

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

On Appeal from Charleston County
Court of Common Pleas

RECEIVED

MAR 15 2016

Clifton B. Newman, Circuit Judge

SC Court of Appeals

Case No. 2066-CP-10-1577
Appellate Case No. 2015-001844

Lawton Limehouse, Sr.,

Appellant,

v.

Paul H. Hulsey and The Hulsey
Litigation Group, LLC,

Respondents.

**INITIAL BRIEF OF RESPONDENTS
Paul H. Hulsey and The Hulsey Litigation Group, LLC**

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TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
Applicable Law	7
<i>Defamation – Generally</i>	7
<i>Issue Preservation & Standard of Review</i>	8
 ARGUMENT	
I. The Trial Court properly admitted the federal RICO complaint.....	9
A. Rule 43(g), SCRCPP, does not preclude admission of a pleading from an underlying action that forms the basis of the claim or a defense.	10
B. The federal RICO pleading does not constitute hearsay because it was not offered to prove the truth of the allegations of the RICO complaint.	11
1. <i>Limehouse did not preserve a hearsay objection to the federal complaint.</i>	11
2. <i>The federal RICO pleading is not hearsay.</i>	13
II. Trial Court properly admitted Hulsey’s testimony regarding conversations he had with his clients and other potential witnesses in the course of his due diligence investigation prior to filing the federal RICO complaint.....	14
III. The Trial Court properly excluded the amount paid in settlement of the federal RICO action pursuant to Rule 408, SCRE.	18
IV. The Trial Court properly found that Hulsey was entitled to present to the jury a fair report privilege as an affirmative defense based on evidence that the comments to the news reporter were about the RICO complaint that he had filed in federal court.	20
A. The jury’s general verdict should be affirmed under the two issue rule.	20
B. Hulsey established a qualified privilege in making his comments to the reporter about the federal court filing.....	22
C. Limehouse did not preserve any objection to the fair report privilege	26
CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases	Page
<i>Anderson v. S. Carolina Dep't of Highways & Pub. Transp.</i> , 322 S.C. 417, 472 S.E.2d 253 (1996)	21
<i>Benbow v. Harvin</i> , 92 S.C. 180, 75 S.E. 414 (1912)	11
<i>Cogdill v. Watson</i> , 289 S.C. 531, 347 S.E.2d 126 (Ct. App. 1986).....	12
<i>Cole v. Raut</i> , 378 S.C. 398, 663 S.E.2d 30 (2008)	20
<i>Conner v. City of Forest Acres</i> , 363 S.C. 460, 611 S.E.2d 905 (2005)	8
<i>Deep Keel, LLC v. Atl. Private Equity Grp., LLC</i> , 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015).....	13
<i>Fleming v. Rose</i> , 350 S.C. 488, 567 S.E.2d 857 (2002)	7
<i>Glasscock, Inc. v. U.S. Fid. & Guar. Co.</i> , 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001).....	14
<i>Gold Kist, Inc. v. Citizens & S. Nat. Bank of S. Carolina</i> , 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985).....	21
<i>Henslee v. Monks</i> , 1977 OK 202, 571 P.2d 440 (1977).....	17
<i>Holtzscheiter v. Thomson Newspapers, Inc.</i> , 332 S.C. 502, 506 S.E.2d 497 (1998).....	7
<i>Jones v. Garner</i> , 250 S.C. 479, 158 S.E.2d 909 (1968).....	7, 23
<i>Jones v. Lott</i> , 387 S.C. 339, 692 S.E.2d 900 (2010).....	20
<i>Limehouse v. Hulsey</i> , 397 S.C. 49, 723 S.E.2d 211 (Ct. App. 2011) rev'd 404 S.C. 93, 744 S.E.2d 566 (2013).....	4
<i>McEntire v. Mooregard Exterminating Services, Inc.</i> , 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).....	26
<i>Oswalt v. State-Record Co.</i> , 250 S.C. 429, 158 S.E.2d 204 (1967).....	8
<i>Padgett v. Sun News</i> , 278 S.C. 26, 292 S.E.2d 30 (1982)	19, 23
<i>Parker v. Evening Post Pub. Co.</i> , 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994)	7

<i>QHG of Lake City, Inc. v. McCutcheon</i> , 360 S.C. 196, 600 S.E.2d 105 (Ct. App. 2004).....	18, 19
<i>Ragland v. Sheehan</i> , 256 Mont. 322, 846 P.2d 1000 (1993).....	13
<i>Savannah Bank, N.A. v. Stalliard</i> , 400 S.C. 246, 734 S.E.2d 161 (2012)	14
<i>State v. Blalock</i> , 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003).....	8, 11
<i>State v. Byers</i> , 392 S.C. 438, 710 S.E.2d 55 (2011)	8
<i>State v. Kromah</i> , 401 S.C. 340, 737 S.E.2d 490 (2013)	16
<i>State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.</i> , 414 S.C. 33, 777 S.E.2d 176 (2015)	12
<i>State v. Smith</i> , 337 S.C. 27, 522 S.E.2d 598 (1999)	27
<i>State v. Thompson</i> , 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003).....	16
<i>State v. Weaver</i> , 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004).....	17
<i>State v. Wiles</i> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	12
<i>Swinton Creek Nursery v. Edisto Farm Credit, ACA</i> , 334 S.C. 469, 514 S.E.2d 126 (1999)	7, 24
<i>Tomasello v. Fairfax Cty.</i> , No. 1:15-CV-95, 2016 WL 165708 (E.D. Va. Jan. 13, 2016)	15
<i>Vaught v. A.O. Hardee & Sons, Inc.</i> , 366 S.C. 475, 623 S.E.2d 373 (2005).....	8
<i>West. v. Morehead</i> , 396 S.C. 1, 720 S.E.2d 495 (Ct. App. 2011).....	24, 26
<i>Winters v. Fiddie</i> , 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011).....	26
<i>Wren v. Kirkland Distrib. Co.</i> , 250 S.C. 178, 156 S.E.2d 865 (1967).....	26

STATUTE, RULES & OTHER AUTHORITIES

Rule 43(g), SCRCF.....	5, 9, 10
Rule 51, SCRCF.....	26
Rule 103(a)(1), SCRE.....	8, 11

Rule 408, SCRE.....	18, 19, 28
Rule 602, SCRE.....	14, 15, 16
Rule 801, SCRE.....	13
Fed. R. Evid. 602	15
27 Fed. Prac. & Proc. Evid. § 6023	15
Trial Handbook for South Carolina Lawyers § 37:9	26

STATEMENT OF THE ISSUES ON APPEAL

Respondents would restate the issues on appeal as:

- I. Did the Trial Court abuse its discretion in admitting into evidence the RICO complaint filed in federal court?
 - A. Does Rule 43(g), SCRCF, preclude the admission of a pleading from a separate action that forms part of the basis for the claims or defenses in the action at bar?
 - B. Does the federal RICO pleading constitute inadmissible hearsay where it was offered, not to prove the truth of the allegations of the RICO complaint, but to rebut the defamation elements of recklessness and malice and to establish privilege defenses?
- II. Did the Trial Court abuse its discretion in admitting into evidence Hulsey's testimony regarding conversations he had with his clients and other potential witnesses in the course of his due diligence investigation prior to filing the federal RICO complaint in rebuttal to the defamation elements of recklessness and malice?
- III. Did the Trial Court abuse its discretion in excluding from evidence, under the provisions of Rule 408, SCRE, the amount paid in settlement of the federal RICO action?
- IV. Did the Trial Court err in finding that Hulsey was entitled to present to the jury a fair report privilege as an affirmative defense based on evidence that his comments to the news reporter were about the RICO complaint that he had filed in federal court?
 - A. Should the jury's general verdict be affirmed under the two issue rule?
 - B. Did the Trial Court properly submit the fair report privilege to the jury?
 - C. Did Limehouse adequately preserve his challenge to the fair report privilege for appeal?

STATEMENT OF THE CASE

This is a defamation action against an attorney and his practice, Defendants Paul H. Hulsey and the Hulsey Litigation Group, LLC (collectively referred to as "Hulsey"), brought by Lawton Limehouse, Sr., the disgruntled defendant in a RICO class action filed in federal court by Hulsey on behalf of former employees of Limehouse's company. This defamation action is predicated on statements made by Hulsey in response to an inquiry from a news reporter regarding the filing of the federal RICO complaint.

Hulsey had filed a class action lawsuit in federal court against L & L Services, LLC, an employment staffing agency, on behalf of former L&L employees, alleging violations of RICO, Racketeer Influenced and Corrupt Organizations Act, and other federal and state laws. [ROA ___; Def. Ex. No. 10. Complaint Maximino Flores, et al. v. Lawton Limehouse, Sr., et al., C.A. No. 2:04-1295-23.] Limehouse and his son, as owners of L & L Services, also were named as defendants in the federal RICO case.

The federal RICO complaint was filed on April 23, 2004. That same day, James Scott, a reporter with the Charleston Post & Courier, called Hulsey for comment on the filing of the RICO complaint. An article by Mr. Scott was published by the Charleston Post & Courier on April 24, 2004, which contained certain statements attributed to Hulsey.

Limehouse filed the complaint in this case on April 19, 2006, and served the Defendants on April 21, 2006 (as to Defendant Hulsey) and April 20, 2006 (as to the Defendant LLC).¹ Limehouse alleged that, on or about April 23, 2004, Hulsey "held a press conference or otherwise made false statements about the Plaintiff to certain new

¹ The RICO case still was pending in federal court.

agencies including but not limited to a reporter from the [Charleston] “Post & Courier staff,” which statements included:

- a) The Plaintiff had engaged in a classic racketeering scheme,
- b) The Plaintiff’s conduct set the community back 150 years,
- c) The Plaintiff engaged in a blatant case of indentured servitude, and
- d) The Plaintiff created a perfect racketeering enterprise just like Tony Soprano.

[ROA ___; Complaint.]

Hulsey filed a notice of removal to federal district court, but when federal district court remanded the matter back to state court, the remand order sent to the Charleston County Clerk of Court’s Office was not certified. Upon the remand from federal court, Limehouse submitted affidavits of default and the Charleston County of Clerk of Court made an entry of default as to both Defendants.

On receiving the notice of entry of default, Hulsey immediately filed an answer on August 29, 2006 and also moved, under Rule 55, to set aside the entry of default. The Trial Court denied the motion, entered default judgment and ordered a damages trial. At the damages trial the Defendants were deemed to have admitted liability for defamation, prevented from presenting any defenses, and severely hampered from presenting evidence on the issue of damages under the strict procedural limitations of a default trial.² As a result, the jury returned a verdict against the Plaintiff for \$2.39 million in actual damages and \$5 million in punitive damages.

Hulsey timely appealed, and the judgment was affirmed by the Court of Appeals, but on a writ of certiorari, the Supreme Court reversed on the grounds that the state court default proceedings were void because “the lack of a certified remand order precluded the

² *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978).

state court from resuming jurisdiction over the cases.” *Limehouse v. Hulsey*, 397 S.C. 49, 723 S.E.2d 211 (Ct.App.2011), rev’d *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566, 568 (2013).

On remand, the Defendants filed an answer making a general denial and asserting defenses including truth, and qualified privileges of fair report and fair comment. [ROA ____; Answer (Post Remittitur), filed August 12, 2013.] The case came to trial before the Honorable Clifton B. Newman and a jury on March 23-27, 2015. This time, after a full trial on the merits, the jury returned a verdict for the Defendants. [ROA ____; Verdict.] The Plaintiff Limehouse filed a motion for a new trial asserting three evidentiary points of alleged error which motion was denied. [ROA ____, Motion, filed April 6, 2015; ROA ____, Order, filed July 29, 2015.] A notice of appeal was timely served and filed on August 27, 2015.

SUMMARY OF ARGUMENT

Limehouse’s defamation claim arises from the Post & Courier article and rests on four comments that Hulsey made to a reporter on the day the federal RICO complaint was filed. Once the default was set aside and remanded, Hulsey was allowed to answer and fully defend the claims made against him. Hulsey did not deny making the comments, but he asserted multiple defenses including truth and qualified privileges of fair report and fair comment. This time, after a full trial on the merits, the jury returned a general verdict for the Hulsey Defendants. On appeal, Limehouse seeks to reverse the jury’s defense verdict based on alleged error in three evidentiary rulings and alleged error in submitting a fair report privilege charge to the jury. Hulsey submits that the trial record does not contain any basis of prejudicial error for reversing the jury’s verdict.

Inexplicably, despite the fact that Hulsey's comments to the reporter, as published in the Post & Courier, were about the filing of the federal RICO complaint, Limehouse objected to both the introduction of the Post & Courier article and the introduction of the federal pleading.³ On appeal, Limehouse has not pursued his objection to the introduction of the article, but he argues that the federal RICO complaint should have been excluded under Rule 43(g), SCRCP and the hearsay rule. Hulsey respectfully submits that the Trial Court acted within its discretion in admitting into evidence the RICO complaint filed in federal court because Rule 43(g), does not preclude the admission of a pleading in a separate action that forms part of the basis for the claims or defenses in the action at bar.

As to Limehouse's argument that the federal RICO complaint was hearsay, the record will show that he did not articulate any hearsay objection when the complaint was introduced into evidence or in his motion for a new trial. In any event, the federal RICO complaint does not constitute hearsay because it was offered, not to prove the truth of the allegations of the RICO complaint, but to rebut the defamation elements of recklessness and malice and to establish the privilege defenses asserted by Hulsey.

Likewise, for similar reasons, the Trial Court acted within its discretion in overruling the hearsay objections and allowing Hulsey to testify regarding conversations he had with his clients and other potential witnesses in the course of his due diligence investigation prior to filing the federal RICO complaint. Hulsey did not testify as to the details of what he was told; rather, he simply laid the foundation of his good faith

³ [ROA ____, __; Plaintiff's Motion in Limine, Tr. I 60-66 (denied). ROA ____, __, __, __; Defendant Ex. No. 9, Tr. I 130, 259 (hearsay objections), Tr. I 133, 259 (court overruled).]

investigation to rebut Limehouse's efforts to prove that he had been reckless or malicious.

In striking contrast to his efforts to prevent the jury from considering the federal RICO complaint and Hulsey's pre-filing investigatory efforts, Limehouse did want to tell the jury the allegedly "paltry" amount of the settlement of the RICO action proved that the statements were false and made recklessly. The Trial Court wisely acted within its discretion in excluding the amount paid in settlement of the federal RICO action pursuant to Rule 408, SCRE.

Apart from the evidentiary issues, Limehouse contends, for the first time on appeal, that the Trial Court erred in charging the jury on the fair report privilege. By failing to raise the issue at trial, Limehouse failed to preserve the issue for appellate review. Moreover, under the two issue rule, the jury's general verdict should be affirmed because Limehouse has not raised any issue challenging the other defenses asserted by Hulsey. Ultimately, however, the verdict can be affirmed because the Trial Court properly held that Hulsey was entitled to present a fair report privilege as an affirmative defense based on evidence that Hulsey's comments to the news reporter were directed towards the RICO complaint that he had filed in federal court.

Applicable Law

Defamation – Generally

The tort of defamation allows a plaintiff to recover for injury to his reputation caused by the defendant's communications to others of a false message about the plaintiff. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). To establish the tort of defamation, a plaintiff must prove four basic elements:

- (1) a false and defamatory statement was made;
- (2) the unprivileged publication was made to a third party;
- (3) the publisher was at fault; and
- (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

Available defenses, as pled by Hulsey and charged to the jury, include truth, and qualified privileges of fair report and fair comment. Truth is an absolute defense to defamation. *Parker v. Evening Post Pub. Co.*, 317 S.C. 236, 245, 452 S.E.2d 640, 645 (Ct. App. 1994). [See charge ROA ____; Tr. III 76/22-23.] An affirmative defense of conditional or qualified privilege may be proved where "one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). "Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged." *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). [See charge ROA ____; Tr. III 79/11 – 80/4.] The doctrine of fair comment

“holds matters of public interest and concern to be legitimate subjects of criticism, and everyone has a right to comment thereon as long as he does so fairly and with an honest purpose.” *Oswalt v. State-Record Co.*, 250 S.C. 429, 433, 158 S.E.2d 204, 206 (1967).

[See charge ROA ___; Tr. III 80/5-15.]

Issue Preservation & Standard of Review

Rule 103(a)(1), SCRE provides that no error will be found in a trial court’s evidentiary rulings unless “a substantial right of the party is affected” and a timely objection or motion to strike has been made. *State v. Byers*, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011). “In order to preserve an error for appellate review, a defendant must make a contemporaneous objection on a specific ground. The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge.” *State v. Blalock*, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003)(citations omitted).

The Trial Court’s evidentiary rulings are subject to review on an abuse of discretion standard:

The admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence.

Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005) (citations omitted). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or

excluded evidence.” *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005).

ARGUMENT

I. THE TRIAL COURT PROPERLY ADMITTED THE FEDERAL RICO COMPLAINT.

During Hulsey’s testimony, Defense Counsel moved to admit the federal RICO complaint into evidence:

Q. All right. Now, in this instance we know that you filed the RICO complaint. Let me just hand to you the copy of it. It's marked as Defendant's Exhibit 10. Mr. Hulsey, does that appear to be a copy of the complaint that was filed in district court that we've been talking about this week?

A. Yes, sir. That's what it looks like.

MR. HOOD: Your Honor, we would offer Defense Exhibit Number 10 as our next into evidence.

MR. CISA: Objection, Your Honor. The pleadings -- on the basis the pleadings aren't allowed. They are allegations.

THE COURT: It's admitted over objection. [ROA ___; Tr. II 169/10-22.]

On appeal, Limehouse argues that the Trial Court’s admission of the federal RICO complaint violated Rule 43(g), SCRPC, and constituted inadmissible hearsay. Hulsey maintains that the Trial Court properly admitted the federal RICO complaint because Rule 43(g), SCRPC does not preclude admission of a pleading in an underlying action that forms the basis of the claim or a defense. As to the hearsay issue, Hulsey submits that Limehouse did not voice any hearsay objection to the RICO complaint at the time of its admission, but, in any event, the federal pleading does not constitute inadmissible hearsay.

A. Rule 43(g), SCRCP, does not preclude admission of a pleading in an underlying action that forms the basis of the claim or a defense.

As evidenced by the trial record, excerpted above, Limehouse objected to the introduction of the federal RICO complaint “on the basis the pleadings aren’t allowed.” Although he did not specifically identify Rule 43(g) at trial, Limehouse did reference rule in his motion for a new trial:

The trial court erred in allowing the introduction into evidence of the 33 page class action RICO Complaint which was filed in the United States District Court by the Defendant’s as pleadings contain allegations and are not allowed to be submitted to the jury for its deliberations pursuant to Rule 43(g), SCRCP. [ROA ___; Motion for New Trial ¶ 1.]

Rule 43(g) provides that pleadings shall not be submitted to the jury for its deliberations:

(g) Statement of Pleadings to Jury. Counsel for any party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the pleadings and the theory of his case; but counsel shall not argue his case during his opening statement. The pleadings shall not be submitted to the jury for its deliberations.

As explained in the Reporter’s Note:

Rule 43(g) preserves Circuit Rule 85, except it prohibits submitting the pleadings to the jury for its deliberations, a needed change to avoid the jury treating pleadings as evidence or having information therefrom contrary to the judge’s charge and instructions.

Rule 43(g) does not apply because the federal RICO complaint is not a pleading in this action. Instead, the federal complaint is admissible because it forms the very basis of Hulsey’s fair report defense and rebuts the maliciousness element of the defamation claim.

The Trial Court charged the jury, without any exception by the Plaintiff, as follows: “The fair report privilege is a qualified privilege that protects fair and accurate reports of judicial records and proceedings and other official acts, reports and records.

.... If you determine that the statement made was a fair and accurate report of matters within public records.” ROA ____,__; Tr. III 79/15-18, 80/1-3.] Quite clearly, the jury was required to compare the comments in the article to the federal RICO complaint to determine if it was a fair and accurate report.

The logical necessity of admitting a pleading for an independent purpose in certain circumstances can be seen in *Benbow v. Harvin*, 92 S.C. 180, 75 S.E. 414 (1912). In that action to quiet title, the Court held that a summons and complaint in a prior partition suit was admissible:

Nor was there error in admitting the summons and complaint, signed by Mr. Wells, as attorney for the Bochette heirs, as plaintiffs, against Mrs. Harvin. It was competent, because it tended to show common source of title; and the complaint also tended to show that at that time Mr. Wells, as attorney for the Bochette heirs, claimed, and that Mrs. Harvin, under whom the other defendants in this action claim, admitted, that all the land north of Duck branch had belonged to Sarah Anderson.

Just as the partition pleading was admissible to prove a common source of title, the federal RICO complaint was admissible to prove the fair report defense and to rebut the maliciousness element of the defamation claim.

B. The federal RICO pleading does not constitute hearsay because it was not offered to prove the truth of the allegations of the RICO complaint.

1. *Limehouse did not preserve a hearsay objection to the federal RICO complaint.*

As a threshold matter, the Court will see that Limehouse did not preserve any hearsay objection for appellate review because he did not articulate a hearsay objection at the time the federal RICO complaint was introduced into evidence or in his new trial motion. Rule 103(a)(1), SCRE (requiring a timely objection); *State v. Blalock*, supra

(evidentiary objection must be preserved by a contemporaneous objection on a specific ground).

Limehouse argues that he preserved a hearsay objection during a colloquy regarding the page and line designations from Hulsey's deposition that he planned to present during his case pursuant to Rule 32, SCRPC. However, under the applicable preservation rules, any and all objections that might have been voiced in the earlier colloquy at the beginning of trial should have been renewed when the federal RICO complaint was introduced three days later. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 59, 777 S.E.2d 176, 189-90 (2015) (noting that generalized continuing objections are not consistent with the requirement for a contemporaneous objections); *State v. Wiles*, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) (a motion in limine is not a final determination unless it is made and ruled upon immediately prior to the introduction of the evidence in issues – “a contemporaneous objection must be made when the evidence is introduced”); *Cogdill v. Watson*, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) (“The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.”).

Moreover, the record will show that Limehouse did not make a hearsay objection during that colloquy. Rather, Limehouse made the same “allegations” argument – grounded in Rule 43(g) – although he never cited to the rule:

- “And I don't think the complaint is admissible in the evidence in this trial. I don't think complaints are. They're allegations. ... He doesn't have any foundation to do that. These are simply allegations. And can't get a complaint in through allegations.” [ROA ___; Tr. I 220/10-19.]

- “He doesn't know anything of his own knowledge. And I think it's inadmissible because we are talking about allegations of the complaint. Complaints don't come into evidence. [ROA ___; Tr. I 221/10-13.]

The Trial Court overruled the objection in the context of the page/line designations. [ROA ___; Tr. I 221/14.]⁴

2. *The federal RICO pleading is not hearsay.*

Pursuant to Rule 801(c), SCRE, “hearsay” is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” The federal RICO complaint was not hearsay because it was not offered in evidence to prove the truth of the allegations of the complaint. Rather, as discussed above, the federal RICO complaint formed the basis of Hulsey’s fair report privilege. This situation is comparable to that in *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 70, 773 S.E.2d 607, 613 (Ct. App. 2015), where the Court held that the loan documents were not hearsay because they were offered to establish the existence of a contract and the terms of that contract. *See also Ragland v. Sheehan*, 256 Mont. 322, 329, 846 P.2d 1000, 1004 (1993) (“when a statement goes to prove an operative fact of the alleged action, that statement is not hearsay”).

⁴ Ironically, it can be noted from those deposition excerpts, as read to the jury, that Limehouse presented the federal RICO complaint (marked as Exhibit 1) to Hulsey and had him identify the document and questioned him regarding certain specifics of the federal pleading. [ROA ___; Ct. Ex. 1 – Hulsey Dep. p. 40, 42-44.]

II. TRIAL COURT PROPERLY ADMITTED HULSEY'S TESTIMONY REGARDING CONVERSATIONS HE HAD WITH HIS CLIENTS AND OTHER POTENTIAL WITNESSES IN THE COURSE OF HIS DUE DILIGENCE INVESTIGATION PRIOR TO FILING THE FEDERAL RICO COMPLAINT.

Limehouse complains that the Trial Court allowed Hulsey to give hearsay testimony about conversations he had with his clients and others when he was preparing to file the federal RICO complaint. During the presentation of his defense, Hulsey testified about conversations with the Post & Courier reporter, his clients, and other witnesses that he interviewed gathering information prior to preparing the federal RICO complaint. Limehouse noted several objections on the basis of foundation and hearsay.⁵

Arguably, Limehouse has not adequately presented this issue on appeal because, while his brief on this issue contains four pages of quotations from the transcript, his argument merely consists of quoting Rule 602, SCRE and a conclusory argument that Hulsey was attempting to prove the truth of his statements to the reporter with hearsay and he should have called his clients as witnesses to prove the hearsay statements. *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 252, 734 S.E.2d 161, 164 n.3 (2012) (conclusory and unsupported claims deemed abandoned); *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”)

It also is questionable as to whether Limehouse's argument on lack of foundation and citation to Rule 602, SCRE is preserved for appeal because he only made a hearsay

⁵Limehouse also raised hearsay objections at several points during the colloquy regarding the page/line designations for excerpts from Hulsey's deposition to be read during his case-in-chief. For examples, see ROA ___, ___; Tr. I 221/20, 222/25.

argument on this point in his motion for a new trial. In any event, Limehouse's perfunctory argument as to lack of foundation misses the mark because Rule 602 does not, as Limehouse to argues, require Hulsey to call his clients to testify as to what they told him. In the context of testimony about a third party's out-of-court statement, Rule 602 requires that a witness heard the statement. In this case, that foundation was established by Hulsey's testimony about his direct interviews with his client and others while gathering information for the federal RICO complaint. [ROA ___; Tr. II 174/11-12.]

Rule 602, SCRE, provides in relevant part: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." As noted in the Committee Comments to the comparable Federal Rule of Evidence, Rule 602, FRE:⁶ "This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement." This application of Rule 602 is also discussed in 27 Fed. Prac. & Proc. Evid. § 6023:

[W]hen a witness repeats the contents of an out-of-court statement, the witness may have used her sense of hearing to perceive the statement but might have no direct perception of the facts asserted in the statement. In such a case, *Rule 602 requires that the witness' testimony about the statement may be admitted to prove only the facts the witness perceived—that the out-of-court statement was made and that the witness heard the statement.* (footnote omitted, emphasis added).

See also *Tomasello v. Fairfax Cty.*, No. 1:15-CV-95, 2016 WL 165708, at *3 n.6 (E.D. Va. Jan. 13, 2016) (in an employment discrimination and retaliation case, a supervisor's testimony explaining his investigation and his conclusions held admissible because he

⁶ The federal rule is substantially the same as our state rule. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, FRE.

had firsthand knowledge of the nature of his investigation and his conclusions). Hulsey's testimony that he heard the out-of-court statements from his clients and others satisfied the personal knowledge requirement of Rule 602.

One line of questions to which Limehouse objected concerned Hulsey's communications with the Post & Courier reporter who testified at trial. The record shows that Hulsey did not testify to any specific statements from the reporter rather, the substance of his testimony was that the reporter "stood behind" what he had written in the earlier articles about the labor and housing issues at L&L. [ROA ___; Tr. II 173/18 - 175/6.] Limehouse also objected to Hulsey testifying about what he found from his conversations with employees, former employees, and city officials when he was gathering information for the preparation of the federal RICO complaint. [ROA ___; Tr. II 176/2 - 178/9.] As to each of these lines of questions, the Trial Court properly overruled the hearsay objection because Hulsey's testimony about those conversations was not offered to prove the truth of what he learned. Rather, it was offered to prove Hulsey had a reasonable foundation for filing the federal RICO complaint in rebuttal to Limehouse's efforts to prove that Hulsey had been reckless or malicious.

The Trial Court's ruling on the hearsay objections is supported by the Supreme Court's decision in *State v. Kromah*, 401 S.C. 340, 355, 737 S.E.2d 490, 498 (2013), where a sheriff's investigator was allowed to testify in detail about his investigative process and the individuals he spoke to as the basis for his decision to arrest the defendant. Similarly, in *State v. Thompson*, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003), the Court of Appeals held that police officers' testimony regarding statements made by a witness was not hearsay because it was not entered for the truth but rather to explain and

outline the officers' investigation and their reasons for their actions in going to the defendant's home. *See also State v. Weaver*, 361 S.C. 73, 86–87, 602 S.E.2d 786, 792–93 (Ct. App. 2004) (holding officer's testimony as to what his investigation revealed and his conclusion that all of the evidence led to the defendant was proper where he did not repeat any statements actually made to him by individuals at the scene and it was offered to explain his investigation.).

The admissibility of Hulsey's testimony about his conversations with his clients and witnesses also is supported by the reasoning of the Oklahoma Supreme Court, in a defamation case of *Henslee v. Monks*, 1977 OK 202, 571 P.2d 440 (1977). There, a police chief brought an action for libel and slander against a news reporter for alleged defamatory remarks concerning an alleged fix between police chief and ranchers regarding the hiring of illegal aliens. At trial, the plaintiff had objected to testimony by the reporter as to out-of-court statements from his conversations with his sources. The court held that the complained of testimony was not hearsay because it was relevant on issue of whether the reporter acted with reckless disregard so as to commit actual malice.⁷

By similar analysis, Hulsey's conversations with the reporter, his clients and other witnesses formed Hulsey's knowledge base for preparing the federal RICO complaint and the statements that he gave to the reporter about that complaint as was quoted in the newspaper. Accordingly, they were not hearsay in that they were offered, not for the truth of the matters, but on the issues of malice and reckless disregard.

⁷The court also held that the trial court did not commit reversible error in not limiting reporter to testifying as to conversations only when the other party was present in court.

III. THE TRIAL COURT PROPERLY EXCLUDED THE AMOUNT PAID IN SETTLEMENT OF THE FEDERAL RICO ACTION PURSUANT TO RULE 408, SCRE.

After two years of pretrial litigation, the underlying federal RICO action was settled by L&L for \$20,000 with no admission of liability. Prior to trial, Hulsey filed a motion in limine to exclude evidence of the “settlement of the underlying RICO case and offers of compromise related to the same.” [ROA ___; Motion ¶7, filed March 20, 2015.] Hulsey also objected to certain page/line designations from Hulsey’s deposition that Limehouse sought to publish in his case-in-chief on the subject of the settlement. [ROA ___; Tr. I 178/7-10.] Limehouse argued that the “paltry” amount paid in settlement was relevant to show that Hulsey made the statements recklessly. [ROA ___; Tr. I 85/23 – 86/10. ROA ___; Tr. I 180/8-16.] The Court properly granted the motion to exclude under Rule 408, SCRE:

I think that what's been presented here is, and Mr. Cisa says he wants to have this evidence admitted to show the invalidity of the lawsuit filed by Mr. Hulsey, and I find that to allow that would be a clear violation of Rule 408 and this line of going and asking him about the amount of this settlement and where the money went, would likewise be a violation of Rule 408. And I grant the defense's motion to exclude discussions of settlement and compromise and the amount of settlement and compromise as being a violation of the 408. [ROA ___; Tr. I 216/11-20.]

“Because the law favors compromises, our appellate courts have long held that testimony as to negotiations and offers to compromise are inadmissible for proving liability. “ *QHG of Lake City, Inc. v. McCutcheon*, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004) (citations omitted). This rule is now codified in Rule 408, SCRE:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule

does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Limehouse cites to *QHG of Lake City* in support of his argument that he was offering the settlement terms for “another purpose,” namely, to show that the Hulsey’s statements to the reporter about the federal RICO complaint “lacked merit and veracity.” However, the opinion in that case does not support his position. There, the plaintiff hospital was asserting claims against one of its doctors for breach of contract to repay loans. On appeal, the defendant asserted the trial court erred by admitting into evidence a \$250.00 check she sent to the hospital which she contended, was written as a part of a settlement negotiation and should have been excluded under Rule 408, SCRE. The Court held that the record did not show any settlement negotiations, and the only evidence was that the check was her first payment on the loan, stating: “Nothing in the rule against settlement testimony requires courts to exclude evidence that a party tendered a sum mutually understood to be due. Therefore, the special referee committed no error in admitting McCutcheon's check.” *Id.* at 111-12.

The hospital’s offer of the check to prove the amount due on the loan has no comparison to Limehouse’s attempt to use the settlement amount and terms as evidence of the truth of Hulsey’s statements about the federal RICO complaint. Moreover, the amount of the subsequent settlement of the federal RICO action could not have been relevant to Hulsey’s statements to the reporter when the complaint was filed. *See Padgett v. Sun News*, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982) (accuracy of fair report of court filing should not be judged in light of subsequent filings).

IV. THE TRIAL COURT PROPERLY FOUND THAT HULSEY WAS ENTITLED TO PRESENT TO THE JURY A FAIR REPORT PRIVILEGE AS AN AFFIRMATIVE DEFENSE BASED ON EVIDENCE THAT HIS COMMENTS TO THE NEWS REPORTER WERE ABOUT THE RICO COMPLAINT THAT HE HAD FILED IN FEDERAL COURT.

Limehouse argues that the jury verdict should be reversed on the ground that the Trial Court erred by charging the jury that Hulsey is entitled to the protection of the fair report privilege. First, Hulsey would note for the Court's attention that Limehouse does not challenge the jury charge on the fair report privilege, and in fact, the Trial Court gave the charge as he requested. Second, while Hulsey maintains that the evidence supports the Trial Court's decision to submit the privilege to the jury, the transcript shows that Limehouse did not preserve for appeal any issue as to the sufficiency of the evidence on any of the defenses. Finally, if not foremost, in the absence of any challenge to the other defenses, the jury's general verdict should be affirmed under the two issue rule.

A. The jury's general verdict should be affirmed under the two issue rule.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). "Under the two-issue rule, when a jury returns a general verdict in a case involving two or more issues or defenses, and the verdict is supported as to at least one issue or defense that has been presented to the jury free from error, the verdict will not be reversed." *Cole v. Raut*, 378 S.C. 398, 406-07, 663 S.E.2d 30, 34 (2008). "[W]hen a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of

action.” *Anderson v. S. Carolina Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 254 (1996).

In this case, Hulsey asserted other defenses in addition to the fair report privilege, i.e. truth and the fair comment privilege, but Limehouse has not presented any issue on appeal pertaining to those other defenses. On this record, application of the two issue rule in this case is comparable to and supported by the Court’s decision in *Gold Kist, Inc. v. Citizens & S. Nat. Bank of S. Carolina*, 286 S.C. 272, 282, 333 S.E.2d 67, 73 (Ct. App. 1985). In *Gold Kist*, the plaintiff sought to challenge a set-off on the defendant’s counter-claim, but it did not challenge the sufficiency of the evidence on its own two claims for breach of express or implied warranties. In applying the two issue rule, the Court noted that plaintiff’s counsel had “acquiesced in a general verdict after having been cautioned that the verdict would deprive Gold Kist of the jury’s answers to the specific issues and defenses raised....” *Id.* at 74. Similarly, Limehouse also acquiesced in the general verdict form despite Hulsey’s request for special interrogatories.

On the fourth day of trial, Hulsey submitted a proposed verdict form with special interrogatories: “MR. HOOD: As it relates to the verdict form I handed up, Your Honor, the reason I had contained all of the special interrogatories on there were to address the complexity of the legal claims that have been brought and the defenses associated with them.” [ROA ___; Tr. II 6/21 – 25. ROA ___; Proposed verdict form.] However, Limehouse stated his preference for a general verdict form: “MR. CISA: That’s what I would prefer; you find for the plaintiff or you find for the defendant. If you find for the plaintiff what are the damages, what are the actual damages. That’s what I would prefer.” [ROA ___; Tr. II 9/1-4.]

On the last day of trial, the Trial Court informed the parties that it would be using a general verdict form. Hulsey again requested that the verdict form include special interrogatories on the defenses of the fair report and fair comment privileges. [ROA ___; Tr. III 15/11-24,]. At that time, Hulsey specifically referenced the importance of special interrogatories for any appellate review:

MR. HOOD: And the other reason I would propose to use interrogatories that are consistent with Your Honor's determinations as a matter of law would be to ensure that when we look back at this case and jury's determination that all parties would have some direction from the jury based on the interrogatories in terms of the evidence that was presented and whether the evidence supports the determinations reached by the jury. Without the special interrogatories we would run the risk of not knowing that information, and I think it would certainly make the record clearer and more easily determined for Your Honor in posttrial motions or anyone else who is looking at the ultimate result. [ROA ___; Tr. II 7/22 – 8/9.]

Nonetheless, Limehouse acquiesced in the use of a general verdict form: “MR. CISA: Your Honor, I think that [general] verdict form is fine....” [ROA ___; Tr. III 15/2-3.]

With the general verdict, there is no way of knowing how the jury may have ruled on the fair report privilege and Limehouse has not presented any challenge on the other defenses. Accordingly, the jury’s general verdict in favor of the Defendants should be affirmed under the two issue rule.

B. Hulsey established a qualified privilege in making his comments to the reporter about the federal court filing.

The Trial Court correctly charged the jury on the law of the fair report privilege as follows:

There are two types of qualified privileges applicable to this case, the fair report privilege and the fair comment privilege. I have determined as a matter of law that the defendants are entitled to the protection of the fair report privilege. The fair report privilege is a qualified privilege that protects fair and accurate reports of judicial records and proceedings and other official acts, reports and records. The fair report privilege does not

depend on the legal sufficiency of the allegations made in the judicial proceedings or the truth of the allegations, but consists of making a fair and substantially true account of the particular record or proceeding. This privilege, however, does not extend to and affords no protection for a defamatory statement made outside of public records, nor does it provide protection where a statement is made with actual malice. If you determine that the statement made was a fair and accurate report of *matters within public records* and without malice, you must find for the defendants.

[ROA ___; Tr. III 79/11 - 80/4 (emphasis added).] This charge on the fair report privilege is a correct statement of law. *Padgett v. Sun News*, 278 S.C. 26, 31, 292 S.E.2d 30, 33 (1982) (“Privilege in reporting a judicial record is not measured by the legal sufficiency of the charges made in the judicial proceedings or the truth of those charges. The privilege consists of making a fair and substantially true account of the particular proceeding or record.”); *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968) (“Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged.”) In fact, while Limehouse noted an objection and requested a slight change in language during the colloquy regarding the Trial Court’s proposed charge,⁸ the Trial Court revised the charge as Limehouse requested (as indicated in the phrase emphasized in the quote above) and he did not make any objection after the jury was charged.⁹

⁸ MR. CISA: ...So I'd ask you insert the following words, if you determine that the statement made was a fair and accurate report of matters within the public records.

THE COURT: All right. *Matters within the public records*, you want me to add those words to the bottom there?

MR. CISA: Right to there. Judge, I think that's all that I have.

[ROA ___; Tr. III 10/16 – 11/5 (emphasis added).]

⁹ THE COURT: All right. Any additions? Before I speak to you in the moment, in the interim, are there any additions or so corrections to the charge or exceptions?

MR. CISA: None from the plaintiff. [ROA ___; Tr. III 86/16-19.]

The privilege of fair reporting is a mixed question of law for the court and question of fact for the jury. “Whether the occasion is one which gives rise to a qualified privilege is a question of law.” *West. v. Morehead*, 396 S.C. 1, 7-8, 720 S.E.2d 495, 499 (Ct. App. 2011) (citing *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999)). “Where there is conflicting evidence, ‘the question whether [a qualified] privilege has been abused is one for the jury.’” *Id.* (footnote omitted).

The article headline read: “Lawsuit Targets Staffing Agency – 6 laborers sue L&L Services;” and it describes the filing of the 33-page complaint and details of the allegations and the named defendants. [ROA ___; Def. Ex. No. 9.] The reporter testified that he called Hulsey on the day of filing for comment on the complaint. [ROA ___; Tr. I 192, 198/19-22.] The reporter further confirmed that the quotes attributed to Hulsey in the article were referencing the allegations in the complaint:

Q. Now, Mr. Scott, when you were discussing this complaint with Mr. Hulsey, you were talking during the entire conversation about the filing of the lawsuit, the complaint, and the various elements and allegations contained therein, correct?

A. Yes. The whole conversation would have been related to the case and this article.

[ROA ___; Tr. I 204/3-9. See also ROA ___, ___, ___; Tr. I 202/22-24; 203/10-14; 203/22 - 204/2.] Limehouse’s Counsel even acknowledged on the trial record that Hulsey’s comments to the reporter were about the federal lawsuit:

- “when Mr. Hulsey was talking to James Scott about the lawsuit he filed in federal court;” [ROA ___; Tr. I 85/7-8.]
- “he’s talking about his lawsuit in this article;” [ROA ___; Tr. I 86/15.]
- “there’s evidence in the record that Mr. Hulsey had talked to Mr. Scott for the

purpose of telling about a lawsuit that he had filed.” [ROA ___; Tr. II 96/15-17.]

At the close of the case, Hulsey renewed his motion for a directed verdict on the as to the fair report privilege and the Trial Court ruled that “the privilege applies. It's for the jury to determine whether those comments were beyond the record and/or if they were made with malice,” [ROA ___; Tr. II 343/18-21]:

THE COURT: I have been thinking about it and I determined that as a matter of law the defendants are entitled to protections of a fair report privilege based on whether the cases that primarily deal with news reporters talking about cases that have been filed and the cases that have extended that protection to individuals. So I believe that all things considered, including this being a conversation between the lawyer who filed the lawsuit and the news reporter that the fair report privilege applies to this case which necessitates a determination of whether or not the comments made were outside of that -- outside of the public records or whether the statements were made for factual malice.

So I'm granting -- determining as a matter of law as you suggest I should, Mr. Hood, that the fair report privilege applies. The jury determines -- and I'm not -- I don't know whether it's a question whether the fair comment privilege applies or whether it applies based on the comments because it's a jury issue as to whether any comments made extended beyond the privilege. So it's a question of structuring the jury charge to tell the jury about all that. [ROA ___; Tr. II 342/3 - 343/5.]

THE COURT: Yeah. I determine as a matter of law that a lawyer commenting on a lawsuit that they filed is covered by the fair report privilege but the comments have to be contained within the record and cannot be based on actual malice toward the other person. That's number one. And then number two, that it's for the jury to determine whether whatever comments made were fair comments on the matter of public interest or concern, or whether or not it was done for an unfair or dishonest purpose or with malice such that the privilege is lost. [ROA ___; Tr. II 344/21 - 345/5.]

As in *West v. Morehead*, the Trial Court correctly ruled that Hulsey's statements were subject to the fair report privilege because they related to the content of federal RICO complaint in the public file in the federal court. *West*, 720 S.E.2d at 499 ("Because the article relates to the content of public files on judicial proceedings, the trial court correctly ruled that the publication of the article is subject to the fair report privilege.") Likewise, accepting – only for the sake of this appeal¹⁰ – that there was conflicting evidence and permissible inferences as to whether Hulsey's description of the federal RICO complaint was a fair and substantially true account of that court filing or whether they were made with actual malice, the Trial Court properly submitted to the jury the question of whether there was an abuse of the privilege.

C. Limehouse did not preserve any objection to the fair report privilege.

Several appellate preservation rules apply to preclude Limehouse's request for a new trial on this issue. First, a failure to timely object to a jury instruction as required by Rule 51, SCRPC, forecloses appellate review. *Winters v. Fiddie*, 394 S.C. 629, 639, 716 S.E.2d 316, 321 (Ct. App. 2011). Second, a directed verdict motion is a prerequisite motion for a new trial on a ground that the evidence does not support the verdict. *McEntire v. Mooregard Exterminating Services, Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003); Trial Handbook for South Carolina Lawyers § 37:9. Third, a motion for a new trial is properly denied where an alleged error in a jury charge is not raised in the motion. *Wren v. Kirkland Distrib. Co.*, 250 S.C. 178, 182, 156 S.E.2d 865, 866 (1967).

¹⁰ Hulsey moved for a directed verdict at the close of the Plaintiff's case on the ground that there was no conflicting evidence and a fair report privilege applied. [ROA ___; Tr. II 109/2-4. See also ROA ___; Tr. II 112/16-19.] The Trial Court denied the motion at that time. [ROA ___; Tr. II 120/1-6.] Hulsey renewed his directed verdict motion at the close of the case. [ROA ___; Tr. II 341.]

Fourth, an issue is not preserved for appellate review where the objection was made at trial on different grounds. *State v. Smith*, 337 S.C. 27, 34, 522 S.E.2d 598, 601-02 (1999).

As noted above, the jury charge cannot be the basis for reversal of the jury's verdict since Limehouse did not object to the jury charge on the fair report privilege after the Trial Court added the language he requested. To the extent that Limehouse is asserting some separate challenge to the sufficiency of the evidence to support the Trial Court's ruling that Hulsey's statements were about the federal RICO complaint, such issue is not preserved because he did not make a motion for a directed verdict on the fair report defense. In fact, Limehouse did not make a motion for directed verdict on any claim or defense at the close of the case. [ROA ___; Tr. II 339/5-7.]

When Hulsey renewed his motion for a direct verdict at the close of the case, the Counsel for Limehouse stated on the record that he understood that the Trial Judge was holding that the privilege applied and that he was going to let the jury determine whether or not Hulsey complied with the privilege. [ROA ___; Tr. II 345/12-16.] As noted above, on the last day of trial, when the Trial Court gave the attorneys a copy of his jury charge, Hulsey again noted his understanding of the Court's ruling and submission of the fair report privilege and he only requested a minor change in the language of the charge. [ROA ___; Tr. III 9/15-11/5.] Finally, Limehouse did not object to submission of the fair report privilege or raise any other issue as to the sufficiency of the evidence on his claim or any of the defenses in his new trial motion. [ROA ___; Motion for a New Trial Absolute.] Accordingly, there is no basis in the record to set aside the jury's general verdict to grant Limehouse a new trial on the fair report privilege.

CONCLUSION

The Plaintiff Lawton Limehouse, Sr. raised three issues in his motion for a new trial, but the trial record will show that the Trial Court did not abuse its discretion in regards to any of those evidentiary rulings. The Trial Court properly admitted the federal RICO complaint because that court document forms the basis for the fair report privilege and to rebut the defamation elements of recklessness and malice. The Trial Court also properly allowed Hulsey to testify regarding conversations he had with his clients and other potential witnesses in the course of his due diligence investigation prior to filing the federal RICO complaint in rebuttal to the defamation elements of recklessness and malice. The Trial Court properly excluded the amount paid in settlement of the federal RICO action as required by Rule 408, SCRE.

The Trial Court also properly submitted the fair report privilege to the jury because Hulsey's comments to the news reporter were directed towards the RICO complaint that he had filed in federal court. In any event, the jury's general verdict in favor of Respondents Paul Hulsey and Hulsey Litigation Group should be affirmed under the two issue rule.

Respectfully submitted,



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Attorneys for Respondents

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

On Appeal from Charleston County
Court of Common Pleas

Clifton B. Newman, Circuit Judge

Case No. 2066-CP-10-1577
Appellate Case No. 2015-001844

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MAR 15 2016

SC Court of Appeals

Lawton Limehouse, Sr.,

Appellant,

v.

Paul H. Hulsey and The Hulsey
Litigation Group, LLC,

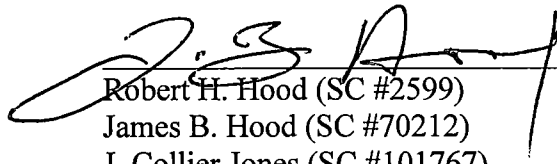
Respondents.

Certificate of Service

I, James B. Hood, the undersigned Counsel for the Respondents do hereby certify that I have this 11th day of March, 2016, served the Initial Brief of Respondents and Designation of Matter upon the Appellant by depositing a copy in the U.S. Mail, with sufficient first class postage, addressed to their Counsel of Record of as listed below:

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March 11, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
MAR 15 2016
SC Court of Appeals

Re: Lawton Limehouse, Sr. v. Paul H. Hulsey and The Hulsey Litigation Group, LLC
C/A No. 2006-CP-10-1577, Charleston CP
HLF File No. 379.000

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the Respondents' Initial Brief and Designations in the above matter. As indicated on the Certificate of Service, we are serving both on Mr. Cisa by copy of this letter. Please return a clocked-in copy of each in the envelope provided.

Kind regards,

Yours truly,


James B. Hood

JBH/anj

Enclosures

cc: Frank M. Cisa, Esquire
Cherie K. Durand, Esquire

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