that she did not believe Ms. Clevinger?
> A. No. Ms. Lloyd, at no time, said that she did not believe what Suzanne Freeman was saying to me or what Clevinger was saying.
>
> Q. In fact, it is already in evidence, I will put it back up. Ms. Lloyd is the one who signed off on the disciplinary conduct form for Ms. Cook on that very day.
> A. Ms. Lloyd actually prepared those documents and signed off on it and delivered it.

{Trans. p. 657-58, R. 496-97}.

Further, Lloyd confirmed Johnson's position and testified that she "believed [Freeman] in what she was saying." {Trans. p. 450, 549-50, R. 314, 401-02}.

The independent evidence established (1) that Cook had contact with Clevinger, (2) that Clevinger perceived the contact as violent, aggressive, and intimidating, (3) that Freeman likewise perceived the contact as violent, aggressive, and intimidating, and (4) that Cook violated Regions Bank policy as a result. Johnson acknowledged that:

> Q. There is enough evidence to suggest this contact may have occurred, is that what you said?
> A. Yes, I did.
>
> Q. You fire people because something might have occurred, is that correct?
> A. I did a very extensive investigation that began on 5/27, 5/26. I immediately began making phone calls. I did a very intensive investigation. I involved my manager. I involved our internal legal counsel. We came to the conclusion through all of the information that we had available that I had not only the fact that Robyn Clevinger felt that that was intimidating, somewhat hostile, it was her perception that she felt from that shaken that she was fearful. It was intimidating. It was hostile.
>
> I had a third party that was corroborating that—and that was Suzanne Freeman who turned around and she viewed it and felt that it was intimidating. She felt like it

> was hurting Robyn, told her to stop. Yes, I felt like it was hurting Robyn, told her to stop. Yes, I felt with that and photographic evidence that, yes, there was enough evidence that it had occurred. I did not have enough evidence to support the fact that it may not have occurred. So with all of those facts, with all of that consultation and the amount of time that I put into that investigation, yes, it led to a termination decision.
>
> . . .
>
> Q. She didn't hurt Ms. Clevinger either.
> A. That is not for you or me to say. My former associate, Robyn Clevinger, felt that it was hostile contact. She was hurt by it. She was intimidated by it and fearful. I had a corroborating witness independent who turned around, who saw the activity and said stop, Lydia, stop whatever you are doing. I confirmed that. I have that verbal statement from her in person. She testified to it.

{Trans. p. 497-99, 500, R. 349-51, 352}.

In sum, the witness accounts and video review confirmed Clevinger's perception of the incident and her report to Regions Bank of that perception. Cook also admitted that contact occurred between her and Clevinger. Thus, Clevinger's statement was true or, at a minimum, substantially true.

d. Regions Bank was not required to prove the precise truth of the statement as claimed by Cook.

Even if Lloyd's testimony constituted probative evidence, the circuit court still erred in submitting the claim to the jury. The law is that if the statement is substantially true, it is not defamatory. See Ross, 266 S.C. at 80, 221 S.E.2d at 772 (holding that "a sufficient defense is made out where the evidence establishes that a statement was substantially true"); Overton, 295 S.C. at 383, 368 S.E.2d at 678. Contrary to Cook's assertion, "[i]t is not necessary to prove the literal truth of the

precise statement made." Restatement (Second) of Torts § 581(A) (1977). "[I]naccuracies of expression are immaterial provided that the defamatory charge is true in substance." Id.

Thus, semantics over whether Clevinger termed the incident an "assault" and could prove an "assault" occurred are immaterial. Cook's claim that the statement was false because an assault did not and could not have occurred based on Cook's physical condition does not impact the analysis. Therefore, the circuit court erred in denying Appellants' motions for directed verdict and JNOV because the statement was true or substantially true.

This Court's decision in Myles v. Main-Waters Enterprises, LLC[4] illustrates this point and is analogous to this matter. That case involved a disputed statement and whether the statement was defamatory because it was false. In that matter, two of plaintiff's acquaintances began to fight in the parking lot of a McDonald's restaurant.[5] Id. at 1. Plaintiff alleged he intervened to "break up the fight." Id. The police responded to the fight and began an investigation. Id. The investigating officer interviewed plaintiff and the two acquaintances. Id. Each confirmed that plaintiff limited his involvement to stopping the fight. Id.

A McDonald's employee informed the officer that plaintiff's involvement was not so limited and that plaintiff participated in the fight. Id. at 2. The witness noted that plaintiff approached the vehicle where the fight began and "pulled [one of the

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[4] Op. No. 2011-UP-112 (S.C. Ct. App. dated March 22, 2011) (Shearouse Adv. Sh. No. 11 at 4). This unpublished case is not cited as precedent but instead is discussed as an example of persuasive reasoning in this analogous matter.

[5] Defendant Main-Waters owned the McDonald's where the fight occurred. Id. at 2.

participants] out of the vehicle and began beating him." Id. This Court noted this account "varied significantly from the other witnesses' accounts" because "no other witness other than the unidentified McDonald's employee told [the officer] [plaintiff] was actively involved in the fight." Id. Nevertheless, the officer arrested plaintiff for fighting. Id.

Plaintiff brought suit against McDonald's alleging, inter alia, defamation. Id. Plaintiff claimed the false statement regarding his participation in the fight caused damage to his reputation. Id. During discovery, the witness testimony diverged as to plaintiff's role in the incident. Five witnesses, including the plaintiff, testified that plaintiff did not fight, and plaintiff limited his involvement to trying to stop the fight. Id. A McDonald's witness testified slightly differently, stating that plaintiff punched one of the men involved in the fight. Id.

McDonald's moved for summary judgment, arguing its employee's statement regarding the perception of the incident as one where plaintiff was involved in the fight was substantially true. Id. at 3. The circuit court granted the motion. Id. On appeal, plaintiff claimed the trial court erred because McDonald's could not prove that plaintiff actually fought. Id. Specifically, plaintiff argued that "the employee's statement was false because he was not actually fighting but merely intervened in a fight" between others. Id.

This Court rejected plaintiff's claims and affirmed the grant of judgment as a matter of law **despite the differing accounts of the incident**. Id. This Court noted that the law did not require McDonald's to prove that plaintiff actually fought, citing to the standard that "it is not necessary to prove the literal truth of the precise statement

made." Id. Rather, the fact that the employee could perceive the plaintiff as being involved in the fight satisfied the substantial truth defense. Id. The Court reasoned that because plaintiff admitted some involvement in removing one of the participants from the vehicle, the witness could reasonably perceive that plaintiff had involvement in the fight. Id.

This matter is analogous. Cook's contention that Appellants were required to prove that an assault actually occurred in order to prove truth lacks merit. Proof of such precision should been rejected in this context. Thus, the reporting of an incident that Clevinger and Freeman perceived as violent, aggressive, and intimidating was true or substantially true under applicable South Carolina law. The circuit court thus erred in denying Appellants' motions for directed verdict and JNOV because this element of the defamation claim failed as a matter of law.

II. The circuit court erred in denying Appellants' motion for directed verdict and JNOV because Cook failed to present any evidence that the statement was published to any third-party.

The circuit court found that Cook introduced evidence to show that Appellants published the statement to various third parties.[6] The trial court erred in this regard as well for several reasons. First, communications between employees of a corporation made in the course of their employment do not qualify as a publication to a third-party. The only evidence in the record established that Regions Bank policy required Clevinger to disclose the incident to her superiors (Andree Lloyd and Patty Austin) and to the human resource employees (Barbara Simpkins and Holly Johnson). Second,

[6] The circuit court found the statement was published to Andree Lloyd, Patty Austin, Barbara Simpkins, Holly Johnson, Suzanne Freeman, and Clevinger's husband. {Order denying Appellants' Motion for JNOV p. 2, R. 8}.

South Carolina law requires that, for a publication to occur, the hearer of the defamatory statement must know the statement referred specifically to the plaintiff. Cook failed to introduce any evidence that Clevinger published Cook's identity to her husband. Third, the statement could not have been published to Suzanne Freeman because she had first-hand knowledge of the incident as an eye-witness.

A required element of defamation is an unprivileged publication to a third-party. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Under South Carolina law, "[t]he publication of defamatory matter is its communication, intentionally or by a negligent act, to a third party—someone other than the person defamed." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 520, 506 S.E.2d 497, 507 (1998) (Toal, J., concurring) (Holtzscheiter II); see also Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001). Defamation is not actionable without a publication. See, e.g., Burris v. Electro Motive Mfg. Co., 247 S.C. 579,583, 148 S.E.2d 687, 688 (1966).

a. Clevinger's reporting of the incident to the required supervisors and human resource employees at Regions Bank cannot constitute a publication as a matter of law.

The circuit court erred in denying JNOV by finding Appellants published the statement to the Regions Bank employees of Andree Lloyd, Barbara Simpkins, Patty Austin, and Holly Johnson. This was error. The only evidence in the record reveals that those individuals constituted Clevinger's superiors in the Regions Bank chain of command and the relevant human resource employees to disclose personnel issues per

applicable company policy. Under South Carolina law, such a disclosure to those individuals could not constitute a publication as a matter of law.

South Carolina law exempts communications between employees of a corporation in the course of their employment as publication for which the employer would be liable. Watson v. Wannamaker, 216 S.C. 295, 57 S.E.2d 477 (1950) (finding that a communication between officers and their agents does not satisfy the publication element for defamation); Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940); Western Union Telephone Company v. Lesesne, 198 F.2d 154, 157 (4th Cir. 1952) (recognizing that "South Carolina belongs to the group of authorities which adhere to the view that communications between employees of a corporation in the course of their employment is not a publication for which the employer is liable"); see also Williams v. Cook, 386 S.E.2d 665, 666 (Ga. App. 1989) ("It is well settled that a communication made by one corporate agent to another is not publication in the legal sense."); Woods v. Helmi, 758 S.W.2d 219, 223 (Tenn. Ct. App. 1988) ("[C]ommunication among agents of the same corporation made within the scope and course of their employment relative to duties performed for that corporation are not to be considered as statements communicated or publicized to third persons.").

Here, the evidence established that Regions Bank policy mandated that it "is the responsibility of all associates to report behavior that is perceived as threatening, violent, or potentially violent to their immediate supervisor and the respective Human Resources Manager." {Regions Bank's Threatening Conduct and Workplace Violence p. 1, R. 720}. Andree Lloyd served as Clevinger's immediate superior at Regions Bank. {Trans. p. 225, 409, 426, 445, 551, R. 95, 273, 290, 309, 403}. Lloyd

reported to Patty Austin. {Trans. p. 406-07, 429, 551, R. 270-71, 293, 403}. Regions Bank employed Patty Austin at that time as the consumer banking executive for South Carolina. {Trans. p. 406, R. 270}. Austin had responsibility for all branch locations in South Carolina, including the Hampton branch, and had supervision of Clevinger as the Hampton branch manager. Barbara Simpkins was Clevinger's human resource contact. {Trans. p. 406-07, 551, R. 270-71, 403}. Finally, Holly Johnson served as Regions Bank's human resource manager for South Carolina and parts of Georgia. {Trans. p. 230-31, 395, 406-07, 551, 635, R. 100-01, 259, 270-71, 403, 474}. Clevinger was required to report the incident to those individuals per company policy. {Trans. p. 403, 404, 406-07, 551, R. 267, 268, 270-71, 403}. Clevinger did not discuss the matter with any other Regions Bank employee. {Trans. p. 407, 551-52, R. 271, 403-04}. Accordingly, the circuit court erred in finding that Clevinger published the statement to Andree Lloyd, Barbara Simpkins, Patty Austin, and Holly Johnson.

b. Cook failed to prove that Clevinger published the statement to her husband.

The circuit court also erred in finding that Clevinger published the statement to her husband. The only evidence in the record established that Clevinger never published Cook's identity to her husband. Therefore, the circuit court erred as a matter of law in finding the statement was published to Clevinger's husband.

South Carolina law requires the plaintiff in a defamation action to prove that the alleged defamatory statement referred to the plaintiff and that the hearer knew the statement referred to the plaintiff. As this Court has recognized:

> To prevail in a defamation action, the plaintiff must establish that the defendant's statement referred to some ascertainable person and that the plaintiff was the person to whom the statement referred.

Burns v. Gardner, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997). "Publication includes proof that the complaining party was the person with reference to whom the defamatory matter was spoken." Kendrick v. Citizens & S. Nat. Bank, 266 S.C. 450, 454, 223 S.E.2d 866, 868 (1976). Moreover, the hearer or recipient of the statement must have understood the statement as defaming the plaintiff. Id. (holding that "[a]ssuming however that the words were spoken within the hearing of a third party, there is nothing to indicate that such third party could have known that they were spoken concerning appellant"). Our Supreme Court held that it is "elementary that it is incumbent upon a complaining party . . . to prove that he is the person with reference to whom the defamatory matter [referenced]." Neeley v. Winn-Dixie Greenville, Inc., 255 S.C. 301, 308, 178 S.E.2d 662, 665 (1971).[7]

Cook failed to meet this requirement as to the publication of the statement to Clevinger's husband. The only evidence in the record established that, while Clevinger related the workplace incidence to her husband, Clevinger never provided her husband with Cook's identity. Clevinger testified:

> Q: Your husband, you did tell him about it, correct?
> A: I told him that there was an incident with a coworker, yes.
>
> Q: You – obviously, he was up all night with you, right?

[7] See also Schrader, 639 N.E.2d at 261, (Ind. 1994) (holding that the hearer or recipient of the statement must have understood the statement as defaming the plaintiff); Davis v. Ross, 754 F.2d 80 (2d Cir. 1985) (same); Colson v. Stieg, 433 N.E.2d 246 (Ill. 1982) (same); Gay v. William Hill Manor, Inc., 536 A.2d 690 (Md. App. 1988) (same).

> A: No, sir. He wasn't. I was up and down.
>
> Q: You said you took pictures and your testimony at least in the wee hours of the morning or early in the morning.
> A: He gets up very early, sir. His occupation sometime requires him to leave very early in the morning.
>
> Q: He got up with you and helped you take the pictures?
> A: Yes, sir. He did.
>
> Q: And you didn't tell him what happened at work?
> A: I told him yes, that I had had an incident with a coworker.
>
> 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.

{Trans. p. 418-20, R. 282-84}. That colloquy does not establish that Clevinger ever informed her husband of Cook's identity or that Cook was the co-worker involved in the incident at work. Moreover, Cook presented no further testimony or evidence on the issue of publication to Clevinger's husband.

As a result, the record contained no evidence that Clevinger published the statement to her husband. The trial court erred in finding otherwise.

c. The circuit court erred in finding Appellants published the statement to Freeman because Freeman had first-hand knowledge of the incident.

Defamation requires an unprivileged publication to a **third-party**. Erickson, 368 S.C. at 465, 629 S.E.2d at 664; Fleming, 350 S.C. at 494, 567 S.E.2d at 860. Freeman did not qualify as a third-party for defamation purposes. The circuit court erred in holding otherwise.

Freeman did not learn of the incident via communication from Clevinger. Rather, Freeman had first-hand knowledge of the incident because she witnessed the altercation between Cook and Clevinger. That first-hand knowledge precluded a finding that there was a publication to Freeman as a third-party. Therefore, any disclosure by Regions Bank in the investigation as to Clevinger's statement about the incident could not constitute a publication to a third-party. This Court should thus reverse.

III. The circuit court erred in failing to grant directed verdict or JNOV to Appellants because even if the statement at issue was defamatory, Appellants were not liable because the statement was subject to a qualified privilege, and Appellants did not abuse the privilege.

As an initial matter, the circuit court determined that a qualified privilege applied to the statement at issue in this action. {Order denying Appellants' Motion for JNOV p. 2, R. 8}. The circuit court correctly made such a finding.

However, the circuit court found that a factual issue existed as to the truth of the statement that warranted submission of whether Appellants abused the privilege to the jury. {Order denying Appellants' Motion for JNOV p. 2, R. 8}. Such an analysis and conclusion constituted reversible error. An abuse of the privilege does not occur

simply when the statement was false. If that were the test, then the privilege would be rendered meaningless. Rather, the privilege applies to insulate a party from liability **after** the publication of a defamatory statement (i.e., one that is false and published to a third-party). Abuse of the applicable privilege must be determined from evidence other than the falsity of the statement itself. Thus, the circuit court misapplied the rule and erred in denying Appellants' motions for directed verdict and JNOV. This Court should reverse.

The Supreme Court has recognized that application of the privilege. "One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published on an occasion that makes it conditionally privileged, and (2) the privilege is not abused." Fountain v. First Reliance Bank, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012) (insulating the defendant from liability for publication of a defamatory statement because "even if we find the statement defamatory, we hold Respondents are entitled to a qualified privilege as a matter of law"). Moreover, it is well-settled that the privilege exists on facts separate from the falsity of the statement.

> The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.

Id. (quoting Manley v. Manley, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987)); see also Cornwell v. Spur Oil Co. of W.S.C., 240 S.C. 170, 178, 125 S.E.2d 270, 274-75 (1962). The test for abuse of that privilege is likewise distinct from the falsity of the statement because:

> An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard for the victim's rights.

Fountain, 398 S.C. at 444, 730 S.E.2d at 310.

"Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). Cook failed to carry that burden.

Here, Cook offered no evidence that Regions Bank acted outside the scope of the privilege. The evidence, in fact, supported a contrary finding. Upon report of a possible violation of its workplace violence policy, Regions Bank initiated and conducted a through investigation into the situation. As part of that investigation, Regions Bank interviewed the sole eye-witness to the incident, reviewed video of the branch location from the time of the altercation, and did not solely rely on the statement from Clevinger. {Trans p. 498-99, 545-56, R. 350-51, 397-98}. Moreover, the evidence in the record established that the communication at issue was disclosed on as limited basis as needed—to employees of the corporation in the course of the investigation. That comprehensive evaluation allowed Regions Bank to arrive at a good faith conclusion that Clevinger reported the incidence in good faith per the mandatory workplace violence policy.

The fact that Cook claimed the statement may have been false is immaterial to that analysis. It was not enough for the statement to be false. Cook had to introduce

evidence that Appellants abused the privilege in the course of the investigation sufficient to overcome the good-faith investigation of Regions Bank. Cook failed to do so.

Two cases are illustrative of the error of the circuit court: Shaheen v. WellPoint Companies, Inc., 490 F.Appx. 552 (4th Cir. 2012) and Bahr v. Boise Cascade Corp., 766 N.W.2d 910 (Minn. 2009). In WellPoint, a dispute arose between two employees—the manager, plaintiff in the action, and her subordinate. 490 F.Appx. at 553. The manager accused the employee of improper language in the workplace. Id. Upon receipt of the complaint, the employer initiated an investigation and advised various employees and witnesses of the allegations from the manager. Id. at 553-54. The investigation determined the manager's accusations lacked merit, and various meeting were held to confront manager in which statements of non-belief were published to others in the company. Id. at 554. The employer terminated the manager for the misrepresentation and noted the personnel file accordingly. Id.

The manager initiated a defamation suit against the employer claiming the statements in the investigation caused damage to her reputation. Id. The employer cited the qualified privilege as its defense. Id. at 556. The district court granted summary judgment to the employer. Id.

On appeal, the manager tried to defeat the privilege by arguing perceived deficiencies in the employer's investigation. Id. The manager claimed that the investigation was "grossly inadequate" and that the investigator did not ask "the right questions" in verifying her version of events. Id. In rejecting this argument, the Fourth Circuit noted that this was not an instance in which the employer made the

statement without conducting any investigation. Therefore, the court held that because an investigation occurred, there was not sufficient proof of malice to cause the employer to lose its qualified privilege. Id.

Thus, the relative truth of the published statement was immaterial to the court's analysis of whether the employer abused the privilege. The Fourth Circuit focused exclusively on the investigation itself and whether evidence of abuse existed as to the investigation. Id.

In Bahr, plaintiff was employed as a store keeper at a plant, along with individual defendant Rasmussen. 766 N.W.2d at 913. Rasmussen's uncle supervised the pair. Id. Bahr and Rasmussen had a history of workplace tension that culminated in several confrontations between the two at work. Id. at 915. Rasmussen filed a complaint against Bahr to human resources. Id. Bahr was escorted from the premises and placed on "investigatory suspension" by Rasmussen's uncle. Id. The company launched an investigation per company policy. Id.

During an investigatory interview, Rasmussen made several allegedly defamatory statements against Bahr. Id. at 915-16. Human resources repeated the allegations on several occasions during an investigation of the events, including interviews with three other stores keepers and in questioning Bahr about the events in the presence of a third-party union representative. Id. at 916-17. Despite Bahr's denials and mixed results of the investigation, Bahr was suspended without pay for three days. Id.

The Minnesota Supreme Court ultimately held that no defamation on the part of the employer occurred because "statements made in the course of an employer's

investigation into employee misconduct are protected by the qualified privilege." Id. at 923. Additionally, Bahr failed to carry his burden sufficient to overcome the qualified privilege because the employer followed its internal procedures for investigating workplace complaints and only spoke to those necessary for the investigation. Id. at 923-25. Further, the court held that any alleged malice could not be transmitted to the employer because no evidence existed that the investigation was motivated by Rasmussen or the uncle's personal ill-will toward Bahr. Rather, "the only motivating force for [employer's] statements revealed in the evidence is [employer's] legitimate pursuit of the internal corporate investigation." Id. at 925.

This matter is analogous to both cases. Clevinger reported her perception of an incident to Regions Bank per applicable policy. Regions Bank did not simply take Clevinger's word. Rather, Regions Bank conducted an investigation as required under the policy. The facts gleaned from that investigation informed Regions Bank's decision to fire Cook. Such a procedure occurred in good faith, and Cook presented no evidence that the conduct of the investigation warranted a finding of abuse of the privilege.

Such a conclusion comports with the point of the qualified privilege in the situation presented in this matter. The privilege exists to give protection to a complaining employee to be able to come forward without fear of a subsequent lawsuit. If a complaining employee makes a report and the employer conducts an investigation and comes to a decision based on all the facts, then the plaintiff must show the employer abused the privilege in the context of the investigation and not just argue that the statement itself was false. The contrary position adopted by the circuit court—that

falsity controls the privilege analysis—would create a jury issue in every defamation case because the plaintiff would claim the statement was false in order to render the privilege a question of fact. Our Supreme Court has acknowledged this concern by recognizing that the defamed party must show abuse of the privilege separate from the truth or falsity of the statement. See Fountain, 398 S.C. at 444, 730 S.E.2d at 310 (2012) (acknowledging the separation of the nature of the statement from the issue of whether the privilege applies to insulate the publishing party from liability).

Fountain further illustrates the circuit court's error in sending the abuse of privilege issue to the jury. The Fountain Court noted:

> While abuse of privilege is ordinarily an issue for the jury, . . . **in the absence of a controversy as to the facts** . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.

Id. (emphasis in original).

The circuit court misinterpreted its duties in this regard. As shown herein, the evidence in this case yields but one inference—Regions Bank did not abuse the privilege in conducting its investigation into the statement.

Moreover, Lloyd's subjective belief as to truth was immaterial to the issue before the circuit court and was not sufficient to create an issue of fact to warrant submission to the jury. The circuit court and Cook's reliance on the testimony of Lloyd as to her personal opinion regarding the veracity of Clevinger did not create an issue of fact that warranted submission of the matter to the jury. Even considering the testimony in the light most favorable to Cook, the circuit court should have granted

Appellants' motions for directed verdict and JNOV. This Court should reverse for the same reasons.

As noted above, Lloyd handled the initial investigation into Clevinger's statement about the incident. {Trans. p. 436, R. 300}. Lloyd interviewed Freeman as part of that investigation. {Trans. p. 441, 452-54, R. 305, 316-18}. Freeman advised that she witnessed Cook wrap her arms around Clevinger, shake Clevinger in an aggressive, hostile, and intimidating manner, and cause Clevinger's head to move in an opposite direction from her body "like a rag doll." {Id., R. 305, 316-18}. When Lloyd compiled her report of the incident, including her impressions of Freeman's statement, Lloyd **never** stated that she believed Freeman to be less than credible. {Trans. p. 437, 441-42, 443, 444, 450, 454, 509-10, 549-50, 657-58, R. 301, 305-06, 307, 308, 314, 318, 361-62, 401-02, 496-97}.

Notably, Lloyd elected to exclude any of her alleged doubts as to the truth of Clevinger's statement from any investigative reporting of the incident Lloyd admitted:

> Q: Can you show me in this document[8] where you said you do not believe what Ms. Clevinger said?
> A: I did not write it down in this document.
> Q: You didn't believe her but you didn't write it down?
> A: Correct. **That was my own opinion. It doesn't fall into the facts of what was discussed . . . My opinion didn't really count on these notes.**

{Trans. p. 437, R. 301 (emphasis added)}. Lloyd reiterated her investigative notes contain nothing to indicate that Clevinger's account was anything less than truthful. {Trans. p. 442; R. 306 ("Q: There's nothing in those six pages where you say you

[8] The document discussed was Lloyd's notes from the investigation and her discussions with Clevinger. {Trans. p. 436-37; Plaintiff Exhibit 50; R. ___}.

don't believe Ms. Clevinger, is there? A: **There is nothing.**") (emphasis added)}.

Lloyd further acknowledged:

> Q: And did you anywhere document[9] your belief that Ms. Clevinger was being less than truthful?
> A: I did not document it.

{Trans. p. 441-42, R. 305-06}. In fact, Lloyd admitted she believed Freeman[10] to be truthful in her perception of the incident:

> Q: And in your fact-finding mission, you made a note that a comment from [Freeman] was looked like a rag doll—what's the next word?
> A: Like her head was going to come off.
> Q: Okay. Now, that was from [Freeman], is that correct?
> A: Yes.
> Q: [D]id you make a notation in your fact-finding that you did not believe [Freeman] with regard to this comment from her?
> A: No, I did not make a notation on my documents.
> Q: Did you believe [Freeman]?
> A: I believed [Freeman] in what she was saying[11] . . .

{Trans. p. 450, R. 314}. Lloyd never expressed any disbelief as to the statements provided by Clevinger or Freeman to Johnson during the investigation either:

> Q: At any time prior to Ms. Clevinger being dismissed, did [Lloyd] indicate any disbelief in the statements of [] Freeman?
> A: No.
> Q: Did she indicate any disbelief in a statement of [] Clevinger?
> A: No.

[9] The document discussed was the termination notice signed by Lloyd after the investigation and her discussions with Clevinger. {Trans. p. 441-42. R. 305-06, Plaintiff Exhibit 22, R. 675}.

[10] Lloyd also admitted that Freeman was an "independent corroborating witness." {Trans. p. 439, lines 8-10, R. 303}.

[11] Lloyd stated she felt this was an exaggeration, however.

{Trans. p. 549-50, R. 401-02}. Because Lloyd had no doubts as to the perception of the incident by Clevinger or Freeman based on the evidence from the investigation, Lloyd ultimately agreed with the decision to terminate Cook and **signed off on the termination notice**. {Trans. p. 454, R. 318}; see, e.g., Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997) (holding that "[t]he issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.").

Lloyd's notes, the investigatory report, and the termination notice constituted the only written evidence admitted at trial (without objection) as to the veracity of the statement at issue. Lloyd's testimony at trial as to her subjective, after-the-fact belief of the truthfulness of the statement cannot be used to contradict the written evidence submitted at trial. See, e.g., Legette v. Piggly Wiggly, Inc., 368 S.C. 576, 580, 629 S.E.2d 375, 377 (Ct. App. 2006) (affirming the grant of judgment as a matter of law because "[t]estimony that contradicts the physical evidence lacks probative value" and cannot be used to create a genuine issue of fact). Thus, Lloyd's unsupported claims at trial did not constitute competent evidence sufficient to withstand directed verdict or JNOV on the issue of whether the statement was true.[12]

[12] The trial court also erroneously found that Lloyd's speculative opinion related to the issue of the falsity of the Clevinger statement for the same reason. See Hanahan, 326 S.C. at 149, 485 S.E.2d at 908.

Thus, the circuit court erred in denying Appellants' motions for directed verdict and/or JNOV. This Court should reverse and enter judgment for Appellants.

IV. The circuit court erred in submitting punitive damages to the jury because Cook failed to present any clear and convincing evidence of actual malice.

The trial court's ruling that clear and convincing evidence existed to submit punitive damages to the jury was wrong. No clear and convincing evidence in the record that Regions Bank acted recklessly. Regions Bank received a report of perceived workplace violence. Regions Bank investigated the matter and took appropriate action.

In a defamation case, for an individual to recover punitive damages, he or she must prove actual malice. Deloach v. Beaufort Gazette, 281 S.C. 474, 480, 316 S.E.2d 139, 143 (1984). Further, the plaintiff has the burden of proving actual malice by clear and convincing evidence. S.C. Code Ann. § 15-33-135 (2013). 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).

Cook failed to introduce any evidence that warranted submission of punitive damages to the jury. The evidence, including Cook's testimony, established that Cook initiated a touching that was perceived by all other parties involved to be aggressive, violent, and intimidating, in violation of Regions' workplace policies. Clevinger reported her perception of that incident as required under Regions Bank's policy. Regions Bank initiated a thorough and independent investigation of that incident. Regions Bank did not solely rely on the statement from Clevinger. {Trans p. 498-99, 545-56, R. 350-51, 397-99}. Moreover, the evidence in the record established that the

communication at issue was disclosed on as limited basis as needed—to employees of the corporation in the course of the investigation. That evidence allowed Regions Bank to arrive at a good faith conclusion that Clevinger reported the incidence in good faith per the mandatory workplace violence policy.

The evidence introduced established that, while she had other opportunities to seek to have Cook fired, Clevinger did not do so. In fact, the evidence showed that on one occasion Clevinger requested human resources **not terminate** Cook despite Cook committing a terminable offense of failing to put an account on hold. {Trans. p. 396, 411, R. 260, 275}. Furthermore, had Clevinger wanted to get Cook fired, Clevinger would not have assisted Cook in finding the cash shortage on May 9th, the day of the incident. {Trans. p. 413; R. 277}. The only reasonable inference from the evidence introduced at trial was that Clevinger did not seek to have Cook fired. Therefore, no evidence of ill will, malice, or recklessness existed, and as a result, Appellants were entitled to judgment as a matter of law on punitive damages. Thus, the circuit court erred in finding that there was clear and convincing evidence otherwise.

Conclusion

Based on the foregoing, this Court should reverse the circuit court and enter judgment in favor of Appellants.

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APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Appellate Case No. 2014-001196

Lydia Cook, ... Respondent,

v.

Regions Bank and Robyn Clevinger, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant Regions Bank, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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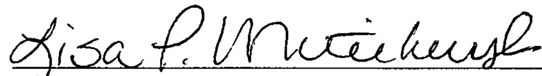

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