THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

J. Scott Kunst .....Respondent,

v.

David Loree .....Appellant.

FINAL BRIEF OF APPELLANT

V. Elizabeth Wright (SC Bar ID 76029)
V. ELIZABETH WRIGHT LAW FIRM, LLC
217 E. Park Avenue
Greenville, SC 29601
(864) 326-5281
bethwrightattorney@gmail.com

Gregory K. Smith (admitted *pro hac vice*)
King & Spaulding, LLP
1180 Peachtree Street
Atlanta, GA 30309
(404) 572-2858
GKSmith@kslaw.com

Attorneys for the Appellants

Other counsel of record:

J. Scott Kunst, *pro se*
130 Arabian Way
Simpsonville, SC 29681
(864) 979-7961

Respondent

Table of Contents

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 5

Argument 6

I. Trial court erred when verdict was error in law. 6

A. Loree proved the substantial truth of Kunst's alleged slanderous statements 6

B. Loree proved the alleged slanderous statements were protected by qualified privilege. 10

II. Trial court erred when there was insufficient evidence to support the jury's findings. 14

A. Kunst did not prove the elements of slander *per se.* 14

III. Trial court erred in not overturning the excessive verdict. 16

Conclusion 21

Table of Authorities

South Carolina Case Law

Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946)..... 15

Constant v. Spartanburg Steel Products, Inc., 316 S.C., 86,
447 S.E.2d 194 (1994)..... 10

Curtis v. Blake, 392 SC 494, 709 S.E.2d 79 (Ct. App. 2011)..... 17

Green v. Hewett. 305 S.C. 238, 407 S.E.2d 651 (1991)..... 15, 16

Holtzscheiter v. Thomson Newspapers, Inc. 332 S.C. 502,
506 S.E.2d 497 (1998)..... 14

Lynch v. Toys "R" Us-Delaware, 375 S.C. 604,
654 S.E.2d 541 (Ct. App. 2007)..... 8

McBride v. School District of Greenville County, 389 S.C. 546,
698 S.E.2d 845 (Ct. App. 2010)..... 15

Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) ... 11, 13

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331,
450 S.E.2d 66 (Ct. App. 1994)..... 17, 20

Parrish v. Allison, 376 S.C. 308,
656 S.E.2d 382 (Ct. App. 2007)..... 6

Proctor v. Dep't of Health & Envtl. Control, 368 SC 279,
628 S.E.2d 496 (Ct. App. 2006)..... 17

Ross v. Columbia Newspapers, Inc., 266 S.C. 75,
221 S.E.2d 770 (1976)..... 6

Sanders v. Prince, 304 S.C. 426, 403 S.E.2d 640 (1991)..... 20

Seabrook Island Prop. Owners' Ass'n v. Berger, 365 S.C. 234,
616 S.E.2d 431 (Ct. App. 2005)..... 18

Small v. Springs Indus., 292 SC 481, 357 S.E.2d 452 (1987)..... 17

State v. Ball, 292 S.C. 71, 354 S.E.2d 906 (1987) 15

Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469,
514 S.E.2d 126 (1999)..... 13

Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81,
221 S.E.2d 773 (1976)..... 5

Federal Case Law

Anderson v. Stanco Sports Library, Inc.,
542 F.2d 638 (4th Cir. 1976) 6

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in not overturning the verdict when it was an error in law?

II. Did the trial court err in not overturning the verdict when there was insufficient evidence to support the verdict?

III. Did the trial court err in not overturning the verdict when the verdict was excessive?

STATEMENT OF THE CASE

Respondent J. Scott Kunst ("Kunst") filed his Complaint on December 19, 2006, naming Richard Gaby, Barbara Gaby, and David Loree as Defendants. Kunst alleged tortious interference with contractual relations, unjust enrichment, intentional infliction of emotional distress, and defamation. (R. p. 27, Complaint). The Gabys were dismissed from the case on April 14, 2007, (R. p. 16, Order of Dismissal) because the court found that Kunst's causes of actions were compulsory counterclaims of another action involving Kunst, *Gaby v Kunst and Kunstwerke Corp.*, case number 2006-CP-23-2943 (the "Gaby Action"), as set forth in Rule 14, SCRCP, which left Appellant David Loree ("Loree") as the sole defendant. Loree moved for summary judgment as to all causes of action and on March 3, 2009 the Honorable Edward W. Miller granted Loree's summary judgment as to the tortious interference and intentional infliction of emotional distress claims, but denied summary judgment as to the defamation claim. (R. p. 14, Order of the Honorable Edward W. Miller dated March 3, 2009).

After Kunst lost his appeal in the Gaby Action, Loree again moved for summary judgment on Kunst's defamation claim based on collateral estoppel. The trial court granted summary judgment (R. p. 1, Order of the Honorable Edward W. Miller dated

October 19, 2010), which Kunst then appealed to the South Carolina Court of Appeals. On August 14, 2013, the Court of Appeals reversed and remanded the case for trial.[1]

Trial of the case took place May 26-28, 2015 in the Pickens County Court of Common Pleas, the Honorable Robin Stilwell presiding. The jury returned a verdict in favor of Kunst on May 28th and awarded him $1,000,000 in actual damages. On June 8, 2015, Loree moved for JNOV, New Trial in the Alternative, New Trial *nisi remittitur* and New Trial absolute. (R.p. 231, Loree JNOV motion). Loree's motion was denied on June 17, 2015.(R. p. 21, Order of the Honorable Robin Stilwell). Loree filed the Notice of Appeal on July 13, 2015.

STATEMENT OF FACTS

This case is Kunst's attempt to re-try the Gaby Action. Indeed, as described in Kunst's e-book, *Cold and Greedy*[2] (R. 461, 497, 505-506, 733, 735-736, Defendant's trial exhibit 22, pages 4, 13, 240, and 242-243) Kunst used this action and the South Carolina courts as a tool to extract revenge for a host of perceived wrongs committed by various members of the community, bench, and bar. In the Gaby Action, the court found Kunst and his business, Kunstwerke Corp., to be in default after each failed to file an answer. When Kunst moved to have the default set aside on December 12, 2006, Judge Patterson denied Kunst's motion. Less than one week later, on December 16, 2006, Kunst filed his Complaint in this action, naming Richard and Barbara Gaby and David Loree as defendants. Kunst alleged claims of tortious interference with a contractual relationship, unjust enrichment, intentional infliction of emotional distress, and defamation against all defendants. As set forth in the Statement of the Case, Loree is the

[1] *See Kunst v. Loree,* Appellate Case No. 2011-199507.

[2] Kunst refers to former lead counsel T. S. Stern, Jr. as "Dandy Nerts" and Loree as "Rollie".

only defendant remaining in this case and the only cause of action now remaining in this action is slander *per se*.

Loree is employed by Richard and Barbara Gaby. The Gabys hired Kunst to design and build a custom home in The Reserve on Lake Keowee. Loree, at the direction of the Gabys, investigated Kunst's work on the Gaby home when it became evident that Kunst was over budget and taking longer to complete the house than he represented. (R.p. 126, Tr., testimony of David Loree, pgs. 163: 3- 164: 9). As is customary in the construction of residences, Kunst would submit an invoice to Mr. Gaby for work thus far completed. Mr. Gaby would pay Kunst the requested amount, with the understanding that Kunst in turn would pay the subcontractors and vendors listed on the invoices. (R., p. 127, Tr., testimony of David Loree, p. 166: 4-8). In the course of his investigation, Loree contacted subcontractors and vendors to determine whether or not they had been paid by Kunst. (R., p. 128, Tr., testimony of David Loree, p. 171: 11-19). Loree found that Kunst was not paying the subcontractors and vendors as he was obligated to do, even after receiving funds from the Gabys to pay the invoices. (R., pgs. 143-147, Tr., testimony of David Loree, pgs. 223-245). Loree also found in some cases that Kunst changed invoice amounts submitted to the Gabys (for amounts more than submitted by the subcontractor). (R. p. 141 - 147, Tr., testimony of David Loree, pgs. 223-245). These, and other of Loree's findings, were among the evidence presented at the damages hearing in the Gaby Action, held before the Honorable G. Edward Welmaker on March 13, 2007. (R., p. 23, Order of Judge Welmaker). Judge Welmaker found all facts pertaining to the pertinent causes of action were admitted. The facts included:

1. Kunst failed to pay vendors and subcontractors as called for in the contract with the Gabys;

2. Kunst performed defective work;

3. Kunst diverted the Gabys' funds for his own personal use;

4. Kunst engaged in unfair and deceptive trade practices; and

5. Kunst breached his fiduciary duty to the Gabys.

Judge Welmaker also found the Gabys proved their damages claim and he awarded $353,993.91 in damages, with attorney's fees and costs in the amount of $35,807.41.

In paragraph 53 of his Complaint, (R. pgs. 34-35) Kunst alleged that all of the "Defendants" defamed him in the following manner:[3]

- Defendants stated "Plaintiff embezzled money from the Defendants";
- Defendants stated "Plaintiff embezzled money from other clients";
- Defendants reported to numerous sub laborers and suppliers that funds intended for them were taken by the Plaintiff for his own personal use;
- Defendants "stated to numerous business associates, clients, and The Reserve sales staff that the Plaintiff was in financial trouble and unable to meet his future obligations."
- Defendants stated to "associates of the Plaintiff that the Plaintiff could go to prison";
- Defendants "planted rumors that the Plaintiff's design work and construction were defective and that he lacked professional qualifications."

[3] Kunst later changed the statements at pre-trial hearings. (R., p. 39-40) Plaintiff's pre-trial brief, pgs. 1-2.

Kunst did not allege that Loree specifically made any of the statements, just "Defendants." Loree denied he made the statements.

Kunst, although a former CPA, was unable to keep his company, Kunstwerke, financially solvent. Kunst claimed that the reason his business failed was because Loree informed other Kunstwerke clients about Kunst's nefarious acts. However, tax liens filed by both the Internal Revenue Service and the South Carolina Department of Revenue indicate that Kunst's financial woes began as far back as 2003, well before Loree started his investigation in 2006. (R. p. 409-455, Defendant's trial exhibits 19, 20, and 21, tax liens).

In sum, during the scope of the investigation Loree performed for his employer, he found Kunst had failed to pay vendors and subcontractors, overcharged on vendor invoices, and used funds paid by the Gabys for his personal use. Judge Welmaker granted damages to Loree's employer based on Loree's findings. If Loree did make the defamatory statements as Kunst alleges, the statements are true and were made during the performance of his duty and protected by qualified privilege. Because the jury's verdict is based on errors of law, it should be set aside and a new trial granted.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to correct errors of law. The factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Townes Associates, Ltd. v. City of Greenville,* 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

ARGUMENT

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

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

Truth is an affirmative defense to allegations of defamation. *Parrish v. Allison*, 376 S.C. 308, 318, 656 S.E.2d 382, 392 (Ct. App. 2007). *See also Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976)(Substantial truth is a valid defense to a libel claim); *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 79, 221 S.E.2d 770, 772 (1976)(The truth of the matter published is ... a complete defense to an action based on defamation).

During the hearing on pre-trial motions Kunst stated he was asserting the following statements from his pre-trial brief as the statements allegedly made by Loree.[4] These statements are:

- The Plaintiff embezzled $400,000 from the Gabys.
- The Plaintiff embezzled money from all of his clients.
- The Plaintiff had taken money from named clients Parham, Covington, Coco, and Hickey.
- The Plaintiff created dummy invoices from dummy companies so that he could steal money from these clients.

[4] Kunst's alleged defamatory statements differ from those asserted in his Complaint. See paragraph 53, Complaint, R. p. 34-35.

- The Plaintiff took money from his clients to spend on an investment project, a car, trips, and family members.
- The Plaintiff did "criminal things" like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.
- The Plaintiff "is going to jail."
- The Plaintiff took money from his other projects and that money was missing from these projects. *See* Kunst pre-trial brief, pages 1-2, R. p. 39-40.

Loree introduced into evidence the Gaby Action order dated March 26, 2007 in which Judge Welmaker found that the Gabys were entitled to recover on all their causes of action including breach of contract accompanied by a fraudulent act, conversion, and breach of fiduciary duty. (R. p. 23, Order of Judge Welmaker, Defense Exhibit 23).[5] As referenced in the Order, Judge Welmaker heard testimony of how Kunst took money from the Gabys, falsified invoices, allegedly purchased and then canceled an insurance policy in order to keep the proceeds, and used the Gabys' money for his personal purchases. Judge Welmaker ruled in favor of the Gabys. Judge Welmaker's Order, which was not reversed by either the Court of Appeals or the Supreme Court, is a public record that affirms that the alleged defamatory statements are true.

Kunst contended that Loree said Kunst had taken money from his clients Covington, Parham, Hickey, and Coco. Of these former clients, Kunst called only Eugene C. Covington to testify. Mr. Covington testified that Kunst disappeared from his building site. Covington testified that was when he learned Kunst had not paid the

[5] Kunst stated on cross-examination that this order had been overturned by the Court of Appeals. That is incorrect. The Court of Appeals affirmed the trial court's order on January 14, 2009. (2009-UP-028). The South Carolina Supreme Court denied Kunst's Petition for Writ of Certiorari on June 10, 2010.

subcontractors on his project. (R. p. 156, Tr., testimony of Eugene Covington, p. 282: 19-25). Covington further testified that Kunst used the money Covington paid for his project to purchase a wedding ring for Kunst's fiancée. (R. p. 156, Tr., testimony of Eugene Covington p. 283:25). Covington went on to testify that he tried to have an accounting done for his project, but Kunst never provided financial records to Covington's forensic accounting expert. (R., p. 157, Tr., testimony of Eugene Covington, p. 285: 1-8). Finally and tellingly, Covington testified that Loree never made any of the alleged statements to him. (R. p. 157, Tr., testimony of Eugene Covington, p. 286, lines 3-13). Nonetheless, Covington's testimony makes it clear that Kunst's alleged defamatory statements are actually true. *See Lynch v. Toys "R" Us-Delaware*, 375 S.C. 604, 611, 654 S.E.2d 541, 549 (Ct. App. 2007)(elements of defamation include unprivileged communication to a third party).

Kunst's witness Kevin Goad testified that he only remembered Loree's general statements (R. p. 116, Tr., testimony of Kevin Goad, p. 121: 2-4) and when asked if Loree's statements were true, testified, "They had as much merit as anything else I had heard." (R., p. 117, Tr., testimony of Kevin Goad, p. 127: 15-17). Goad further testified that he only talked to Loree concerning the accounting on the Gaby project. (R. p. 119, Tr., testimony of Kevin Goad, p. 135: 4-8). Finally, Goad did not recall who told him Kunst was going to jail. (R. 120, Tr., testimony of Kevin Goad, p. 137: 1-8). Goad's testimony established that he regarded Loree's statements to be true and that Loree did not tell him Kunst was going to jail.

Glenn Alfonzo, another of Kunst's witnesses, read from "his" affidavit that Loree said Kunst was a criminal, but on cross-examination, admitted that the affidavit was

incorrect and that it did not reflect what he had said. (R., p. 124, Tr., Glenn Alfonzo testimony, p. 153: 14 - p. 154: 13). Alfonzo later admitted that his affidavit, if ever corrected, should state that Loree told him Kunst did things that were criminal. However, Alfonzo also admitted Kunst prepared his affidavit, leaving it in question as to whether the affidavit really reflects what Alfonzo heard or what Kunst wanted him to say that he heard. (R., p. 124, Tr. testimony of Glenn Alfonzo, p. 156:. 14-21). Interestingly, Alfonzo testified that it was true that the Kunstwerke checks to him bounced and so he made arrangements for Kunstwerke to pay him with certified checks. (R., p. 124, Tr., Glenn Alfonzo testimony, p. 155:. 1-8). Alfonzo's testimony established that it is doubtful Alfonzo really heard Loree accuse Kunst of criminal acts, but it is certain the Kunstwerke checks bounced.

Loree moved for JNOV on the grounds that if he did make any of the alleged defamatory statements, he produced unrefuted evidence that the statements are substantially true. (R., p. 231, Loree Motion for JNOV). Loree introduced in his testimony invoices and a letter from Select Stone and Systems Specialties (R., p. 371, 373, 375, 377, Defense Exhibits 2, 3, 4, and 5) to show that Kunst marked up invoices to the Gabys. (R. pgs. 141 - 142, Tr., testimony of David Loree, pgs. 223: 10 – 228: 25). He introduced an email from Paul Anderson (R., p. 391, Defense Ex. 11) to show Kunst had not paid a supplier even though he had been provided with the funds to do so. *See* also R., pgs, 141-147, Tr., testimony of David Loree, pgs. 223-245, in which Loree accounts in detail the various invoices that Kunst did not pay using the funds Gaby sent him and the invoices that Kunst marked up. Kunst never introduced any evidence to refute Loree's testimony.

On cross-examination of Kunst, Loree entered into evidence the Parham Order (R., pgs. 400-408, Defense Ex. 14) and the Gaby Order (R. pgs. 738-741, Defense Ex. 23) to show that two courts had found Kunst had taken funds from his clients. While Kunst contends these orders were issued by corrupt judges (R., p. 733, Defense Exhibit 22, "Cold and Greedy", p. 240), he introduced no evidence to refute the Orders or the facts contained therein.[6]

Kunst's witness Tracey Hilton never heard any of the alleged defamatory statements. Between witnesses Alfonso, Goad, and Covington, it is clear that none of the alleged slanderous statements were ever made. Even if the jury thought Loree did make the statements, Judge Welmaker's order in the Gaby action and the evidence on the record supports the truth of the alleged slanderous statements. The overwhelming evidence shows the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law.

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

Qualified privilege is a communication made in good faith on any subject matter in which the person communicating has an interest or duty if made to a person with a corresponding interest or duty even though it contains matter, which, without this privilege, would be actionable. *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C., 86, 88, 447 S.E.2d 194, 196 (1994). One publishing under a qualified privilege is liable upon the proof of actual malice, meaning the defendant acted recklessly or wantonly or with a conscious disregard of the plaintiff's rights. *Id.*

[6] Kunst never appealed the Parham Order. He did appeal the Gaby Order, but the Court of Appeals affirmed that order.

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. *Murray v. Holnam*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001). When one has an interest in the subject matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by the occasion. The statement must be such as the occasion warrants and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed. *Murray, id.* Whether privilege exists is a question of law, whether it was abused is a question for the jury. *Murray, id.*

Kunst himself established in the direct examination of Loree that Loree was conducting an investigation that his employer, the Gabys, requested he perform. Kunst first established that Loree was working for the Gaby family and was paid by one of their family holdings. (R., p. 125, Tr., testimony of David Loree, direct examination, p. 159: 11-17). Kunst also established in the Loree direct examination that Loree was conducting an investigation concerning the Gaby home project. (R., p. 128, Tr., testimony of David Loree, p. 171: 8-19, re meeting with Kunst). Hence, the elements of the qualified privilege were established by Kunst's direct examination of Loree.

Kunst produced only two witnesses who could testify as to what Loree allegedly said. The witnesses, Goad and Alfonzo, were vendors on the Gaby home project and they both testified that Loree was checking to see that they had been paid by Kunst. Their testimony establishes that Loree was speaking to parties with a corresponding

interest. (R., p. 119, Tr., testimony of Kevin Goad, pg. 135: 4-8 and R. p., 124, Tr., testimony of Glenn Alfonzo, pg. 155: 16-17).

Kunst also failed to produce any former client to testify that Loree defamed Kunst. Kunst specifically alleged that his clients Covington, Coco, Parham, and Hickey heard Loree's defamatory remarks. Kunst called only Covington, who testified he did not recall ever having a conversation with Loree on any topic. (R., p. 157, Tr, testimony of Eugene Covington, p. 286: 9-13). In both direct examination of Loree and in his failure to rebut Loree's qualified privilege defense with any evidence, Kunst failed to show in any way whatsoever that the qualified privilege did not apply or was abused.

Kunst offered no evidence whatsoever to show Loree acted with actual malice, that is, with a reckless disregard for Kunst's rights. First, Loree's unrefuted testimony was that Kunst did not direct Loree to avoid contacting his clients; in fact, Loree testified that Kunst did not seem to care if he contacted the clients. (R., p. 141, Tr., testimony of David Loree, pg. 222: 2-10). Kunst's witness Eugene Covington testified that he had never seen or met with Loree. (R., p. 156, Tr., testimony of Eugene Covington, p. 282, l. 19-25). Kunst's witness Goad testified Loree only discussed the Gaby project with him. (R., p. 119, Tr., testimony of Kevin Goad, p. 135, 4-8). Goad further testified that because Kunst had disappeared from the project site and could not be located, Loree became the contact man for payment. (R., p. 117, Tr., testimony of Kevin Goad, p. 125: 6-14). Kunst's witness Alfonzo testified that Loree had said Kunst had done criminal things, not that Kunst was a criminal. Alfonzo also testified that Loree consulted him to make sure he had been paid so that the project could go forward. (R., p. 124, Tr., testimony of Glenn Alfonzo, p. 155: 16-19). No witness testified that Loree had behaved

in a reckless or wanton manner. Kunst produced no evidence to show that Loree had made defamatory statements (though, even if made, the statements were true) to people not concerned with the investigation Loree was conducting on behalf of his employer.

The jury had absolutely no evidence to determine that Loree was not protected by qualified privilege. As discussed above, Kunst himself established the elements of qualified privilege.

In fact, the trial court found that the defense of qualified privilege should be allowed, but did not determine as a matter of law whether the qualified privilege should apply. (R., pgs. 212-213, Tr., , p. 506:15-509:1). This was an error of law. "It is the duty of the trial judge to determine if the statement is privileged." *Murray v. Holnam*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001); *accord Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 485, 514 S.E.2d 126 (1999). The trial court should have instructed the jury that the qualified privilege did apply. Instead, the trial court allowed the jury to determine as a matter of fact whether the qualified privilege applied. (R., 221-222, Tr., p. 544:16-545:12).

Loree requested a directed verdict on the grounds of qualified privilege, which the trial court denied. (R., pgs. 226-229, Defendant's motions for directed verdict). Loree also moved for the jury's verdict to be overturned on the grounds that the alleged slanderous statements were protected by qualified privilege, which was also denied. (R., pgs. 231-241, Defendant's JNOV motion).

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

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

Loree moved for JNOV on the grounds that Kunst did not prove the elements of slander *per se*. (R., pgs. 226-229, Defendant's motions for directed verdict). To prove slander *per se*, Kunst must show with a preponderance of evidence that Loree charged Kunst with commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in his business or occupation. *See Holtzscheiter v. Thomson Newspapers, Inc.* 332 S.C. 502, 510, 506 S.E.2d 497, 505 (1998).

There is no evidence on the record to show that Loree ever charged Kunst with the commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in his business or occupation. Kunst brought the cause of action for slander *per se* in the Complaint and he made no motion to amend his Complaint throughout the action. During the hearing on pre-trial motions Kunst stated he was asserting the following statements from his pre-trial brief as the statements allegedly made by Loree. These statements are:

- The Plaintiff embezzled $400,000 from the Gabys.
- The Plaintiff embezzled money from all of his clients.
- The Plaintiff had taken money from named clients Parham, Covington, Coco, and Hickey.
- The Plaintiff created dummy invoices from dummy companies so that he could steal money from these clients.

- The Plaintiff took money from his clients to spend on an investment project, a car, trips, and family members.
- The Plaintiff did "criminal things" like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.
- The Plaintiff "is going to jail."
- The Plaintiff took money from his other projects and that money was missing from these projects. (R., pgs. 39-40, Kunst pre-trial brief, pgs. 1-2).

On their face, in none of the above statements is it alleged that Kunst had a loathsome disease, committed adultery, was unchaste, or was unfit for his profession or occupation (that of a designer of residential homes). Loree testified that he had never told anyone Kunst was a bad designer and he commended Kunst at the trial on his home designs. (R., p. 149, Tr., testimony of David Loree, p. 254: 2-14).

Further, none of the statements charge Kunst with a crime of moral turpitude. Crimes of moral turpitude involve acts of baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man. *Green v. Hewett.* 305 S.C. 238, 407 S.E.2d 651, 652 (1991) citing *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987). None of the alleged statements rise to the level of baseness, vileness, or depravity.

The case of *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010) is instructive. In *McBride*, this Court found the statement that a teacher stole school property was actionable *per se*. The Court cited the case of *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) which

held that an allegation charging the plaintiff with larceny or breach of trust was actionable *per se*. However, unlike Kunst's allegations related to his few clients, these cases involve plaintiffs whose actions affected "society as a whole." *Green, id.* A teacher who takes school property is in effect taking property from all the taxpayers in that school district. A bank teller who takes money from customers' deposits is in effect taking money from the bank and its investors. In Kunst's case, there is no evidence in the Record, nor any evidence presented at trial, that the alleged statements would affect more persons than just his clients, which were five in number. Because there is nothing in the alleged statements rising to the level of baseness, vileness, or depravity, nor any evidence in the Record to support such a finding, Kunst cannot, and did not, prove he was ever charged with committing a crime of moral turpitude. Therefore, Kunst did not prove his case for slander *per se* and the verdict should have been overturned.

Loree also moved for JNOV on the grounds that because Kunst did not allege a cause of action for slander and there is no evidence in the Record to show common law malice or special damages, the verdict should be overturned. (R., pgs. 231-241, Defendant's JNOV motion,). Because Kunst only alleged slander *per se* and he has not met those elements, the verdict should have been overturned.

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

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive although not motivated by considerations such as passion, caprice, or prejudice. The granting or denial of this motion is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66, 74 (Ct. App. 1994). If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence, the trial court must grant a new trial absolute. *Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011). When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict. *See Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011) *citing Small v. Springs Indus.,* 292 SC 481, 487, 357 S.E.2d 452, 455 (1987). Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur* and the consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *See Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011) *citing Proctor v. Dep't of Health & Envtl. Control*, 368 SC 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006)

The jury awarded Kunst one million dollars in actual damages. This amount is grossly excessive and is not based on any evidence in the record. Kunst did not produce any evidence to support this claim or any documentation to support the figure of one million dollars. Of more importance, there is no evidence on the record to show that any monetary loss Kunst suffered was due to Loree.

Kunst merely stated to the jury that he needed 1.6 million dollars to pay his attorney's fees and the judgments held against him. (R., p. 175, Tr., testimony of J. Scott Kunst, p. 358: 1-18 and R., p. 215, Tr., p. 518: 11-19). Kunst was *pro se* in this action.

Therefore, he has no attorney's fees. What Kunst is trying to do is collect attorney's fees for other cases he has litigated, which have nothing to do with Loree. Kunst did testify that he was going to hire a tax attorney for $100,000 to remove the tax liens, but he produced no documentation whatsoever to show he had consulted with a tax attorney and that he would need $100,000 for the attorney's services. (R., p. 173, Tr. testimony of J. Scott Kunst, p. 352: 13-16). Certainly, Kunst could not explain why the tax liens against him were related to Loree's alleged defamatory statements. In any case, Kunst presented no evidence whatsoever why Loree should be liable for Kunst to hire an attorney *in the future* to remove tax liens imposed on Kunst *before Loree even began his investigation of Kunst*. This defies reason.

Even more importantly, a plaintiff is not entitled to collect attorney's fees in a defamation case because in South Carolina one is entitled to attorney's fees only if there is a provision in the contract or there is a statute providing for attorney's fees, which is not the case here. *See Seabrook Island Prop. Owners' Ass'n v. Berger,* 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005).

Further, none of the judgments against Kunst are due to any defamation by Loree. Of the five judgments against him, four involve suppliers whom Kunst never paid.[7] (R. , p. 175, Tr., testimony of J. Scott Kunst, p. 358: 1-18). The fifth judgment is from the Gaby Action. While Kunst claimed Loree's defamation caused his business to crumble, there is no evidence in the Record to support Kunst's claim. Indeed, Kunst testified that the majority of his damages were related more to the breach of contract cases involving

[7] General Shale & Brick, Inc., GBS Lumber, Jennings Builders Supply and Hertz Rental.

his other clients Covington, Parham and Hickey. (R., p. 202, Tr., testimony of J. Scott Kunst, p. 467: 10-21).

The evidence did show that suppliers were unpaid due to Kunst's poor accounting, and not anything Loree allegedly said. For example, Glenn Alfonzo testified that he had to make Kunst pay him with certified checks because Kunst's business checks bounced. (R., p. 124, Tr., testimony of Glenn Alfonzo, p. 154: 1-8). Kevin Goad testified that Kunst disappeared from the site and could not be found. (R., p. 118, Tr., testimony of Kevin Goad, p. 132: 12-24). Eugene Covington testified that the accounting for his project was in arrears and Kunst would not provide him the records needed to reconcile the account. (R., p. 156, Tr., testimony of Eugene Covington, , p. 282: 19-25 and R., p. 157, testimony of Eugene Covington, p. 285: 1-8). Kunst himself testified that he was having financial problems with his business in January 2006, a month before Loree began his investigation. (R., p. 162, Tr.. testimony of J. Scott Kunst, p. 308: 17-18, "clients got slow", R., p. 163, testimony of J. Scott Kunst, p. 309: 16-21, "bank put 10-day hold on his deposits", and R. , p. 166, testimony of J. Scott Kunst, p. 324: 21- 325: 2, "funding deficit January February 2006 of $539,000). Finally, Kunst's tax liens, which Kunst used to justify an award of 1.6 million dollars, date from 2003, three years before Loree began his investigation. (R. p. 447, Kunst SCDOR tax lien, Defense trial exhibit 20).

Kunst failed to prove his case for slander *per se*, therefore he is not entitled to any damages at all. The jury's verdict is grossly excessive and the amount awarded is shockingly disproportionate to Kunst's injuries. Indeed, there is no evidence to show Kunst suffered any injury due to Loree's alleged defamatory statements. Because the verdict is so disproportionate and not based on any evidence in the record, a new trial

absolute should be granted. *Curtis, id.* Certainly, the trial court was entitled in its discretion to reduce this excessive verdict, and should have done so. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66, 74 (Ct. App. 1994).

A new trial is also justified based on the Supreme Court opinion *Sanders v. Prince*, 304 S.C. 426, 403 S.E.2d 640 (1991). In *Sanders*, a slander action in which the jury returned a verdict in excess of one million dollars, the South Carolina Supreme Court found that a jury sent a question to the trial judge during deliberations asking, "Can we force [the defendant] to resign from the School Board?" The Supreme Court noted that the trial judge acted properly in answering the jury's question in the negative, but that the "attempt by the jurors to exceed the authority granted them by the trial judge's instructions is evidence of the fact that the jury was motivated by passion, caprice, and prejudice." *Sanders*, 304 S.C. at 238-39. The Supreme Court held that "the conduct of the jury, as well as the amount of the award, lead us to the conclusion that the jury's verdict was based on passion, caprice, and prejudice, rather than on the evidence presented at trial." *Id.*

In this case, during deliberations, the jury sent a note to the court asking if they could decide who of Kunst's creditors would get the money they chose to award. (R., p. 224, R., p. 759, Tr. 554, Court Exhibit 4) This is exactly what the Supreme Court in *Sanders* found to be "evidence of the fact that the jury was motivated by passion, caprice, or prejudice." *Sanders*, 304 S.C. at 238-39. The jury in this case exceeded its authority when it took upon itself to direct who would get a portion of the damages award and how much it would be. The verdict is also disproportionate to any reasonable amount, particularly given the paucity of Kunst's evidence on damages. The jury's actions in

exceeding its authority, the excessive amount of the damages award, and the paucity of evidence to support the damages award show that the jury must have been motivated by passion, caprice, and prejudice and therefore, following the *Sanders* holding, the trial court should have overturned the verdict.

Conclusion

There is no evidence in the record to support Kunst's cause of action of slander *per se*. Further, there is also a preponderance of evidence to show Loree's alleged defamatory statements were either true or protected by qualified privilege and therefore not defamatory. Certainly there is no evidence whatsoever in the record to support an award of one million dollars. For these reasons, Loree respectfully requests that this Court reverse the trial court and remand this action for a new trial.

Respectfully submitted.

V. ELIZABETH WRIGHT LAW FIRM, LLC

V. Elizabeth Wright (Bar ID 76029)
217 E. Park Avenue
Greenville, SC 29601
(864) 326-5281
bethwrightattorney@gmail.com

Gregory K. Smith (admitted *pro hac vice*)
King & Spalding, LLP
1180 Peachtree Street
Atlanta, GA 30309
(404) 572-2858
GKSmith@kslaw.com

Greenville, South Carolina

April 25, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

J. Scott Kunst .....Respondent,

v.

David Loree .....Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and the Final Reply Brief of the Appellant comply with Rule 211(b), SCACR.

V. Elizabeth Wright (SC Bar ID 76029)
V. ELIZABETH WRIGHT LAW FIRM, LLC
217 E. Park Avenue
Greenville, SC 29601
(864) 326-5281
bethwrightattorney@gmail.com

Gregory K. Smith (admitted *pro hac vice*)
King & Spaulding, LLP
1180 Peachtree Street
Atlanta, GA 30309
(404) 572-2858
GKSmith@kslaw.com

Attorneys for the Appellants

Other counsel of record:

J. Scott Kunst, *pro se*
130 Arabian Way
Simpsonville, SC 29681
(864) 979-7961

Respondent