THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2015-000613

Jeffrey Kennedy ..... Respondent,

v.

Richland County School District Two, Eric Barnes, and Chuck Earles ..... Appellants.

APPELLANTS' RETURN TO PETITION FOR REHEARING

CHILDS & HALLIGAN, P.A.

Kathryn Long Mahoney, S.C. Bar No. 65332
kmahoney@childs-halligan.net

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

1301 Gervais Street, Suite 900
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Appellants

Other Counsel of Record:

T. Jeff Goodwyn, Esq.
Rachel G. Peavy, Esq.
Goodwyn Law Firm
2519 Devine Street, Suite A
Columbia, SC 29205

Attorneys for Respondent

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I. INTRODUCTION

Pursuant to Rule 240(e) of the South Carolina Rules of Appellate Procedure, Appellants, Richland County School District Two, Eric Barnes, and Chuck Earles, hereby timely submit their Return to Respondent's Petition for Rehearing filed February 9, 2017. Appellants submit that this Court's *per curiam* opinion of January 25, 2017, was properly grounded in law and the record before the Circuit Court and Respondent has identified no errors or points overlooked or misapplied by the Court that would warrant rehearing or reversal of its well-reasoned opinion. For the reasons set forth in Appellants' prior briefs and this Return, Respondent's Petition should be denied.

II. ARGUMENT

A. The Court Properly Held That No Evidence In The Record Supported A Finding That Appellants Made Any Defamatory Communication Regarding Respondent That Exceeded Their Qualified Privilege

The Circuit Court properly found that a qualified privilege applied to any alleged defamatory communication by Appellants regarding Respondent, and that finding was uncontested on appeal. To defeat the qualified privilege, it was Respondent's burden to prove an abuse of the privilege by demonstrating either: (1) a statement made in good faith that went beyond the scope of what was reasonable under the duties and interests involved; or (2) a statement made in reckless disregard of the victim's rights. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012). To prove actual malice sufficient to overcome the privilege, a plaintiff "must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights." *Harris v. Tietex Intern. Ltd.*, 417

S.C. 533, 541, 790 S.E.2d 411, 416 (Ct. App. 2016) (internal citations omitted). In the absence of a controversy as to the facts it is for the court to say in a given instance whether or not the privilege has been abused or exceeded. *Id.*; *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. The Court properly found that no factual dispute existed in this case.

In his Petition, Respondent argues that this Court overlooked facts in the record that would have supported a jury finding that Appellants exceeded the privilege or made a false communication about him with actual malice. However, Respondent mistakes attorney arguments and impermissible inferences for "facts" and essentially reasserts the same flawed arguments that: the jury could have inferred facts by disbelieving otherwise undisputed witness testimony; the jury could have found that non-specific "conduct" of Mr. Barnes and Mr. Earles constituted a defamatory communication that exceeded the privilege; and the jury could have inferred, *ipso facto*, that either Mr. Barnes or Mr. Earles exceeded the privilege merely because witnesses beyond the addressees listed on Mr. Earles' Confidential email testified that they had seen the email. As the Court held, none of this sufficed as evidence that would reasonably support the finding of the jury. *See Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 412, 717 S.E.2d 765, 769 (Ct. App. 2011).

First, counsel for Respondent conceded at oral argument that a jury's mere disbelief of a witness' testimony, without affirmative facts contradicting that witness' testimony, would not satisfy the plaintiff's burden of proof. The law is clear that affirmative evidence rather than a mere appeal to "credibility" is needed to survive a motion for directed verdict. *See Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *Peeler v. Spartanburg Herald-Journal Div. of The New York Times Co.*, 681 F. Supp.

1144, 1147 (D.S.C. 1988) ("The Plaintiff cannot rely upon the hope that witness cross-examination will raise a credibility issue as regards actual malice."); *Jones v. Owens-Corning Fiberglass Corp.*, 69 F.3d 712, 718 (4th Cir. 1995) (party opposing summary judgment may not "merely recite the incantation, 'credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof"); *McManus v. Taylor*, 756 S.E.2d 709, 716 (Ga. Ct. App. 2014).

Second, Respondent's continued reference to "words and conduct," without reference to any specific conduct alleged to have communicated a defamatory message, cannot support a finding that the privilege was abused. South Carolina appellate courts have recognized the possibility that a defendant's conduct may support a defamation claim when an insinuation "is *false and malicious and the meaning is plain.*" *See Tyler v. Macks Stores of SC, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980) (emphasis added). However, Respondent still has not identified any conduct of any defendant that a jury reasonably could have found to communicate an insinuation with a plain meaning that was false, malicious, and unprivileged. As such, the Court properly evaluated Mr. Earles' confidential email of June 15, 2011, (R. p. 1010), as the potentially defamatory communication in this case.

Third, the Court properly found that Mr. Barnes' communication to John Reid, as set forth on page 13 of Respondent's petition, was not a publication beyond the scope of what was reasonable under the duties and interests involved. Respondent worked the shift immediately following Mr. Reid and relieved the latter of his duties on a daily basis. (R. at p. 241 ll. 4-7; p. 249 l. 16- p. 250 l. 5.) According to Mr. Reid, "[I]t became an issue with him relieving us. We was [sic] turning over keys and stuff to him.

So that's when we were informed." (R. p. 250 ll. 1–3.) Respondent offered no evidence from which a jury could find that Mr. Barnes' alleged communication was anything other than a limited and necessary relay of work duties and responsibilities to an employee with a direct need to know Mr. Earles' directive that Respondent was not to be assigned keys, delivered by a supervisor tasked with effectuating Mr. Earles' directive. *See Harris*, 417 S.C. at 542 n. 4; 790 S.E.2d at 416 n. 4. The Court properly found that no reasonable juror could have found this communication exceeded the scope of the qualified privilege or was made with actual malice.

Fourth, Respondent has simply failed to point to any factual evidence, as opposed to argument, speculation, and impermissible inference building, that would support a jury finding that either Mr. Barnes or Mr. Earles violated the latter's own directive that the June 15, 2011 email to supervisors was to remain confidential and for their eyes only. Further, no reasonable juror could review the evidence at trial and conclude that if Mr. Barnes or Mr. Earles did not print and leave out the email themselves, they possessed a secret, unexpressed intent that the email recipients should print it out for rank and file employees to see.

Finally, contrary to Respondent's arguments, it would be far from impossible to overcome Mr. Earles' and Mr. Barnes' testimony that they did not further publish the confidential email if that testimony were, in fact, false. For example, a witness could have testified that he or she observed one of the defendants print out and leave multiple copies of the email in the security office, electronic data might have shown distribution beyond the list of supervisors, or a myriad of other types of witness testimony or evidence could have been offered to undercut the defendants' testimony.

No such evidence was presented at the trial of this case, and thus, Respondent has failed to identify any evidence that would support a finding that Appellants exceeded the qualified privilege that would warrant reconsideration or rehearing.

III. CONCLUSION

The Court's January 25, 2017 *per curiam* Opinion properly reversed the trial court's denial of Appellants' motion for directed verdict and JNOV, and the Petition for Rehearing should be denied.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: _____

Kathryn Long Mahoney, S.C. Bar No. 65332
kmahoney@childs-halligan.net
Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Appellants

February 21, 2017

Columbia, South Carolina

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APPEAL FROM RICHLAND COUNTY
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v.

Richland County School District Two, Eric Barnes, and Chuck Earles ..... Appellants.

PROOF OF SERVICE

I certify that I have served the **APPELLANTS' RETURN TO PETITION FOR REHEARING** on counsel for Respondent, by depositing a copy of it in the U.S. Mail, postage prepaid, on February 21, 2017, addressed to T. Jeff Goodwyn, Esq. and Rachel G. Peavy, Esq., Goodwyn Law Firm, 2519 Devine Street, Suite A, Columbia, SC 29205.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: _____

Kathryn Long Mahoney, S.C. Bar No. 65332
kmahoney@childs-halligan.net

Thomas K. Barlow, S.C. Bar No. 8995
tbarlow@childs-halligan.net
P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Appellants

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

The Tower at 1301 Gervais, Suite 900, Columbia, SC 29201
Post Office Box 11367, Columbia, SC 29211-1367

Telephone (803) 254-4035
Facsimile (803) 771-4422

February 21, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Jeffrey Kennedy v. Richland School District Two, Eric Barnes and Chuck Earles v. Jeffrey Kennedy
Appellate Case No. 2015-000613

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced case please find an original and seven copies of Appellants' Reply to Respondent's Petition for Rehearing, along with a Proof of Service. Please return the extra file-stamped copy of the motion to our office via our courier.

Thank you for your attention to this matter.

Sincerely yours,

Thomas K. Barlow
tbarlow@childs-halligan.net

/lmc
Enclosures

c: T. Jeff Goodwyn, Jr., Esq.
Rachel G. Peavy, Esq.