THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2013-CP-18-0735
Appellate Case No. 2015-000058

William McFarland and Jennifer McFarland,

Appellants,

v.

Mansour Rashtchian and Amy Rashtchian,

Respondents.

APPELLANTS' PETITION FOR REHEARING

YOUNG CLEMENT RIVERS, LLP
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Counsel for Appellants

COME NOW the McFarlands,[1] by and through their undersigned counsel, pursuant to Rule 221, SCACR, and hereby petition this Honorable Court for rehearing.

ARGUMENT/GROUNDS FOR REHEARING

Having submitted this case for decision without oral argument, the Court affirmed the trial court pursuant to Rule 220(b), SCACR, and the following string of authorities:

> *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence."); *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (providing an appellate court reviewing a jury charge "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." (quoting *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995))); *id.* at 495-96, 514 S.E.2d at 574 ("A jury charge is correct if '[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.'" (alteration by *Keaton*) (quoting *State v. Johnson*, 315 S.C. 485, 487 n.1, 445 S.E.2d 637, 638 n.1 (1994)));

[1] The "McFarlands" are Plaintiffs/Appellants William and Jennifer McFarland, collectively; they are "Bill" and "Jennifer," respectively. The "Rashtchians" are Defendants/Respondents Mansour and Amy Rashtchian, collectively; they are "Mansour" and "Amy," respectively.

> *id.* at 496, 514 S.E.2d at 574 ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)); *Cartwright v. Herald Publ'g Co.*, 220 S.C. 492, 498, 68 S.E.2d 415, 417 (1951) ("Statements made in an honest endeavor to vindicate one's character or to protect one's interests are usually regarded as qualifiedly privileged, even though they are false, if they are made in good faith and without malice. Thus, it seems to be definitely settled that when one person assails another in the public press, the latter is entitled to make reply therein, and so long as the reply does not exceed the occasion, he cannot be held responsible for any resultant injury. . . . On the other hand, however, it is clear that a defensive communication will lose its privileged character if the person making it goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." (quoting 33 Am. Jur. *Libel and Slander* § 134)).

McFarland v. Rashtchian, Unpublished Opinion No. 2017-UP-067 (S.C. Ct. App. filed Feb. 1, 2017) (the "Subject Decision")).

Essentially, the Court cited three cases in support of the Subject Decision: Cole, Keaton, and Cartwright.[2] Of these cases, only Cartwright addresses the substantive law of defamation; Cole and Keaton address the standard of review. This, then, would appear to be the Court's reasoning: When read as a whole, the charge was correct, or at least "reasonably free from error," under the substantive law articulated in Cartwright. Most respectfully, the Court overlooked or

[2] The other authorities referenced in the Subject Decision, i.e., the ones cited parenthetically, are attributions for quoted material.

misapprehended a number of material points.

1. As explained in the McFarlands' brief, the trial court committed reversible error by charging the jury that self-defense, which the court incorrectly equated with provocation and justification, was an absolute defense to the defamatory statements at issue.

As, indeed, the Court's own citation to Cartwright makes clear, the privilege afforded to "[s]tatements made in an honest endeavor to vindicate one's character or to protect one's interests" is *qualified*, not *absolute*. See Subject Decision (quoting Cartwright, 220 S.C. at 498, 68 S.E.2d at 417). The trial court, however, erroneously instructed the jury that it is an "absolute" defense,[3] and under the law of defamation, there is, of course, a material difference between absolute and qualified privileges. Hainer v. American Med. Intern., Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (explaining no action lies for publication of an absolutely privileged communication, even when the communication is made with malice, but where a communication is only qualifiedly privileged, the plaintiff can recover upon showing it was actuated by malice). The trial court's mere linking of the word "absolute" to self-defense was therefore incorrect and confusing to the jury.

Moreover, the trial court incorrectly equated justification and provocation with self-defense and conflated these concepts in its charge. Compare Cartwright, 220 S.C. at 498, 68 S.E.2d at 417 with Johnston v. Life & Cas. Inc. Co., 192 S.C.

[3] (R. p. 513, lines 5-8.)

518, 7 S.E.2d 463, 465 (1940) ("It is true that when the plea of *justification* is entered in an action of slander *there is no complete defense except by proof of the charge*, but in fixing the *amount of the verdict* we do not see why there may not be circumstances of aggravation or of mitigation in such case as well as in any other. Why may not the defendant say: 'I spoke the words, but under great *provocation*, or in sudden heat and passion,' . . . ? It is true that the defendant cannot avail himself of the defense which the truth of the charge affords without pleading *justification*; but it does not follow that in all such cases the verdict must be the same without regard to the facts and circumstances of aggravation or mitigation."). As Johnson reflects, "justification" is simply another name for the defense of truth, i.e., that the alleged defamatory statement is true—what the Johnson Court referred to as "proof of the charge." But, as explained in the McFarlands' brief, the defense of truth is not involved here; the trial court correctly determined as a matter of law that the charge, which Mansour admitted making, that Bill stole his father-in-law's business was defamatory and actionable *per se*. (R. p. 493, line 23 - 497, line 16.) And, as Johnson also reflects, "provocation" is not a defense but an argument in mitigation of damages.

2. As also explained in the McFarlands' brief, the trial court erred by even charging the jury on self-defense to begin with, when, by Mansour's own admission, the incident wherein the subject defamation occurred was triggered by his "foolish" actions and "should never [have] happened."

As the Court recognized, "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Subject Decision (quoting Cole, 378 S.C. at 404, 663 S.E.2d at 33). Under Cartwright, it is only "[s]tatements made in an *honest endeavor to vindicate one's character or to protect one's interests* [that] are usually regarded as qualifiedly privileged, even though they are false, if they are made in good faith and without malice[,]" and "a *defensive* communication will lose its privileged character if the person making it goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." 220 S.C. at 498, 68 S.E.2d at 417 (emphasis added).

Thus, to be qualifiedly privileged under Cartwright, a statement must be defensive, for the purpose of vindicating one's character or protecting one's interests, and without malice. Here, based on Mansour's own admissions, it was clearly his "poor judgment," his "foolish[ness]," that sparked the whole defamatory episode, in which Amy joined. (See Testimony of Mansour Rashtchian: R. p. 450, lines 6-15; R. p. 459, line 24 - p. 460, line 1; R. p. 469, line 4 - p. 471, line 9; see also Defendants' Counsel's Opening Statement: R. p. 65,

lines 13-18; Defendants' Counsel's Closing Argument: R. p. 508, line 24 - p. 509, line 2.) Without question, Mansour was not in a defensive posture; there had been no unpleasantness at all that day until Mansour stormed from his house to confront Bill in the middle of Flud Street. (See Testimony of Mansour Rashtchian: R. p. 446, lines 18-23.) At that, Mansour's defamatory statements were not made in an honest endeavor to vindicate his character or to protect his interests, nor can it reasonably be said that calling Bill a thief and Jennifer an adulteress could have possibly done so—indeed, as for Jennifer, there is no evidence of her making any defamatory remarks at all. (See Testimony of Stephon Johnson: R. p. 232, line 15 - p. 233, line 9; R. p. 242, lines 8-15; Lance Johnson: R. p. 346, line 23 - p. 347, line 4; R. p. 352, lines 9-16.) Rather, the only evidence is that the Rashtchians' fuse, short and already dripping with an incendiary ill will, was lit by Mansour himself; and if anything, Bill was provoked, not the other way around. Further still, even assuming, *arguendo*, that there had been an "original attack" on the Rashtchians, the defamation at issue certainly "goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." Cartwright, 220 S.C. at 498, 68 S.E.2d at 417. Notwithstanding any unpleasant or disparaging words the Rashtchians may claim the McFarlands directed toward them on April 26, 2011,[4] exactly none of them were said before, nor would any of

[4] The McFarlands, of course, deny the lion's share of the Rashtchians'

them have been said at all had not, Mansour—acting in a manner grossly disproportionate to the transgression he claims to have prompted him—angrily burst from his home to initiate that day's discord.

Again, respectfully, the trial court misapprehended the relevant law and failed to appreciate that self-defense was misfit for this case, and by charging—and confusing—the jury with irrelevant and inapplicable principles upon which to decide Bill and Jennifer's claims, the trial court abused its discretion, resulting in prejudice to the McFarlands, and, thereby, committed reversible error. See Cole, 378 S.C. at 404, 663 S.E.2d at 33.

3. **The Subject Decision did not address every point distinctly stated in the case necessary to the decision of the appeal as required by Rule 220(b).**

As stated above, this appears to have been the Court reasoning in affirming the trial court: When read as a whole, the charge was correct, or at least "reasonably free from error," under the substantive law articulated in Cartwright. The Court did not address the McFarlands' points about the trial court's legal errors regarding absolute versus qualified privilege and conflation of self-defense, justification, and provocation. Nor did the Court address the McFarlands points

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allegations in this regard. (See Testimony of Bill McFarland: R. p. 98, line 7 - p. 99, line 11; R. p. 174, lines 9-17; R. p. 176, line 16 - p. 177, line 2; R. p. 184, lines 12-14; R. p. 184, line 24 - p. 185, line 4; Jennifer McFarland: R. p. 299, line 16 - p. 300, line 16; see also Stephon Johnson: R. p. 239, lines 16-20; R. p. 242, lines 8-15.)

about the charge being without evidentiary support and misfit for this case. Rule 220(b) provides, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."[5] Most respectfully, the McFarlands' submit that the Court erred in not addressing all of the distinctly stated points in their brief necessary to decision of this appeal and ask the Court to address these points via rehearing.

INCOPORATION AND REITERATION OF ARGUMENT/ANALYSIS IN APPELLATE BRIEF

The McFarlands do not intend to abandon (for any potential future consideration) any argument/analysis presented in their brief; therefore, out of an abundance of caution, besides making the above points, the McFarlands incorporate their brief by reference herein and hereby reiterate the argument/analysis therein in support of this petition, all of which they now respectfully ask the Court to reconsider.

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[5] The McFarlands acknowledge that Rule 220(b)(2) provides this exception: "The Court of Appeals need not address a point which is manifestly without merit[;]" however, again, most respectfully, the McFarlands submit that it is inapplicable here and that their arguments were appropriately presented and developed for the Court's consideration.

CONCLUSION

For the foregoing reasons, Appellants ask this Honorable Court to grant this petition, rehear this matter, and issue a re-filed opinion that reverses the defense verdict and judgment in favor of the Rashtchians and remands this matter for a new trial.

Respectfully submitted,
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By: _____

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Counsel for Appellants

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, hereby certify that **APPELLANTS' PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on March 17, 2017, properly posted for delivery to the following addressees:

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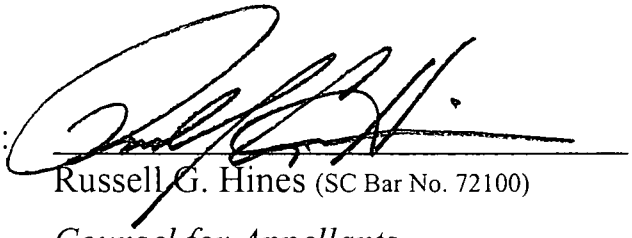
Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: 
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March 17, 2017

VIA FEDEX
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Re: McFarland v. Rashtchian
Appellate Case No.: 2015-000058
Circuit Court Case No.: 2013-CP-18-0735
YCR File: 15508-20150131

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and seven (7) copies of **Appellants' Petition for Rehearing** and the original and one (1) copy of a **Proof of Service** regarding the same. Also enclosed is a firm check in the amount of $25.00 to cover the cost associated with this request.

Kindly file the original and return one court-stamped copy of each document to me using the pre-stamped envelope provided. Thank you for your assistance with this matter. With best wishes and kindest regards, I am

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Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines

Enclosures
cc: Michael L. Leech, Esquire, Clawson & Staubes, LLC (via US Mail)
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