THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

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 Reply Brief of Appellants

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

In her brief, Cook again[1] claims the trial court properly rejected Regions Bank's truth defense because Clevinger "accused Cook of a crime." {App. Br. p. 17 ("Based on the evidence that the accusations were false and accused Cook of a crime . . . .") (emphasis removed); App. Br. p. 18}. Cook misconstrues this issue before this Court, just as she did before the trial court. The issue was not whether Regions Bank was required to prove Cook committed a crime in order to assert the truth defense. Rather, the issue was whether Clevinger properly reported her perception of the undisputed[2] incident with Cook as required by the applicable Regions Bank policy.

A. The evidence at trial established that Cook initiated inappropriate contact with Clevinger, and South Carolina law did not require Regions Bank to prove that an assault occurred, as argued by Cook.

The evidence in the record established one conclusion—that Clevinger accurately reported[3] an incident that she perceived as hostile (and not as a criminal "assault" as claimed by Cook) and that the sole eye-witness to the incident confirmed the contact as violent, intimidating, and hostile. {Trans. p. 403-04, 408, 442, 453-54,

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[1] At trial, Cook alleged the statement was improperly reported as an assault and, therefore, was defamatory.

[2] Cook admitted to this Court that some contact occurred and that such contact was "a little hostile." {App. Br. p. 19}.

[3] Pursuant to Regions Bank 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)}. Holly Johnson's uncontradicted testimony established that how the employee perceived the conduct triggered the obligation to report the incident to Regions Bank. {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. {Trans. p. 403-04, 408, R. 266-67, 272}.

547, 555-56, 556-57, 642, 652, R. 266-67, 272, 306, 317-18, 399, 407-08, 408-09, 481, 491}. Cook's brief fails to refute the fact that Suzanne Freeman, the independent witness to the incident, corroborated Clevinger's perception of the incident with Cook. Freeman confirmed that "[Cook] grabbed [Clevinger] from the side and wrapped her arms around her and began shaking her. . . . I looked over and saw her shaking [Clevinger], [Clevinger's] head was going in the opposite direction as her body. . . . 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}.

Likewise, Cook ignores the fact that Regions Bank's internal investigation established that Clevinger accurately reported the incident with Cook through the account of Freeman's independent witnessing of the incident and through a review of security camera footage. Both confirmed Clevinger's account of the incident. {Trans. p. 441, 450, 452-54, 501, 545-56, 549-50, 556-57,657-58; R. 305, 314, 316-318, 353, 397-98, 401-02, 408-09, 496-97}. The independent evidence thus established that Cook had contact with Clevinger, that Clevinger perceived the contact as violent, aggressive, and intimidating, and that Freeman and the video corroborated the account of the incident. Cook also 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, 361, 408-09}. As a result, Regions Bank concluded the Cook violated Regions Bank's policy. {Trans. p. 497-99, 500 R. 349-51, 352}.

In addition, the evidence adduced at trial 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 claim of an assault:

> 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. 517-18, R. 369-70}. Cook failed to present any evidence that Clevinger reported the incident as an assault or other crime. Thus, Cook's argument fails.

B. Andree Lloyd's testimony does not create an issue of fact as to the truth of Clevinger's perception of the incident.

Cook further claims that the fact that Andree Lloyd did not believe Clevinger's account of the Cook incident provides sufficient evidence that Clevinger's account was false. {App. Br. p. 19-20}. This argument lacks merit. Lloyd never conveyed her subjective belief as to truth of Clevinger's account of the incident to Regions Bank during the course of the investigation, which she led.

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, 549-50, 657-58, R. 301, 305-06, 307, 308, 314, 318, 361, 401-02, 496-97}. Lloyd also excluded any mention of her alleged personal doubts as to the truth of Clevinger's statement from any investigative reporting of the incident. {Trans. p. 437, 442, R. 301, 306}. Lloyd

admitted she believed Freeman to be truthful in her perception of the incident. {Trans. p. 450, R. 314}. Lloyd also **never** orally expressed any disbelief as to the statements provided by Clevinger or Freeman to Johnson during the investigation. {Trans. p. 549-50, R. 401-02}. Thus, Cook did not introduce any evidence that Regions Bank knew of Lloyd's doubts at the time of the incident or during the investigation. Thus, Lloyd's testimony could not create an issue of fact as to the truth of Clevinger's reporting of the incident.

C. Regions Bank was not required to prove that an assault occurred in order for the trial court to grant Regions Bank's directed verdict and JNOV motions as to the defense of truth, even if Lloyd's testimony constituted probative evidence.

With respect to a claim of defamation, "a sufficient defense is made out where the evidence establishes that a statement was substantially true." Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976); 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). 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.

Therefore, semantics over whether Clevinger termed the incident an "assault" and whether Regions Bank could prove whether an "assault" occurred are immaterial. Proof of such precision has been rejected in this context. See Myles v. Main-Waters

Enterprises, LLC, Op. No. 2011-UP-112 (S.C. Ct. App. dated March 22, 2011) (Shearouse Adv. Sh. No. 11 at 4).[4] The evidence at trial established that Cook, as she admitted, initiated contact with Clevinger, Clevinger accurately reported that she perceived the contact as hostile, and that perception was confirmed by the independent evidence. Thus, Clevinger's statement was true or, at a minimum, substantially true. That is all that matters under South Carolina law. As a result, the circuit court erred in denying Appellants' motions for directed verdict and JNOV. This Court should reverse.

II. Cook failed to present any evidence that the statement was published to any third-party recognized by South Carolina law.

Cook alleges that Clevinger published the incident to Suzanne Freeman, Andree Lloyd, Patty Austin, Barbara Simpkins, Holly Johnson, and Clevinger's husband. {App. Br. p. 21-29}. Clevinger's communications to those individuals did not qualify as a publication. As a result, Cook failed to introduce any evidence of a publication to a third party sufficient to carry her burden of proof on this element of the defamation claim, and the claim fails as a matter of law. The trial court erred in denying Appellants' motions for directed verdict and JNOV.

A. Clevinger did not publish the statement to Freeman because Freeman had first-hand knowledge of the incident.

First, Cook claims that Clevinger published the incident to Freeman. {App. Br. p. 22-23.}[5] Specifically, Cook claims a publication can occur even when the third-

[4] This case is not cited as precedent, but only as an example of persuasive reasoning.

[5] Cook also claims that she did not have the burden to prove the statement was published to Freeman, a third-party. See App. Br. p. 22 ("Appellants place a burden on Cook that is not required by South Carolina law"). That is incorrect. As plaintiff, South Carolina law places the burden of proof on Cook

party had first-hand knowledge of the incident because the third-party witnessed the incident. {App. Br. p. 22}.

Contrary to Cook's claim, our Supreme Court has addressed the situation where the plaintiff published the allegedly defamatory incident to a third-party and then later claims defamation because the defendant later communicated the same to others. In Fonville v. McNease, 23 S.C.L (Dud.) 303 (1838), Fonville claimed defamation on the basis that McNease made a defamatory statement in an unsigned letter and later admitted to the statements in the presence of others. The Court noted that Fonville had first published the statements for the letters to others and then McNease admitted to the third-parties that he sent the letter. Id. at 311. Fonville claimed damages stemming from the statements in the letter that were published to the third-parties. Id.

The Court rejected that argument. The Court held that if the party claiming defamation "makes public the charge, the defendant is not answerable for the consequences—for the action of publication is not his[,]" even if the defendant also communicates the defamatory statement. Id. In fact, the Court noted that "these principles seem so plain to me, as only to require to be stated to receive the assent of every one." Id.; see also Prosser, Law of Torts § 113 (4th Ed. 1971) ("The defendant is not liable for any publication made to others by the plaintiff himself, even though it was to be expected that [defendant] might publish it").

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to establish each element of her claim. It is axiomatic that publication to a third-party constitutes a seminal element of a defamation claim. See Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006) (holding that a required element of defamation is an unprivileged publication to a third-party; Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002) (same); Burris v. Electro Motive Mfg. Co., 247 S.C. 579,583, 148 S.E.2d 687, 688 (1966) (holding that defamation is not actionable without a publication). Thus, Cook bore the burden of proof on the issue of publication.

That is precisely what occurred in this matter. Freeman did not learn of the incident for the first time from a publication by Clevinger. Instead, Cook published the incident (of which Cook based her entire defamation claim) **in the presence of Freeman**. Freeman possessed first-hand knowledge of the incident because she witnessed the altercation between Cook and Clevinger. The fact that Clevinger later discussed the incident with Freeman is inconsequential to the issue of publication as our Supreme Court has recognized. Therefore, Cook's argument lacks merit because Clevinger did not publish the statement to Freeman. This Court should reverse.

B. 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.

In her brief, Cook alleges Clevinger's reporting of the incident to Andree Lloyd, Patty Austin, Barbara Simpkins, and Holly Johnson constitute a publication because the communication was not subject to a privilege. {App. Br. p. 24}. Cook misconstrues the applicable test. Publication and privilege constitute separate and distinct issues in a defamation case as recognized by our Supreme Court.

In Watson v. Wannamaker, 216 S.C. 295, 57 S.E.2d 477 (1950), the Supreme Court recognized that the test for publication does not hinge on privilege. The court held that privilege and publication are not one in the same. In Watson, the plaintiff sued Wannamaker for defamation, alleging a publication occurred when Wannamaker dictated a defamatory letter to his employee. 216 S.C. at 297-98, 57 S.E.2d at 477-78. The Supreme Court, as discussed further below, rejected the argument that a publication occurred. Id. The court held that "[h]aving concluded that there was no publication, in a legal sense, of the allegedly defamatory matter, **it is unnecessary to**

consider the questions of privilege and malice . . . ." Id. at 299, 57 S.E.2d at 478 (emphasis added). Thus, the Supreme Court rejected Cook's argument that publication hinges on privilege.

Moreover, Cook fails to appreciate that South Carolina and other jurisdictions have held that communications between employees of a corporation made in the course of their employment do not qualify as a publication to a third-party at all.[6] Andree Lloyd, Barbara Simpkins, Patty Austin, and Holly Johnson 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. See Watson v. Wannamaker, 216 S.C. 295, 57 S.E.2d 477 (1950) (exempting communications between employees of a corporation in the course of their employment as publication for which the employer would be liable); Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940).

Cook's attempt to distinguish Watson fails. {App. Br. p. 24-25}. The alleged factual distinctions drawn by Cook are immaterial and do not alter the fact that the Supreme Court rejected the argument that a communication between employee and employer constitute a publication sufficient to maintain a defamation action.

In Watson, plaintiff sued Wannamaker for defamation, alleging that a publication occurred when Wannamaker dictated a letter to his employee that contained defamatory statements against Watson. 216 S.C. at 297-98, 57 S.E.2d at 477-78. The Supreme Court addressed whether the communication of an allegedly defamatory

[6] Even if the reporting of the incident did constitute a publication, the communication was subject to a qualified privilege as set forth in section III, infra.

statement "to [plaintiff's] private stenographer or secretary, **in the ordinary course of business**, constitutes a publication so as to afford the basis for an action for libel or slander." Id. at 297, 57 S.E.2d at 477. The Supreme Court rejected that contention and concluded "there was no publication" between the employer and employee in the ordinary course of business. Id. at 298-99, 57 S.E.2d at 478. The Supreme Court did not limit its ruling, as alleged by Cook. Rather, the court analyzed whether a communication between corporate employees in the course of business could constitute a publication at all. The court unequivocally held that such communication cannot constitute a publication sufficient to maintain a defamation action. This holding has been recognized by the Fourth Circuit. 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").[7]

Cook's reliance on McBride v. Sch. Dist. of Greenville Cnty., 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010), does not alter the holding of Watson. In that case, this Court did not combine privilege and publication as suggested by Cook. Rather, this Court determined the statement between employees qualified as a publication because the employee did not make the statement in the course of business. McBride,

[7] Other jurisdictions align with South Carolina. See 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."); ITT Rayonier, Inc. v. McLaney, 420 S.E.2d 610 (Ga. Ct. App. 1992); 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."); Hellesen v. Knaus Truck Lines, Inc., 370 S.W.2d 341 (Mo. 1963); Halsell v. Kimberly-Clark Corp., 683 F.2d 285 (8th Cir. 1982).

389 S.C. at 562, 698 S.E.2d at 853. This Court used that holding to distinguish McBride from the Watson rule, noting that in Watson, the defendant made the defamatory statement **in the course of business**. Id. ("In Watson, the defendant made the statements in question for the purpose of including them in a letter he was dictating[,]"i.e., in the course of ordinary business). Thus, McBride did not alter the rule pronounced by the Supreme Court in Watson. This Court instead recognized the rule and found the facts in McBride distinct because the statement there was not made in the ordinary course of business.

This matter fits squarely within the holding of Watson. The uncontradicted evidence at trial established that Clevinger made the statement to Andree Lloyd, Patty Austin, Barbara Simpkins, and Holly Johnson in the ordinary course of business. Regions Bank's policy mandated that Clevinger "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}. Clevinger was required to report the incident to those individuals per company policy. {Trans. p. 403, 404, 406-07, 551, R. 267, 268, 270-271, 403}. Clevinger did not discuss the matter with any other Regions Bank employee. {Trans. p. 407, 551-52, R. 271, 403-04}. Accordingly, Clevinger made the statement in the ordinary course of business and to the required employees of Regions Bank. Thus, no publication occurred to Andree Lloyd, Barbara Simpkins, Patty Austin, or Holly Johnson.

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

Cook also argues that Clevinger published the statement to her husband despite the fact that Clevinger **never** provided sufficient indicia of identification so as allow her husband to know that Clevinger was referencing Cook. Specifically, Cook claims that the Clevinger's reference to a "co-worker" alone in the conversation with her husband was sufficient to indentify Cook by implication and establish a publication. {App. Br. p. 28}. Cook's position lacks merit because Cook's position ignores the fact that our law requires more than a mere mention of an unnamed "co-worker" in order to meet that test. Clevinger never provided her husband with Cook's identity or any means to discern the identity of the "co-worker" in Clevinger's statement to him.

South Carolina law requires the plaintiff in a defamation action to prove that the alleged defamatory statement referred to the plaintiff, by name or implication, and that the hearer knew the statement referred to the plaintiff. Burns v. Gardner, 328 S.C. 608, 615, 493 S.E.2d 356, 359 (Ct. App. 1997) ("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"). "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) (emphasis added). 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") (emphasis added). Moreover, 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 [was made].**" Neeley v. Winn-Dixie Greenville, Inc., 255 S.C. 301, 308, 178 S.E.2d 662, 665 (1971) (emphasis added).[8]

Cook asks this Court to ignore this authority and infer that the mere mention of a "co-worker" without any more indicia of identification is sufficient for publication. The only evidence in the record established that, while Clevinger related the workplace incident to her husband, Clevinger never provided her husband with Cook's identity or any means to discern the identity of the "co-worker" mentioned in the colloquy. Therefore, no publication occurred. As a result, the record contained no evidence that Clevinger published the statement to her husband. The trial court erred in finding otherwise.

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.

Cook claims that the trial court correctly submitted the qualified privilege issue to the jury pursuant to Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946). {App. Br. p. 29-31}. Specifically, Cook cites the proposition that "the protection of the privilege is destroyed" upon a finding of actual malice. {App. Br. p. 31}. This argument has no bearing on the issue before this Court. The trial court did not submit

[8] See also Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 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).

the qualified privilege to the jury on the basis that evidence of actual malice existed. The trial court submitted the issue to the jury because **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}. That was error and provides the basis for this Court to reverse.

The trial court conflated the issue of falsity and abuse of the qualified privilege. Our case law establishes that an abuse of the privilege does not occur simply when the statement was false because, if that were the test, then the privilege would be rendered meaningless. 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"). Rather, the trial court should analyze the application of the privilege **after** the plaintiff presents sufficient evidence of falsity and publication to a third-party. Id. (recognizing the distinction between evidence of a defamatory statement and the application of the privilege, noting "[o]ne 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"); Manley v. Manley, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987) (setting forth the elements of privilege as separate from the falsity of the statement). Likewise, the test for abuse of privilege has no reference to the falsity of the statement. Fountain, 398 S.C. at 444, 730 S.E.2d at 310 (holding that "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").

Based on the above, abuse of the applicable privilege must be determined from evidence other than the falsity of the statement itself. Cook fails to address this issue. The circuit court erred in submitting the qualified privilege to the jury based on alleged evidence of falsity. This Court should reverse.

Cook also alleges that Appellants abused the qualified privilege because such privilege "does not protect statements that are fabricated . . . because obviously the statement would not be made in good faith." {App. Br. p. 32}. Specifically, Cook claims her testimony that she told Holly Johnson that she believed that Clevinger was retaliating against her was sufficient to create an issue of fact as to the privilege. {App. Br. p. 30-31}. This is incorrect. It was not enough that Cook expressed her beliefs to Regions Bank about the nature of the incident and Clevinger's reporting. Instead, our law required Cook to introduce evidence that Regions Bank abused the privilege in the course of the investigation sufficient to overcome the good-faith investigation of Regions Bank.

Cook offered no evidence that Regions Bank acted outside the scope of the privilege after receiving Clevinger's report of the incident. The evidence, in fact, supported a contrary finding.[9] Upon report of a possible violation of its workplace violence policy, Regions Bank initiated and conducted a thorough 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,

[9] The citations to that evidence are set forth in great detail in Appellants' brief-in-chief. Appellants will not repeat here for brevity and due to page limitations.

and did not solely rely on the statement from Clevinger. 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. Cook's subjective beliefs do not alter that fact.[10] Therefore, even considering the testimony in the light most favorable to Cook, the trial court should not have submitted the qualified privilege issue to the jury. This Court should reverse and enter judgment for Appellants.

IV. The evidence relied upon by Cook in her brief cannot be used to support the trial court's decision to submit punitive damages to the jury because such evidence was unrelated to the incident with Cook and was not part of Regions Bank's investigation of the incident.

In her brief, Cook claims that clear and convincing evidence of actual malice existed because Clevinger "exhibited retaliatory behavior to fellow Regions (sic) employees" but fired Cook nonetheless. {App. Br. p. 35-36}. Cook ignores the full context of the evidence presented to the trial and instead asks this Court to affirm an award of punitive damages against Regions Bank based on misconstrued portions of testimony.

Cook first alleges clear and convincing evidence of actual malice exists because Regions Bank "remove[d] [Clevinger] from the Hampton branch manager position

[10] Moreover, Cook fails to address the cases of 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). As set forth in Appellants' brief-in-chief, both of those cases demonstrate the trial court's error in submitting the qualified privilege issue to the jury. Those cases establish that the relative truth of the published statement should be immaterial to the court's analysis of whether the employer abused the privilege. The focus instead is exclusively on the investigation itself and whether evidence of abuse existed as to the investigation. Here, Cook offered no such evidence.

based on . . . ***possible retaliatory behavior*** with fellow Regions (sic) employees." {App. Br. p. 35, citing Trans. p. 523 and 505 (emphasis in original)}. Cook specifically claims this "retaliatory behavior" related to the Cook incident and supported the decision to submit punitive damages against Regions Bank to the jury. However, a full review of the testimony illustrates that the behavior discussed did not relate to the inappropriate touching incident with Cook. Rather, that behavior related to a separate and wholly unrelated issue with Cook that arose after the resolution of the incident with Cook.

Holly Johnson testified that the retaliatory behavior cited as a ground for terminating Clevinger **did not relate** to the inappropriate contact incident with Cook. As Johnson testified, that behavior related to a prior decision by Clevinger to require Cook to take her lunches at ten o'clock each day:

> Q: You say you are terminating her for loss of confidence concerning possible retaliatory behavior with the associate, correct?
> A: That was related to removing her from branch manager as you and I have discussed before, the retaliatory behavior and having [Cook] take lunches at 10 o'clock in the morning.
>
> Q: You thought the retaliatory behavior was only for lunch?
> A: That was the main item.
> Q: You thought the lunch item was bigger than trying to get her fire (sic)?
> A: I never felt [Clevinger] was trying to get her fired, sir. That is not correct.

{Trans. p. 505-06, R. 357-58}. Johnson again clarified that issue after repeated questioning by counsel for Cook:

> A: . . . We told [Clevinger] based on her style of leadership and communication and possible retaliatorial (sic) behavior with associates, which I explained—or associate, which I explained again was **primarily going back to the 10 o'clock lunch**.

{Trans. p. 523, R. 375 (emphasis added)}. Cook ignores this critical qualification language and asks this Court to do the same. As is evident from the above testimony, the retaliatory behavior bore no relation to the Cook incident and cannot be used to support the trial court's punitive damages ruling.

Cook next claims that "Regions suspected deception from Clevinger" based on a polygraph test administered to Clevinger, and therefore, Regions Bank acted with actual malice. {App. Br. p. 35-36}. This too misrepresents the factual record presented to the trial court. Cook was terminated on May 31st. On June 1, Clevinger removed confidential information from the Hampton branch office. {Trans. p. 520, R. 372}. Regions Bank administered a polygraph test to Clevinger as a result of that issue—again, one that occurred after and had no relation to the Cook incident. {Id.}.

The results of the polygraph related to the June 1 removal of confidential information led to Regions Bank's loss of confidence in Clevinger and her termination. {Id.}. The polygraph examination did not relate to the Cook incident as Johnson clarified at trial:

> Q: . . . . your script says Ms. Clevinger was non-cooperative, engaged in deceptive behavior, was untruthful and had without authority removed confidential information in a manner that was unsafe, is that correct?
> A: This is related to what occurred on 6/1, not what occurred prior to 6/1. This is related to 6/1 events that resulted in Robyn Clevinger's termination.

{Trans. p. 520, R. 372}. Cook ignores that this temporal limitation for this evidence renders it immaterial to the Cook incident. Thus, Cook's attempt to link this polygraph examination to the Cook incident improperly misrepresents the evidence at trial. Such testimony cannot and does not support a finding of actual malice against Regions Bank related to the Cook incident.

Cook further claims that Andree Lloyd's expressed disbelief at trial in Clevinger's account of the Cook incident provides sufficient evidence of actual malice to send punitive damages to the jury. {App. Br. p. 36}. This argument lacks merit. Lloyd's subjective belief as to truth cannot be used to submit punitive damages to the jury. Lloyd **never** informed Regions Bank during the course of the investigation (which she led) of her doubts as to Clevinger's account of the incident.

When Lloyd compiled her report of the incident, including her impressions of Freeman's statement, Lloyd (1) **never** stated that she believed Freeman to be less than credible, (2) **never** documented any doubts of Clevinger's account; rather, she reiterated her investigative notes contain nothing to indicate that Clevinger's account was anything less than truthful, (3) **never** orally expressed any disbelief as to the statements provided by Clevinger or Freeman to Johnson during the investigation, and (4) elected to exclude any of her alleged personal doubts as to the truth of Clevinger's statement from any investigative reporting of the incident. {Trans. p. 437, 441-42, 443, 444, 450, 454, 509, 549-50, 657-58, R. 301, 305-06, 307, 308, 314, 361, 401-02, 496-97}. Lloyd further admitted she believed Freeman to be truthful in her perception of the incident. {Trans. p. 450, R. 314}. As a result, Cook failed to introduce any evidence that Regions Bank knew of Lloyd's doubts at the time of the

incident or during the investigation. Thus, Lloyd's testimony did not constitute clear and convincing evidence that Regions Bank acted with actual malice during the investigation. As a result, this testimony cannot be support the trial court's decision to submit punitive damages to the jury.[11]

Lastly, Cook relies on a letter from her doctor as clear and convincing evidence that Regions Bank acted with actual malice. {App. Br. p. 36}. Cook clamed this letter showed that she was incapable of shaking Clevinger due to the conditions of her hands. However, this argument is a red-herring. The condition of Cook's hands was an attempt to distract from the nature of the incident with Clevinger because, as noted by Freeman, Cook "wrapped her **arms** around" and used the **arms** to begin "shaking [Clevinger]." {Trans. p. 555-56, R. 407-08 (emphasis added)}. Thus, this evidence cannot support the trial court's decision to submit punitive damages to the jury.

The fact of the matter is that no clear and convincing evidence existed in the record that Regions Bank acted recklessly. Cook failed to introduce any evidence that warranted submission of punitive damages against Regions Bank 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. Regions Bank received a report of perceived workplace violence as required under Regions Bank's policy. Regions Bank then initiated a thorough and independent investigation of that incident. The evidence

[11] Moreover, Lloyd's notes, the investigatory report, and the termination notice constituted the only written evidence admitted at trial 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).

uncovered in that investigation allowed Regions Bank to arrive at a good faith conclusion that Clevinger reported the incident in good faith per the mandatory workplace violence policy. Therefore, no evidence of ill will, malice, or recklessness existed. As a result, Regions Bank was 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.

V. Appellants properly preserved their arguments for appellate review.

Cook alleges that Appellants failed to preserve any arguments for JNOV by failing to move for a directed verdict after plaintiff published a stipulation as to the net worth of Regions Bank to the jury. {App. Br. p. 16-17}. Cook relies solely on Stephens v. CSX Transportation, Inc., Opinion No. 27587 (S.C. Sup. Ct. filed November 4, 2015) (Shearouse Adv. Sh. No. 43 at 47), to support this claim. Cook's argument seeks to expand Stephens past the limits of the rule announced by the court.

In this case, Cook presented her case and then rested. {Trans. p. 599, R. 438}. Appellants then moved for directed verdict on each of the defamation arguments raised on appeal, and Cook offered rebuttal. {Trans. p. 608-10, R. 447-49}. Appellants sought reply to Cook's rebuttal, but Cook sought to re-open her case to publish a stipulation regarding the net worth of Regions Bank. {Trans. p. 610, R. 449}. The circuit court allowed Cook to re-open for that limited purpose. {Id.}. Cook said she would publish the stipulation but did not do so. {Id.}. The parties then moved to Appellants' reply to Cook's rebuttal on Appellants' directed verdict motion. {Trans. p. 611, R. 450. When the jury returned, Cook still did not publish the stipulation. {Trans. p. 619, R. 458}.

Appellants then presented their case and moved for directed verdict at the close of their case. {Trans. p. 710-11, R. 549-50}. The circuit court denied the motion. {Trans. p. 711, R. 550}. After the jury charge conference, Cook—not Regions Bank—published the stipulation to the jury. {Trans. p. 764, R. 568}. The stipulation related solely to the net worth of Regions Bank for use in the punitive damage deliberation by the jury. {Id.}. Cook did not introduce any new evidence related to the defamation issue. {Id.}.

Cook now claims that Appellants were required to again move for directed verdict after publication of the stipulation, based on Stephens. Stephens does not control here, and the rule in Stephens should not be expanded. In fact, the rule should be modified and exceptions provided. In Stephens, plaintiff closed his case in chief and moved for directed verdict. Op. No. 27587 at 44. The circuit court denied the motion. Id. Defendants then presented their case. Id. at 45. Plaintiff moved for directed verdict. Op. No. 27587 at 46. The trial court denied the motion. Id. **Plaintiff** then decided to present rebuttal evidence to defendants' case in chief. Id. After presenting this new evidence relevant to his case, Plaintiff did not renew his directed verdict. Id. After the jury verdict, Plaintiff then appealed to this Court and the Supreme Court.

On appeal, defendants argued that plaintiff could not move for JNOV because plaintiff failed to renew his directed verdict motion after he presented additional evidence to support his case. Op. No. 27587 at 50. This Court and the Supreme Court agreed. Id. The Supreme Court ultimately held that because plaintiff introduced additional evidence then plaintiff was required to renew his directed verdict motion before moving for JNOV. Id. (holding that "because [plaintiff] failed to renew his

motion for directed verdict after offering evidence in rebuttal" then plaintiff was barred from seeking JNOV). Thus, plaintiff, as the party introducing the new evidence, could not move for JNOV, and his arguments were not preserved for appellate review. Id. at 50-51. The Supreme Court articulated the following rule—if a party introduces evidence after the close of his case, then that party must renew his motion for directed verdict in order to move for JNOV.

This matter is thus distinguishable from Stephens. As noted, Appellants did not offer any additional evidence after the close of its case. Cook introduced additional evidence. Thus, Stephens does not apply to Appellants' appeal. This Court should reject Cook's attempt to expand Stephens.

Under Rule 50(b), SCRCP, "[a] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict." Rule 50, SCRCP. Because Rule 50 is modeled after the corresponding federal rule, South Carolina courts routinely look to federal court interpretation of the rules of civil procedure. See, e.g., Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004) (looking to "the prevailing view among federal courts" regarding post-trial motions). Furthermore, like federal courts, our courts apply the rules of civil procedure in a manner that promotes the interests of justice and a search for the truth. Elam, 361 S.C. at 25, 602 S.E.2d at 780 (recognizing that "civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ."). Instead, procedural rules should be liberally

construed in order to "do substantial justice." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Limited exceptions exist to the rule that a party must move for directed verdict at the close of all of the evidence. In Singer v. Dungan, 45 F.3d 823 (4th Cir. 1995), defendants made a Rule 50(a) motion at the close of the plaintiff's case but did not renew it at the close of all of the evidence. The Fourth Circuit instructed that the issues raised in a prior Rule 50(a) motion may be preserved for appeal where, "(1) the court indicated that the renewal of the motion was unnecessary and/or; (2) the evidence following the party's unrenewed motion under Rule 50(A) was either nonexistent or was brief enough to be obviously inconsequential on the issue of the evidence's legal sufficiency." 45 F.3d at 829. Federal courts have also recognized exceptions, "where there has been substantial compliance with the rule," and/or "where manifest injustice will otherwise occur [where] the verdict is wholly without legal support." Smith v. University of N.C. at Chapel Hill, 632 F.2d 316, 339 (4th Cir. 1980). South Carolina courts have also acknowledged that exceptions may be warranted in some cases. See Henderson v. St. Francis Cmty. Hosp., 295 S.C. 441, 447, 369 S.E.2d 652, 656 (Ct. App. 1988), rev'd on other grounds, 303 S.C. 177, 399 S.E.2d 767 (1990).

The exceptions recognized in federal and South Carolina courts apply here. First, the net worth evidence was inconsequential to this appeal, the directed verdict, and the JNOV motion. The evidence was limited to one facet of the punitive damage deliberations of the jury. It had **no bearing or relation** to any of the evidence, argument, or jury deliberation as to the defamation claim, or as to whether punitive damages should have been awarded. Thus, the net worth evidence could not

possibly have impacted the trial court's ruling on Appellants' directed verdict motion on the defamation claim or on whether punitive damages should have been awarded.

Appellants also substantially complied with the rule by renewing their directed verdict motion at the close of their case and the close of all the evidence on the defamation claim submitted to the jury. [12] At the time of the motion for directed verdict at the close of Appellants' case, the trial court was aware that Cook was planning to publish the net worth evidence. Furthermore, the trial court made it clear throughout the trial that the defamation claim was going to go to the jury by the denial of Appellants' two directed verdict motions on identical grounds. Therefore, "it was not incumbent upon defense counsel to harass the judge by parading the issue before him again. . . ." Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993); see also Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (where an objection has already been raised and ruled on by the court, there is no need for defense counsel to repeatedly object to similar testimony); State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 854-55 (1994) (holding that, once defense counsel objected, "it would have been futile to move to strike testimony which the trial court had already ruled was proper"). Hence, at minimum the late introduction of the net worth evidence should have no effect on the preservation respecting the defamation claim arguments of Appellants, because a subsequent request for directed verdict after the introduction of such evidence would have been futile.

[12] In no event should the Stephens rule bar Appellants' arguments related to the defamation claim. The net worth evidence did not relate to and was not relevant to those issues. Thus, Appellants moved for directed verdict at the close of all the evidence related to the defamation claim submitted to the jury.

Conclusion

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

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HAMPTON COUNTY
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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 Reply 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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