

THE STATE OF SOUTH CAROLINA
In the Supreme Court
Appellate Case No. 2015-000613

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison R. Lee, Circuit Court Judge

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2017-UP-040 (S.C. Ct. App. filed January 25, 2015) **S.C. SUPREME COURT**
Case No. 2013-CP-40-1460
Appellate Case No. 2015-000613

Jeffrey Kennedy..... Petitioner,

v.

Richland County School District Two, Eric Barnes and Chuck Earle..... Respondents.

APPENDIX

Volume I of III

(Pages 1-400)

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Jeffrey Kennedy, Respondent,

v.

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

Appellate Case No. 2015-000613

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Unpublished Opinion No. 2017-UP-040
Heard November 17, 2016 – Filed January 25, 2017

REVERSED

Thomas Kennedy Barlow and Kathryn Long Mahoney,
both of Childs & Halligan, P.A., of Columbia, for
Appellants.

Thomas Jefferson Goodwyn, Jr. and Rachel Gottlieb
Peavy, both of Goodwyn Law Firm, LLC, of Columbia,
for Respondent.

PER CURIAM: In this civil matter, Richland County School District Two (the District), Eric Barnes, and Chuck Earles (collectively, Appellants) appeal the

circuit court's award of actual and punitive damages to Jeffrey Kennedy in his defamation claim against them. Appellants contend the circuit court erred in (1) denying their motions for directed verdict and judgment notwithstanding the verdict (JNOV) regarding the defamation claim; (2) denying their motion for JNOV regarding individual capacity claims under the South Carolina Tort Claims Act; (3) denying their motion for JNOV regarding punitive damages, or alternatively, for a new trial absolute or nisi remittitur and affirming the constitutionality of the punitive damages award; (4) excluding evidence of Kennedy's alleged theft and termination from a subsequent employer that occurred during the pendency of the trial; and (5) failing to instruct the jury that no defamatory communication was made as a result of Kennedy's termination from the District and Kennedy's termination was not part of his defamation claim. We reverse.

1. We find the circuit court erred in denying Appellants' motions for directed verdict and JNOV on Kennedy's defamation claim. Based upon our review of the record, we find no evidence that either Earles or Barnes was responsible for disseminating the defamatory e-mail beyond its intended recipients. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012) ("An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below."). Because no evidence indicates that either Earles or Barnes printed or otherwise showed the e-mail to nonsupervisory employees, the jury could not have properly found that they exceeded the scope of their qualified privilege. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (stating when a qualified privilege exists, the plaintiff has the burden to show actual malice or that the scope of the privilege has been exceeded). Therefore, we reverse the circuit court's decision to deny Appellants' motions for directed verdict and JNOV on Kennedy's defamation claim.

2. Because our resolution of the prior issue is dispositive, we decline to address the remaining issues on appeal. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

REVERSED.

SHORT, WILLIAMS, and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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,

RESPONDENT'S PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Respondent Jeffrey Kennedy respectfully moves the Court for rehearing and/or to alter its opinion no. 2017-UP-040 of January 25, 2017, which reversed the trial court's denial of directed verdict and JNOV sought by Appellants. This appeal arises from a verdict in a week-long jury trial in favor of Mr. Kennedy for damages arising out of workplace defamation – a verdict that was accompanied by a special interrogatory finding that both Chuck Earles and Eric Barnes acted with actual malice. R. pp. 3-4. Because the Court's opinion overlooks evidence in the record that would support the lower court's denial of these motions and the jury's verdict, Respondent respectfully requests that the Court rehear this matter or alter its opinion to affirm the rulings of the trial court and uphold the jury's verdict. See, e.g. Brown v. Dick Smith Nissan, Inc., 414 S.C. 101, 777 S.E.2d 208 (2015) (reinstating the trial judge's decision where there was evidence in the record to support the findings of fact and

the Court of Appeals ignored such findings and substituted its own, thereby exceeding its standard of review.)

The “any evidence” standard applicable here is equivalent to a “scintilla of evidence.” Despite the well-defined standard of review, the Court instead appears to have overlooked some evidence of defamation, or improperly weighed the evidence and decided which evidence was more important. In doing so, the Court’s opinion conflicts with the relevant case law and deviates from the standard of review.

“It is established that a defamatory insinuation may be made by actions or conduct as well as by word . . . Defamation need not be accomplished in a direct manner. To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain.” Tyler v. Macks Stores of S. Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980)

The opinion further misapprehends the evidence in the record to support the jury’s verdict and the lower court’s rulings; rather than reviewing the record on appeal to determine whether the low bar of “any evidence” to support the ruling was found, the Court appears to have only considered the testimony of the Appellants that they did not publish the e-mail, and therefore the qualified privilege could not have been exceeded.

In short, the Court has overlooked evidence in the record that supports both the trial court’s denial of the motions for directed verdict and JNOV and the jury’s verdict.

Legal Standard

An appellate court can only reverse the trial court’s ruling on a denial of a directed verdict and JNOV when *no evidence* supports the ruling or when the ruling is controlled

by an error of law. Steinke v. S.C. Dep't of LLR, 336 S.C. 373, 520 S.E.2d 142 (1999). A factual finding by the jury will not be overturned unless there is no evidence that reasonably supports the jury's findings. Pope v. Heritage Communities, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). The "any evidence" standard is the equivalent of a "scintilla of evidence." Hancock v. Mid-South Mgmt., 381 S.C. 326, 673 S.E.2d 801 (2008).

"On appeal, the jury's verdict must be upheld unless no evidence reasonably supports the jury's finding. Moreover, neither an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." Bass v. SC DSS, 414 S.C. 558, 780 S.E.2d 252 (2015) (reversing the Court of Appeals' decision reversing a jury verdict in favor of plaintiffs, finding that the Court of Appeals "acted outside its limited scope of review" when, "rather than examining the record to discern whether there was any evidence put forward to support the jury verdict, the Court of Appeals seems to have searched the record for evidence to corroborate [the Defendant's] theory of the case . . ."); See also Cook v. Regions Bank, 2016-UP-387 (*per curiam*) (Ct. App. July 27, 2016) (upholding trial court's denial of motions for directed verdict and JNOV in defamation case because a reasonable jury could have believed the plaintiff's version of events, **even if contradicted by the defense**).¹ Credibility of witnesses is always for the jury, and a jury may properly consider motive, bias, and the demeanor of a witness when determining what to believe and disbelieve. R. pp. 974-976.

¹ Counsel is aware that citation to unpublished opinions is disfavored under the Appellate Court Rules; however, counsel respectfully believes that this opinion could aid in the Court's consideration of this matter, given that the opinion concerns workplace defamation and was rendered by the same panel of judges.

Grounds for Rehearing

The Court found that there was no evidence to support a claim for defamation because there was “no evidence that either Earles or Barnes was responsible for disseminating the defamatory e-mail beyond its intended recipients” and therefore “the jury could not have properly found that they exceeded the scope of their qualified privilege”. See Opinion.

This was error, as the Court overlooked the substantial evidence – or at least a *scintilla* of evidence –that the entirety of the Appellants’ conduct could be found, by a reasonable jury, to have defamed Mr. Kennedy. The Court appears to have overlooked some evidence of defamation under South Carolina law, or improperly weighed the evidence and decided which evidence was more important (i.e. the Appellants’ denial that they printed and left out an e-mail). See Brown v. Dick Smith, supra. South Carolina law clearly provides that publication can be established by either direct or circumstantial evidence, and a trial court will properly deny directed verdict if there is even circumstantial evidence of defamation. Duckworth v. First Nat. Bank, 176 S.E.2d 297, 254 S.C. 563 (1970). “Publication . . . may be established by the positive testimony of a person to the effect that the slanderous remarks were heard by him or by evidence tending to show that third persons were present and near enough at the time to hear the words spoken.” Id.

The Court’s opinion misapprehends the legal basis for the defamation claim in this lawsuit, which was predicated on both words and conduct. Long-standing South Carolina law has found sufficient evidence of defamation through words or conduct or a combination of both. See, e.g., Mains v. K-Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (no error in denial of motion for directed verdict and JNOV when a jury could

have found that “words or conduct or the combination of words and conduct can communicate defamation.”) Furthermore, defamation need not be accomplished in a direct manner – mere insinuation is actionable. See Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987) (where city manager implied that employees were guilty of wrongdoing, even though he knew that SLED found no criminal wrongdoing, evidence was sufficient to submit the case to the jury); See also Constant v. Spartanburg Steel (affirming denial of directed verdict where evidence that employer continued to convey its belief that an employee was a thief, despite having no evidence to support that belief, was sufficient to find that employer exceeded qualified privilege).

In defamation cases, the defendant may assert conditional or qualified privilege as an affirmative defense, and the court will determine as a matter of law whether such privilege attaches. See Swinton Creek v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). However, the question of whether the privilege has been abused is for the jury. Id. For instance, publication to a co-worker may be the basis of a defamation action if a qualified privilege is abused. Bell v. Bank of Abbeville, 208 S.C. 490, 38 S.E.2d 641 (1946) (cited with approval in Swinton Creek).

In Bell, the Supreme Court overturned the trial court’s granting of the Bank’s *demurrer* on a defamation cause of action on the grounds that the communication was qualifiedly privileged, noting that the trial court had overlooked the principle that “if actual malice is shown, the protection of the privilege is destroyed.” Id. at 495 (emphasis added).

In this case, the trial court properly denied Appellants’ motion for directed verdict and submitted the issue of whether the privilege was abused based on the evidence that

Earles and Barnes were not acting in good faith by attempting to let the greater Richland Two community know that they considered Kennedy a thief, even though the Sheriff's Department declined to charge anyone and the Human Resources Department refused to terminate him. Where there is some evidence tending to show abuse of the privilege – and evidence of improper motive – the trial court's denial of directed verdict and JNOV should be affirmed. See Cook v. Regions Bank, supra. The trial court's ruling is further supported by the jury's specific finding that Appellants acted with actual malice towards Mr. Kennedy.

The Court here overlooked evidence of defamation under existing South Carolina law or improperly *weighed* the evidence and decided which evidence (i.e. the denial by the Appellants that they printed and left out the e-mail) was more important than other evidence (i.e. that the Appellants got the word out to staff that Kennedy was not to be trusted; that Appellants never bothered to investigate or follow up with the other recipients of the e-mail to determine who printed it out, if they themselves actually didn't). As a result, the Court has disregarded the "any evidence" standard.

The trial court correctly found that, viewed in the light most favorable to the plaintiff, there was at least a *scintilla* of evidence (i.e. "any evidence") to support a cause of action for defamation, and the considerable evidence presented was susceptible to more than one reasonable inference. As outlined in more detail below, there was at least some evidence that Appellants communicated to rank and file employees, either through words or conduct or a combination of both, that they believed Jeffrey Kennedy was a thief, could not be trusted, and was unfit for his job and that they were motivated by ill will and malice in doing so, perhaps the result of frustration with the decision by Richland Two to keep

Mr. Kennedy employed, or by the decision of the Sheriff's Department not to charge him (or anyone) with the alleged theft. A "trial court should deny the motion [for directed verdict and JNOV] where either the evidence yields more than one inference or its inference is in doubt." Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003).

Undisputed Facts

In the Spring of 2011, Jeffrey Kennedy was employed as a security guard, working third shift, with Richland Two. As part of his shift, he was responsible for patrolling various schools, including Spring Valley High School. Appellant Chuck Earles was the director of security and Appellant Eric Barnes was his deputy. Appellants believed that the security division had a rumor and gossip problem. R. p. 418, l. 15 – p. 419, l. 18; R. p. 423, l. 25 – p. 424, l. 9; R. p. 305, l. 17- p. 306, l. 2.

On February 28, 2011, Mr. Earles recommended Mr. Kennedy for a promotion and it was known among the rank and file that Mr. Kennedy was getting the promotion. It was known among the rank and file that Mr. Kennedy was getting the promotion. R. pp. 153 - 154; R. p. 225, l. 25 – p. 226, l. 8; R. p. 268, l. 13-20.

On March 4, 2011, Spring Valley's athletic director, Tim Hunter, alleged that he left \$1,000 in some cash boxes in his office the night before, and discovered the money was missing the next day. R. p. 319, l. 21 – p. 320, l. 2; R. p. 608, l. 14 – p. 611, l. 18; R. p. 1025. Mr. Hunter had a safe in his office where he usually locked up money; however, he alleged that he felt sick the evening of March 3rd and wanted to leave the cash boxes out, in case a staff member needed to access the cash for an event.² This was not his standard practice. R. p. 611, l. 19- p. 612, l. 6.

² Obviously, Mr. Hunter did end up coming to work the following day.

There are approximately 100+ thefts which occur every year at Spring Valley. R. p. 746, l. 4. – p. 747, l. 4. Numerous witnesses testified that “everyone had keys” at Spring Valley and, in fact, the Richland Two security division (including Appellants) did not even know who had keys to what – that decision was made by Spring Valley’s principal. R. p. 154, l. 23 – p. 156, l. 25; R. p. 248; R. p. 419, l. 19 – p. 421, l. 1.

Mr. Hunter’s actions on the night in question were deemed “odd” and “suspicious” by certain people, including Appellants. R. p. 226, l. 14 – p. 227, l. 7; R. p. 362, l. 10- 18; R. pp. 434-435. There was no video footage from the security camera of anyone entering or exiting Mr. Hunter’s office on the night in question. R. p. 349, l. 1-5; R. p. 442, l. 23 – p. 443, l. 5.

Mr. Kennedy was on duty the evening of March 3rd and, as part of his rounds, turned on the alarm in the Athletic Department around 11:00 p.m., and came back and disarmed it by himself sometime around 5:55 a.m. on March 4th. R. p. 159, l. 1-14. Sometime after the alarm was set, the baseball team returned to campus and set off the alarm. When the alarm went off, Mr. Kennedy was instructed by his shift lieutenant, Lt. Young, to drive over and check on things. R. p. 159, l. 17 – p. 161, l. 12. By the time Kennedy arrived, the baseball coach was already turning the alarm off himself and Kennedy did not re-enter the building. However, while sitting in his vehicle outside, Mr. Kennedy observed numerous players and coaches in the hallway by Mr. Hunter’s office; additionally, there were numerous players and coaches observed on the videotape from the security camera in the Athletic Department building. R. pp. 159 -161; R. p. 243, l. 19 – p. 244, l.10.

While some witnesses testified that they saw the baseball team on the video footage from the evening in question, Chuck Earles did not recall seeing the team when he reviewed

the footage, R. p. 559, l. 24 – p. 560, l. 18; however, Earles did observe Mr. Kennedy on the phone as he exited the building around 5:55 a.m. At the time when he disarmed the alarm, and other nights in question, Mr. Kennedy spent time in the weight room, “killing time”. R. p. 515, l. 15 – p. 517, l. 10. While in the weight room on the morning in question, Kennedy received a call from Lt. Young, directing him to go to another school. R. pp. 162, l. 13 – p. 163, l. 16.

Earles never followed up to see who Kennedy was speaking with that morning. R. p. 543, l. 9 – p. 546, l. 2. Earles refused to testify as to whether “it would be highly unlikely that [Kennedy] would be in the process of robbing something while he is talking to somebody else.” R. p. 545, l. 24 - p. 546, l. 2. Earles did not save any video from the night in question which showed Tim Hunter leaving or arriving, nor did he save the video from the period of time after Kennedy disabled the alarm. R. p. 560, l. 19 – p. 561, l. 25.

Despite no one ever having observed Kennedy – during the three years he had been a night watchman - entering or exiting any office where he was not supposed to be (including Mr. Hunter’s), and despite the District finding that others had “access and opportunity” to Mr. Hunter’s office, Mr. Kennedy was the sole focus of the Appellants’ investigation. R. p. 272, l. 11-17; R. p. 351, l. 15 – p. 352, l. 2.; R. p. 565, l. 10 – 14, R. pp. 1011-1012. Appellants never interviewed the baseball team, baseball coach, or the custodial staff. R. pp. 323 -325, R. p. 184, l. 18 – p. 186, l.23 , R. p. 331, l. 13 – p. 332, l. 22.

Appellants testified that they did not really perform an investigation, but merely acted as liaisons to the Richland County Sheriff’s Department. R. pp. 319-322, 329. However, both men reviewed videotape of the nights in question; met with human

resources staff and with Mr. Kennedy; and reviewed instances of other petty thefts at Spring Valley High School and sought to “catch” the alleged thief by placing “bait money” in a certain location, without success. R. pp. 323-325; R. pp. 482 – 483.

Appellants never questioned Mr. Kennedy about what his training had been, or what his habits were, or reviewed videotape from months past. R. pp. 314-315; R. p. 406, l. 18 – p. 407, l. 6; R. p. 533, l. 10 – p. 535. They also did not speak with his supervising lieutenants, who could presumably attest to the training Kennedy received and his habits. R. p. 564, l. 18-20; R. pp. 533-535.

Despite the Sheriff’s Department decision not to charge anyone, Appellants both believed that Kennedy was the thief, and Earles withdrew the recommendation for the promotion. R. pp. 351-352, R. pp. 444 - 445. Mr. Barnes was “very frustrated” and simply could not believe that Mr. Kennedy was not fired, and characterized Richland Two, his voice dripping with sarcasm at trial, as a “beautiful place to work”. R. p. 328, l. 21-23; R. p. 366, l. 9 – p. 367, l. 21; R. p. 847, l. 19-24.

Mr. Kennedy returned to work at the security division in June 2011; however, Chuck Earles decided that Mr. Kennedy was not to have keys and was to be assigned to desk duty only. R. p. 422, l. 25 – p. 423, l. 12. In order to implement his decision, Appellants communicated to non-supervisory staff (i.e. “the rank and file”) that Kennedy was not have keys. R. p. 249, l. 14 – p. 250, l. 16. Kennedy testified that he heard that Appellants said he was the thief. R. p. 168, l. 5-23.

Mr. Earles also sent out an e-mail, marked confidential, to the supervisors within the security division, along with his deputy, Mr. Barnes. The e-mail states explicitly that Mr. Kennedy is returning to work on desk duty and is “NOT to be given any assignment

that involves having keys to any District facility.” R. p. 1010. The e-mail was printed out and left out for the rank and file employees to see in the security division office and their vehicles. R. p. 168, l. 11 – p. 169, l.22; R. p. 229, l. 21 – p. 230, l. 11; R. p. 246, l. 7 – p. 247, l. 24. Appellants denied printing it out or leaving it out. R. p. 364, l. 21 – p. 365, l. 1; R. p. 519, l. 1-5. Appellants admitted that the e-mail would have harmed Kennedy if it had gone beyond the recipients. R. pp. 359 - 360; R. p. 423, l. 25 - p. 426, l. 8.

Current and former Richland Two security employees testified that they saw the e-mail and knew what it meant – that Earles and Barnes considered Kennedy to be the thief and that he could not be trusted. R. p. 227, l. 23 – p. 230, l. 20; R. p. 274, l. 7 – p. 276, l. 10. These same witnesses testified that you can “put two and two together”, and that it was “obvious” that Appellants thought Kennedy had stolen the \$1,000. R. p. 227, l. 23- p. 230, l. 25.

Upon learning that the supposedly “confidential” email had been printed out and left out for all to see, neither Barnes nor Earles ever followed up with their supervisory staff to find out who (if not them) had left it out, or why their confidentiality directive was ignored. R. p. 400, l. 24 – p. 406, l. 8; R. pp. 398-399; R. pp. 310-311; R. p. 359.

Richland Two’s human resources department, in confronting a situation where highly sensitive employee information was conveyed to non-supervisory staff, noted that the District strives for a “culture of excellence” when dealing with sensitive employment issues. R. p. 849, l. 2 – p. 851, l. 24. The communication of negative information related to Mr. Kennedy’s trustworthiness to the general staff did not reflect the “culture of excellence”, nor was it indicative of the District’s “best practices”. R. p. 851, l. 25 – p. 852, l. 19; R. p. 857, l. 8 – 24 .

Argument in Support of Rehearing or Alteration

I. There is At Least Some Evidence in the Record to Support the Verdict and the Trial Court's Denial of the Motions

The record before the Court is substantial and consists of direct and circumstantial evidence from which the jury could, and did, find that the Appellants communicated a defamatory message about Mr. Kennedy – that he was a thief and unfit for his profession-- and that such message exceeded the scope of qualified privilege and was delivered with actual malice.

It would have been incredible for the Appellants to admit that they communicated to the staff, through words or conduct, that Mr. Kennedy was a thief or could not be trusted (or for them to admit that they printed out the e-mail and left it out for all to see). A cause of action for defamation necessarily must involve circumstantial evidence - unless a newspaper is involved - since most defendants are unlikely to admit words or conduct which defame someone.

1. There is direct, undisputed evidence in the record that Appellants communicated to staff (i.e. the rank and file), through words and/or conduct, that Kennedy could not be trusted. John Reid, a member of the security division staff working second shift, recounted:

Q. When did you first find out that Jeffrey was being investigated for the theft?

A. Well, I mean, after [Eric Barnes] asked me about it, [Kennedy] didn't come to the shift to take the supervisor's position. They moved him into the office, and all he could do was answer the telephone, wasn't to have any keys, wasn't to drive any vehicles.

Q. How did you find out that he wasn't supposed to have keys or drive vehicles.

- A. It was told to us. Because he came in on third shift and he would relieve us, and sometimes he would beat the shift supervisor to work himself . . .
- Q. Who told you he was not supposed to have keys?
- A. It was put out by Mr. Barnes.
- Q. What did you think of that?
- A. Well you know, it's pretty obvious. I mean, a guy supposed to get promoted; and all of a sudden, they move. He didn't get promoted, and then he is brought into the office. All he can do is answer telephones. Evidently he was under suspicion for something.
- Q. Was it clear to you that he was under suspicion for the thousand dollar theft?
- A. That's when it started. So, I mean, put one and two together.
- Q. So you ended up getting the job that Jeffrey had been promoted to and that was revoked?
- A. Yes, sir.
- Q. . . . Did Jeffrey's job overlap with what you thought your job was supposed to be as the second shift supervisor?
- A. I didn't get the job until later on.
- R. at p. 249, l. 14 – p. 251, l. 3.

There was no evidence in the record that Mr. Reid had become a supervisor at the time this conversation occurred. In their rebuttal at oral argument, counsel for Appellants incorrectly asserted that this conversation was privileged because Mr. Reid was a supervisor. This is incorrect, as Mr. Reid clearly testified that he didn't get that promotion until later on.

Barry Mitchell, another shift security guard, also testified that Mr. Barnes and Mr. Earles let the staff security guards know that they considered Kennedy to be the thief, *even if* he was back at work and never charged with any crime:

Q. Based on your personal knowledge, going back to those days and months around March 2011, personally was it obvious to you that Mr. Earles and Mr. Barnes thought that Jeffrey was not to be trusted?

A. Yes, ma'am. Once they promoted him to lieutenant and then demoted him to a desk job, it was rather obvious that he was under investigation for it.

Q. Where did you see this [Earles e-mail] before?

A. There is an office in the support service center where we have a file cabinet where we keep our time sheets . . . and it was laying on the desk.

Q. So that office is not a secure area?

A. No.

Q. Staff goes in and out of there?

A. Yes, ma'am.

Q. And so the letter says [Kennedy] is not to have keys?

A. Yes, ma'am.

Q. And you interpreting that how?

A. He was not to be trusted.

Q. A security guard without keys really isn't a security guard?

A. Is worthless, for what we do. If you can't use keys, you can't work.

R. p. 229, l. 13 – p. 231, l. 1.

2. The direct evidence that Appellants communicated to the staff that Kennedy could not be trusted also serves as circumstantial evidence that Appellants would have been likely to have printed and left the e-mail out, in an effort to get the word out and harm Kennedy.

Earles and Barnes, upon learning that the e-mail had been printed out and left out, never asked their subordinates if they had done so, nor did they investigate the matter further. This failure to investigate the alleged breach of confidentiality creates a reasonable inference for the jury to conclude that the Appellants did nothing because they, in fact, were the ones who printed the e-mail out and left it out for the rank and file to see.

Additionally, despite believing that the security division was a “rumor mill” in need of reform, neither Earles nor Barnes took any action to ensure that this “confidential” memo – which they knew would harm Kennedy if it was seen by others – would actually be kept confidential. R. p. 426, l. 4-21; R. p. 427, l. 17- p. 428, l. 2. This evidence, taken as a whole, also creates a reasonable inference for the jury to believe that Appellants did not take steps to ensure confidentiality, because they either wanted to communicate the message that Kennedy was a thief to the staff, or because one or both of them did, in fact, leave it out for all to see.

The position of the Court appears to be that a cause of action for defamation cannot stand because the jury was not allowed to “disbelieve” the Appellants’ testimony regarding the e-mail, despite evidence in the record supporting the jury’s verdict. This position ignores the other evidence of conduct and communication which can constitute defamation, and results in the Court determining the credibility of the witnesses – not the jury. Under

this standard, if a defendant denies publication, all other evidence of defamation is disregarded and a cause of action cannot stand.

If this is to be the law of South Carolina, then it is unlikely that any cause of action for defamation can ever stand if a defendant denies publication, despite other evidence to the contrary. Credibility was an issue for the jury; the jury could have concluded that since Appellants considered Kennedy the thief, they left the memo out (and also communicated their belief through words and conduct) in order to harm Kennedy. This argument is bolstered because the jury specifically found that the Appellants acted with actual malice.

Furthermore, the jury could have concluded that Eric Barnes was not credible because he testified that there had been no petty thefts at Spring Valley High School since March 2011, R. p. 361, l. 1-7, even though an assistant principal testified there were 100+ thefts a year at Spring Valley. Similarly, Chuck Earles could have been considered not credible because he testified that he didn't recall seeing the baseball team on the videotape from the night in question (although it was undisputed they were there that night), and despite others having "access and opportunity", he never spoke to anyone on the team or otherwise. R. p. 443, l. 11-13, R. p. 434, l. 17- p. 435, l. 10; R. p. 560.

3. Appellants solely focused on Jeffrey Kennedy in investigating the missing money and believed from the very beginning that he was the thief, despite others having access and opportunity and despite the admittedly suspicious behavior of the Athletic Director in leaving the money out. R. p. 272, l. 11-17; R. p. 351, l. 15 – p. 352, l. 2.

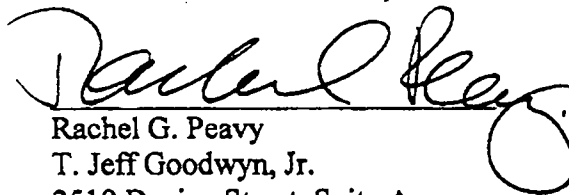
4. Mr. Kennedy testified that he heard that Appellants said he was the thief. R. p. 168, l. 5-23.

Conclusion

This Opinion fails to address the entire record before the Court and deviates from the applicable standard of review. The Court has failed to consider all of the evidence in the record and, accordingly, rehearing is necessary to correct these errors and to issue an opinion which fully addresses the application of existing South Carolina law to the facts presented.

The opinion of the Court only addressed the e-mail evidence and whether or not there was publication of the e-mail by the Appellants; however, that was not the only evidence in the record upon which the trial court relied upon in denying the motions for directed verdict and JNOV and, accordingly, Petitioner respectfully requests that the Court grant this Petition. Upon such further review, Petitioner requests that the Court withdraw its opinion, address all the evidence in the record, and affirm the lower court's rulings and the jury's verdict in this matter.

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Dated: February 9, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

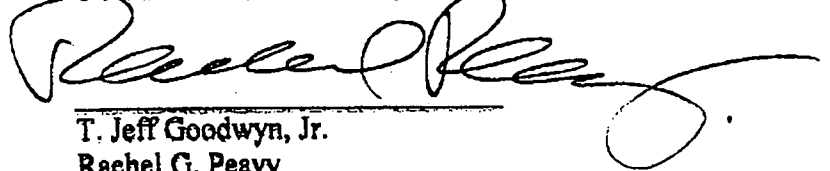
Richland County School District Two, Eric Barnes and Chuck Earles.....Appellants.

PROOF OF SERVICE

I certify that I have served the **Respondent's Petition for Rehearing** on Thomas K. Barlow, Esquire and Kathryn Long Mahoney, Esquire, Attorneys for the Appellants, at the address listed below by depositing a copy of same in the United States Mail, postage prepaid, on February 9, 2017.

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February 9, 2017

The South Carolina Court of Appeals

Jeffrey Kennedy, Respondent,

v.

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

Appellate Case No. 2015-000613

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr.

J.

H. Ben Wain

J.

Paul C. Thomas

J.

Columbia, South Carolina

cc:

Kathryn Long Mahoney, Esquire
Thomas Kennedy Barlow, Esquire
Thomas Jefferson Goodwyn, Jr., Esquire

FILED

April 17, 2017

Rachel Gottlieb Peavy, Esquire
Jeanette W. McBride

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.

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I. STATEMENT OF ISSUES ON APPEAL

- (1) Did the Trial Court Err In Denying Appellants' Motion For Directed Verdict/JNOV On Respondent's Defamation Claim?
- (2) Did The Trial Court Err In Denying Appellants' Motion For JNOV On The Issue Of Individual Liability Under The South Carolina Tort Claims Act?
- (3) Did The Trial Court Err In Denying Appellants' Motion For JNOV On The Issue Of Punitive Damages Under The South Carolina Tort Claims Act?
- (4) Did The Trial Court Err In Excluding Evidence Of Respondent's Alleged Theft And His Corresponding Loss Of Employment With A Subsequent Employer During The Pendency Of This Case?
- (5) Did The Trial Court Err In Failing To Instruct The Jury That No Defamatory Communication Was Made As A Result Of Respondent's Termination And That Respondent's Employment Termination Was Not Part Of His Defamation Claim?
- (6) Did The Trial Court Err In Denying Appellants' Motion For A New Trial Absolute On The Grounds That The Amount Of The Verdict, Given The Evidence Presented At Trial, Demonstrated That It Was Motivated By Caprice, Passion, Or Prejudice?
- (7) Did The Trial Court Err in Denying Appellants' Motion For New Trial Nisi Remittitur?
- (8) Did The Trial Court Err In Affirming the Constitutionality Of The Jury's Award Of Punitive Damages?

II. STATEMENT OF THE CASE

Respondent, Jeffrey Kennedy, is a former employee of Appellant Richland School District Two ("Richland Two"). He filed this action on March 11, 2013, in the Richland County Court of Common Pleas alleging multiple causes of action against the following defendants: Richland School District Two ("Richland Two"), Dr. Katie Brochu,

Roosevelt Garrick, Traci Batchelder, Kim Jones, Eric Bonds [sic], and Chuck Earles. (R. pp. 13-18.) Prior to trial, the parties stipulated to the dismissal of Dr. Brochu, Mr. Garrick, and Ms. Batchelder. (R. p. 26.) The case was called for trial during the September 29, 2014 Common Pleas term of court. A jury was empaneled and Mr. Kennedy's case proceeded against Richland Two, Chuck Earles, Eric Barnes, and Kim Jones.

Upon the close of Mr. Kennedy's case, the Court granted a directed verdict for all defendants on Mr. Kennedy's intentional infliction of emotional distress claim and his defamation claim against Ms. Jones. (R. p. 598 l. 22 - p. 601 l. 15.) After Appellants rested their case, the Trial Court directed a verdict on Mr. Kennedy's claim of Negligent Supervision and Retention against Richland Two. (R. p. 937 l. 8 - p. 942 l. 2.) The Trial Court denied the directed verdict motion only as to Mr. Kennedy's defamation claim against Mr. Earles and Mr. Barnes with regard to alleged communications in June 2011, regarding Mr. Kennedy's reassignment to a desk-based position inside the School District's security office, following a theft investigation at Spring Valley High School ("SVHS"). The Trial Court granted the motion for directed verdict to the extent Mr. Kennedy contended that any communications surrounding or related to the termination of his employment with Richland Two in October 2012 were defamatory. (R. p. 908 l. 20 - p. 910 l. 2; p. 922 ll. 18-23.)

On October 3, 2014, the jury returned a verdict against Mr. Barnes for \$100,000 in actual damages and \$150,000 in punitive damages, and a verdict against Mr. Earles for \$100,000 in actual damages and \$200,000 in punitive damages. The Court allowed the parties ten days for post-trial motions and Appellants timely submitted their post-trial motions on October 13, 2014. (R. pp. 46-75.) The Court denied Appellants' post-trial

motions on February 24, 2015, and Appellants timely filed their Notice of Appeal on March 13, 2015. (R. pp. 100-108.)

III. STATEMENT OF FACTS

Mr. Kennedy began working third shift as a security guard in Richland Two's security department in May 2008. (R. pp. 140-142.) His starting rate of pay was \$11.77 per hour. (R. p. 141.) In his position, he was essentially the night watchman. (R. p. 144.) Spring Valley High School ("SVHS") was his base school. He was also responsible for security at seven other schools on nightly rounds. (R. p. 145.)

At relevant times, Mr. Earles was Richland Two's Emergency Services Manager. (R. p. 409 l. 22 – p. 410 l. 1.) Mr. Barnes was Richland Two's Assistant Security Manager. (R. p. 287 ll. 13-20; p. 410 ll. 2-5.)

In February 2011, Mr. Kennedy applied for a lieutenant position in the security department, which was essentially a patrol supervisor, shift leader job. (R. p. 152.) He was to move to the second shift and would have received an unspecified pay raise. (R. pp. 412-413, 1009.) Mr. Kennedy offered no evidence of the difference in pay he would have received as lieutenant. *Id.* Mr. Earles recommended Mr. Kennedy to Richland Two's Human Resources department for the position on or around February 28, 2011. (*Id.*) The position was scheduled to start March 7, 2011. (R. pp. 416, 1009.)

On the morning of March 4, 2011, SVHS Athletic Director Tim Hunter reported that \$1000 in cash was missing from his office in the athletic department at SVHS. (R. pp. 607, 1025.) Mr. Hunter left the money under his desk in a cash box after collecting it from a sporting event the previous night. (R. pp. 611, 1025.)

Mr. Kennedy became the focus of the investigation of the missing funds. Specifically, the money went missing during his shift and on his watch, there were some other thefts at SVHS on his watch in other parts of campus that were under investigation

at that time, he had a key that would open any door on campus, and videotape surveillance showed him engaging in what school district administrators, including Mr. Barnes and Mr. Earles, considered unusual behavior in lingering off camera for five minutes in the SVHS athletic department. (R. p. 510 l. 14 – p. 516 l. 20.) According to defense witnesses, this would have provided Mr. Kennedy an opportunity to rifle through Mr. Hunter's office, which was not covered by a security camera. (R. pp. 491, 510-515, 619-621.)

Mr. Kennedy was placed on paid administrative leave during the investigation and the matter was referred to the Richland County Sheriff's Office. (R. p. 210 ll. 11-14.) Mr. Kennedy was not criminally charged for the theft. (R. p. 167 ll. 9-11; p. 210.) He was returned to full duty security work with Richland Two on or around June 16, 2011. (R. p. 766 l. 16 – p. 767 l. 9; pp. 1010-1012.) Roosevelt Garrick, who was then Richland Two's Chief Human Resource Officer, informed Mr. Kennedy that he would be permitted to return to work, but due to concerns with Mr. Kennedy's lack of candor during the investigation and suspicious behavior, he would not be promoted to lieutenant at that time. (R. pp. 826-842, 1011-1012.)

Prior to Mr. Kennedy's return to work in June 2011, Mr. Earles sent an email with the reference line "**CONFIDENTIAL**" in bold, capital letters to security department supervisors that read as follows:

THE INFORMATION CONTAINED IN THIS
EMAIL IS CONFIDENTIAL AND WILL ONLY
BE SHARED WITH OTHER DISTRICT
SECURITY SUPERVISORS, AS NEEDED,
WHEN THEY WILL BE SUPERVISING
MR. KENNEDY.

Mr. Kennedy will be reporting to work
tomorrow night (Thursday, June 16) to work on
third shift, weekdays. This will be his permanent
assignment.

I have told him that he will be assigned to work in the watch room answering phones and performing whatever other duties are necessary in the watch room.

He is NOT to be given any assignment that involves having keys to any District facility.

Thank you.

(R. pp. 424-428; p. 518 l. 15 – p. 520 l. 25; p. 1010.) Two of Mr. Kennedy's former coworkers testified that they saw Mr. Earles' confidential email printed out at the security office. (R. p. 229 l. 21 – p. 231 l. 1; p. 274 l. 16 – p. 275, l. 17.) However, both of those co-workers testified that they first heard Mr. Kennedy was under investigation for the SVHS theft from Mr. Kennedy himself. (R. p. 235 ll. 6-23; p. 276 l. 23 – p. 277 l. 1.) Mr. Kennedy testified that he also saw the email "lying out" in security vehicles and in offices. (R. p. 168.) No evidence was presented at trial that Mr. Earles or Mr. Barnes had printed out the email or were aware that it had been printed out prior to the litigation. Both Mr. Earles and Mr. Barnes testified that they were not aware of any rumors or allegations that the email had been printed out until Mr. Kennedy alleged it by way of this action. (R. p. 308 l. 11 – p. 312 l. 4; p. 429 ll. 2-7; p. 519.)

After returning to work in June 2011, Mr. Kennedy did not look for another job for the next fourteen months. (R. p. 213.) He testified that he continued to enjoy his job. (R. pp. 213-214.) Mr. Kennedy did not receive any reprimands or warnings after reinstatement to his position in June 2011. (R. p. 214.) His at-will employment with Richland Two was ultimately terminated in October 2012. (R. p. 213.)

Mr. Kennedy contended that he was further defamed by way of his termination and by Kim Jones, a bus driver for Richland Two who had reported Mr. Kennedy for intimidating behavior toward her during an investigation of whether Ms. Jones may have improperly reviewed a school video with Mr. Kennedy's assistance. (Compl. ¶¶ 13-17;

R. p. 15.) However, the Trial Court's rulings granting Ms. Jones a directed verdict on that claim and holding that Mr. Kennedy did not prove any defamatory communication in connection with his termination have rendered the circumstances of his 2012 employment termination largely irrelevant to this appeal.

Mr. Kennedy offered evidence that after his termination in October 2012, he was evicted from his house, his car was repossessed, and ultimately he was divorced from his wife. (R. pp. 180-183, 1013-1014.) At the time of trial, he was working for GEO Care as a security officer, where he was eligible for stock and participation in its 401(k) program. (R. p. 183.) Between his employment at Richland Two and GEO Care, he worked for Allied Barton as a security guard at an hourly rate of \$13.26. (R. p. 205 ll. 10-11.) His final hourly rate at Richland Two was \$12.77 per hour. (R. p. 219.) Mr. Kennedy testified that he resigned from Allied Barton in February 2014. (R. pp. 204-205) The Trial Judge limited defense counsel's ability to cross examine Mr. Kennedy under Rule 405 of the South Carolina Rules of Evidence regarding the circumstances of his resignation from Allied Barton. (R. p. 193 l. 11 – p. 201 l. 25.) At the time of trial, Mr. Kennedy had pending charges of petty larceny for thefts at the SCANA campus where he was assigned to work through Allied Barton. Appellants challenge this ruling below. (R. pp. 27-32, 116-122.) Mr. Kennedy testified that he had no evidence that anyone at Richland Two had provided a negative reference or had attempted to keep him from securing subsequent employment. (R. p. 221.)

IV. ARGUMENTS

A. The Trial Court Erred In Denying Appellants' Motion For A Directed Verdict/JNOV On Mr. Kennedy's Defamation Claim.

1. JNOV Was Warranted Because Mr. Kennedy Did Not Carry His Burden Of Proving Each Element of His Defamation Claim.

A Motion for JNOV is a renewal of the directed verdict motion. *See Roland v.*

Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992); *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993). Directed verdict is a test of the sufficiency of the evidence. *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d 774 (1972) (when evidence presented at trial raises no issue for the jury as defendant's liability, a motion for a directed verdict based on the sufficiency of the evidence-should be granted); *see also, e.g., Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547 (1939) (remarking that review of a trial court's failure to grant directed verdict is a test of the sufficiency of the evidence). A court should grant a JNOV when the evidence presented at trial is insufficient to support the jury's verdict. *See Rogers v. Norfolk S. Corp.*, 343 S.C. 52, 59, 538 S.E.2d 664, 668 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 65, 71, 588 S.E.2d 87 (2003).

To prove a defamation claim, a plaintiff carries the burden of proving: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

Mr. Kennedy did not meet his burden of proving an unprivileged publication by either Mr. Earles or Mr. Barnes. First, the only possible defamatory communication Mr. Kennedy identified at trial was Plaintiff's Exhibit 4 - the June 15, 2011 email from Defendant Earles addressed to the following individuals: Angelia Permenter, Eric Barnes, Gerome Young, Lelith Zerzycki, and Rick Groves, with a copy to Traci

Batchelder. The Trial Judge identified this as the only potentially defamatory comment in her charge to the jury. (R. p. 981.) It was undisputed that each of the recipients of the email was a supervisory-level employee in the security department, with the exception of Ms. Batchelder, who was a Director of Human Resources.

Mr. Kennedy and witnesses testified that they saw printed copies of the email in a security department truck as well as in an office in the Security Services building. (R. p. 168, p. 229 l. 21 – p. 231 l. 2; pp. 274-275.) No witness testified: (1) that Mr. Earles or Mr. Barnes¹ was responsible for distributing the email or placing it in the locations it was found; (2) that the witness had discussed the confidential email with either Mr. Earles or Mr. Barnes²; (3) that Mr. Earles or Mr. Barnes discussed the subject matter of the investigation with any third party not addressed in the email itself; or (4) that they had reason to believe Mr. Earles or Mr. Barnes knew the email had been seen by others prior to the litigation.

As the Trial Court recognized during directed verdict arguments at the conclusion of the evidence, the mere fact that non-supervisor witnesses may have seen the confidential email is not sufficient evidence for the jury to conclude *ipso facto* that Mr. Barnes or Mr. Earles was responsible for its printing or circulation beyond the email's listed recipients. (R. pp. 926-927.) Proof of a defamatory publication requires publication by the defendant, not speculation that an addressee of the email may have ignored the directive of Mr. Earles' email to maintain confidentiality. Further, it was not a permissible inference for the jury to speculate that either Mr. Barnes or Mr. Earles was responsible for issuing the communication to a third party (*i.e.*, outside the group of

¹ Mr. Kennedy introduced no evidence at trial that Mr. Barnes contributed to preparation of the email, sent the email, printed the email, or copied the email.

² In fact, Mr. Kennedy's witnesses specifically denied discussing the memorandum with Mr. Earles or Mr. Barnes. (R. pp. 235, 258, 277-279.)

supervisory addressees) just because it had been printed out and seen by Mr. Kennedy and two of his witnesses.

The proof of publication offered by Mr. Kennedy in this case was similar to the proof the Court of Appeals flatly rejected in *Williams*, 369 S.C. at 304, 631 S.E.2d at 286. In that case, the plaintiff argued that because a rumor existed that the plaintiff coach was having an affair with a school secretary, the school principal, who confronted the plaintiff coach about being in a bathroom alone with the secretary, must have been responsible for publishing the rumor. However, the Court of Appeals found:

Based on the evidence of record, there were numerous individuals who were aware of the . . . incident besides [the Principal]. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were [the principal and the assistant principal]. Thus, the rumors cannot be said to have only been possibly attributable to [the principal] and the Williamses' argument concerning indirect evidence fails.

Williams, 369 S.C. at 304, 631 S.E.2d at 292.

Because Mr. Kennedy offered no direct or circumstantial evidence that either Mr. Barnes or Mr. Earles was responsible for printing out the email or any further distribution of the email beyond the addressees, he failed to prove by a preponderance of the evidence any defamatory publication by Mr. Earles or Mr. Barnes, and JNOV was warranted for that reason.

Likewise, the evidence introduced at trial did not establish the "fault" element on the part of either Mr. Barnes or Mr. Earles without proof that they published the email beyond the list of addressees. As a matter of law, the language of the email itself demonstrates that Mr. Earles took reasonable precautions to assure its confidentiality.

The Trial Court so held in granting Richland Two JNOV on Mr. Kennedy's negligent supervision claim:

And the testimony was, "When I send out something confidential, I would expect that those in a supervisory role would understand that importance and to show and demonstrate and respect the fact it's confidential and should not be shared with others." I think that's a reasonable expectation. I also believe that based upon the evidence and the case law that there is not a --- that there has been no reason to believe that those individuals would therefore go out and do something contrary to what the expectation was in light of the fact that the memo clearly says its confidential.

(R. pp. 939-940.) The suggestion that Mr. Earles could have gone to each supervisor individually, or not sent the email at all, does not negate the reasonableness of the precautions demonstrated by Mr. Earles' testimony and the text of the email itself.

(R. pp. 425-428, 518-519.) Mr. Kennedy offered no evidence to suggest that any of the addressees were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential. An employer is not obligated to maintain a "rumor free" workplace, particularly in the absence of any evidence that any of the email recipients could not be trusted with, or were likely to disclose confidential information. Accordingly, there was insufficient evidence of a false and defamatory publication by Mr. Earles or Mr. Barnes, or fault on behalf of Mr. Earles or Mr. Barnes in any disclosure made by another employee, to warrant submitting the defamation claim to the jury. Appellants were entitled to JNOV on that basis as well.

**2. Any Allegedly False And Defamatory Statement Published
By Any Defendant Regarding Mr. Kennedy Was Subject
To A Qualified Privilege And Mr. Kennedy Produced No
Evidence To Support A Jury Verdict That Any Publication
Was Made With Actual Malice.**

The Court properly determined that a qualified privilege applied to Mr. Earles' email to the security supervisors as a matter of law. (R. p. 981.) A statement made in connection with an employer's *bona fide* inquiry into possible employee misconduct is qualifiedly privileged. *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 507 (Ct. App. 1989). "Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141 542 S.E.2d 743, 749 (Ct. App. 2001).

Where a defendant is entitled to a qualified privilege, a plaintiff can recover for defamation only if he or she can show that the defendant exceeded the scope of the privilege or was motivated by actual malice in the publication of the allegedly defamatory statements. *Richardson v. McGill*, 273 S.C. 142, 145, 255 S.E.2d 341, 342 (1979). In the defamation context in South Carolina, "actual malice" means that the defendant acted "with ill will toward the plaintiff or that [he] acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights." *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). South Carolina law also requires, in order to prove actual malice, that "at the time of his act or omission to act, the tortfeasor be conscious, or chargeable with consciousness of his wrongdoing." *Id.* Both ill will and consciousness of wrongdoing must be shown by more than a scintilla of evidence. *See Austin v. Torrington Co.*, 810 F.2d 416, 425 (4th Cir. 1987) (applying South Carolina law). Relevant factors may include whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited, and whether the statement was sent only to the proper parties. *See Swinton Creek Nursery v. Edisto Farm*

Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). The issue of malice is for the jury only when a reasonable juror could draw more than one inference from the evidence. Otherwise, the issue becomes a question of law for the court. *Bell v. Bank of Abbeville*, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947) ("*Bell II*").

It is clear that the plaintiff must show that *the publication* was made with actual malice. See *Murray*, 344 S.C. at 143-44, 542 S.E.2d at 750-51. The South Carolina Supreme Court in *Bell II* framed the issue as follows:

Assuming the statements in question to be slanderous in character, were they uttered in good faith in the pursuit of the business of the bank by and to persons who had a right to hear and consider such statements, at a time and place and in a manner and under circumstances which effectually negative the existence of a purpose to injure and defame the respondent; or were the statements made maliciously, or without any proper occasion for the making of the same, and in such manner or under such circumstances that it may be reasonably inferred that the object of the parties was not to bona fide act in the pursuit of the business of the appellant, but to use the excuse of a meeting of the officers and directors to injure and defame the respondent?

Bell II, 211 S.C. at 173, 44 S.E.2d at 330.

Bell II is apposite to this case. In *Bell II*, numerous customers of the bank complained about the actions of the plaintiff in the handling of their accounts, some of which amounted to accusations of criminal conduct by the plaintiff. Based on his duties as an employee, the cashier to whom the complaints were made repeated these complaints to two members of the bank's board of directors. Based on these reports, the board decided to terminate the plaintiff, and the plaintiff sued for defamation. The court determined that a qualified privilege existed because the cashier had an interest in advising the plaintiff's employer of the complaints he had heard about the plaintiff.

Because of the qualified privilege, the plaintiff had the burden of establishing malice, even though he was alleging defamation *per se*. *Bell II*, 211 S.C. at 171-72, 44 S.E.2d. at 329-30. After the case proceeded to a jury trial, the court then overturned the verdict and held that a directed verdict should have been granted because there was not sufficient evidence to create a question of fact on the issue of malice, even though the plaintiff alleged that the cashier disliked him and there were strained relations between the two of them. *Id.* at 333.

Likewise, Mr. Kennedy offered no evidence from which the jury could conclude that the confidential email was sent to supervisors with the design to injure him, as opposed to a need to communicate operational instructions for supervisory employees in the security department and advise them of the conditions of Mr. Kennedy's return to full employment. Nothing in the email itself is false or would support a finding of malice. In addition to *Bell II*, numerous courts applying South Carolina law have granted summary judgment, directed verdict, or JNOV on qualified privilege grounds when evidence of actual malice was lacking. *See Wright*, 298 S.C. at 469, 381 S.E.2d at 503 (summary judgment granted for defendant; lack of evidence of actual malice); *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1985) (directed verdict upheld for lack of evidence of actual malice) (reversal of jury verdict on appeal because evidence of mere false statement and strained relations was insufficient to send issue of actual malice to jury); *Austin*, 810 F.2d at 416 (applying South Carolina law and reversing lower court's denial of directed verdict because evidence insufficient to demonstrate actual malice as a matter of law); *Cosby v. Legal Servs. Corp, Inc.*, 2006 WL 4781412 (D.S.C. 2006) (summary judgment on qualified privilege proper where no evidence of malice presented).

As in those cases, Mr. Kennedy offered no evidence that Mr. Earles, the drafter of the confidential email, was motivated by ill will or a desire to injure him, in either drafting the email or sending it to the addressees, as opposed to being motivated by legitimate operational concerns regarding his return to work from leave as directed by Human Resources. Mr. Earles' undisputed testimony was that he communicated to the supervisors by electronic mail because security runs three round-the-clock shifts, which made in-person communication too difficult. (R. pp. 426-427.)

Even more tenuous is Mr. Kennedy's claim that Mr. Barnes was motivated by malice or ill will in making the communication, because Mr. Kennedy simply did not offer any evidence of any communication by Mr. Barnes regarding his job status or suspected involvement in the SVHS thefts to any non-supervisory employee. Even if he had, any such investigative communications would be privileged under *McBride v. Sch. Dist. of Greenville Cnty.*, 2013 WL 8541576 at *1 (S.C. Ct. App. Nov. 20, 2013) (principal's statement to school secretary that teacher "cleaned us out" was qualifiedly privileged as a matter of law).

In contrast, the great weight of evidence negated any suggestion of ill will or desire to harm Mr. Kennedy by way of the communication regarding his return to work. Prior to the SVHS thefts, it was undisputed that Mr. Kennedy had been recommended for promotion by Mr. Barnes and Mr. Earles. There was no evidence of prior animosity between Mr. Kennedy and any Richland Two supervisors. Mr. Barnes' and Mr. Earles' mere unexpressed belief that Mr. Kennedy had a role in the SVHS thefts and could not be trusted is insufficient to establish actual malice. See *Bell II*, 211 S.C. at 174, 44 S.E.2d at 330 ("in answering these questions we are not concerned with the guilt or innocence of the respondent in respect to the matters charged in the alleged slanderous statements quoted in the complaint and disclosed by the testimony.") It was further undisputed that

upon his return to work at the same pay, same hours, and same benefits, Plaintiff did not receive any warnings or reprimands for the next fourteen months and that the termination of Mr. Kennedy's employment was not a defamatory communication that could have been considered by the jury.

In summary, Mr. Kennedy did not offer even a scintilla of evidence that Mr. Barnes or Mr. Earles acted with ill will or conscious indifference to his rights by way of Mr. Earles' very limited, confidential email communication to the supervisors to whom Mr. Kennedy would be reporting once he returned to work. The trial court thus erred by failing to grant Mr. Barnes and Mr. Earles a directed verdict on Mr. Kennedy's defamation claim on qualified privilege grounds.

B. The Trial Court Erred In Failing To Grant JNOV On Individual Capacity Claims Against Mr. Barnes And Mr. Earles Under The Tort Claims Act.

S.C. Code Ann. § 15-78-70 provides:

(a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).

(b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

For the reasons set forth above, Mr. Kennedy did not prove "actual malice" sufficient to overcome the qualified privilege that attached to the alleged defamatory communications by Mr. Barnes and Mr. Earles. Even assuming *arguendo* that that the jury could have

properly found actual malice for purposes of the qualified privilege, the evidence does not support a finding of “actual malice” for purposes of individual liability under the Tort Claims Act.

The term “actual malice” under the Tort Claims Act has been interpreted by the courts to mean “constitutional malice.” See *Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (Ct. App. 1994). In at least three other cases, courts in South Carolina have applied the constitutional “actual malice” standard when addressing individual immunity under the Tort Claims Act. *Thompson v. Univ. of S.C.*, No. 04-219, 2006 WL 2583595, at *15 & n. 6 (D.S.C. Sept. 5, 2006); *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 643 (S.C. 1991); *Seaton v. City of N. Charleston*, 2:10-CV-03186-DCN, 2012 WL 6186158 (D.S.C. Dec. 12, 2012). To meet the constitutional malice standard, the plaintiff must show that at the time the alleged defamatory statement was made, either that the defendant knew the statement was false or that the defendant made the statement with reckless disregard of its falsity. *Gause*, 317 S.C. at 42, 451 S.E.2d at 409 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This is a higher standard than the common law “actual malice” standard which Mr. Kennedy did not prove for the reasons set forth above. There was simply no showing that either Mr. Barnes or Mr. Earles published any defamatory statement or insinuation about Mr. Kennedy with either knowledge of its falsity or reckless disregard of its falsity under the actual malice standard applicable to the Tort Claims Act immunity. As such, Mr. Kennedy did not carry his burden of proving the requisite “actual malice” sufficient to maintain individual capacity claims against Mr. Barnes and Mr. Earles under the Tort Claims Act. Mr. Kennedy’s claims against Mr. Barnes and Mr. Earles in their individual capacities should not have been allowed to go to the jury under S.C. Code Ann. § 15-78-70(b) and they were each entitled to JNOV on this additional ground.

C. The Trial Court Erred In Failing To Grant JNOV Regarding Punitive Damages Because Mr. Kennedy Did Not Prove By Clear And Convincing Evidence Any Defamation By Mr. Barnes Or Mr. Earles That Was Willful, Wanton, Or In Reckless Disregard Of Mr. Kennedy's Rights.

Notwithstanding the unconstitutionality of the punitive damages award in this case, *see infra*, the Trial Court erred by failing to grant JNOV on the issue of whether there was sufficient evidence to allow the jury to consider punitive damages. In South Carolina, punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's actions were willful, wanton, malicious, or in reckless disregard of the plaintiff's rights indicating a failure to exercise even the slightest care. S.C. Code Ann. § 15-33-135 (Supp. 1999); *Taylor v. Medenica*, 324 S.C. 200, 470 S.E.2d 35 (1996). A plaintiff cannot recover punitive damages based on merely negligent conduct. *See Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952). Recklessness is distinguished from negligence. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). While negligence is the failure to use due care, recklessness is a higher degree of culpability and responsibility and signifies a conscious failure to exercise due care. *Id.*

A finding of such conduct by Mr. Barnes or Mr. Earles is entirely inconsistent with the Trial Court's rulings granting directed verdict on Mr. Kennedy's claims for intentional infliction of emotional distress and negligent supervision. In granting the directed verdict on the negligent supervision claim, the Trial Court noted that the School District, through Mr. Earles, had a reasonable expectation that the email would be kept confidential and there was no reason to believe supervisors would violate his confidentiality directive. (R. pp. 939-940.) As with the actual malice analysis, the great weight of the evidence shows the lack of any willful, wanton, or malicious conduct by either Mr. Barnes or Mr. Earles toward Mr. Kennedy with regard to any alleged

defamatory publication, and certainly not recklessness. Mr. Barnes and Mr. Earles recommended Mr. Kennedy for a promotion shortly before the SVHS theft investigation. Following the police investigation by the Richland County Sheriff's Department, Mr. Kennedy returned to essentially the same job for fourteen months without reprimand, warning, or negative impact on his pay, work hours, or benefits that could be attributed to any defamatory publication by Mr. Barnes or Mr. Earles. The ultimate termination of Mr. Kennedy's employment for reasons not attributable to the 2011 SVHS theft investigation, or to Mr. Barnes or Mr. Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages. The Trial Court properly found no actionable defamation in connection with the termination of Mr. Kennedy's employment in 2012. (R. p. 922 ll. 18-22.) Accordingly, there was insufficient evidence to send the punitive damages issue to the jury and the punitive damages awards must be set aside as a matter of law.

D. The Trial Court's Exclusion Of Evidence Or Cross-Examination Regarding Mr. Kennedy's Other Alleged Thefts And The Resulting Termination Of His Subsequent Employment At SCANA Was Prejudicial Error.

Mr. Kennedy submitted to the Court on the first day of trial a motion *in limine* seeking to bar any evidence or cross examination on specific instances of similar petty thefts he was accused of committing as a night shift security guard with Allied Barton, his immediate subsequent employer, while on duty at SCANA. (R. pp. 37-45.) On the same date they learned of the information, Defendants timely identified Bill Simpson, an investigator employed with SCANA, as a witness who would testify to his investigation of Mr. Kennedy for thefts that occurred at SCANA in February 2014; Mr. Kennedy's confession to some of the thefts; Mr. Kennedy's payment of restitution for the thefts; and his termination of employment from SCANA and Allied Barton. Mr. Simpson was prepared to authenticate a video recording showing Mr. Kennedy in the act of committing

petty thefts during his third shift security work at SCANA. (R. pp. 27-32, 116-124.) The Court excluded the testimony of Mr. Simpson and the desired cross-examination as inadmissible character evidence under Rules 404 and 403 of the South Carolina Rules of Evidence on the grounds that: the evidence was not a “prior” bad act of Mr. Kennedy; it was unrelated in time to his alleged defamation by Appellants; it would be more prejudicial than probative; and Rule 404 requires clear and convincing evidence of other crimes, wrongs, or acts that are not the subject of a criminal conviction. (R. pp. 193-199.)

The Trial Court erred by excluding this “other acts” evidence because Mr. Kennedy’s defamation claim placed his reputation and character for petty theft and lack of trustworthiness directly in issue under Rules 404 and 405, SCRE, and the evidence was highly probative to Appellants’ truth defense, Mr. Kennedy’s damages for alleged loss of reputation, causation of Mr. Kennedy’s alleged damages for lost reputation and alleged special damages, and Mr. Kennedy’s failure to mitigate damages.

Neither the South Carolina appellate courts nor any other court interpreting the identical federal rule have ever applied a “clear and convincing” standard under Rule 405 to cases in which character is a direct issue in the claim or defense. Because Mr. Kennedy placed his character and reputation squarely in issue with his defamation claim, the evidence was not *unfairly* prejudicial to his claims under Rule 403, even though it was highly probative of his lack of character or trustworthiness, diminished reputation, and suggested another obvious cause of his diminished reputation. *See State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) (“All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.”) (internal quotations omitted, emphasis in original). The exclusion of the SCANA evidence effectively allowed Mr. Kennedy to extol his character and reputation and claim

continuing damages, allegedly suffered only due to the Appellants' alleged defamatory communication, while at the same time, insulating his character and reputation from legitimate questioning and attack based on a nearly identical alleged theft committed at his new job during the pendency of this litigation.

SCORE 405 provides:

Rule 405. Methods of Proving Character

(a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

The South Carolina appellate courts do not appear to have addressed the applicability of Rules 404 and 405 to a defamation case. However, pre-rules cases clearly provide that a defamation claim puts character directly in issue and character evidence is admissible in defamation cases. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579 (1922) ("the plaintiff's character is directly put in issue by the action of slander, and the defendant may, in mitigation, give in evidence his general bad character . . .") (citing *Buford v. McLuny*, 10 S.C.L. 268 (S.C. Const. App. 1818)). "This court expressly recognizes that an action for libel or slander is embraced within the exception to the general rule that 'reputation, good or bad, may not be pleaded or proved' in a civil action. *Id.*, citing *Smith v. Lafar*, 67 S.C. 495, 46 S.E. 333 (1903). Further, "[O]ne of disparaged fame is

not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence.” *Id.*

Cases from other states and federal courts interpreting identical, or practically identical, versions of Rule 405 uniformly recognize a clear exception from normal character evidence rules that applies to defamation or slander cases when character and reputation are directly placed in issue. *See State v. Doherty*, 437 A.2d 876, 878 (Me. 1981) (“A prominent example of ‘character in issue’ is the defamation action where, to support the defense of truth, the defendant may prove that his or her allegedly defamatory communication accurately depicted the plaintiff’s character.”); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) (“Character may be ‘in issue,’ as when a statute specifies the victim’s chastity as an element of the crime of seduction, or when the defense to a defamation action is the truth of the allegedly defamatory statement.”); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843 (1976) (“Appellant Pierson brought suit to recover damages for respondents’ publication of an alleged document concerning Pierson. Pierson contends the district court erred in admitting into evidence criminal acts committed by him more than 10 years before the alleged libel. Pierson’s reliance is misplaced. Since Pierson’s character was put in issue by respondents’ defense of truth, the evidence was properly admissible.”); *Holiday v. Cutchin*, 305 S.E.2d 45, 47 (N.C. Ct. App. 1983) *aff’d*, 316 S.E.2d 55 (N.C. 1984) (“Therefore, character evidence is admissible when character is directly in issue as in actions involving moral intent: seducing an innocent or virtuous woman, defamation, or malicious prosecution.”); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554 at n. 5 (N.D. Ill. Oct. 8, 1996) (“It is rare that character is an essential element. The typical example of such a case is defamation where injury to reputation must be proven.”); *Ajouelo v. Auto-Soler Co.*, 6 S.E.2d 415, 419 (Ga. Ct. App. 1939) (“It is generally held that the foundation of an action

for defamation is the injury done to the reputation, that is, injury to character in the opinion of others arising from publication...."); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988) ("Here the district court decided that specific instances of conduct were admissible under Rule 405(b) because they demonstrated the honesty of the defendant, which was an essential element of the crime charged."); *Redfearn v. Thompson*, 73 S.E. 949 (Ga. Ct. App. 1912) (permitting the jury to consider plaintiff's bad reputation in mitigation of damages); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1371-72 (11th Cir. 1998) ("Since the plaintiff's character is substantively at issue in a libel case under Georgia law, Rule 405(b) permits the admission of evidence regarding specific instances of the plaintiff's conduct on that issue."); *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 511 n. 4 (3d Cir. 1985); cf. *Longmire v. Alabama State Univ.*, 151 F.R.D. 414, 419 (M.D. Al. 1992) (permitting discovery regarding specific incidents of misconduct because libel plaintiff put his character in issue).

The rationale for admission of other acts evidence in defamation cases is that "[t]he hazards of prejudice, surprise, and time consumption implicit in this manner of proof are more tolerable when character is itself in issue than when this evidence is offered as an indirect indication of how [the party] behaved on a specific occasion." See *Character in Issue*, 1 McCormick on Evidence, § 187 (7th Ed.). "[T]he possibility that specific acts may be inquired into on cross examination (which may prompt barring specific act evidence when character is not in issue) is hardly of concern, since the door to such evidence is already open." *Id.* "For example, testimony concerning a defendant's reputation for truthfulness is admissible in a defamation action, and evidence of specific instances of a plaintiff's conduct is admissible in a libel action because the plaintiff's character is substantively at issue." 32 C.J.S. Evidence § 664.

Mr. Kennedy's complaint alleged that he suffered "loss of reputation in the security industry" as a result of Defendants' alleged defamatory statements. (Compl. ¶¶ 19, 26; R. pp. 15-17.) In addition to coming to trial with the door wide open, Mr. Kennedy further opened the door to evidence of his loss of employment at SCANA, the reasons for that loss of employment, and accusations of theft at SCANA on multiple occasions by:

- 1) Introducing evidence regarding his subsequent, current employment at GEO Care without offering any testimony about his tenure at Allied Barton or SCANA following his employment at Richland Two. (R. pp. 183-184, 191-192.)
- 2) Eliciting Mr. Kennedy's hearsay testimony that he had "recently" overheard a former student saying that Mr. Kennedy had stolen items from SVHS. (R. p. 184.)
- 3) Cross-examining defense witnesses on the issue of whether Mr. Kennedy had been accused of other thefts (after the Trial Court had excluded such evidence regarding SCANA) and citing the absence of other theft accusations to bolster his proclaimed innocence of SVHS thefts. (R. pp. 549-555.)
- 4) Eliciting Mr. Kennedy's testimony regarding alleged financial damages incurred following his October 2012 termination from Richland Two³, the causation of which Appellants were unable to effectively challenge without being able to question Mr. Kennedy as to his SCANA separation. (R. pp. 180-184.) The SCANA accusations and employment termination would be an obvious alternative cause of his alleged financial difficulties or current state of his reputation or character at the time of trial.

³ Appellants submit that all of Mr. Kennedy's alleged damages would have resulted from either his termination from Richland Two in October 2012 or from a subsequent employer, rather than from a June 2011 alleged publication, and thus, cannot support the actual damages or punitive damages awards erroneously approved by the Trial Court in this case.

Finally, the Trial Judge erred in drawing a distinction between “prior bad acts” and “subsequent bad acts” for purposes of Rule 405. Federal and state courts interpreting the identical rule have noted this lack of a distinction, and have not distinguished between prior and subsequent bad acts when evaluating admissibility under either Rule 404 or 405. See *State v. Weaverling*, 337 S.C. 460 523 S.E.2d 787 (Ct. App. 1999) (affirming admission of both prior and subsequent wrongful acts to show common scheme or plan); *United States v. Lighty*, 616 F.3d 321 (4th Cir. 2010) (no distinction between prior and subsequent bad acts for purposes of rule 404(b)); *United States v. Cardenas*, 32 F.3d 563 (4th Cir. 1994) (“We have consistently recognized that under Rule 404(b), a court may admit subsequent bad acts to establish prior intent or knowledge.”); *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982) (“subsequent conduct may be highly probative of prior intent. That one has thought in a particular illegal way over a period of time is evidence that one’s thought patterns had already been so developed and were so operating on another previous occasion.”); see also *Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 930 (Miss. 1999) (“the analysis as to the admissibility of specific instances of conduct on cross-examination under Rule 405 appears to apply equally to prior and subsequent acts. Similar to Rule 404, Rule 405 makes no distinction between prior and subsequent specific instances.”) (citing *United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997); *Bullock v. Commonwealth of Virginia*, 498 S.E.2d 433, 437 (Va. 1998) (holding that the same principle of admission of prior bad acts “applies equally in cases of subsequent bad acts.”). In the context of defamation or slander, Mr. Kennedy’s subsequent misconduct at SCANA was directly probative on the truth defense (that Mr. Kennedy is not trustworthy/is prone to petty theft), as well as Mr. Kennedy’s reputation at the time of the damages award, causation of his alleged reputational injury, and his failure to mitigate damage to his reputation allegedly caused by Appellants. It

was also relevant to show absence of mistake or common scheme or plan under Rule 404(b), as his alleged third shift rifling through SCANA employees' desks and cabinets was practically identical to the manner, method of operation, and type of thefts reported at SVHS in February and March 2011. As a result of the exclusion of the evidence, Mr. Kennedy was able to present himself at trial as someone with a long-standing, current reputation of trustworthiness in the security industry who had only allegedly been accused of workplace theft by Mr. Barnes and Mr. Earles in June 2011. Appellants were not permitted to challenge that false representation or challenge Mr. Kennedy's claim that Appellants, rather than another employer, were the proximate cause of that alleged reputational injury. Accordingly, it was prejudicial error to exclude the evidence and a new trial is warranted.

E. The Trial Court Erred In Failing To Instruct The Jury Regarding Its Ruling That No Defamation Accompanied Mr. Kennedy's Employment Termination.

At the conclusion of evidence, the Trial Court specifically ruled that Mr. Kennedy's testimony or any communication surrounding his termination in 2012 would not support a defamation claim:

Mr. Barlow: As far as the defamation claim, we feel that the evidence has not established any of the requisite publication.

Specifically with regard to the termination, there has not been anything published to anyone. There is no evidence of that, that anybody heard or understood that to be defamatory in any way, shape or form.

The Court: You're saying the termination?

Mr. Barlow: The termination itself. I think the termination can be severed from the reassignment in terms of an adverse action to the plaintiff. I think it's unfair for the jury to consider this as a wrongful termination case. He's an at-will employee.

The Court: I certainly haven't considered it as a wrongful termination case or that the defamation related to the termination. It's always been my understanding from everything I've heard and everything that I've read that it related to purely the circumstances regarding the investigation and the claims relating to the money that was missing in these other instances.

* * * * *

The Court: I'm sorry. Before I get to that, we're all in agreement then that any defamation does not relate to the termination?

Ms. Peavy: Yes, Your Honor.

(R. p. 909 ll. 2-22; p. 922 ll. 19-22.)

Upon receipt of the jury's question regarding the terms "actual, punitive, and malice" and request for a percentage chart to calculate damages, Appellants' counsel suspected the jury was considering this is a termination case and requested that the Trial Court correct its earlier charge and instruct the jury that Mr. Kennedy's employment termination was not part of the case and should not be considered. The Trial Court refused. (R. pp. 996-997, 1016.)

This ruling effectively allowed the jury to consider and award damages for Mr. Kennedy's claims that the conduct of Mr. Barnes and Mr. Earles forced him to cash out his retirement, sleep in his car after being evicted, and effectively ended his marriage. No reasonable jury could have found a causal connection to the alleged defamatory communications in 2011 and these alleged injuries and damages following either Mr. Kennedy's employment termination in October 2012 or his subsequent termination from Allied Barton/SCANA. Accordingly, the jury's apparent consideration and award for these alleged damages prejudicially deprived Appellants of a fair trial and a new trial is warranted.

F. The Trial Court Erred By Refusing To Grant A New Trial Absolute Because The Size Of The Verdict, Given The Evidence Presented, Demonstrated That It Was Motivated By Caprice, Passion, Or Prejudice.

“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 judge must grant a new trial absolute.” *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting *O’Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)); *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 241, 734 S.E.2d 148, 159 (2012). “The Court should grant a new trial absolute when the verdict rendered is so “shockingly disproportionate to the injuries suffered” that it must have been motivated by passion, prejudice, and caprice. See *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 762 (Ct. App. 2000).

The size of this verdict in relation to any injuries caused by or damages proximately flowing from the alleged defamatory communication in the Spring of 2011 shocks the conscience. In this case, the undisputed testimony was that, despite being questioned and placed on administrative leave with full pay during a criminal investigation which did not result in charges, Mr. Kennedy’s employment was not terminated. He was not promoted, but he was returned to his job with the same pay, benefits, and hourly schedule. Mr. Kennedy received no warnings or reprimands for the next fourteen months until his employment was terminated. In return for the minor indignity of being subjected to an investigation of money that went missing on his direct watch, in an area and during a time when he was on duty, the jury awarded Mr. Kennedy more than a half-million dollars. This outcome defies both logic and more than 35 years of jurisprudence that requires courts to grant deference to internal reassignments and other employment decisions of public school districts. See *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005); accord *Singleton v. Horry Cnty.*

Sch. Dist., 289 S.C. 223, 227–28, 345 S.E.2d 751, 753–54 (Ct. App. 1986); *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978); *see also Palms v. Sch. Dist. of Greenville Cnty.*, 408 S.C. 576, 579, 758 S.E.2d 919, 920 (Ct. App. 2014), *reh'g denied* (July 10, 2014), *cert. denied* (May 7, 2015).

The Trial Court specifically held, and Mr. Kennedy conceded, there were no defamatory communications arising in the context of the ultimate termination of his employment in October 2012 from which he could recover damages. Nevertheless, the jury was permitted, without clarification from the Trial Court, to consider and award damages that would not have been supported even in a wrongful termination case.

During the fourteen months Mr. Kennedy remained employed with Richland Two following the alleged defamatory communications by Mr. Barnes and Mr. Earles, he testified that he liked his job and did not apply for any positions outside Richland Two. (R. pp. 213-214.) Following his termination from Richland Two, Mr. Kennedy promptly secured a job making a higher hourly wage at Allied Barton. (R. pp. 205, 219.) He remained in that job until he “resigned” his employment in February 2014. He promptly found another job at GEO Care. It was further undisputed that neither defendant gave Mr. Kennedy a negative job reference or took any action to prevent him from securing comparable employment.

Mr. Kennedy produced no witness testimony or other evidence that any non-supervisor’s opinion of him had changed following Richland Two’s investigation and his reassignment to a position in which he testified he was performing “supervisory” duties. Two of Mr. Kennedy’s three witnesses testified that *Mr. Kennedy himself* was the source of their knowledge that he had been accused of theft at SVHS and was under investigation. None of them actually believed that he had taken the money or had a lesser

opinion of him as a result of any alleged defamatory communication by Mr. Barnes or Mr. Earles. (R. pp. 233, 242, 267-268.)

Moreover, Mr. Kennedy offered no testimony or evidence that either Mr. Barnes or Mr. Earles told anyone other than supervisory-level employees that Mr. Kennedy was not a supervisor upon his return to work. It was also undisputed that Roosevelt Garrick, who was in charge of human resources, made the decision to deny Mr. Kennedy the promotion for which he had initially been recommended, and that neither Mr. Barnes nor Mr. Earles was responsible for the denial of the promotion. (R. pp. 831-836.)

Mr. Kennedy produced no evidence of special damages and testified only to his own alleged hurt feelings and embarrassment at being accused of and investigated for the SVHS thefts. Any special damages alleged by Mr. Kennedy (*i.e.*, cashing out retirement, living out of his car) would have been attributable to the termination of his employment from the School District or SCANA, and thus not recoverable as proximately caused by the alleged defamation. *See Wardlaw v. Peck*, 282 S.C. 199, 205-06, 318 S.E.2d 270, 275 (Ct. App. 1984) ("special damage must consist of some provable material loss to the plaintiff as a result of the injury to his reputation.") The Trial Court ignored its own trial ruling in its post-trial finding that these alleged post-termination injuries could support the jury's award of punitive damages. (R. pp. 5-9.)

Despite this paucity of liability and damages evidence, the jury awarded Plaintiff \$200,000 in actual damages and \$350,000 in punitive damages. Given the evidence presented at trial, the sheer amount of the verdict clearly shows forces at work other than a legitimate review and assessment of the evidence of liability and damages presented at trial. The Trial Court's failure to instruct the jury that Mr. Kennedy's termination from employment should not have been considered for liability or damages in this case clearly confused the jury and deprived Appellants of a fair trial. Accordingly, the Trial Court

erred in failing to set aside the verdict and order a new trial absolute.

**G. The Trial Court Erred In Failing to Rule That, At A Minimum,
Defendants Were Entitled To A New Trial Nisi Remittitur.**

Even if the verdicts were not the result of passion, caprice, or prejudice, they were at least excessive and Appellants submit that they are entitled to a remittitur. “The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive.” *O’Neal v. Bowles*, 314 S.C. 525 at 527, 431 S.E.2d 555 at 556; *see also Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct. App. 1997) (stating “[t]he trial judge has the discretionary power to grant a new trial *nisi*”). When a party moves for a new trial *nisi*, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (citing *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993)). Even assuming the award was not the result of passion, caprice, prejudice, or matters outside the evidence, its undue liberality is patently obvious given that Mr. Kennedy offered no evidence of special damages arising from the only alleged defamatory publication that the jury could have considered, and punitive damages were completely inappropriate for the reasons previously stated and for the reasons set forth below. Accordingly, the Trial Court abused its discretion by failing to reduce the verdict.

**H. Appellants Are Entitled To A Reversal Or Reduction In The
Amount Of Punitive Damages Because They Did Not Comport
With Constitutional Due Process.**

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Solanki v. Wal-Mart Store No. 2806*, 2012-213247, 2014 WL 4087911 (S.C. Ct. App., Aug. 20, 2014). The awards of punitive

damages in this case do not comport with constitutional due process. *See Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). The practice of awarding punitive damages originated in principles of criminal law “to deter the wrongdoer and others from committing like offenses in the future.” *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d.206, 210 (1964) (internal citation omitted). Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); *see also Gore*, 517 U.S. at 568, 116 S. Ct. at 1595 (“The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.”) (internal quotations omitted).

The United States Supreme Court has set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. Those guideposts include: (1) the reprehensibility of the defendant’s conduct; (2) the ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and (3) comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598.

Reprehensibility is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” *Gore*, 517 U.S. at 75, 116 S. Ct. at 1599. “This principle reflects the view that some wrongs are more blameworthy than others.” *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had

financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

Each of the *Campbell/Fortis* factors demonstrates that the punitive damages the jury awarded Mr. Kennedy were constitutionally impermissible. First, despite the Trial Court's mistaken finding that Mr. Kennedy was forced to cash out his retirement as a result of the alleged defamation (as opposed to his termination from either Richland Two or SCANA), Mr. Kennedy offered no proof of any economic harm from the alleged defamation and certainly no physical harm. Second, there was no evidence of a reckless disregard for the health or safety of Mr. Kennedy, who kept his job after the alleged thefts without reprimand or warning for fourteen months. Mr. Kennedy admittedly sought no other jobs until his termination fourteen months later for reasons the Trial Court found non-actionable as a matter of law. Third, Mr. Kennedy offered no evidence of any financial impact that *the alleged defamatory communication*, as opposed to his employment termination, had upon him. Fourth, the alleged defamation was a one-time event and Mr. Kennedy continued working for fourteen months after the alleged defamatory email to supervisors, segueing into another job with a better per-hour pay rate upon his discharge from Richland Two in 2012. Finally, there was no trickery, deceit, or intentional malice even if a jury could somehow find from the evidence that Mr. Earles or Mr. Barnes was responsible for any communications about Mr. Kennedy's trustworthiness outside the supervisory chain addressed in the "CONFIDENTIAL" email. The conduct of Mr. Barnes and Mr. Earles was not even negligent, as the Trial Court specifically found in granting directed verdict on the negligent supervision claim. The evidence presented at trial was that other witnesses who were not named defendants,

including Roosevelt Garrick, Tim Hunter, and Jim Childers, similarly believed that Mr. Kennedy was responsible for the SVHS thefts and that they communicated that belief internally among supervisors who had a legitimate need to know the information. Moreover, the undisputed testimony was that it was the decision of Mr. Garrick, not Mr. Barnes or Mr. Earles, to deny Mr. Kennedy the promotion to lieutenant originally recommended by Mr. Barnes and Mr. Earles. (R. pp. 833-842, 1011-1012, 1038-1040.) Mr. Earles merely effectuated that decision by returning Mr. Kennedy to work and reassigning his position, which was communicated only to supervisors.

As to the second *Gore* factor, the Supreme Court has indicated that the reasonableness of a punitive damages award cannot be determined solely by comparing the punitive damages award to the actual damages award; rather, the touchstone of the inquiry is reasonableness. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. While the multiplier for punitive damages is low in this case, the unreasonable amount of actual damages based on the lack of evidence presented by Mr. Kennedy to support a \$200,000 award of actual damages makes the amount of the punitive damages award completely unreasonable.

As to the final *Gore* factor, *i.e.*, comparison of the punitive damages award to civil fines and criminal penalties that could be imposed for similar conduct, there are no criminal penalties for workplace defamation in South Carolina. Consequently, there is nothing to assess this particular factor against.

Moreover, application of the eight factors set forth by our own state Supreme Court, in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), for a post-verdict review of due process of punitive damages awards also warrants reversal of the jury's punitive damages awards against Defendants.

The *Gamble* factors are:

- (1) defendant's degree of culpability;
- (2) duration of the conduct;
- (3) defendant's awareness or concealment;
- (4) the existence of similar past conduct;
- (5) likelihood the award will deter the defendant or others from like conduct;
- (6) whether the award is reasonably related to the harm likely to result from such conduct;
- (7) defendant's ability to pay; and
- (8) other factors deemed appropriate.

Id. at 111-12, 406 S.E.2d at 354.

Defendants' analysis of the *Fortis/Campbell* reprehensibility factors disposes of the first four *Gamble* factors. Mr. Earles' and Mr. Barnes' conduct was, at its very worst, negligent and numerous other employees participated in or made decisions regarding Mr. Kennedy's employment and shared the belief that Mr. Kennedy's trustworthiness was implicated by the SVHS investigation. The alleged defamatory email was a one-time event, as Mr. Kennedy did not show any prior or subsequent defamation and could not sustain a negligent supervision claim or an intentional infliction of emotional distress claim as a matter of law. Moreover, Mr. Kennedy's continuation in employment without complaint or incident and the lack of testimony that any co-workers or non-supervisors considered Mr. Kennedy a thief after the reviewing Mr. Earles' email demonstrates a lack of harm from the email communication. Any communications Mr. Barnes and Mr. Earles made were limited in scope to proper parties on a proper occasion and related to business operations.

With regard to the final four factors, Mr. Kennedy offered no evidence whatsoever of the Defendants' ability to pay. As noted above, the punitive damages

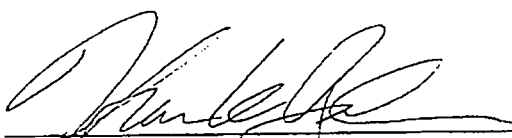
award is not likely to deter future workplace defamation because the award of punitive damages was completely unpredictable and bore no reference to the alleged culpability of Mr. Barnes and Mr. Earles, who were merely acting as part of a larger organizational personnel and operational management decision. Finally, the award is not reasonably related to the harm likely to arise from the alleged defamatory communication in this case. As such, the punitive damages awards in this case do not comport with due process and should have been set aside or reduced by the Trial Court.

V. CONCLUSION

For all of the reasons stated above, this Court should reverse the judgment of the trial court and grant Appellants judgment notwithstanding the verdict. In the alternative, this Court should grant Appellants a new trial absolute, or at a minimum, *nisi* remittitur, and vacate the punitive damages awards.

Respectfully submitted,

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November 30, 2015

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.

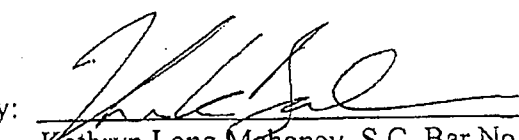
Richland County School District Two, Eric Barnes, and Chuck Earles Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL CORRECTLY DENIED APPELLANTS' DIRECTED VERDICT AND JNOV MOTIONS AS AMPLE EVIDENCE WAS PRESENTED AT TRIAL TO SUPPORT RESPONDENT'S DEFAMATION CLAIM AND THE QUESTION OF MALICE BEING ALLOWED TO GO TO THE JURY.
- II. THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION FOR JNOV, NEW TRIAL ABSOLUTE, AND NEW TRIAL NISI REMITTUR WAS PROPER AS THERE WAS CLEAR AND CONVINCING EVIDENCE OF RECKLESSNESS AND MALICE, THE SIZE OF THE VERDICT WAS NOT GROSSLY EXCESSIVE, AND THE PUNITIVE DAMAGES AWARD WAS NOT EXCESSIVE.
- III. THE TRIAL COURT CORRECTLY RESPONDED TO THE JURY'S QUESTIONS ON CLARIFYING THE TERMS 'ACTUAL' AND 'PUNITIVE' IN CONSIDERING DAMAGES, AND APPELLANTS DID NOT PRESERVE THIS ISSUE FOR REVIEW.
- IV. THE TRIAL COURT CORRECTLY EXCLUDED EVIDENCE OF ANOTHER ACCUSATION OF THEFT AGAINST RESPONDENT WHICH OCCURRED THREE YEARS AFTER THE SPRING VALLEY THEFT, AND PROPERLY EXCLUDED EVIDENCE OF OTHER PRIOR PETTY THEFT ALLEGATIONS UNDER THE SOUTH CAROLINA RULES OF EVIDENCE.

STATEMENT OF THE CASE

The Respondent, Jeffrey Kennedy (hereafter “Kennedy” or “Mr. Kennedy”), filed suit against Appellants and others on March 11, 2013 in Richland County. The Respondent subsequently dismissed certain named defendants from the lawsuit prior to trial.

This case was tried before a jury, with the Honorable Alison R. Lee presiding, beginning on September 29, 2014. The named defendants at the trial were Appellants and Kim Jones, a Richland Two employee. During the weeklong trial, the trial court granted Appellant Richland Two’s directed verdict motion on the claim for negligent supervision, and also granted the Appellants’ directed verdict motion as to the claim for intentional infliction of emotional distress. R. p. 599, l. 4-23; R. p. 937, l. 8 – p. 942, l. 2. The trial court granted the directed verdict motion as to a defamation claim against Kim Jones, thereby dismissing her from the case entirely. R. p. 599, l. 24 – p. 600, l. 13. Accordingly, the sole cause of action before the jury was a claim for defamation against Defendants/Appellants Chuck Earles and Eric Barnes, who are both employees in the security division of Richland County School District Two.

A verdict was rendered in favor of Mr. Kennedy on October 3, 2014. The jury specifically found, by way of a special interrogatory, that Chuck Earles and Eric Barnes defamed Mr. Kennedy and acted with actual malice in doing so. The jury entered a verdict against Chuck Earles in the amount of \$100,000 actual damages and \$200,000 punitive damages. The jury found against Eric Barnes in the amount of \$100,000 actual damages and \$150,000 punitive damages. The trial court denied the Appellants’ post-trial motions by order dated February 24, 2015, and this appeal timely followed.

STATEMENT OF FACTS

Mr. Kennedy began working in the security division of Richland Two in May 2008, working third shift – essentially, he was the night watchman from approximately 11:00 p.m. – 7:00 a.m. R. pp. 140-141. Mr. Kennedy was born in Columbia, South Carolina, graduated from Keenan High School, and is an Army veteran. At the time of his hiring, Mr. Kennedy was a father, husband, and grandfather. R. pp. 139-140. He was also a leader at his church and participated in youth mentoring programs he had founded there. He also performed certain security functions for the church. His salary with Richland Two was \$11.77/per hour, plus overtime, benefits and retirement. R. p. 141, l. 8 – p. 142, l. 15. Prior to the incident in question, Kennedy took home about \$1600 - \$1700 in wages every two weeks. R. p. 212, l. 17-23, p. 218, l. 19 -24.

At the time of his hiring in 2008, Kennedy was trained by the then-Chief of Security, Chief Propst, and others on how to perform night watchman duties. R. p. 148, l. 21 – p. 149, l. 4; R. p. 893, l. 16 -19; R. pp. 894-896. As part of his on-the-job training, Mr. Kennedy was instructed not to keep warm by sitting in a running vehicle, in order to help the District save on gas expenses. R. p. 163, l. 17-25. Additionally, he was taught how to “space out” his duties so they were not completed too quickly. R. pp. 147 -148, l. 5; R. pp. 888, l. 6-13. Finally, part of being a night watchman was to change up the routine so that others could not predict his actions and location. R. p. 144, l. 12 – p.146, l. 16; R. pp. 559, l. 3-18. Part of Kennedy’s duties were patrolling schools, responding to calls, setting alarms, checking windows and doors, and generally observing the premises of certain Richland Two schools, including Spring Valley High School. R. p. 142, l. 16 – p.

143, l. 18. Respondent Barnes testified that “boredom is a problem” on the job of the night watchman. R. p. 313, l. 12 – p. 315, l. 9.

Spring Valley High School is a huge, physical plant serving approximately 2,000 students. R. p. 700, l. 5-14. There are approximately 100+ thefts which occur every year; however, many of these thefts are never reported to the security division. R. p. 746, l. 4. – p. 747, l. 4. There have been instances of people breaking in through ceiling panels and through open windows. R. p. 713, l. 14 - p. 722, l. 2. There have been robberies of student valuables, and creative means used to access areas of Spring Valley High School. R. p. 745, l. 18 - p. 747, l. 12.

Numerous witnesses testified that “everyone had keys” at Spring Valley and, in fact, the Richland Two security division did not know who had keys to what – that decision was made by Spring Valley’s principal. R. p. 154, l. 23 – p. 156, l. 25; R. p. 248; R. p. 419, l. 19 – p. 421, l. 1. Appellants, among others, testified that it was a challenge to maintain security when they did not know who had keys to what buildings at Spring Valley. R. p. 243, l. 20 – p. 248, l. 17; R. p. 363, l. 15 – p. 364, l. 14. Kids, parents, and other staff members were all given or loaned keys from time to time. R. p. 227, l. 8-22; R. pp. 317-318. John Reid, a security guard, testified that Mr. Barnes was surprised at how many people had keys at Spring Valley. R. p. 244, l. 9 – p. 246, l. 12.

In order to work the third shift as the night watchman, Mr. Kennedy was given keys at the beginning of his shift to the buildings and offices of Spring Valley High School, among other schools. Beginning with his hiring in 2008, Mr. Kennedy was also able to work overtime, at a much greater rate of pay, at school events and athletic games and tournaments, thereby increasing his income. R. p. 141, l. 17-25.

In 2010, Chief Propst was fired by Richland Two and Chuck Earles assumed the position of Emergency Services Manager. R. p. 149, l. 5-16. Mr. Earles subsequently hired Eric Barnes as his Assistant Security Manager. R. p. 150, l. 22-25. Both Earles and Barnes were former longtime employees of the Richland County Sheriff's Department and seasoned law enforcement professionals. The rank and file employees believed that Messrs. Earles and Barnes wanted to make Richland Two security more like law enforcement, R. p. 151, l. 1-23; however, Richland Two security guards do not carry guns and were trained to call the police in the event a dangerous situation arose.

Respondent Earles believed that the Security Division had a rumor problem and a gossip problem and that Chief Propst allowed a lot of inappropriate conduct among employees. R. p. 418, l. 15 – p. 419, l. 18; R. p. 423, l. 25 – p. 424, l. 9. As a result, Mr. Earles sought to “change the culture” of the Security Division by having employees, including Kennedy, read and sign a “Change of Culture” memorandum (R. p. 1008, Pl. Tr. Ex. 2) which provided, in part, that employees were to mind their own business. R. pp. 149-150. Mr. Barnes was familiar with this Change of Culture memorandum, R. p. 304, l. 17-24, and also believed that gossip and rumor were a problem in the Security Division. R. p. 305, l. 17- p. 306, l. 2.

In or around February 2011, Mr. Kennedy applied for a supervisor's job as a lieutenant within the security division. If he was hired, the position would pay more and would allow him to work “second shift”, allowing for more family - friendly hours. R. p. 151, l.24 – 152, l. 20. Other than a few letters in his personnel file concerning tardiness or absences, Mr. Kennedy had been a good employee. R. p. 205, l. 8-18; R. p. 241, l. 23 – p. 242, l. 22.

Appellants interviewed Mr. Kennedy and ultimately decided he was the best candidate for the job. R. p. 152, l. 20 – p. 153, l. 15. On February 28, 2011, Mr. Earles recommended him for the promotion and sent his recommendation up to the human resources department, which would run background checks, etc. R. p. 153, l. 16 – p. 154, l. 10. Sometime after being recommended for the promotion (but before HR formally approved it), Mr. Kennedy was invited to the regular supervisor's meeting and introduced as the new lieutenant. R. p. 154, l. 12-22; R. p. 301, l. 3-24. It was known among the rank and file that Mr. Kennedy was getting the promotion.¹ R. p. 154, l. 12-22; R. p. 225, l. 25 – p. 226, l. 8; R. p. 268, l. 13-20.

On March 4, 2011, Spring Valley's athletic director, Tim Hunter, alleged that he left \$1,000 in some cash boxes under his desk, in his office, the night before and that he discovered the money was missing the next morning when he arrived at his office. R. p. 319, l. 21 – p. 320, l. 2; R. p. 608, l. 14 – p. 611, l. 18; R. p. 1025 (Def. Tr. Ex. 4). Hunter's office is located in the athletic department (AD) building at Spring Valley, also known as Bates Hall.

Mr. Hunter has a safe in his office where he usually locks up money received from tournaments; however, he alleged that he felt sick the evening of March 3rd and wanted to leave the cash boxes out, in case a staff member needed to access the cash for an event the next day.² This was not his standard practice. R. p. 611, l. 19- p. 612, l. 6. Mr. Hunter testified he put the black cash boxes under his desk and someone would have had to have physically gotten down on the ground to find them – they were not visible to someone just walking through. R. p. 633, l. 2-9.

¹ Announcing a promotion before HR approval was against Earles's policy. R. p. 417, l. 6-23.

² Obviously, Mr. Hunter did end up coming to work the following day.

Mr. Hunter's actions were deemed "odd" and "suspicious" by some employees, especially since other administration employees had the combination to the safe and could have retrieved the cash drawers from the safe in the morning. R. p. 226, l. 14 – p. 227, l. 7; R. p. 362, l. 10- 18; R. pp. 434-435. However, Mr. Hunter was a longtime, valued Spring Valley employee and was never considered a suspect by Appellants, nor did he feel he was ever treated as one. R. p. 390, l. 6-16; R. p. 601, l. 1-2.

None of the security cameras at Bates Hall were pointed at Mr. Hunter's office door. R. p. 349, l. 1-5; R. p. 442, l. 23 – p. 443, l. 5. As a result, there was no video of anyone entering or exiting Mr. Hunter's office on the night in question.

Mr. Kennedy was on duty the evening of March 3rd and, as part of his rounds, turned on the alarm in the Athletic Department building with another security officer, John Reid, around 11:00 p.m., and came back and disarmed it by himself sometime around 5:55 a.m. on March 4th. R. p. 159, l. 1-14. At the time when he disarmed the alarm, and other nights in question, Mr. Kennedy told Appellants that he had spent time in the weight room, playing with his phone and by his own admission was "wasting time" and "killing time". R. p. 515, l. 15 – p. 517, l. 10. During that time in the weight room, he received a call from his shift supervisor, Lt. Gerome Young, informing him that Mr. Kennedy needed to go open a gate at another school. R. pp. 162, l. 13 – p. 163, l. 16. Kennedy testified he never went into Hunter's office on the night in question or checked the door. R. p. 164, l. 1-13.

During the evening hours, between when the alarm was first set by Mr. Kennedy and John Reid late on March 3rd and when Kennedy returned around 5:55 a.m. on March 4th, the Spring Valley baseball team returned to campus after a late game and set off the alarm. When the alarm went off, Mr. Kennedy was instructed by Lt. Young to drive over

to Bates Hall to check on things. R. p. 159, l. 17 – p. 161, l. 12. By the time Kennedy arrived, the baseball coach was already turning the alarm off himself and Kennedy did not re-enter the building. However, while sitting in his vehicle outside, Mr. Kennedy observed numerous players and coaches through the plate glass windows up in the hallway by Mr. Hunter's office; additionally, there were numerous players and coaches observed on the videotape from the security camera in the Athletic Department building. R. pp. 159 -161; R. p. 243, l. 19 – p. 244, l.10. Tim Hunter testified that in his review of security video, he did not recall seeing players near his office, nor did he recall whether the baseball coach came back down the to turn the alarm back on, so the alarm could have been off the rest of the night. R. p. 623, l. 10-15.

Custodians had keys to the athletic department offices, as did athletic coaches. R. p. 227, l. 8-22; R. pp. 722-726. Mr. Hunter's right hand man, Sonny Uker, knew that he had placed the cash in his office, however Mr. Uker was never considered a suspect. R. p. 719, l. 7-11. The video camera footage from Bates Hall was taped over by Richland Two except for a few camera views. While some witnesses testified that they saw the baseball team on the video footage from the evening in question, Chuck Earles did not recall seeing the team, R. p. 559, l. 24 – p. 560, l. 18; however, he did see Mr. Kennedy on the phone as Kennedy exited Bates Hall around 5:55 a.m. Earles never followed up to see who Kennedy was speaking with, or to confirm the length of the conversation, even though the school district provides phones to the security staff and could access that data. R. p. 543, l. 9 – p. 546, l. 2. Earles refused to testify as to whether "it would be highly unlikely that [Kennedy] would be in the process of robbing something while he is talking to somebody else." R. p. 545, l. 24 - p. 546, l. 2. Earles did not save any video from the

night in question which showed Tim Hunter leaving Bates Hall or arriving the next morning, nor did Earles save the video from the period of time after Kennedy disabled the alarm around 5:55 a.m. R. p. 560, l. 19 – p. 561, l. 25. Assistant Principal Jim Childers, who also reviewed the video, did not save it. R. p. 735, l. 5 – p. 737, l. 6.

Tim Hunter testified that the video showed that only the baseball coach came up the hallway near his office and that the other players stayed down the hall, R. p. 615, l. 24- p. 618, l. 19; however, Kennedy testified that, when he responded to the alarm call, he observed the baseball players up by Hunter's office where the cash had allegedly been left out. R. p. 159, l. 1 – p. 161, l. 12.

The Richland Two Human Resources department, which interviewed Kennedy as part of their investigation, found that others had “access and opportunity” to the office. R. p. 1011-1012 (Pl. Tr. Ex. 5). The video camera security system in place at the time when the relevant incidents occurred has since been replaced and the District no longer uses the system from 2011 due to certain deficiencies in the software. R. p. 504, l. 19-24. There was evidence that the video would tape over itself and that when school is in session, images are recorded over fairly often. R. p. 570, l. 25 – p. 571, l. 10.

Despite no one ever observing Kennedy – during the three years he had been a night watchman - entering or exiting any office where he was not supposed to be,³ R. p. 565, l. 10 – 14, and despite others having had “access and opportunity” and keys, Mr. Kennedy was the sole focus of the Appellants' investigation. R. p. 272, l. 11-17; R. p. 351, l. 15 – p. 352, l. 2. Appellants never interviewed the baseball team, baseball coach, the custodial

³ Testimony at trial was that security guards always know they may be recorded on camera at any given time, and that someone might be watching or recording their movements, even if they don't know where the cameras are pointed. R. p. 273; R. p. 282, l. 3-11.

staff or Sonny Uker and never considered them to be suspects. R. pp. 323 -325, R. p. 184, l. 18 – p. 186, l.23 , R. p. 331, l. 13 – p. 332, l. 22.

Mr. Earles and Mr. Barnes alternately testified that they did not really perform an investigation, but merely handed it over to the Richland County Sheriff's Department for investigation and acted as "liasons". R. pp. 319-322, 329. However, both Appellants reviewed video tape of the nights in question; met with human resources staff and with Mr. Kennedy; and reviewed instances of other petty thefts at Spring Valley High School and sought to "catch" the thief by placing "bait money" in a certain location. R. pp. 323-325; R. pp. 482 – 483. Earles never sought to learn what training Kennedy had received to perform the third shift duties. R. pp. 533-535. Earles testified he only saved 2 out of 16 camera views from Bates Hall. R. p. 442, l. 3-14.

In February/March 2011, a check, some cash, and a ring were reported stolen by some staff in the administrative offices of Spring Valley. R. pp. 386 - 388; R. pp. 701 -704. However, some of the staff members could not say when the items had gone missing, as they were kept in drawers and not something that was checked on regularly. R. p. 701, l. 18 – p. 702, l. 113.

Mr. Kennedy was questioned about his actions in the administration building as well, because he was deemed to have taken "excessive time" in the break room there and gone through a back door instead of a front door. Barnes didn't save all of the video he reviewed. Again, there was no video footage showing Kennedy entering locked offices, R. p. 400, l. 19-21; R. p. 551, l. 1-21; R. p. 565, l. 10 - 14. No one followed up to see if the stolen check had ever been cashed, and no fingerprints were collected from the offices. R. p. 738; R. p. 761, l. 12-19. Finally, neither Appellant questioned Mr. Kennedy about what

his training had been, or what his habits and routines were, or reviewed videotape from months past to find out what his habits or routines were. R. pp. 314-315; R. p. 406, l. 18 – p. 407, l. 6; R. p. 533, l. 10 – p. 535. Kennedy told them it was his habit to take breaks. R. p. 338. They also did not speak with his supervising lieutenants, who could presumably attest to the training Kennedy received and his habits. R. p. 564, l. 18-20.

During the period of investigation beginning with Tim Hunter's report on March 4th, Mr. Kennedy was placed on paid administrative leave. Roosevelt Garrick, the Chief HR Officer of Richland Two who oversees human resources, was extremely disappointed when, in his interviews with Mr. Kennedy in the months following the thefts, Mr. Kennedy repeatedly professed to "wasting time" during his night shift, as Mr. Garrick did not consider that to be an appropriate use of district resources. R. p. 822, l. 21- p. 823, l.18, R. p. 825, l. 19 - p. 827, l.6. Garrick was also concerned that Mr. Kennedy's recollection of his movements on the nights in question revealed some inconsistencies. R. p. 170, l. 9 – p. 173, l. 4; R. p. 825, l. 19 - p. 827, l.6.

Mr. Kennedy was not surprised that he was investigated, given that security guards on duty are always questioned. However, from the beginning, Kennedy vehemently denied stealing anything, R. p. 793, l. 6-8, and informed the HR department during their investigation that he had been "doing the same things" on his shift for 4 years. He admitted to Tracy Batchelder, the HR director and a longtime Richland Two employee, that during the times when he was "off camera" in buildings, he was wasting time and taking breaks. Kennedy further stated that he had a wife and mortgage and was up for a promotion – why would he steal? R. pp. 1029-1037; (Def. Tr. Ex. 7 & 8); R. p. 165; R. p. 786, l.2 – p. 789, l.11.

The Richland County Sheriff's Department investigated the alleged theft of the \$1,000 and declined to charge anyone – including Kennedy. Their investigation included Richland County deputies showing up with “carloads of police” at the home of Mr. Kennedy's elderly mother, with Eric Barnes along for the ride. R. p. 157, l. 19 – p. 158, l. 9. Batchelder testified that she would have liked for the Sheriff's Department to have taken fingerprints from the administrative offices and checked Kennedy's phone records. R. p. 793, l. 23 – p. 794, l. 4.

Despite the Sheriff's Department decision not to charge anyone, Appellants both believed that Jeffery Kennedy was the thief, R. pp. 351-352, R. pp. 444-445, and withdrew the recommendation for the promotion – an action which Mr. Garrick approved of, given his tremendous disappointment with Kennedy's “wasting time”.

Mr. Garrick informed Mr. Kennedy that he would need to restore Richland Two's trust and confidence in him. R. p. 834; R. pp. 1011-1012 (Pl. Tr. Ex. 5). Despite acknowledging that others had “access and opportunity” to the money, R. p. 173, l. 5-23, neither Mr. Garrick (nor anyone else) ever met with the other employees who had “access and opportunity”. R. p. 255, l. 20 – p. 256, l. 6; R. p. 845, l. 17 – p. 847, l. 18. Mr. Barnes was “very frustrated” and simply could not believe that Mr. Kennedy was not fired, and characterized Richland Two, his voice dripping with sarcasm at trial, as a “beautiful place to work”. R. p. 328, l. 21-23; R. p. 366, l. 9 – p. 367, l. 21; R. p. 847, l. 19-24.

Mr. Kennedy returned to work at the security division in June 2011; however, Chuck Earles decided that Mr. Kennedy was not to have keys and was to be assigned to desk duty only, with no access to keys. R. p. 422, l. 25 – p. 423, l. 12. Ultimately, the promotion to lieutenant was given to John Reid, a fellow Richland Two employee.

Kennedy testified that these adverse actions against him led to a reduction in his take home pay, as he was unable to garner as many overtime hours. R. p. 184, l. 17 – p. 185, l. 16. Barnes had no reason to doubt that assessment. R. p. 373, l. 3-6. Additionally, he did not receive the raise that would have come with the promotion to lieutenant. R. p. 833, l. 20-24.

In order to implement his decision, Mr. Earles sent out an e-mail, marked confidential, to the supervisors within the security division, along with his deputy, Mr. Barnes. The e-mail states explicitly that Mr. Kennedy is returning to work on desk duty and is “NOT to be given any assignment that involves having keys to any District facility.” R. p. 1010 (Pl. Tr. Ex. 4). The e-mail was printed out and left out for the rank & file employees to see in both the security division office and their vehicles. R. p. 168, l. 11 – p. 169, l. 22; R. p. 229, l. 21 – p. 230, l. 11; R. p. 246, l. 7 – p. 247, l. 24. Appellants denied printing it out or leaving it out. R. p. 364, l. 21 – p. 365, l. 1; R. p. 519, l. 1-5. Appellants admitted that the e-mail would have harmed Kennedy if it had gone beyond the recipients. R. pp. 359 - 360; R. p. 423, l. 25 - p. 426, l. 8. Kennedy testified that he heard that Appellants said he was thief. R. p. 168, l. 5-23. He testified it was upsetting and stressful, but he needed the job and stayed on because it was a good job with benefits, state retirement, etc. R. p. 174, l. 15 – p. 175, l. 8.

Current and former Richland Two security employees testified that they saw the memo lying out and knew what it meant – that Earles and Barnes considered Kennedy to be the thief and that he could not be trusted. R. p. 227, l. 23 – p. 230, l. 20; R. p. 274, l. 7 – p. 276, l. 10. These same witnesses testified that you can “put two and two together”, and that it was “obvious” that Appellants thought Jeffery had stolen the \$1,000 and could

not be trusted. It was undisputed that a security guard without keys was worthless. R. p. 227, l. 23- p. 230, l. 25. Barnes communicated to the rank and file that Kennedy was not to have keys. R. p. 249, l. 14 – p. 250, l. 16.

The fact that Mr. Kennedy was considered a thief by his employers got around to his fellow church members and also to students. Upon learning that the supposedly “confidential” email had been printed out and left out for all to see, neither Barnes nor Earles followed up with their supervisory staff to find out who had left the memo out or why the confidentiality directive was ignored. Mr. Kennedy testified that as a result of the actions of Appellants, he was humiliated, embarrassed, and faced financial problems. R. p. 174, l. 11 – p. 175, l. 8. Additionally, he and his wife were put under significant stress and eventually split up. R. p. 180, l. 16-21. He also testified that church members found out about the theft accusation and he lost his stature and position within the church community, including with the Godly Men’s Program, and was barred from assisting with the collection plate. Tr. p. 180, l. 22 – p. 182, l. 10. Kennedy testified that recently while he was at Wal-Mart, he overheard Spring Valley students that he recognized laughing and snickering about him being a thief. R. p. 184, l. 3-13.

During the same time that the Athletic Department theft was reported in March 2011, the Spring Valley Assistant Principal, Jim Childers, took away the master key from the night shift custodian, Ms. Jackson, after a report of a theft on February 25th. R. p. 707, l. 15 – 25. Richland Two’s cleaning crews are subcontracted out through Service Solutions and there is significant turnover of cleaning crew staff. R. p. 683, l. 8 – p. 684, l. 16. Richland Two relies on Service Solutions to perform background checks and screen individuals. R. p. 732, l. 2 – 21.

Mr. Childers took this action because he wanted to rule out Ms. Jackson as a suspect, as he had the utmost trust for her. R. p. 736, l. 4-13. In order to avoid having her placed under a cloud of suspicion and to protect her reputation, Mr. Childers told her directly that he was taking her key away – he also told one or two other people on a “need to know” basis that he was taking away Ms. Jackson’s key. R. p. 755, l. 16 –p. 756, l. 16. He did not send out an e-mail or other written correspondence; his communications were verbal. R. p. 708, l. 6 -23. He did not inform Earles or Barnes of his decision. R. p. 304, l. 8-13; R. p. 741, l. 9 - 21. Ms. Jackson’s key was subsequently returned to her and she remains employed at Richland Two. There was no evidence that Mr. Childers’s action was made known to Ms. Jackson’s fellow employees, nor was there any evidence that fellow employees learned that she was under suspicion for theft.

Mr. Childers’s treatment of Ms. Jackson was characterized as the “gold standard” by Richland Two’s HR director, Roosevelt Garrick. Richland Two strives for a “culture of excellence” and Mr. Childers met that standard when he discreetly dealt with Ms. Jackson, in Mr. Garrick’s opinion. R. p. 849, l. 2 – p. 851, l. 24. A confidential memo being left out about Mr. Kennedy did not reflect the “culture of excellence”, nor does the dissemination of sensitive employee information to fellow employees. It is not indicative of “best practices” in the HR field. R. p. 851, l. 25 – p. 852, l. 19; R. p. 857, l. 8 – 24 . Garrick was disheartened to hear that the “confidential” e-mail memo about Kennedy had gotten out to the rank and file employees. R. p. 852, l. 1-19.

In January 2012, Mr. Kennedy hired an attorney, Franchot Brown, to write a letter to Mr. Garrick requesting that he be given the promotion. Mr. Garrick refused to reinstate the promotion. R. p. 173, l. 24 – p. 174, l. 10. In October 2012, Mr. Kennedy was accused

of showing a security video to a fellow employee, Kim Jones. R. p. 177, l. 12-16. Ms. Jones was also a Richland Two parent, and she was concerned about allegations of improper behavior by her son at school. R. p. 175, l. 9-22. If the video was shown to Ms. Jones, this would have been a violation of District policy. R. p. 179, l. 8-11. Mr. Kennedy was subsequently accused by Ms. Jones of threatening her if she identified him as having shown her the video. Mr. Kennedy denied having threatened his co-worker, and denied showing her the videotape or knowledge of the policy. R. p. 175, l. 9 - p. 176, l. 13; R. p. 898, l. 4-9. Richland Two did not find him credible, and subsequently terminated him after he refused to resign. R. p. 179, l. 8-25. Ms. Jones received only a letter of caution reiterating the District policy on security videos and remained employed by District Two. R. p. 770, l. 14 - p. 771, l. 2.

Following his termination, Mr. Kennedy subsequently obtained employment as a security guard at other firms after a period of unemployment, during which time he was evicted and cashed out his state retirement. R. p. 180; R. pp. 182-183; R. p. 217, l. 15 - 23.

ARGUMENT

I. There was No Error and Sufficient Evidence of Defamation Was Presented to Support the Denial of the JNOV/Directed Verdict Motions

In response to arguments A. and B. of the Initial Brief of the Appellants, Respondent replies as follows. This case went to the jury on the sole cause of action for defamation, after the trial judge properly denied the motion for directed verdict on that claim after a lengthy hearing. R. p. 575, l. 22 – p. 586, l. 5; R. p. 599, l. 24 – p. 601, l. 5; R. p. 910, l. 3 – p. 913, l. 18; R. p. 915, l. 22 – p. 919, l. 13; R. p. 922, l. 24 – p. 928, l. 10; R. p. 929, l. 11 – p. 937, l. 7; R. p. 942, l. 3 – 14.

“The tort of defamation allows a plaintiff to recover for injury to her reputation as the result of the defendant’s communications to others of a false message about the plaintiff. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct.” Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497, 501 (1998). “A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” Id. at 506. To prove defamation, the plaintiff must show (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.” McBride v. School District of Greenville, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010). “Defamation need not be accomplished in a direct manner. A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning was clear.” Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987).

“When reviewing the denial of a motion for directed verdict or JNOV, [the Court of Appeals] must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. [The Court of Appeals] will reverse the trial court only when there is no evidence to support the ruling below. When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or resolve conflicts in the testimony or evidence.” Tucker v. Doe, Op. 2014-000134 (S.C. Ct. App. Filed Aug. 5, 2015) (emphasis added) (citing Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000) (emphasis added); See also Clark v. S.C. Dept. of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) (noting that the appellate court will reverse the trial court’s ruling only where there is no evidence to support the ruling or where the ruling is controlled by a clear error.”) “The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.” Erickson v. Jones St. Publishers, 368 S.C. 444, 629 S.E.2d 653 (2006) (cited in Donevant v. Town of Surfside Beach, Op. 5345 (S.C. Ct. App. Aug. 26, 2015)).

Mr. Kennedy met his burden of proving each element of his defamation claim. At trial, the undisputed testimony was that the email marked “confidential” was printed out and left in the open in the office and in vehicles for Richland Two employees to see. See Testimony of Messrs. Kennedy, Mitchell, and Permenter.

Both Appellants testified that they did not print the e-mail out and leave it lying around; however, the credibility of these men was for the jury to weigh.⁴ The jury could have concluded that since Appellants considered Kennedy to be the thief, they left the memo out in hopes of harming him, given that the District declined to fire him and the Sheriff's Department declined to charge him. This was a permissible inference for the jury to make. The testimony suggests either verbal or written communication to other staff members regarding the contents of the email. Appellants acknowledged that if the information in the memo got out to the rank and file, it would hurt Kennedy. R. pp. 358 – 360, p. 365, l. 21-25; R. p. 423, l. 25 - p. 426, l. 8

Incredibly, the Appellants argue that "Plaintiff offered no evidence to suggest that any of the addressees [of the email] were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential." App. Final Br. at p. 10. **This statement is in direct conflict with the evidence presented at trial – that Chuck Earles considered Richland Two's security division to be a rumor mill and both he and Eric Barnes required employees to sign a "Change of Culture" memorandum stating that they would not gossip, among other things.**

Because there was testimony in the record from which the jury could have found that, by either the words or a combination of words and conduct, it was communicated to Richland Two employees that Barnes and Earles considered Jeffery Kennedy to be a thief and unfit for his job, there was sufficient evidence to constitute proof of publication and directed verdict was properly denied. See Mains v. K-Mart Corp., 297 S.C. 142, 375

⁴ For instance, Barnes testified in October 2014 that there had been no thefts reported at Spring Valley HS since the March 4th Tim Hunter theft. R. p. 361, l. 1-7. The jury could have found his testimony absurd, given that Assistant Principal Childers testified that on average he sees 100+ thefts per year at Spring Valley.

S.E.2d 311 (Ct. App. 1988) (holding that the jury could have found that “words or conduct or the combination of words and conduct can communicate defamation” and therefore there was no error in the denial of defendant’s motion for directed verdict or JNOV) (citing Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980)).

The trial court correctly charged the jury that the memo at issue was a qualifiedly privileged communication to supervisory staff, and that it was a question of fact for the jury as to whether such qualified privilege was exceeded (or “lost”) when the memorandum was left out in the open for rank and file Richland Two employees to observe. R. pp. 936-937; See also Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) (noting that whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, was properly for the jury); See also Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

Appellants incorrectly assert that Kennedy had to show actual malice in order to show that the privilege was destroyed. App. Final Br. at pp. 11-12. This is not the law in South Carolina, which provides that “where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded.” Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (S.C. 1999) (emphasis added). “The question whether the privilege had been abused is one for the jury. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id at 134.

In Swinton, the Supreme Court held that when the defamatory communication took the form of libel (i.e. a written communication), “malice was presumed” and it was a “defendant’s burden to establish that a privilege existed in order to rebut this presumption.” The Court held that it was error for the trial court to grant a motion for directed verdict on the plaintiff’s defamation claim because it was for the jury to decide whether the privilege was exceeded and, further, there was evidence suggesting reckless disregard which could constitute actual malice. Id. at 134-135.

Here, the undisputed testimony at trial was that the security division was such a “rumor mill” that under the leadership of Earles and Barnes, employees were required to read and sign the “Change of Culture” memo. The undisputed evidence was that a “confidential” email was printed out and left out in vehicles and in Richland Two offices for employees other than the recipients of the e-mail to see. Accordingly, directed verdict and JNOV motions were properly denied and the Court should affirm such denial on these grounds and any other grounds found in the record pursuant to Rule 220(c), SCACR. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

The jury heard the following testimony from Earles and Barnes: that they thought Jeffrey Kennedy stole the money; that they had no idea who had keys to what buildings; and that they didn’t bother to interview other individuals who were in the AD building on the night in question. Earles testified explicitly that he formed his opinion that Kennedy was a thief based on a “very limited set of facts” and that he was still comfortable with that opinion. R. p. 569, l. 9-25. Finally, it heard testimony that Appellants knew that the security division was a “rumor mill” and had a rumor problem, but that Appellants did

nothing to ensure that the memo be kept confidential. R. p. 311, l. 10- p. 312, l. 4; R. p. 426, l. 9 – p. 428, l. 2.

Appellants' reliance on Williams v. Lancaster County School District 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006) is misplaced. Unlike the instant case, Williams concerned a cause of action for slander – a spoken defamation. In Williams, a husband and wife who were both high school teachers brought an action for slander against the school principal, alleging that the principal accused the husband of committing adultery with a school secretary during meetings which the principal had with both of them (and the secretary), and that thereafter rumors of adultery immediately spread throughout the school community.

The trial court granted summary judgment, holding that the record was devoid of any evidence of any publication of a slanderous statement by the principal. The Court of Appeals affirmed, noting that several employees, and possibly parents and students, were in the immediate area after the husband and school secretary were discovered locked in a bathroom together. Additionally, the deposition testimony confirmed that rumors had been circulating for some time prior to the bathroom incident about a possible romantic relationship between the two. Id. at 292-293.

Unlike the situation in Williams v. Lancaster County, here the evidence was that there were no negative rumors circulating, or innuendo surrounding, Mr. Kennedy reputation as of March 2011—rather, the testimony was that he was a valued part of the security division who had just been recommended for a promotion and was introduced as a new supervisor at the lieutenant's meeting. Clearly, Kennedy had a good reputation until Earles and Barnes decided to label him as untrustworthy and unfit for his profession, and

disseminate that information to his fellow employees. There was sufficient evidence for the jury to decide that Earles and Barnes left the “confidential” memo out for all to see in the office and the vehicles, given that they were the author and recipient respectively and clearly had opportunity and motive.

The jury could have reasonably concluded that the Appellants acted with actual malice and left the memo sitting out in order to punish Kennedy and ruin his reputation - because Appellants were angry that he wasn’t charged with the theft by the Sheriff’s Department or fired by Richland Two. The trial court carefully considered these exact same arguments of the Appellants – both at the directed verdict stage and at the JNOV stage – and properly found that there was sufficient evidence for the jury to consider whether the qualified privilege was exceeded and whether the Appellants acted with actual malice. See R. p. 575, l. 22 – p. 586, l. 5; R. p. 599, l. 24 – p. 601, l. 5; R. at pp. 908-913; R. p. 915, l. 22 – p. 919, l.13; R. p. 923, l. 22 – p. 927; l. 13; p. 922, l. 24 – p. 928, l. 10; R. p. 929, l. 11 - p. 945, l. 7; R. pp. 48-74 (Def. Post-Trial Motion)

Appellants assert that there is only “one inference” that can be drawn from the evidence before the Court; however, a plain reading of the transcript shows that the jury could reasonably have found Messrs. Earles and Barnes to be callous, careless, and recklessly deficient in their handling of this matter. The juxtaposition between the way in which Assistant Principal Childers discretely handled the situation with the custodian and the public humiliation of Kennedy could not have been more clear. Accordingly, the denial of the directed verdict motion and the denial of the JNOV was proper and the Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220, SCACR. See, e.g., cases

cited herein; See also Constant v. Spartanburg Steel Products, Inc., 447 S.E.2d 194, 316 S.C. 86 (1994); Mains v. KMART, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988); Lynch v. Toys R Us, 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007); McBride v. School Dist. of Greenville, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010).

The Court Correctly Found That A Question of Fact Existed As To Whether the Appellants Acted with Actual Malice and Denial of the JNOV Was Proper.

Appellants appeal from the denial of their directed verdict and JNOV motion as to the claims against them individually (i.e. outside their official capacities) under the Tort Claims Act. R. p. 915, l. 22 – p. 918, l. 4. The Court correctly held that whether there was evidence of actual malice – such that immunity would be lost - was properly for the jury. R. at p. 930, l. 18 -931, l. 8; R. p. 942, l. 3-14. (Judge Lee noting as it relates to the SCTCA that “there would have to be some finding and maybe some interrogatory to the jury that talks about if there is a recovery against the defendants, whether they acted with actual malice”).

In fact, the Appellants specifically agreed to a special interrogatory on the verdict form to address this issue. R. p. 1057, l. 4 – p. 1059, l.4; R. p. 1060, l. 19 – p. 1065, l. 14; See also R. pp. 3 - 4 (Verdict Form). Finally, the judge charged the jury the following: “*you have to decide whether the defendant exceeded the privilege by communications or publication with actual malice. That is again with knowledge that it was false or with reckless disregard of whether it was true or false or that it was not made at the proper time or to the proper parties or in the proper manner.*” R. p. 981, l. 22 – p. 982, l. 3.

Section 15-78-80(b) of the Tort Claims Act provides that “nothing in the chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee’s conduct was not within the scope of his official

duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.” Pridgen v. Ward, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011).

In Pridgen, the defendants were supervisors who were tasked with investigating alleged infractions at the prison where the plaintiff also worked. The Court of Appeals held that the denial of defendants’ motions for directed verdict and JNOV as to immunity under the SCTCA was proper. The Court of Appeals held that because the plaintiff alleged personal motives and bias on the part of the defendants, “there was at least circumstantial evidence that the defendants acted outside the scope of their employment and with the intent to harm the plaintiff . . . [and] [t]he jury could infer from . . . the nature of their actions that they intended to harm [the plaintiff].” 705 S.E.2d at 64.

“Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff’s rights.” Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) “Malice may be proved by direct or circumstantial evidence . . . Whether malice is the incentive for a publication is ordinarily for the jury to decide. Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury.” Id. at 750-751.

Appellants argue that the Court erred in failing to grant JNOV because of a failure by Kennedy to prove “constitutional malice”. The case upon which Appellants rely, Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), is inapplicable because it concerns the standard applicable where the case involves defamation of a public official.⁵ See also Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (holding that defendant

⁵ No evidence was presented at trial the Mr. Kennedy was a public figure.

was not entitled to a “constitutional malice” charge because the plaintiff, an assistant school principal, was not a public official).

This argument also fails because the Appellants never argued or requested a charge on “constitutional malice” at the trial stage. The trial judge did, in fact, charge the jury with language from the Gause case, as evidenced by the charge excerpted above. For the reasons previously cited, the jury could certainly have found that the Appellants acted with “actual malice” when the memo was left out for all to see and they clearly communicated that they considered Kennedy to be a thief. The jury could have concluded, based on the evidence, that Earles and/or Barnes printed out the memo and left it out and that they lied on the stand when they denied doing so. The trial court’s rulings were proper and therefore Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

II. The Trial Court’s Denial of Appellants’ Motions for JNOV, New Trial Absolute, New Trial Nisi Remittitur Was Proper and Not in Error.

In response to arguments C., F., G., and H. contained in the Brief of Appellants, Respondent replies as follows.

Denial of the JNOV as to Punitive Damages Was Not An Abuse of Discretion As There Was Clear and Convincing Evidence of Recklessness and Malice

The trial court, in upholding the award of punitive damages in this case, conducted a post-trial review to ensure that the punitive damage award was proper, relying upon the cases of BMW of North America v. Gore, State Farm v. Campbell, and Mitchell, Jr. v. Fortis Ins. Co., R. pp. 6-9 (Post-Trial Order of Judge Lee). In the instant case, this Court

Court must review the denial of JNOV under an abuse of discretion standard. See McAlhanev v. McElveen, Op. 5328 (S.C. Ct. App. July 15, 2015).

In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. Cody P. v. Bank of America, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011). In Bank of America, the Court of Appeals found that the trial court properly denied the bank's motion for JNOV on punitive damages when it found that the evidence, viewed in the light most favorable to the plaintiff, showed that a person of ordinary reason and prudence would have known that he or she was acting in contravention to the bank's policies and procedures and, further, had acted recklessly when he or she opened bank accounts carelessly. Id. at 482.

Similarly, here the evidence, viewed in the light most favorable to Mr. Kennedy, showed that Appellants knew there was a rumor and gossip problem in the security division, but chose to disseminate false and harmful information about Kennedy in writing and otherwise, and failed to ensure that it was kept confidential among supervisors or not printed out. This was in stark contrast to the "gold standard" exemplified by Assistant Principal Childers's treatment of the custodian, and in direct contravention to Richland Two's "best practices", which seek to keep potentially damaging employee information confidential. R. p. 848, l. 16 – p. 851, l. 24. Given that the Appellants clearly believed Kennedy was a thief, and were frustrated that he was not fired and charged criminally by the Sheriff's Department, there was sufficient evidence for the jury to consider awarding punitive damages.

Denial of the Motion for New Trial Absolute Was Not an Abuse of Discretion

Appellants argue that the verdict is so “grossly excessive” so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence.” Final Br. At p. 27. The Court “may not reverse the decision [denying a motion for new trial absolute] unless the trial court committed an abuse of discretion.” McAlhaney v. McElveen, *supra*. In Rush v. Blanchard, 426 S.E.2d 802, 310 S.C. 375 (1993), the Supreme Court, affirming the trial court’s denial of a new trial absolute, held that the decision to grant a new trial is left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal. See also RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (finding the trial court’s decision to deny a motion for a new trial absolute on the basis of excessive punitive damages was within its discretion).

“A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives.” Smalls v. SC Dept. of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (internal citations omitted).

As previously discussed, the evidence in the record was that the investigation conducted by the Appellants – two longtime law enforcement employees - was minimal at best, exceeding sloppy at worst; that the security division was a “rumor mill”; and that no one else who had access to the Athletic Director’s office on the night in question was ever even questioned and that Kennedy was never charged or convicted of a crime. The jury heard undisputed testimony that “everyone had keys” at Spring Valley; that Earles and

Barnes did not even know who had keys to which offices on the dates in question; and that no one had even saved the majority of the video footage which was apparently so crucial in their targeting of Mr. Kennedy. The jury also heard testimony that the Appellants did not even speak with the shift supervisor, Lt. Gerome Young, who was on duty on the night in question. The jury heard testimony that others had "access and opportunity", but only Mr. Kennedy was targeted.

Finally, there was evidence that there was a "right" way to conduct such a sensitive investigation, as demonstrated by the testimony of Assistant Principal Jim Childers. Human Resources Director Roosevelt Garrick testified that Richland Two strived for a "culture of excellence" which was demonstrated by the discretion and sensitivity of Mr. Childers. Taken together, the glaring contrast between the actions of Messrs. Earles and Barnes and Assistant Principal Childers was certainly sufficient to show recklessness and malice. Messrs. Earles and Barnes let it be known that they thought Mr. Kennedy was a thief and could not be trusted, regardless of the fact that he was never arrested or convicted of any crime.

Furthermore, Mr. Kennedy's own testimony, which was apparently believed by the jury, could be described as heartbreaking and certainly sufficient to support an award of punitive damages. Mr. Kennedy testified that because of the smear on his reputation he suffered stress and humiliation and loss of income; that this stress and humiliation adversely affected his marriage; and that he was essentially shunned at church. Furthermore, he testified that he was the subject of stares and gossip. This testimony and supporting exhibits were entered without objection from the defense. The trial court rightly concluded that there was "repetitive conduct of rumors being spread in general in the

department” and that “Plaintiff argued, and the jury could have inferred from the evidence presented that the harm was the result of intentional malice, trickery or deceit”. R. pp. 6 – 9 (Post-Trial Order of Judge Lee).

Finally, in the instant case, the multiplier for punitive damages is low – 1.5 for Barnes and 2.0 for Earles, and the lower court properly found that the award was proper. See Cody P. v. Bank of America, 720 S.E.2d at 483 (“while there is no concrete constitutional limit on the ration between actual and punitive damages, few awards exceeding a single digit ration between punitive and compensatory damages will satisfy due process.”)

Respondent’s counsel, in closing and without objection from defense counsel, asked the jury to return a verdict that would send a message: that it believed that the Defendants were wrong and that Jeffery Kennedy had been unfairly slandered. Counsel asked the jury to look back at the evidence, to look back at Jeffery Kennedy’s tearful testimony, when it considered whether to award a verdict. Counsel also asked that the jury consider what would be a reasonable amount, an amount that sent a message that would deter this type of conduct in the future. R. pp. 943-958. Deterrence is one of the factors considered in Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991).

To assist the jury in its calculations, counsel suggested a figure of \$400,000, and to help them put this amount in perspective, suggested that they could view it in terms of being approximately 10 years of Kennedy’s salary at Richland Two. Mr. Kennedy testified that he was earning approximately \$1,700 to \$1,800 every pay period. This suggested amount was certainly reasonable in light of the evidence before the jury. Additionally, defense counsel did not object to Respondent’s closing. The general rule is that the lack

of a contemporaneous objection to an improper argument acts as a waiver. Varnadore v. Nationwide Mutual Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986). Without a contemporaneous objection, the defendant must also show that the argument was a flagrant violation and the vicious or inflammatory nature of the argument resulted in clear prejudice. South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977). The argument made by Plaintiff's counsel in this case was neither vicious nor inflammatory. R. pp. 943-958.

Just because Appellants did not believe that Kennedy had been harmed and had only been subjected to a "minor indignity", Final Br. at p. 27, and further argued in closing that Kennedy "basically got a four month paid vacation" when he was on leave, R. at p. 967, l. 10-11, does not mean that the members of the jury saw it that way. In fact, defense counsel specifically noted in closing that "[t]hey want you to believe that there's some secret message in that email . . . that really says that Chuck Earles is sending mind vibes to these people to say, "print this out. Make sure we can get Jeffery Kennedy and embarrass him by doing this." R. p. 968, l. 25 – p. 969, l. 5.

The jury found exactly that – that Earles and Barnes had wanted to defame and humiliate Mr. Kennedy and did so. Finding the conduct of the Appellants reprehensible, the jury chose to award Mr. Kennedy \$550,000. This was entirely proper.

The size of the verdict did not demonstrate improper motive. Kennedy testified that he suffered shame and humiliation, lost his marriage, his standing at Church, and his position with a youth mentor group, among other damages, when he was defamed by Mr. Barnes and Mr. Earles.

The credibility of the witnesses was for the jurors to consider: the jurors sat and listened as Mr. Barnes became quite distraught over what he believed to be Richland Two's deficiencies in failing to immediately fire Mr. Kennedy. The jurors sat and listened as Chuck Earles stated that he never interviewed anyone else about the AD department theft, despite there being other people with "access and opportunity" (to quote the Richland Two HR director, Roosevelt Garrick). Perhaps the jurors thought Mr. Earles and Mr. Barnes were smug. Perhaps the jurors thought that their "investigation" was a sham and conducted maliciously. Perhaps the jury thought the Appellants printed out the email and posted it themselves for all to see because they were angry that Mr. Garrick chose not to fire Mr. Kennedy. Whatever the reason, the jury chose to award an amount which spoke to the seriousness of the claim and their perception of the wrongdoing perpetrated by Appellants. Case law abounds of \$500,000 + verdicts in defamation lawsuits which were upheld on appeal. See, e.g., Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding award of \$250,000 actual damages and \$500,000 in punitive damages); Constant v. Spartanburg Steel Prods., 316 S.C. 86, 447 S.E.2d 194 (upholding jury verdict of \$400,000 in actual damages and \$100,000 in punitive damages); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987) (upholding an award of \$1 million in actual damages and \$45,000 in punitive damages).

Furthermore, the jury clearly wanted to send a message to the Appellants to deter similar conduct in the future and implement more effective methods for dealing with sensitive employee situations involving serious allegations. See Cody P. v. Bank of America, supra. For these reasons, the award of damages was proper under South Carolina

law and the Court should affirm the trial court's rulings for the reasons stated above, or for anything other reason found in the record pursuant to Rule 220(c), SCACR.

Denial of the Motion for New Trial Nisi Remittitur Was Proper

"There is no formula or standard that can be used as a measure for assessing punitive damages." Austin v. Specialty Transportation Svs., Inc., 358 S.C. 298, 594 S.E.2d 867, 875 (Ct. App. 2004). Addressing the suggested factors for the Court to consider – as outlined in Gamble v. Stevenson and BMW v. Gore and relied upon by the Appellants - Kennedy again submits that there was clear evidence of the reprehensibility of the Appellants' conduct and of the Mr. Kennedy's damages for the jury to consider.⁶ Furthermore, the ratio of actual damages to punitive damages in this case is well within the "single digit multiplier" espoused by both State and Federal Courts. See Austin, supra at p. 877 – 878 (and cases cited therein) (noting that single-digit multipliers, while not binding, are more likely to comport with due process and finding that a punitive damages award of 2.5 times actual damages was not excessive).

While the Appellants asserted that their actions were neither serious nor harmful, the evidence before the jury was that Mr. Kennedy suffered greatly as a result of being labeled a "thief" in a workplace environment that was best described as a "rumor mill" according to the trial testimony and "Change of Culture" memo. Mr. Kennedy testified that his marriage broke down; he lost his position as a youth mentor at his church; he lost the trust and faith of his fellow parishioners; and he was subject to rumor and innuendo. In short, just because the Appellants apparently never took the case seriously does not mean that the

⁶ The South Carolina Supreme Court has characterized the *Gamble* factors as factors to "provide guidance" and are not to be considered "hard and fast" requirements. See Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587, 5963 (2004).

jury was not free to do so. See Wilhoit v. WCSC, Inc., 293 S.C. 397, 358 S.E.2d 397 (Ct. App. 1987) (holding that the trial judge properly refused to set aside the award of \$1 actual damages and \$45,000 punitive damages where there was no evidence that the jury was motivated by passion, caprice, or prejudice and, in fact, the evidence showed that the defendants falsely implied that plaintiff committed a crime).

The facts in the instant case were essentially undisputed at trial: the Appellants focused their investigation solely on Mr. Kennedy to the exclusion of all other suspects from day one, and, when law enforcement declined to press charges and HR refused to fire him, chose to go ahead and let everyone know that they considered Kennedy guilty regardless. They failed to safeguard confidential information and they failed to control the very “rumor mill” that they acknowledged existed at Richland Two. Furthermore, the argument that the Appellants’ conduct was not reprehensible because “Plaintiff continued in his job without complaint or incident for another fourteen months after reinstatement” is not supported by the evidence. See Init. Br. at p. 30. In fact, Mr. Kennedy tried to get his promotion reinstated and had his lawyer write a letter to Roosevelt Garrick to that effect.

Finally, the jury heard testimony that the night custodian, Ms. Jackson, was also subject to an investigation due to having opportunity and access, but her investigation was kept strictly confidential and her reputation survived intact. The jury could have compared and contrasted the actions of Jim Childers with the actions of Barnes and Earles.

Furthermore, there is substantial precedent for large verdicts in defamation lawsuits, including punitive damages, given that one’s reputation can be damaged irrevocably through a single action that reverberates for years. See, e.g., Lynch v. Toys R Us, 375 S.C. 654 S.E.2d 541 (Ct. App. 2007) (upholding jury award of \$50,000 in actual

damages and \$250,000 in punitive damages); Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding verdict in the amount of \$250,000 actual damages and \$500,000 punitive damages as appropriate where defamatory (and unsupported) statement that police officer had sexually harassed a co-worker effectively destroyed his reputation and ended his career); King v. Santee Resort Condominium Association, et al., 2013 WL 8691349 (S.C. Com. Pl. Clarendon County Dec. 5, 2013) (\$890,000 verdict on defamation claim arising out of defendants' erroneous, and repeated, identification of plaintiff as a registered sex offender)⁷.

In Lynch v. Toys R Us, the Court of Appeals upheld the trial court's denial of Toys R Us's motion for JNOV or *nisi remittitur* based on the jury's award of \$50,000 in actual damages and \$250,000 in punitive damages. The Court of Appeals noted that the plaintiff was arrested without justification and in full view of customers, and the combination led to humiliation, sleeplessness, and emotional pain, which constituted actual damages. Further, the punitive damages award was upheld "as a warning and example to deter the wrongdoer and others from committing like offenses in the future." 654 S.E.2d at 552. In the instant case, the jury may have wanted the punitive damages award to send a message that the Appellants needed to be much more careful in the future when handling sensitive information related to their employees.

Similarly, in Miller v. City of West Columbia, the Court of Appeals held that the trial court properly denied the defendants' motion for a new trial and to strike the punitive damages award where the evidence showed that the city administrator carelessly investigated a dispatcher's claims of sexual harassment against the plaintiff, a longtime

⁷ The Santee Resort case was subsequently settled by the parties prior to appeal.

city police officer, and furthermore made a statement, not based on evidence and in the presence of others, that the plaintiff had, in fact, harassed the dispatcher. Based upon the evidence, the Court held that the jury award in the amount of \$250,000 actual damages and \$500,000 punitive damages was “appropriate and necessary” under Gamble.

Here, the jury awarded actual damages of \$200,000 and punitive damages of \$350,000. This is well within the bounds of constitutionality, is reasonable given the evidence, and is in line with other jury awards for defamation.

As to Appellants’ argument that no evidence was offered as to their ability to pay, the Appellants are successful professionals who were ably represented by counsel. Both men testified to stable employment histories and successful personal lives. There was no evidence presented that would indicate that the Appellants could not pay the award; furthermore, Barnes and Earles did not engage separate counsel from their employer. All were ably represented by the same law firm. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

III. The Trial Court Correctly Responded to the Jury’s Request to Clarify the Terms “Actual” and “Punitive” and, furthermore, Defense Counsel Failed to Preserve This Argument of Review.

In response to Argument E contained in Appellants’ Final Brief, Kennedy responds as follows.

At the Charge Conference, R. pp. 1043-1065 (Appendix), the Appellants did not object to the trial judge’s charge and did not proffer a proposed charge on the issue of wrongful termination or whether the termination was grounds for damages. Accordingly, this argument is not properly preserved for review. See Rule 51, SCRCP; See also Dixon

v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005). Given that the sole claim before the jury was for defamation, it can be reasonably presumed that defense counsel did not wish to confuse the jury by charging the law of termination.

Defense counsel did object to Kennedy's proposed charge on the mortality tables on the grounds that "the termination is not to be part of the damages in the case" and that it would not be "fair to charge that he can recover future defamation damages." R. at p. 1053, l. 2-25 (Appendix). The trial judge agreed with defense counsel and declined to charge the mortality tables. R. at p. 1054, l. 1-14 (Appendix). The trial judge proceeded to charge the jury, and when asked if "there were any exceptions from the defense", defense counsel responded "no". R. pp. 973 -992. Accordingly, having failed to request a charge on termination, and having failed to note an objection to the judge's charge to the jury, the issue is not preserved for review. See Rule 51, SCRCP; See also Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005). Appellants also did not raise this alleged "failure to charge" in their post-trial motions. In short, Appellants' argument is not preserved for review and was waived.

Appellants seek to "revive" this issue by pointing to a note that the jury sent out during its deliberations which stated as follows:

"We are a little confused. Question one, we are seeking clarity from you on terms actual, punitive, and malice. Question two, is there a percentage chart to use or do we break the amount into a rounded number to the best of our ability?"

R. p. 995, l. 18-25; R. p. 1016 (Court's Ex. 2).

After the trial judge indicated how she intended to respond, R. pp. 996, l. 1 – p. 997, l. 2; R. p. 997, l. 16 – p. 998, l. 4, the following exchange occurred:

Mr. Barlow: Would there be any way to clarify that that this is not a termination case?

Mr. Goodwyn: I would object to that since that was not charged.

The Court: I don't know that there is anything in here that relates to termination.

Mr. Barlow: Well, damages.

The Court: Well, there are damages for slander. So, you know, I mean, that's a cause of action for defamation.

Mr. Barlow: All right.

Mr. Goodwyn: You're just going to recharge them basically on the damages?

The Court: I'm not giving them any new instructions. I'm not doing anything different.

R. p. 997, l. 3 - 17.

The trial judge proceeded to call the jury back in and ask them to clarify their questions and the foreman replied that "I just want actual and punitive damages". R. p. 998, l. 11 – p. 999, l. 16. The Court proceeded to re-charge the jury on the elements of damages for a defamation claim. R. p. 999, l. 17- p. 1003, l. 16.

Appellants argue that the "ultimate termination of Plaintiff's employment for reasons not attributable to the theft investigation, or to Barnes or Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages." Final Br. at p. 18.

Again, the Appellants ignore the evidence which showed that Mr. Kennedy was defamed in 2011 and damaged by the malicious actions of Appellants when they took away his keys, let people know they considered him a thief, and denied him the promotion after

letting everyone know that he had been promoted. Accordingly, as recounted in great detail in Respondent's prior arguments, there was plenty of evidence for the jury to consider which supports the award. Simply because Kennedy, many months later, was eventually terminated does not mean the jury relied on the termination in awarding its damages. After all, Kennedy testified that despite a few rough months following his termination, he had been gainfully employed since. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220, SCACR.

IV. The Exclusion of Evidence of Another Accusation of Theft Against Kennedy Which Occurred Three Years After the Spring Valley Theft Was Not Prejudicial Error.

In response to Argument D contained in the Appellants' Brief, Kennedy responds as follows.

"The grant or denial of a new trial motion rests within the discretion of the trial judge and will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the non-moving party. Creighton v. Coligny Plaza Ltd., 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998) (upholding denial of motion for a new trial because the jury's verdict was not against the greater weight of the evidence presented at trial, and nothing in the record suggested the trial court's denial of the motion for a new trial was an abuse of discretion.) (citing Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989)).

The decision whether or not to admit testimony into evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. Am. Fed. Bank v. Number One Main Joint Venture, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); See also Arthur v. Sexton Dental Clinic, 628 S.E.2d 894, 368 S.C. 326 (Ct. App. 2000) (no abuse of discretion by trial judge in excluding witnesses at trial). “No error in either the admission of the exclusion of evidence . . . is ground for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” Rule 61, SCRPC.

On March 25, 2014 – over 3 years after the alleged theft at the AD’s office – Mr. Kennedy was arrested and charged with a misdemeanor petty larceny charge relating to his employment by Allied Barton as a security guard at the SCANA plant. At the time of the trial, the charges were pending.⁸

The incident occurred while Kennedy was employed by Allied Barton as a security officer, working under its contract with SCANA. The charges alleged that Mr. Kennedy stole a pair of safety glasses (valued at \$5.00) and \$10.00 in cash from a room at a SCANA location. On the eve of trial, defense counsel informed plaintiff’s counsel of the pending charges and identified Bill Simpson, the head of SCANA security as witness whom they

⁸ Appellant’s counsel has filed a motion to enlarge the record on appeal, pursuant to Rule 212, SCACR, to include the Richland County Summary Court record reflecting the jury’s verdict on the petty larceny charges as of April 8, 2015. Included in the motion is an argument as to harmless error under Rule 61, SCRPC, which Respondent specifically reserves the right to argue, among other grounds, in the event the motion to enlarge the record on appeal is granted.

intended to call to offer evidence of the alleged theft, pending charges, and Kennedy's dismissal from the SCANA jobsite.

Kennedy filed a *Motion in Limine* seeking to exclude evidence of the alleged SCANA theft and the testimony of Bill Simpson, arguing that the any mention of the pending SCANA incident and pending charges would result in extreme prejudice and, further, were irrelevant as they concerned future events – three years down the road – that were not in existence at the time this defamation action arose. Plaintiff's counsel further argued that Appellants were trying to prove what they were unable to prove (or even charge) over three years ago at Spring Valley HS, and that these were mere accusations. See Pl. Mot. In Limine, R. pp. 37-45; See Oral Argument on Motion, R. p. 109, l. 12 – p. 127, l. 9

After lengthy review, the trial judge granted the motion and excluded the SCANA evidence and testimony. R. p. 193, l. 11 – p. 201, l. 25. The trial court ruled that defense counsel could cross-examine Mr. Kennedy as to whether he had been terminated from Allied Barton or SCANA. R. p. 196, l. 21 – 197, l. 9; R. p. 198, l. 17 – p. 201, l. 25. Appellants assert this was prejudicial error and seek a new trial.

The Trial Court Properly Considered the Rules of Evidence and South Carolina Case Law in Granting the Motion in Limine to Exclude the SCANA Evidence

The trial court heard extensive oral argument and reviewed the relevant case law and South Carolina Rules of Evidence during the hearing on the Motion *in Limine* and subsequent ruling granting the motion. R. pp. 109-127, R. pp. 193-201.

During the hearing on the Motion *in Limine*, the following exchange occurred:

Mr. Barlow: “We have a truth defense. We should be entitled to prove that this gentleman is not trustworthy. He has put his character directly in

issue in this case, as all the cases we have cited, cite Rules 405 to 7.”

The Court: “So basically what you’re saying is that because something happened two years later, it should refer back to what happened in March of 2011 and therefore he should not be able to ask for damages?”

Mr. Barlow: Certainly.

R. at p. 120, l. 3 - 12.

The Court Properly Ruled the SCANA Evidence Was Unfairly Prejudicial

“As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE.” State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). The trial court held that while the information related to SCANA may have been relevant, it was unfairly prejudicial and not admissible under the Rules of Evidence, including Rules 404 and 405. R. p. 193, l. 11 – p. 198, l. 16.

“Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE; See also State v. Gilchrist, 496 S.E.2d 424, 329 S.C. 621 (Ct. App. 1998) (evidence of defendant’s statement was relevant as it showed his statement of mind when such statement was made in close proximity to the commission of the crime in question.)

Even if evidence is deemed relevant under Rule 401, SCRE, such evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .” Rule 403, SCRE. “Evidence of similar acts has the potential to be exceedingly prejudicial.” Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). The trial court correctly concluded that even if

the Court were to have instructed the jury otherwise, the evidence was so prejudicial as to deem pointless the Mr. Kennedy's defamation case against the Appellants. R. pp. 193-196. The trial court noted that **"let's just say even if the higher court were to determine that it would be relevant and probative, I think the prejudicial value outweighs the probative value for this reason."** R. p. 195, l. 23 – p. 196, l. 2. In short, the trial judge correctly concluded that a jury could not be expected to ignore the 2014 SCANA allegation as evidence of Mr. Kennedy's guilt in the 2011 incident.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003). In Griffin, the Court held it was error for evidence to be admitted that the plaintiff tested positive for marijuana at the time of the accident because there was no correlation between the between the marijuana and the accident. The Court held that the marijuana evidence was more prejudicial than probative, given that the test did not measure the quantity of marijuana in the plaintiff's system or how recently he had been exposed to it. 595 S.E.2d at 251. See also USA v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses".)

In State v. Lyle, the Supreme Court considered the exclusion of evidence which was from 10 days to 7 weeks removed from the crime charged. The Court asked, "what is there in the alleged passing of forged checks at widely separated points . . . prior to the commission of the crime charged that tends, in a legal sense, to identify the defendant as the man who uttered the forged paper....? True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he

was also guilty of the latter, but that is the precise inference the general rule was wisely designed to exclude . . . There is no connection of time and place . . .” 118 S.E. at 808 (holding evidence was improperly allowed). Similarly, there was no connection as to time and place between the SCANA incident and the Spring Valley incident three years prior.

The SCANA Evidence Was Properly Excluded As Not Sufficiently Similar

Furthermore, “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). “However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Id. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within [this] exception in Rule 404(b).” Id. In Cope, the Supreme Court held that there was no abuse of discretion in the trial judge’s exclusion of evidence of other crimes under Rule 404(b) where the other crimes occurred subsequent to the murder at issue and there were “many distinctions” as well, although there were also some similarities. Furthermore, the subsequent crimes at issue in Cope occurred within 6 weeks of the underlying murder.

The trial court correctly found that the SCANA evidence also did not meet the “common scheme or plan” requirement – a/k/a “Lyle-type” evidence. R. p. 193, l. 11- p.195. Here, the subsequent “act” – really an unproven allegation⁹ - was 3 years removed from the Spring Valley incident. Furthermore, the difference in the amount of money alleged to have been stolen from SCANA (\$10 and plastic safety glasses vs. \$1,000 cash)

⁹ See Footnote 6.

is considerable. Finally, the Court specifically considered the cases which Appellants rely upon in their brief and found each to be unpersuasive because they concerned prior bad acts. R. pp. 197-198.

Finally, the Court held that the SCANA evidence was not admissible under Rule 405, SCRE, which allows that on cross-examination of the character witness as to reputation, “the court may allow an inquiry into relevant specific instances of the person’s conduct.” Accordingly, before inquiry can be made, the specific instances of conduct must still be found to be relevant (and not unfairly prejudicial) under Rules 401 and 404, SCRE. For the reasons previously cited herein, the Court correctly ruled that the pending SCANA charges, while perhaps relevant, were unfairly prejudicial. Kennedy alleged that he was defamed in 2011 when he was deemed a thief by Appellants, and his fellow employees were subsequently made aware of their opinion through the malicious publication of their opinion. The evidence, outlined exhaustively in the Statement of Facts herein, shows that the Messrs. Earles and Barnes willfully and recklessly defamed Mr. Kennedy by letting everyone know that he was not to have keys, and then did nothing when they discovered that their supposed “confidential” memo was left out for all to see.

Appellants argue that Rule 405 draws no distinction between “prior bad acts” and “subsequent bad acts”, relying upon State v. Weaverling, 523 S.E.2d 787, 337 S.C. 460 (Ct. App. 1999). Final Br. at p. 24. However, Weaverling is unpersuasive given that it concerns the “common scheme or plan exception” to the prior bad acts exclusion, which the Court of Appeals noted is “generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged . . . is held admissible as tending to show continued illicit intercourse between the same parties.” Rule 405 does not exist in

a vacuum, and the Court properly considered all the rules relating to the admissibility of evidence when it granted the Motion *in Limine*.

Furthermore, upon information and belief, Appellants can point to no South Carolina case law which provides that the admission of other acts or instances of conduct, under either Rule 404 or Rule 405, is not subject to an evaluation of relevancy and prejudice under South Carolina law. Appellants cannot circumvent the plain language of Rules 403 and 404, SCRE, in arguing for the primacy of Rule 405. Appellants cite to various out of state cases in support of their position, along with several pre-rule cases; however, none of these cases can be considered to have precedential value in South Carolina. Final Br. at pp. 20-22. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR

Evidence of Prior Petty Thefts at Spring Valley High School in 2010 Was Properly Excluded And Was Not Prejudicial Error.

On February 28, 2011, Mr. Kennedy was recommended for a promotion. Appellants sought to introduce evidence at trial related to petty thefts which occurred at Spring Valley High School prior to the March 4th theft reported by Tim Hunter. Specifically, they sought to introduce evidence that in the fall of 2010, cans of air freshener went missing from a bathroom. They also sought to introduce evidence that other employees reported thefts in spring 2010, and items missing around the same time as the Tim Hunter allegation, by way of written statements prepared on March 24, 2011.

Plaintiff's counsel filed a motion *in limine* to exclude evidence of reports of other thefts at Spring Valley and the Court heard lengthy arguments from counsel on this Motion. R. pp. 33-36; R. pp. 127, l. 13 – p. 138. Counsel argued that because Appellants were

recommending Kennedy for a promotion in February 2011, they obviously did not believe he was responsible for the 2010 thefts.

The trial court allowed the admission of evidence of other petty thefts at Spring Valley that it deemed were contemporaneous and related temporally with the March 4, 2011 incident – specifically reports by staff in the administrative office that they had discovered that a ring, check, and cash were missing around the same time as the Hunter theft (although they could not say when the items went missing); however, the trial court excluded evidence related to the missing air fresheners in fall 2010, as well as reports of petty theft from Spring 2010. Furthermore, defense counsel specifically agreed to this limitation on its evidence – specifically the redaction of Defendants’ trial exhibit #1 as it referenced the air fresheners and other alleged 2010 thefts, and any related testimony, and therefore Respondent submits the issue is not properly preserved for review. R. p. 378, l. 6 – p. 384, l. 11; See also R. pp. 127-138.

Defense counsel presented evidence that Mr. Kennedy was in the administration building at the time these alleged other thefts occurred in February/March 2011, and elicited sustained testimony from Appellants and other witnesses as to what they deemed “suspicious” behavior on the part of Mr. Kennedy. Accordingly, Appellants were certainly able to present evidence of other thefts at Spring Valley; however, the trial court, for the reasons addressed *supra*, properly excluded any evidence of the 2010 thefts and defense counsel agreed to the exclusion. R. pp. 378-384.

Plaintiff’s counsel argued that Spring Valley High School was a huge physical campus, covering many acres, with thousands of people going in and out of its doors every

day.¹⁰ The allegations of these other petty thefts in 2010 were unproven, were never investigated by law enforcement, and were never proved (i.e. no charges were ever brought, no conviction ever secured). Accordingly, they were not relevant to whether Mr. Kennedy was, in fact, a thief or was properly the focus of the District's "investigation" into the allegedly missing money from the Athletic Director's Office in March 2011.

Furthermore, even if deemed relevant by the Court, they were highly prejudicial as they "muddy the proverbial waters" by injecting further, unproven allegations into the jurors' minds. Finally, the 2010 thefts all occurred before Kennedy was recommended for the promotion to supervisor; therefore, Kennedy must **not** have been considered a suspect in the eyes of Richland Two at that time, otherwise he wouldn't have been promoted. Counsel argued that by using these allegations now, the defense was seeking to prove Jeffery Kennedy was a habitual thief even while they were promoting him in February 2011.

Furthermore, this "prior bad act" evidence does not fit within an exception in Rule 404(b). First, "if the [party] was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). "The connection between the prior bad act and the crime must be more than just a general similarity." State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005). It must fall within the purview of the "common scheme and plan" exception under Rule 404(b). Id. at 583. Furthermore, the timing of the prior bad acts is crucial. Here, the District sought to present a laundry list of reported petty thefts that began in spring 2010 – almost a full year prior to the Athletic Director's report. See, e.g., State v. Pierce, 326 S.C. 176, 485 S.E.2d

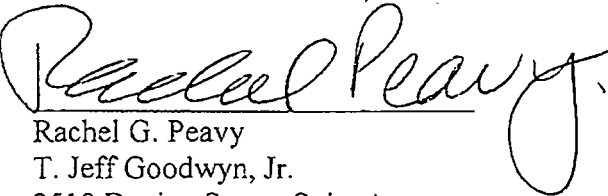
¹⁰ Indeed, at trial, Jim Childers estimated there were probably 100 thefts a year at Spring Valley.

913 (1997) (finding that the space of one year made evidence of prior act inadmissible under the common scheme or plan exception). As a result, the exclusion of the 2010 thefts was not prejudicial error and the ruling of the trial court should be upheld. Respondent requests that the Court affirm the holding of the lower court for the reasons stated herein or for any other reason found in the record pursuant to Rule 220(c), SCACR.

CONCLUSION

For the foregoing reasons, and for any reason found in the record pursuant to Rule 220(c), SCACR, the Respondent Jeffrey Kennedy respectfully requests that the jury award and trial court's rulings be affirmed.

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A handwritten signature in black ink, appearing to read "Rachel Peavy", written over a horizontal line.

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Dated: December 1, 2015

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,

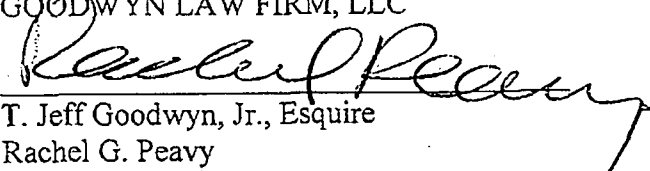
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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December 2, 2015

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.

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I. INTRODUCTION

Pursuant to Rule 208(a)(3), SCACR, Appellants, Richland County School District Two, Eric Barnes, and Chuck Earles, hereby submit their Reply to Respondent Jeffrey Kennedy's Brief.

II. ARGUMENTS

A. Mr. Kennedy's Response Highlights The Insufficiency Of The Evidence Offered In Support of His Defamation Claim And The Trial Court's Error in Refusing To Grant JNOV.

Mr. Kennedy identifies the June 15, 2011 "Confidential" email from Mr. Earles to supervisors as the sole potential defamatory communication in this case. (Resp. Init. Brf. pp. 18-20.)¹ While he continues to give lip service to legal authorities suggesting that a combination of "words and conduct" could be construed as defamatory, *see Mains v. K Mart Corp.*, 297 S.C. 142, 148, 375 S.E.2d 311, 314 (Ct. App. 1988), he has not identified any conduct of the Appellants in the record that was understood by any witness to communicate a defamatory message. As such, evaluation of Appellants' JNOV motion turns entirely on the evidence in the record that could have supported a jury finding that Mr. Barnes and Mr. Earles published the June 15, 2011 Confidential email beyond the group of supervisors addressed in the email.

First, the Trial Court properly found the Confidential email to be a qualifiedly privileged communication as a matter of law. (R. p. 981 ll. 17-21.) It is undisputed that Mr. Barnes and Mr. Earles both denied circulating the Confidential email or re-sending it to anyone who was not an addressee of the email. (R. p. 308 l. 25 – p. 309 l. 23, p. 518 l. 15 – p. 519 l. 20.) Mr. Kennedy offered no testimony or other evidence that Mr. Barnes or Mr. Earles did so. In fact, it appears that Mr. Kennedy cannot settle on a theory as to

¹ There was also testimony from Lieutenant John Reid, a supervisor, that Mr. Barnes told him verbally that Mr. Kennedy was not to have keys. (R. p. 249 l. 16 – p. 250 l. 5.)

who may have printed it out, as he alleges both that Appellants Earles and Barnes intentionally left it out to harm him, (Resp. Init. Brf. pp. 22, 26), and also that they “failed to ensure that it was kept confidential among supervisors or not printed out.” (Resp. Init. Brf. pp. 27, 45.)

Mr. Kennedy further argues that the unprivileged publication element of his defamation claim could be satisfied based solely on the jury’s disbelief of Mr. Barnes’ and Mr. Earles’ testimony that they did not further publish the Confidential email. (Resp. Init. Brf., pp. 19, 26.) However, it is settled, axiomatic law that a jury verdict based solely on rejection of defense testimony, without affirmative evidence of the element to be proven by the plaintiff, cannot stand. Most notably, Judge Learned Hand addressed this issue in *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). He reasoned that although a witness’s demeanor alone might rationally justify a finding opposite to the witness’s testimony in court, the theory must be rejected on the policy ground that there could be no effective appellate review of a trial judge’s decision to permit an issue to go to the jury on the basis of witness demeanor alone. In Judge Learned Hand’s words: “although it is . . . true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him.” *Id.* at 269. The U.S. Supreme Court affirmed this sound logic in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), holding that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant’s denial. *See Id.* at 252; *see also, 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 Fiberglas 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).

The party with the burden of proof does not make an issue for the jury’s determination by relying on the hope that the jury will not trust the credibility of the witnesses. If all of the witnesses deny that an event essential to the plaintiff’s case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event in question actually occurred.

§ 2527 Credibility of Witnesses, 9B Fed. Prac. & Proc. Civ. § 2527 (3d. ed.). To hold otherwise would impermissibly shift the burden of proof (making it a burden of “disproof”) to the defendant.

The Trial Court implicitly recognized this in rejecting Mr. Kennedy’s *ipso facto* argument that if non-supervisory co-workers saw the Confidential email in paper form, Mr. Barnes and/or Mr. Earles must have printed and left it out rather than one of the supervisors to whom it was addressed, or even Mr. Kennedy himself. (R. pp. 926-927.) Nevertheless, the Trial Court erred in allowing the jury’s apparent disbelief of Mr. Barnes’ and Mr. Earles’ testimony that they did not print out or further distribute the Confidential email, without affirmative evidence to the contrary, to support its finding that Messrs. Barnes and Earles actually published the Confidential email to non-supervisory employees.

For these reasons, Mr. Kennedy’s proof is no different from that this Court rejected in *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). The plaintiff in *Williams* attempted to rely on a similar *ipso facto* argument. He argued that because the school principal had asked him about his apparent romantic relationship with the school secretary, the jury could find that the principal was

responsible for publishing rumors of the affair outside the “need to know” group. Implicit in the *Williams* Court’s rejection of the plaintiff’s logic was that it was not enough for the jury to simply disbelieve the principal’s testimony without affirmative evidence that he started or repeated the rumor. *Id.*

As in *Williams*, any of the email recipients in the instant case could have been responsible for printing it out and failing to maintain its confidentiality. Accordingly, the jury’s finding that Mr. Earles and Mr. Barnes published the Confidential email to individuals outside the supervisory group, based only on its presumed disbelief of Mr. Earles’ and Mr. Barnes’ testimony on that issue, cannot support the verdict and it must be set aside.

**B. Even If The Evidence Supported A Finding Of An
Unprivileged Defamatory Publication By Either
Mr. Earles or Mr. Barnes, The Record Is Devoid Of
Evidence That Any Such Communication Was Made With
Actual Malice.**

Second, the Trial Court erred in permitting even more attenuated and impermissible inference building by upholding the jury’s finding that Mr. Barnes and Mr. Earles exceeded the scope of the qualified privilege or further published the Confidential email with actual malice.

Whether malice is the incentive for a publication is *ordinarily* for the jury to decide. See *Murray v. Holnam, Inc.*, 344 S.C. 129, 144, 542 S.E.2d 743, 751 (Ct. App. 2001 (*emphasis added*)). However, as noted in Appellants’ Initial Brief, it is not *always* for the jury to decide. (App. Init. Brf. pp. 13-14.) See also *Woodward v. S. Carolina Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981) (“While abuse of the conditional privilege is ordinarily an issue reserved for the jury . . . in the absence of a controversy as to the facts, as here, it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.”) (internal citations omitted).

Actual malice must be proven and is not presumed.² *Bell v. Bank of Abbeville*, 208 S.C. 490, 494-95, 38 S.E.2d 641, 643 (1946). On its face, there is nothing false or malicious about the Confidential email. It is a directive from a manager to supervisors, limited in scope to address Mr. Kennedy's return to work following an investigation of theft at Spring Valley High School (SVHS). In fact, the Trial Court specifically found:

[T]he testimony was, "When I send out something confidential, I would expect that those in a supervisory role would understand that importance and to show and demonstrate and respect the fact it's confidential and should not be shared with others." I think that's a reasonable expectation. I also believe that based upon the evidence and the case law that there is not a – that there has been no reason to believe that those individuals would therefore go out and do something contrary to what the expectation was in light of the fact that the memo clearly says it's confidential.

(R. p. 939 l. 21 – p. 940 l. 8.)

Further, no reasonable jury could have found that Mr. Earles' directive to the security department in August 2010 to stop engaging in rumors and gossip in the workplace was evidence that Mr. Earles or Mr. Barnes somehow believed or intended that department supervisors would release the Confidential email to their subordinates and injure Mr. Kennedy. (R. p. 1008.) Mr. Earles' prior directive negates, rather than supports, any finding that he sent the Confidential email to supervisors with the intent that they do the exact opposite of what the email instructed them to do. Regardless, if Mr. Kennedy's theory is that Mr. Barnes or Mr. Earles failed to prevent a subordinate supervisor from further publishing the Confidential email, that at most would prove

² Contrary to Mr. Kennedy's arguments, proof of an alleged libelous statement that is subject to a qualified privilege does not obviate a plaintiff's burden to prove actual malice to defeat the qualified privilege. See *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999).

negligence and fall well short of the required showing that Mr. Earles or Mr. Barnes made a defamatory communication with actual malice.

To prove actual malice in the defamation context, the plaintiff has to show that *the defamatory communication* was made “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 indifference toward plaintiff’s rights.” *Murray*, 344 S.C. at 143, 542 S.E.2d at 750 (emphasis added). It is not enough to show that a defendant believed that the plaintiff was responsible for missing money or should have been terminated from employment. As with the evidence of lack of publication, the jury’s mere disbelief of Mr. Barnes’ and Mr. Earles’ testimony is not enough to support a finding that they published a defamatory email about Mr. Kennedy with actual malice. By permitting the jury to consider whether the scope of the qualified privilege had been exceeded or whether evidence of actual malice existed, and refusing to grant JNOV, the Trial Court improperly granted the jury Orwellian authority³ to punish Appellants merely for their beliefs that Mr. Kennedy was responsible for the missing money, rather than for any actual malicious communications to others, as Mr. Kennedy was required to prove.

**C. The Evidence Mr. Kennedy Presented Does Not Support
The Jury’s Actual Or Punitive Damages Award And A
New Trial Is Required Because The Jury Capriciously
Fixed Damages Without Regard To The Evidence.**

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 considerations not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.” *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (quoting *Small v. Springs Indus., Inc.*, 292 S.C.

³ George Orwell’s 1984 introduces the concept of “thoughtcrime,” by which unspoken beliefs or thoughts are punishable as criminal acts. George Orwell, 1984 (New York: Signet Classic, 1950).

481, 487, 357 S.E.2d 452, 455 (1987)). If a jury arbitrarily and capriciously fixes damages without reference to the evidence, it is error for the court to refuse a motion for new trial. *Carrigg v. Blue*, 283 S.C. 494, 500, 323 S.E.2d 787, 790 (Ct. App. 1984). The trial judge's failure to grant a new trial absolute in such situations amounts to an abuse of discretion and on appeal this court will grant a new trial absolute. *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 518, 435 S.E.2d 864, 868-69 (1993); *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 647-48 (Ct. App. 1990).

At the close of evidence, the Trial Court granted a directed verdict to the extent that Mr. Kennedy claimed that the termination of his employment in October 2012, more than a year after he returned to work at Richland Two following the SVHS theft investigation, communicated a defamatory message. (R. p. 908 l. 20 – p. 910 l. 2, p. 922 ll. 18-23.) Thus, it is undisputed that the loss of Mr. Kennedy's employment was not a result of or accompanied by any alleged defamation by Appellants and the jury could not have considered it or its effects in calculating damages for defamation.

Mr. Kennedy's trial testimony tied the following losses to the termination of his employment – loss of his marriage, eviction from his house, repossession of his car, and cashing out his retirement savings. (R. pp. 180-183.) In an attempt to save an award that shocks the conscience, Mr. Kennedy now attempts to argue that these alleged injuries were caused by the Confidential email's statement that in his new assignment, he was not to be given keys.

The cases upon which Mr. Kennedy relies on to support a \$550,000 verdict for a denial of a promotion and sixteen-month reassignment of job duties are clearly distinguishable. In *Miller v. City of W. Columbia*, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996), for example, the evidence showed that the plaintiff was forced to resign his employment and:

Broom's defamatory statement effectively destroyed Miller's reputation and ended his distinguished twenty-five year law enforcement career. Miller had been the assistant chief of police for seventeen years, and during this time he had received the highest awards available to law enforcement officers. However, after resigning from the West Columbia Police Department, Miller had difficulty obtaining employment.

Miller, 322 S.C. at 231, 471 S.E.2d at 687. *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 447 S.E.2d 194 (1994), is likewise distinguishable because the defamatory communication resulted in the termination of employment of a 53-year-old employee who had been working for Spartanburg Steel for 10 years and had not been able to find another job at the time of trial. *Constant*, 316 S.C. at 91, 447 S.E.2d at 197.

In contrast to *Miller* and *Constant*, Mr. Kennedy concedes that, for his remaining sixteen months with the School District, he did not seek employment outside Richland Two, and continued to enjoy his job. (R. p. 214.) Respondent concedes that "despite a few months following his [non-actionable] termination, he has been gainfully employed since." (Resp. Init. Brf. p. 39.) Of course, at the time of trial, Mr. Kennedy had already been terminated from another, higher paying job for alleged third-shift thefts and had promptly found another job with GEO Care. (R. p. 183 ll. 13-16, p. 208 ll. 7-11.)

Finally, *Wilhoit v. WCSC, Inc.*, 293 S.C. 34, 40, 358 S.E.2d 397, 400 (Ct. App. 1987), did not arise out of the employment context, and is easily distinguished in that it involved five news broadcasts to the public at large insinuating that plaintiff, who was merely a trial witness, was the defendant found guilty of embezzlement following a criminal trial. The *Wilhoit* actual damages award of \$1 was appropriate on those facts because the plaintiff, like Mr. Kennedy, did not prove any special damages or other injury from the publication.

The verdict the Supreme Court set aside as “grossly excessive” in *Small*, 292 S.C. at 481, 487, 357 S.E.2d at 455, is more analogous to the verdict in Mr. Kennedy’s favor. In *Small*, a breach of implied employment contract agreement resulted in termination of the plaintiff’s employment, the jury awarded \$300,000 in actual damages. The Supreme Court noted, “The jury’s verdict would put Small in the position of never having to work again and having no obligation to mitigate her damages . . . To allow Small to recover for loss of wages and benefits for the remainder of her life is unreasonable and contrary to her duty to minimize her damages.” *Id.*

In this case, it was undisputed that Mr. Kennedy was an at-will employee. (R. p. 1007.) Following the Spring Valley investigation, Mr. Kennedy was, at most, denied a promotion, the difference in pay for which he offered no evidence at trial, and was reassigned to a job which he testified that he liked and did not seek alternative employment for sixteen months. (R. p. 214.) A comparison of the verdict in this case with the verdicts in *Miller* and *Constant*, which involved the deprivation of the plaintiffs’ livelihoods resulting from termination of employment and difficulty finding comparable employment, leads to the obvious conclusion that the jury improperly awarded damages as though the termination of Mr. Kennedy’s employment with Richland Two in October 2012 was an actionable injury. Thus, the award was clearly excessive and fixed capriciously without regard to the evidence the jury should have considered.

This was not a “wrongful termination” or “negligent investigation” case. The Trial Court should have instructed the jury as to the alleged defamation they were to consider when presented with questions that suggested the jury was considering Mr. Kennedy’s termination from employment or other matters outside the evidence in their verdict. (See Appellants’ Init. Brf. pp. 25-26.) Employees are investigated, transferred, and denied promotions every day in this state. Allowing this verdict to stand

will effectively create an unnecessary exception to the doctrine of employment at-will permitting employees to legally challenge virtually any undesired change in job status short of a termination on the grounds that the change was accompanied by or caused some form of reputational injury to the employee. This Court has been reluctant to create a catch-all defamation cause of action to permit at-will employees to challenge employment decisions. See *McNeil v. S. Carolina Dep't of Corr.*, 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013), *reh'g denied* (June 25, 2013).

Particularly, as applied to a public school employee like Mr. Kennedy, the verdict upon the facts at trial further ignores *Singleton v. Horry Cnty. Sch. Dist.*, 289 S.C. 223, 227–28, 345 S.E.2d 751, 753–54 (Ct. App. 1986), and *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978), which recognize that school districts should have significant discretion in employee assignments and personnel matters to carry out the duties required of them. The damages award should be set aside and a new trial absolute ordered.

**D. The Applicable Factors For The Court's Consideration
Do Not Support An Award Of Punitive Damages In This
Case.**

A punitive damages award based on an unsupported actual damages award also fails. See *Sparrow*, 302 S.C. at 422, 396 S.E.2d at 648. In this case, the punitive damages award is even more problematic than the compensatory damages award given that the “multiplier” factor is the only *BMW N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), or *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991), factor that would arguably support the award. Mr. Kennedy points to no evidence, let alone clear and convincing evidence, that either Mr. Barnes or Mr. Earles was responsible for circulating the Confidential email to non-supervisory employees or otherwise engaged in conduct that was willful, wanton, or in reckless disregard of Mr. Kennedy’s rights.

See Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996) (punitive damages may only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights). He further offers no precedent that would suggest that the denial of a promotion, with no proof of the difference in pay between the job sought and the job retained, and reassignment to a job he liked and from which he did not seek to leave until he was terminated for other reasons in October 2012, could support a \$350,000 punitive damages windfall. Mr. Kennedy has had little trouble finding other, better paying jobs in the security industry following the SVHS investigation. As noted, any alleged special damages would have been occasioned by Mr. Kennedy's termination from the School District or from Allied Barton/SCANA prior to trial. The mere fact that another employee who was not suspected of theft was treated differently than Mr. Kennedy by other supervisors was not evidence that any Appellant acted willfully, wantonly, or in reckless disregard of Mr. Kennedy's rights. Accordingly, this Court should, at a minimum, set aside the award of punitive damages in this case under *Gore* and *Gamble*.

E. The Great Weight Of Authority Confirms That The Trial Court Committed Reversible Error By Excluding Evidence Of Mr. Kennedy's Theft Accusations, Termination, And Criminal Charges Pursued By His Immediate Subsequent Employer.

Mr. Kennedy's response completely ignores the language and rationale of SCRE 405, which permits more extensive inquiry into and proof of other bad acts when character and reputation have been placed *directly in issue* by the claim alleged. In fact, Mr. Kennedy simply dismisses the notion that when character and reputation have been placed directly in issue, the evidence should be treated differently than character evidence in any other type of case. He labels almost 200 years of settled legal authority to the

contrary as “pre rules” or as nonbinding authority from out of state. (Resp. Init. Brf. p. 46.)

Moreover, the SCANA theft evidence was not offered solely for purposes of the truth defense, as Mr. Kennedy argues, but also for purposes of refuting causation of Mr. Kennedy’s alleged damages, the extent of his alleged damages, and his failure to mitigate damages. Though ignored in Mr. Kennedy’s response, this was clearly argued and rejected by the Trial Court. (R. pp. 118-122.)

It was manifestly unfair for Mr. Kennedy to argue that the sole blemish on his otherwise stellar reputation at the time of trial was the Spring Valley theft accusation. In addition to denying the Appellants the right to fairly challenge that assertion, the Trial Court unfairly allowed Mr. Kennedy to: (1) bolster that reputation by prohibiting witnesses from referencing the SCANA accusations, investigation, and employment termination when Respondent’s counsel asked if Mr. Kennedy had ever been accused or implicated in any other thefts; (2) deny Respondents the opportunity to show other potential causes for Mr. Kennedy’s alleged financial losses and alleged personal problems; and (3) discount the obvious similarities in the SVHS and SCANA charges which both involved using the convenience of his third-shift position to engage in petty theft.

Finally, Mr. Kennedy’s focus on the time lapse between his reassignment in June 2011 and the alleged SCANA thefts is misplaced. Mr. Kennedy certainly did not limit his proof of damages to the time period from June 2011 until his SCANA termination in March 2014. He claimed that he had recently overheard remarks about the Spring Valley theft at a Wal-Mart and argued for future damages based on 10 years of employment, the loss of which was not the result of any alleged defamation as a matter of law. Mr. Kennedy’s reputation and character at the time of trial, rather than at a discrete time

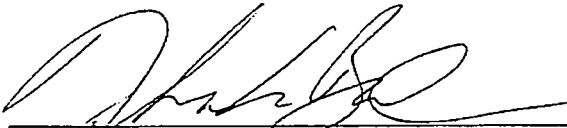
in the past, was the relevant issue for the jury to consider. Appellants were unfairly and prejudicially prohibited from challenging that alleged character and reputation with the Allied Barton/SCANA evidence and are entitled to a new trial.

III. CONCLUSION

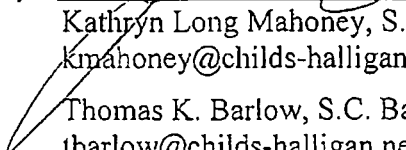
For the foregoing reasons and those set forth in Appellants' Initial Brief, Appellants are entitled to Judgment Notwithstanding the Verdict. In the alternative, Appellants must be granted a new trial absolute; at a bare minimum, Appellants are entitled to a reduction in the jury's award of actual and punitive damages.

Respectfully submitted,

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November 30, 2015

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.

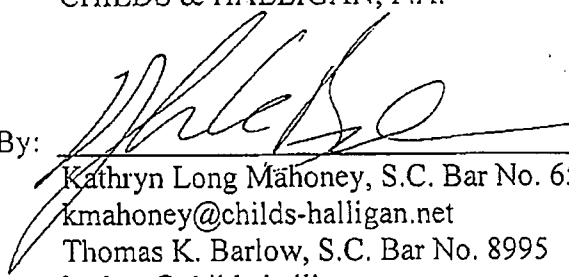
Richland County School District Two, Eric Barnes, and Chuck Earles Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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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.

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STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 13 CP- 40-1460

Jeffrey Kennedy

Richland Co. School District 2

Eric Barnes, Charles Earles
DEFENDANT(S)

PLAINTIFF(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment

by the Court:

Verdict for Plaintiff against all defendants. Post trial motions

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

to be filed with 10 day and
response within 5 day thereafter.

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Alfred Lee
Circuit Court Judge

Judge Code

10/3/2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Oct, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Oct, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

J. Goodwin / R. Peavy

T. Barbw / K. Mahoney

ATTORNEY(S) FOR THE PLAINTIFF(S)

[Signature]
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff,

v.

Richland Two County School District,
Eric Barnes, Chuck Earles,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2013-CP-40-01460

VERDICT

FILED
2014 OCT 10 AM 10:29
JOANNE L. H. MCBRIDE
C.C.P. & G.S.

On the **Defamation** claim against **Eric Barnes**, we, the jury, unanimously find for

☒

PLAINTIFF

One hundred Thousand dollars (\$100,000)
Actual damages

One hundred Fifty Thousand dollars (\$150,000)
Punitive damages

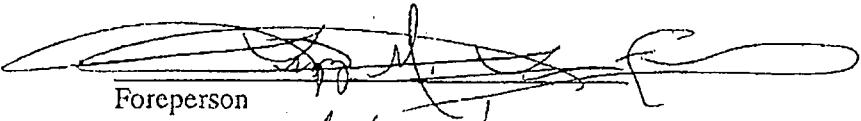
☐

DEFENDANT Eric Barnes

If you returned a verdict in favor of Plaintiff, do you the jury unanimously find that Eric Barnes acted with actual malice?

☒ Yes

☐ No.


Foreperson

Date: 10/3/2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff,

v.

Richland Two County School District,
Eric Barnes, Chuck Earles,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No: 2013-CP-40-01460

VERDICT

FILED
2014 OCT 10 AM 10:29
JEANETTE W. MOBRILE
S.C.P. & G.S.

On the Defamation claim against Chuck Earles, we, the jury, unanimously find for

☒ **PLAINTIFF**
One hundred thousand dollars (\$100,000)
Actual damages
Two Hundred thousand dollars (\$200,000)
Punitive damages

☐ **DEFENDANT** Chuck Earles

If you returned a verdict in favor of Plaintiff, do you the jury unanimously find that Chuck Earles acted with actual malice?

☒ Yes

☐ No.

Foreperson

Date:

10/3/2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4001460

Jeffrey Kennedy

Richland Two County School District

PLAINTIFF(S)

Katie Brochu

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Liantant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 February 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Jefferson Goodwyn Jr.

Thomas Kennedy Barlow

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2013-CP-40-01460

ORDER

RICHLAND COUNTY
FILED
2015 FEB 24 AM 9:43
JEANETTE W. MCENROY
C.C.P. & G.S.

This matter comes before the Court on Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial Absolute, or, in the alternative, for a new Trial Nisi Remittitur. This case came to trial on September 29, 2014. The jury returned a verdict of \$100,000 in actual damages and \$150,000 in punitive damages against Defendant Barnes and a verdict of \$100,000 in actual damages and \$200,000 in punitive damages against Defendant Earles. Defendants filed this motion pursuant to Rules 50 and 59(e), SCRCF, on October 13, 2014. After careful consideration of the motions made, memorandum submitted, and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial Absolute, or, in the alternative, for a new Trial Nisi Remittitur. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

Additionally, regarding awards of punitive damages, this Court shall conduct a post-trial review to ensure that a punitive damage award is proper. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). "Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punishments on tortfeasors. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996).

and
#1

The United States Supreme Court set forth three guideposts for the trial courts to consider when assessing whether an award of punitive damages violates due process. *BMW of North America v. Gore, supra*. Those guideposts are: (1) the reprehensibility of the defendant's conduct; (2) the ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and (3) comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at 574.

Reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

The South Carolina Supreme Court previously employed an eight factor post-verdict review that trial courts were required to conduct to determine if a punitive damages award comports with due process. *See Gamble, supra*. However, following *Gore, supra*, and *Campbell, supra*, as well as other United States Supreme Court opinions, in *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the Court "articulate[d] the following test for our courts in conducting a post-judgment review of punitive damages awards":

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. ... In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the

and
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punitive damages award. ... Although the Supreme Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award, and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Id. at 587-89, 686 S.E.2d at 185-86. Applying the reprehensibility factors, Plaintiff suffered no physical harm from the defamation, other than perhaps distress and embarrassment. Second, there was no evidence of a reckless disregard for the health or safety of Plaintiff. Evidence was presented that Plaintiff was financially vulnerable; for example, after his termination, he cashed out his retirement. Fourth, the alleged defamation was a one-time event; however, there was repetitive conduct of rumors being spread in general in the department. Finally, Plaintiff argued, and the jury could have inferred from the evidence presented that the harm was the result of intentional malice, trickery, or deceit.

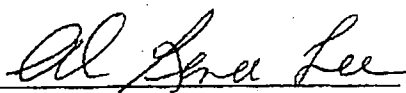
As to the ratio factor, although there is no bright-line test regarding the ratio of the actual damages to the punitive damages, the multiplier for punitive damages is low in this case, being 1.5 for Barnes and 2 for Earls. This factor weighs in favor of finding the punitive damages award appropriate.

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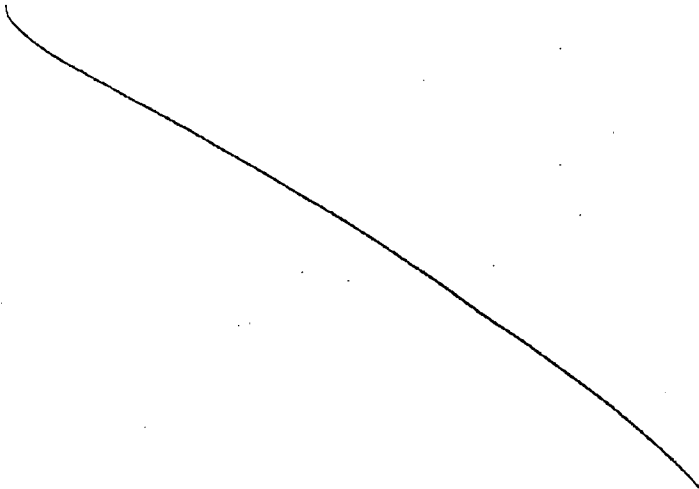
As to the comparative penalty awards factor, there are no criminal penalties for workplace defamation in South Carolina. Consequently, there is nothing against which to assess

this particular factor. Based upon all of these factors and the evidence presented, the punitive damages award does not violate constitutional due process. Defendants are not entitled to a reversal or reduction in the amount of punitive damages.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

February 23, 2015
Columbia, South Carolina


arf
#4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff(s)

vs.

Richland Two County School District, and its
Superintendent, Dr. Katie Brochu, Eric Bonds,
Chuck Earles, Traci Batchelder, Roosevelt
Garrick, Kim Jones,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013- CP - 40- 01460

(Please Print)

Submitted By: T. Jeff Goodwyn, Jr., Esquire

Address: 2519 Devine Street, Suite A
Columbia, SC 29205

SC Bar #: 73789

Telephone #: (803) 251-4517

Fax #: (803) 251-4527

Other:

E-mail: JGoodwyn@Goodwynlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med Mal (230)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☒ Other (399)
Negligence/Defamation

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstatement Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600) ☐ Pharmaceuticals (630)
☐ Automobile Arb. (610) ☐ Unfair Trade Practices (640)
☐ Medical (620) ☐ Out-of State Depositions (650)
☐ Other (699)

Submitting Party Signature:

T. Jeff Goodwyn, Jr.

Date: March 7, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

SCCA / 234 (8/06)

Page 1 of 2

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Appendix - Kennedy vs. Richland Two 0151

FOR MANDATED ADR COUNTIES ONLY
Florence, Horry, Lexington, Richland, Greenville and Anderson

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR.**
 Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

) Civil Action No.: 13-CP-_____

Jeffrey Kennedy,

Plaintiff,

vs.

SUMMONS

Richland Two County School District, and
its Superintendent, Dr. Katie Brochu, Eric
Bonds, Chuck Earles, Traci Batchelder,
Roosevelt Garrick, Kim Jones,
Defendant.

FILED
2013 MAR 11 AM 11:38
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served on you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office at 2519 Devine Street, Suite A, Columbia, South Carolina, 29205, within thirty (30) days of the date of service, exclusive of the day of such service; if you fail to answer the said Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the said relief demanded in the Complaint.

This 7th day of March, 2013

GOODWYN LAW FIRM, LLC

By: T. Jeff Goodwyn, Jr.

T. Jeff Goodwyn, Jr., Esquire

2519 Devine Street

Suite A

Columbia, South Carolina 29205

(803) 251-4517

(803) 251-4527 (f)

JGoodwyn@Goodwynlaw.com

ATTORNEY FOR PLAINTIFF

Columbia, South Carolina

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

) Civil Action No.: 13-CP-_____

Jeffrey Kennedy,

)
)
) Plaintiff,

)
)
) vs.

COMPLAINT
(JURY TRIAL DEMANDED)

)
)
) Richland Two County School District, and

) its Superintendent, Dr. Katie Brochu, Eric

) Bonds, Chuck Earles, Traci Batchelder ,

) Roosevelt Garrick, Kim Jones,

)
)
) Defendant.

The Plaintiff, complaining of the Defendants, would respectfully show the Court

1. The Plaintiff is a citizen and resident of Richland County, South Carolina.
2. The Defendant Richland Two School District (hereafter "Richland 2") is a governmental entity within the meaning of the South Carolina Tort Claims Act and is subject to the jurisdiction and venue of this Court
3. The Defendant Katie Brochu (hereafter "Brochu") is, upon information and belief, a citizen and resident of South Carolina and is the Superintendent of Richland 2 and is subject to the jurisdiction and venue of this Court.
4. The Defendant Eric Bonds ("Bonds") is, upon information and belief, a citizen and resident of Richland County, South Carolina and currently resides at 3023 Eastway Drive, Columbia, South Carolina 29209-4911, and is subject to the jurisdiction and venue of this Court.

5. The Defendant Chuck Earles ("Earles") is, upon information and belief, a citizen and resident of South Carolina and currently resides at 6402 Trenholm Road, Columbia, South Carolina 29206-2137 and is subject to the jurisdiction and venue of this Court.
6. The Defendant Traci Batchelder ("Batchelder ") is, upon information and belief, a citizen and resident of South Carolina and currently resides at 105 Clarmont Court, Lexington, South Carolina, 29072-7017 and is subject to the jurisdiction and venue of this Court.
7. The Defendant Roosevelt Garrick, Jr. is, upon information and belief, a citizen and resident of South Carolina and currently resides at 3113 Berkeley Forest Drive, Columbia, South Carolina, 29209.
8. The Defendant Kim Jones ("Jones") is, upon information and belief, a citizen and resident of South Carolina and currently resides at 25 Small Oak Court, Blythewood, South Carolina 29016-7921 and is subject to the jurisdiction and venue of this Court.
9. For many years, Plaintiff was employed by Richland 2 in a security guard capacity.
10. In or around February 2011, Plaintiff had recently received a promotion to Lieutenant, resulting in a significant pay raise.
11. At or around the time of the promotion, Plaintiff was accused by Richland 2 personnel, specifically Chuck Earles and Eric Bonds, of stealing money from Coach Tim Hunter's office at Spring Valley High School during the course of Plaintiff's regular nightly security rounds. Plaintiff denied the charges.
12. After an extensive investigation by Richland County law enforcement into the alleged theft, no charges were filed. However, Plaintiff, after statements were made by Eric Bonds and Chuck Earles and Traci Batchelder and Roosevelt Garrick, Jr. was

demoted ultimately by Roosevelt Garrick, Jr. of Richland 2 to a non-lieutenant position watching security videos, resulting in lost opportunities, loss of reputation, decreased pay and reduced benefits.

13. In or about October 2012, Defendant Jones's son – a Richland 2 student – was accused of being involved in an altercation.
14. Defendant Jones told Plaintiff that she wanted to review the security videos which were in place at the time of the alleged altercation.
15. Plaintiff informed Jones that he was incapable of sharing any video content with her due to his lack of training on this part of the system.
16. Despite Plaintiff's refusal, Jones proceeded to tell Richland 2 personnel, and others, that Plaintiff had shown her the video and/or had described to her the contents of the video footage, statements which were false and which she knew to be false. Jones also signed her name to a written statement to that effect.
17. As a result of Jones's actions, Plaintiff was placed on administrative leave by Richland 2 and his reputation has suffered greatly and he is subject to continuing rumor, gossip, and innuendo in the workplace.
18. Beginning in or around February 2011, and continuing through the present day, Richland 2, by and through the leadership and management present therein, including Superintendent, allowed the vicious and unwarranted allegations that Plaintiff "was a thief" and "could not be trusted" to be perpetrated and spread, causing defamation to the Plaintiff and resulting in a hostile workplace.
19. The actions of the Defendants, jointly and severally, caused Plaintiff to be investigated by the Richland County Sheriff's Department and caused Plaintiff to

suffer a demotion and loss of reputation in the security industry, resulting in damages including, but not limited to, loss of income, loss of reputation, loss of privacy, and general devastation to his professional livelihood and person.

Count I
Negligent Supervision and Retention
(As to Defendant Richland 2)

20. The preceding allegations are incorporated herein as if repeated verbatim.
21. At the time of the above-described actions of Bonds, Batchelder, Earles, Garrick, and Jones, Richland 2 knew or should have known of the necessity and opportunity to control the Defendants, as the above-described defamation began to escalate and as a result, they were under a duty to exercise reasonable care to control its employees, Defendants Bonds, Batchelder, Earles, Garrick, and Jones, as to prevent them from intentionally harming Plaintiff or from so conducting themselves as to create an unreasonable risk of harm to Plaintiff.
22. Richland 2 breached this duty to Plaintiff by failing to exercise reasonable care so as to control its employees during these events as to prevent them from intentionally harming Plaintiff or from so conducting himself as to create an unreasonable risk of harm to Plaintiff.
23. As a direct and proximate cause of this breach, Plaintiff sustained injury, lost wages, mental disturbance and is entitled to an award of punitive damages in an amount to be determined at trial.

Count II
Defamation
(As to All Defendants Except Richland 2)

24. The preceding allegations are incorporated herein as if repeated verbatim.

25. Defendants Katie Brochu, Eric Bonds, Chuck Earl, Tracey Baxelder, Roosevelt Garrick, Jr., and Kim Jones made and repeated numerous statements concerning the Plaintiff that he was untrustworthy; a thief; and a bad employee, all of which were untrue, such statements being uttered and/or published throughout Richland 2 and made in reckless disregard for the truth and with conscious knowledge of the falsity of the same. Further, such statements were defamatory per se imputing to the Plaintiff the possible commission of a crime and i unfitness to hold a position of security responsibility within Richland 2.
26. As a direct and proximate result of the aforesaid defamation by the Defendants, the Plaintiff has sustained loss of reputation, a loss of earning capacity, humiliation, embarrassment and emotional and mental suffering.
27. The Plaintiff is also entitled to punitive damages against the Defendants for the intentional and willful conduct described herein to punish and deter and to make an example. The Plaintiff further asks for the costs of this action to be leveed upon Defendants.

Count III
(Intentional Infliction of Emotional Distress/Outrage)
(As to All Defendants)

28. The preceding allegations are incorporated herein as if repeated verbatim.
29. The Defendants intentionally or recklessly inflicted severe emotional distress upon the Plaintiff when they spread rumor and innuendo that Plaintiff was a thief, untrustworthy, and not a good employee.
30. The Defendants' conduct was extreme and outrageous, exceeding all possible bounds of decency and was, in effect, a "witch hunt".

31. The actions of the Defendants caused the Plaintiff severe emotional distress outside the bounds of reasonableness.

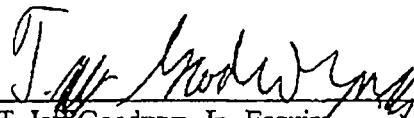
32. As a result of the intentional actions of the Defendants, Plaintiff is entitled to recover damages for this conduct.

WHEREFORE, Plaintiff requests a trial by jury and prays for judgment against the Defendants for all actual, consequential and resulting damages including, but not limited to, all lost wages, mental anguish, an award for punitive damages, and for all other damages found to be fair and reasonable as determined by this Court in an amount to be determined at trial. Plaintiff further requests that he be awarded his attorneys' fees and costs in this matter.

This 6TH day of March, 2013

GOODWYN LAW FIRM, LLC

By:



T. Jeff Goodwyn, Jr., Esquire
2519 Devine Street
Suite A
Columbia, South Carolina 29205
(803) 251-4517
(803) 251-4527 (f)
JGoodwyn@Goodwynlaw.com
ATTORNEY FOR PLAINTIFF

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Jeffrey Kennedy,
Plaintiff,

C.A. No. 2013-CP-40-01460

ANSWER AND AFFIRMATIVE
DEFENSES

vs.

Richland Two County School District;
and its Superintendent, Dr. Katie Brochu,
Eric Bonds, Chuck Earles, Traci
Batchelder, Roosevelt Garrick, Kim
Jones,

Defendants.

Defendants, Richland School District Two, Dr. Katie Brochu, Eric Barnes (improperly identified as "Eric Bonds" in the Complaint), Chuck Earles, Traci Batchelder, Roosevelt Garrick, Kim Jones, by and through their undersigned counsel, hereby respond to the allegations of Plaintiff's Amended Complaint, in accordance with the numbered paragraphs thereof, as follows:

1. Admitted on information and belief.
2. Denied as stated. Defendants admit only that Richland School District Two is a political subdivision of the State of South Carolina with duties and responsibilities defined by State and federal law, and Defendants refer to those applicable laws as the best source of information concerning its authority and responsibilities.
3. Admitted.
4. Denied.
5. Admitted.
6. Admitted.
7. Admitted.
8. Admitted.

9. Denied as stated. Plaintiff was employed by Richland School District Two as a security officer from May 12, 2008, through October 19, 2012. Defendants deny the remaining allegations of this paragraph.

10. Denied.

11. Denied as stated. Defendants admit only that the District conducted an investigation of missing money in February/March 2011 and Plaintiff was questioned as part of the investigation.

12. Admitted in part and denied in part. Defendants admit only that Plaintiff was not charged with any crime by law enforcement in connection with the February/March 2011 investigation of missing money. Defendants deny the remaining allegations of this paragraph.

13. Admitted.

14. Admitted.

15. Denied.

16. Admitted in part and denied in part. Defendants admit only that Defendant Jones reported to administrators that Plaintiff had described the contents of a video and that Defendant Jones gave a statement as to what Plaintiff had shown her.

17. Admitted in part and denied in part. Defendants admit only that Plaintiff was placed on administrative leave as a result of concerns with his conduct. Defendants deny the remaining allegations of this paragraph.

18. Denied.

19. Denied.

Count I
Negligent Supervision and Retention
(As to Defendant Richland 2)

20. Defendants incorporate by reference its responses to Paragraphs 1 through 19 of the Complaint as if stated herein verbatim.

21. Denied.

22. Denied.

23. Denied.

Count II
Defamation
(As to All Defendants Except Richland 2)

24. Defendants incorporate by reference its responses to Paragraphs 1 through 23 of the Complaint as if stated herein verbatim.

25. Denied.

26. Denied.

27. Denied.

Count III
Intentional Infliction of Emotional Distress/Outrage
(As to All Defendants)

28. Defendants incorporate by reference its responses to Paragraphs 1 through 27 of the Complaint as if stated herein verbatim.

29. Denied.

30. Denied.

31. Denied.

32. Denied.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to set forth facts sufficient to constitute a cause of action or state a claim for relief against the Defendants.

SECOND AFFIRMATIVE DEFENSE

On information and belief, Plaintiff has failed to mitigate his alleged damages.

THIRD AFFIRMATIVE DEFENSE

Any wages Plaintiff earned by way of any subsequent employment or in any other

capacity during or following his employment with the Defendants must be off-set from his alleged lost earnings or lost earning capacity.

FOURTH AFFIRMATIVE DEFENSE

Defendants further allege as an affirmative defense the specific immunities of the Tort Claims Act, § 15-78-60, including immunity for: quasi-judicial action or inaction; administrative action or inaction of a quasi-judicial nature; compliance with any law, including written policies; and the exercise of discretionary judgment by the governmental entity or employee or the performance or failure to perform any act or services, which is in the discretionary judgment of the governmental entity or employee. See S.C. Code Ann. §§ 15-8-60(1), (2), (4), (5), (17), (23), (25), and 70(b).

FIFTH AFFIRMATIVE DEFENSE

Any defamatory, libelous, or slanderous statements allegedly made by the Defendants were true, privileged, and/or made in good faith, and do not constitute actionable defamation.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff is barred from recovery for defamation because any alleged defamatory statements made by Defendants were true or substantially true.

SEVENTH AFFIRMATIVE DEFENSE

Any alleged defamatory statements made by Defendants were self-publicized by Plaintiff, and thus do not constitute actionable defamation.

EIGHTH AFFIRMATIVE DEFENSE

The District is immune from liability under the South Carolina Tort Claims Act to the extent Plaintiff's alleged loss, if any, resulted from the adoption, enforcement, or compliance with a law, rule, regulation, or written policy.

NINTH AFFIRMATIVE DEFENSE

To the extent that Plaintiff seeks punitive damages from Defendants, an award of such

damages is precluded by the Tort Claims Act, and further, such an award would violate Defendants' rights to due process and equal protection under the Constitution of the United States and South Carolina.

TENTH AFFIRMATIVE DEFENSE

All actions by Defendants were taken for legitimate business reasons.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiff's third cause of action is barred by the doctrine of worker's compensation exclusivity.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by contributory/comparative negligence in that Plaintiff contributed to any negligence or gross negligence, which is denied, to a greater degree than any Defendant.

THIRTEENTH AFFIRMATIVE DEFENSE

At all times, Defendants acted reasonably and in good faith within the scopes of their employment with Defendant Richland School District Two.

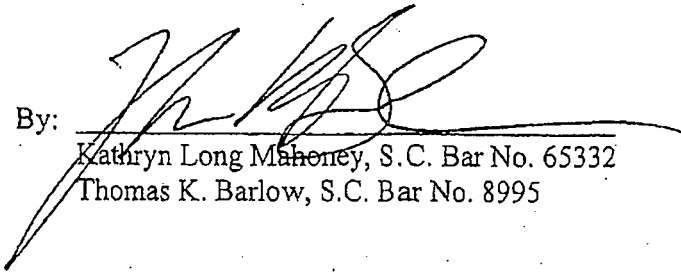
FOURTEENTH AFFIRMATIVE DEFENSE

At all relevant times, Plaintiff was an at-will employee.

WHEREFORE, having fully answered the Complaint, Defendants respectfully pray that the Court dismiss Plaintiff's claims against them, with all costs and expenses awarded to the Defendant, together with any and all further relief that the Court deems equitable and just.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Kathryn Long Mahoney, S.C. Bar No. 65332
Thomas K. Barlow, S.C. Bar No. 8995

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Attorneys for Defendants

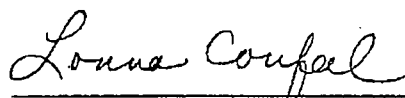
May 16, 2013

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **ANSWER AND AFFIRMATIVE DEFENSES** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 16th day of May, 2013:

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



Lonna M. Coufal

RICHLAND COUNTY
CLERK OF COURT
JUN 20 AM 11:07
FANNETTE W. MCBRIDE
C.C.P. & C.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Jeffrey Kennedy,)
)
Plaintiff,)

C.A. No. 2013-CP-40-01460

vs.)

**STIPULATION OF DISMISSAL AS TO
DEFENDANTS KATIE BROCHU,
ROOSEVELT GARRICK, AND
TRACI BATCHELDER**

Richland Two County School District,)
and its Superintendent, Dr. Katie Brochu,)
Eric Bonds, Chuck Earles, Traci)
Batchelder, Roosevelt Garrick, Kim)
Jones,)

Defendants.)

FILED
2014 SEP 26 PM 1:11
JEANETTE W. NORMAN
CLERK, S.C.

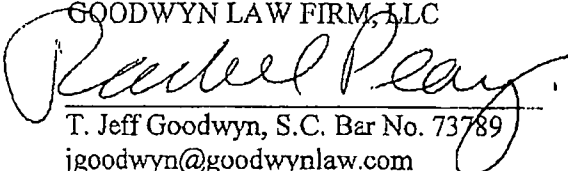
Pursuant to Rule 41(a)(1) SCRCP, Plaintiff and Defendants hereby stipulate that all claims against Katie Brochu, Roosevelt Garrick, and Traci Batchelder in their individual capacities are voluntarily dismissed from the above-entitled action with prejudice.

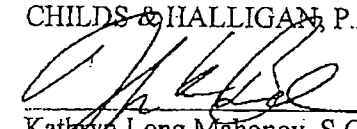
I SO MOVE:

I CONSENT:

GOODWYN LAW FIRM, LLC

CHILDS & HALLIGAN, P.A.


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Attorneys for Plaintiff

Attorneys for Defendants

September 23rd, 2014

September 26, 2014

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Jeffrey Kennedy,
Plaintiff,

vs.

Richland Two County School District,
and its Superintendent, Dr. Katie Brochu,
Eric Bonds, Chuck Earles, Traci
Batchelder, Roosevelt Garrick, Kim
Jones,

Defendants.

C.A. No. 2013-CP-40-01460

**DEFENDANTS' MEMORANDUM OF LAW
REGARDING ADMISSIBILITY OF
OTHER INSTANCES OF PLAINTIFF'S
MISCONDUCT**

RICHLAND COUNTY
FILED
2014 OCT -2 AM 9:11
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

FACTS/INTRODUCTION

In this case, Plaintiff claims that, among other things, he was falsely accused of stealing money and other items at Spring Valley High School ("SVHS") during his employment at Defendant Richland County School District Two ("Richland Two"). He claims that his managers defamed him by transferring him from a third shift security guard position at SVHS to a desk job on the same shift, with the same pay, hours, and benefits, at the security office and denied him keys to access school facilities following an investigation of Plaintiff that did not result in criminal charges. Plaintiff claims that his character and reputation were impugned by the message sent by his transfer.

On September 18, 2014, Defendants became aware that Plaintiff had been investigated for similar thefts during his third shift security detail at a SCANA site, where he was working through Allied Barton, which was then his employer. The SCANA investigator was promptly identified to Plaintiff's counsel as a potential trial witness and Defendants immediately served a subpoena *duces tecum* for records related to SCANA's investigation of Plaintiff. Defendants

provided Plaintiff's counsel a copy of the SCANA subpoena response the same day the defense counsel received it.

Defendants believe that the SCANA witness and documentary evidence will show, among other things:

- 1) Plaintiff was caught on video rifling through cabinets and taking \$10 in cash and a pair of safety glasses belonging to a SCANA employee.
- 2) Plaintiff confessed to this theft when questioned by the SCANA investigator.
- 3) Plaintiff paid SCANA \$100 in restitution.
- 4) Plaintiff's employment was terminated by his employer, Allied Barton, in February 2014.
- 5) Plaintiff was arrested and will be tried for Petit Larceny on October 9, 2014, in Magistrate's Court.

A. Plaintiff Will Suffer No Prejudice From Alleged "Late Notice" Of Defendants' Identification Of A Witness And Documents Related To The Theft Investigation Regarding Plaintiff At SCANA In February/March 2014.

As outlined above, Defendants first became aware of Plaintiff's pending criminal charges and an investigation through his work at SCANA, on September 18, 2014. Defendants served supplemental interrogatory answers on Plaintiff's counsel and served subpoenas on Allied Barton and SCANA the same day. In contrast, Plaintiff has known about the SCANA investigation and his apparent employment termination since February 2014. Despite Plaintiff's investigation by SCANA and termination of his employment at Allied Barton, a security contractor for SCANA which was his direct employer, Plaintiff did not supplement discovery pursuant to Rule 26(e) or otherwise provide Defendants any notice of his status change. Since Plaintiff has known about these issues for several months longer than we have, he cannot claim

any prejudice arising from Defendants' recent discovery and immediate identification of Bill Simpson, the SCANA investigator, and other evidence of misconduct at SCANA that goes directly to character, reputation, and damages because he has raised a claim for defamation arising out of a similar investigation during his employment in Richland School District Two.

B. Plaintiff Has Placed His Character And Reputation Directly At Issue By Way of His Defamation Claim, and Under the South Carolina Rules of Evidence, Specific Instances of Other Misconduct Can Be Proved As Well As Inquired Into On Cross Examination.

As a predicate to the admissibility of evidence of specific instances of conduct, the character or character trait of the person must constitute an essential element of the charge, claim, or defense. S.C.R.E. 405(b). The Advisers' Note to rule 405 makes clear that evidence of specific instances of conduct is admissible under rule 405(b) "when character is actually in issue; that is, when character or a character trait is an operative fact which under the substantive law determines the legal rights of the parties." *Accord*, 2 Weinstein's Evidence 405(04) (1981), stating that character must be a "consequential fact" if character evidence is admissible under Fed.R.Evid. 405(b). South Carolina Rule 405(b) is identical to the federal rule and is consistent with prior South Carolina law. *State v. Amburgey*, 206 S.C. 426, 34 S.E.2d 779 (1945).

Plaintiff has directly placed his reputation and character in issue by asserting a defamation claim alleging that Defendants have caused him reputational injury and somehow lowered his status and employability in the private security community. *State v. Doherty*, 437 A.2d 876, 878 (Me. 1981) ("A prominent example of 'character in issue' is the defamation action where, to support the defense of truth, the defendant may prove that his or her allegedly defamatory communication accurately depicted the plaintiff's character."); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) ("Character may be 'in issue,' as when a statute

specifies the victim's chastity as an element of the crime of seduction, or when the defense to a defamation action is the truth of the allegedly defamatory statement.); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843 (1976) (Appellant Pierson brought suit to recover damages for respondents' publication of an alleged document concerning Pierson. Pierson contends the district court erred in admitting into evidence criminal acts committed by him more than 10 years before the alleged libel. Pierson's reliance is misplaced. Since Pierson's character was put in issue by respondents' defense of truth, the evidence was properly admissible.); *Holiday v. Cutchin*, 305 S.E.2d 45, 47 (1983) *aff'd*, 316 S.E.2d 55 (1984) ("Therefore, character evidence is admissible when character is directly in issue as in actions involving moral intent: seducing an innocent or virtuous woman, defamation, or malicious prosecution); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554 (N.D.Ill. Oct. 8, 1996) ("It is rare that character is an essential element. The typical example of such a case is defamation where injury to reputation must be proven."); *Ajouelo v. Auto-Soler Co.*, 6 S.E.2d 415, 419 (1939) ("It is generally held that the foundation of an action for defamation is the injury done to the reputation, that is, injury to character in the opinion of others arising from publication...."); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988) (Here the district court decided that specific instances of conduct were admissible under Rule 405(b) because they demonstrated the honesty of the defendant, which was an essential element of the crime charged.); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988) ^{prior acts - existing at time} *Redfearn v. Thompson*, 73 S.E. 949 (1912) (permitting the jury to consider plaintiff's bad reputation in mitigation of damages); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1371-72 (11th Cir. 1998) ("Since the plaintiff's character is substantively at issue in a libel case under Georgia law, Rule 405(b) permits the admission of evidence regarding specific instances of the plaintiff's conduct on that issue.); *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 511 n. 4 (3d

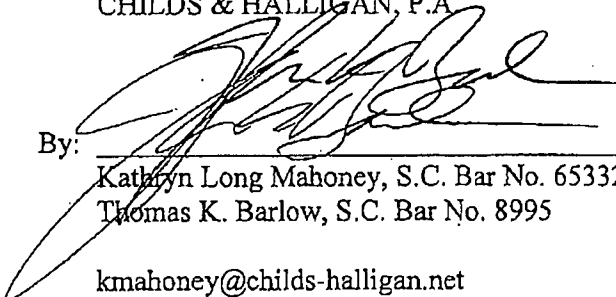
opinion of others arising from publication

prior bad act
time could not
1982
crime 1984
trial 1986

Cir.1985); *cf. Longmire v. Alabama State Univ.*, 151 F.R.D. 414, 419 (M.D.Al.1992) (permitting discovery regarding specific incidents of misconduct because the libel plaintiff put his character in issue). As such, Defendants may inquire into such incidents of conduct on cross under Rule 405(a) and make proof of specific instances in its own case under SCRE 405(b).

The allegations of theft investigated by SCANA are practically identical to the theft allegations investigated at Spring Valley High School in 2011, after which Plaintiff was reassigned to a position receiving identical pay, benefits, and hours, which he now alleges communicated a defamatory meaning that he was a thief and not to be trusted. Defendant will proffer evidence in the form of testimony by Mr. Simpson and video evidence that establishes the truth of those alleged defamatory insinuations regarding Plaintiff. It would also be manifestly unfair to allow Plaintiff to claim a spotless reputation and character impugned only by Defendants when SCANA evidence will show that he does not possess such a character or reputation. Because the SCANA evidence is highly probative on matters directly placed at issue by Plaintiff's defamation claim, it would be error to exclude it from the trial of this action.

CHILDS & HALLIGAN, P.A.

By: 

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Thomas K. Barlow, S.C. Bar No. 8995

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Attorneys for Defendants

September 29, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
) IN THE COURT OF COMMON PLEAS
)

) Civil Action No. 2013-CP-40-01460
)

Jeffrey Kennedy,

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)
) Plaintiff,
)
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vs.

)
)
)
) Richland Two County School District and its
) Superintendent, Eric Barnes, Chuck Earles,
) and Kim Jones,
)

) Defendants.
)
)

MOTION IN LIMINE
CONCERNING REPORTED PETTY THEFTS

AT
SPRING VALLEY HIGH SCHOOL

2014 OCT -2 AM 9:11
RICHLAND COUNTY
FILED
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff hereby submits this Motion *in Limine* to exclude all evidence, exhibits, and testimony concerning reports of petty thefts at Spring Valley High School prior to the Athletic Director incident which allegedly occurred on the evening of March 3, 2011. Specifically, Defendants seek to introduce testimony, and several statements, written or transcribed by Richland Two staff, all dated March 24, 2011, which attest to reports of petty thefts which occurred at Spring Valley beginning in Spring 2010. The statements are attached hereto as Exhibit A. These statements concern thefts that occurred in Spring 2010, Fall 2010, February 14, 2011, February 25, 2011, and sometime between February 28-March 2, 2011.

Spring Valley High School is a huge physical plant, with thousands of people going in and out of the doors every day. These allegations of other petty thefts are unproven, were never investigated by law enforcement, and were never proved (i.e. no charges were ever brought, no conviction ever secured). Accordingly, they are not relevant to whether Mr. Kennedy was properly the focus of the District's "investigation" into the allegedly missing money from the

Athletic Director's Office. Furthermore, even if deemed relevant by the Court, they are highly prejudicial as they "muddy the proverbial waters" by injecting further, unproven allegations into the jurors' minds.

Perhaps most importantly, all but one of these reports of theft occurred before Jeffery Kennedy was recommended for the promotion to supervisor; therefore, Jeffery Kennedy must **not** have been a suspect in the eyes of Richland Two at that time, otherwise he wouldn't have been promoted. To use them now, the defense seeks to prove Jeffery Kennedy was a habitual thief even when they didn't even obviously consider him to be the thief as of February 28, 2011, when Chuck Earles signed off on the promotion.

Legal Standard

"As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Furthermore, even if evidence is deemed relevant under Rule 401, SCRE, such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Rule 403, SCRE.

Furthermore, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "However, such evidence may be admissible to show motive, identity, the

existence of a common scheme or plan, the absence of mistake or accident, or intent.” Id. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within [this] exception in Rule 404(b).” Id.

Argument

I. The Evidence Is Not Relevant Since Jeffery Kennedy Wasn’t A Suspect In These Prior Thefts

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE (cited in State v. Gilchrist, 496 S.E.2d 424, 329 S.C. 621 (Ct. App. 1998)).

The truth is Mr. Kennedy was recommended for a promotion by Richland Two on February 28, 2011. The evidence is that he was considered trustworthy by his peers and the “best candidate” for a supervisory job by his supervisors.

Furthermore, this “prior bad act” evidence does not fit within an exception in Rule 404(b). First, “if the [party] was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). “The connection between the prior bad act and the crime must be more than just a general similarity.” State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005). It must fall within the purview of the “common scheme and plan” exception under Rule 404(b). Id. at 583. Furthermore, the timing of the prior bad acts is crucial. Here, the District seeks to present a laundry list of reported petty thefts that began in Spring 2010 – almost a full year prior to the Athletic Director’s report. See,

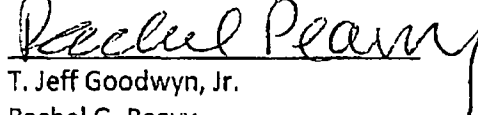
e.g., State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (finding that the space of one year made evidence of prior act inadmissible under the common scheme or plan exception.)

II. Even if Relevant, the Evidence is Exceeding Prejudicial

Even if deemed relevant by the Court, the Plaintiff would submit that this evidence should be excluded because "[e]vidence of similar acts has the potential to be exceedingly prejudicial." Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). Even if the Court were to determine that the evidence of the other petty thefts was relevant to how Mr. Kennedy acted – and his character – on the night in question, the evidence is so prejudicial as to deem pointless the Plaintiff's case. In short, a jury cannot be expected to ignore this evidence as evidence of Mr. Kennedy's guilt in the 2011 incident.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003). Here, the Defendants seek to prove that Jeffery Kennedy was the person who stole the \$1,000 by seeking to admit evidence that they considered him the petty thief in the prior incidents – even though they clearly did not because they were promoting him in February 2011. See, e.g., USA v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses".)

GOODWYN LAW FIRM, LLC



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Attorneys for the Plaintiff

September 29, 2014

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No. 2013-CP-40-01460

Jeffrey Kennedy,

Plaintiff,

vs.

Richland Two County School District and its
Superintendent, Eric Barnes, Chuck Earles,
and Kim Jones,

Defendants.

MOTION IN LIMINE
AND
MOTION TO EXCLUDE TESTIMONY
OF
BILL SIMPSON

RICHLAND COUNTY
FILED
2014 OCT -2 AM 9:11
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff hereby submits this Motion in Limine to exclude all evidence and testimony related to pending charges and alleged theft at SCANA arising out of Plaintiff's employment with Allied Barton, SCANA's security contractor. The SCANA witness was identified by defense counsel at 4:53 p.m. on September 18, 2014, and the Plaintiff's counsel promptly objected to same as late and occurring on the eve of trial. Furthermore, the alleged SCANA events occurred over three (3) years after the events which form the basis of this lawsuit. Plaintiff submits that any mention of the SCANA incident --and pending charges - will result in extreme prejudice and, further, are irrelevant as they concern future events -- three years down the road - that were not in existence at the time this action arose. Finally, Plaintiff would submit that the Defendants are now trying to prove - by seeking to admit evidence of these pending charges and events - what they were unable to prove (or even charge) over three years ago. Mr. Kennedy has not been convicted of any crime; Mr. Kennedy has not had his day in court. Mr. Kennedy is innocent of the SCANA charges until proven guilty.

Factual Background

Plaintiff was hired as a security guard for Richland Two in 2008. In February 2011, he was recommended for a promotion to supervisor on the security staff by Defendant Chuck Earles, security director.

In early March 2011, the Athletic Director at Spring Valley High School, Tim Hunter, reported that he had left cash out in his office one evening after 10 p.m. and returned the next morning to find it gone. Mr. Hunter had collected cash from a tournament that week, and had placed approximately \$7,000 in the safe in his office but reported that he left \$1,000 out because he wasn't feeling well and wasn't sure if he would be in the next day, and wanted his staff to have access to the money for use with the change boxes over the weekend. However, Mr. Hunter did end up reporting for work early the next day and reported that the \$1,000 was missing.

At that point, Richland Two security staff proceeded to review the security footage and the time stamps from the evening/morning in question.

It was undisputed that the baseball team returned late from a game (after Mr. Hunter had left for the evening) and set off the alarm. It was undisputed that other individuals had keys and access to the athletic department and the AD's office after Mr. Hunter left. Finally, it was undisputed that there was no video footage showing anyone entering or leaving the Athletic Director's office on the night/early morning the alleged theft occurred. It was further undisputed that Jeffery Kennedy was working the evening/morning in question and had been responsible for setting the alarm and also for turning it off a little before 6 a.m. It is further undisputed that the

records of Richland Two show that Jeffery Kennedy only took seconds to turn the alarm on, and that when he disabled the alarm shortly before 6 a.m., the time logs recorded him spending over 5 minutes in the Athletic Department. Finally, the testimony of Richland Two security staff is that "everyone had keys" and that the security supervisory staff, Defendants Earles and Barnes, in fact, did not control, or even have a list of, who possessed keys to either the Athletic Department or the AD's office. Keys were handled by the school administration at Spring Valley.

The Security Department, led by Messrs. Earles and Barnes, proceeded to focus on Jeffery Kennedy exclusively and handed over the video/time footage to the Richland County Sheriff's Department. The Sheriff's Department conducted an investigation and declined to press charges. Richland Two's Chief Human Resources officer, Mr. Roosevelt Garrick, acknowledged to Plaintiff that other individuals had access and opportunity to the AD's office. Nevertheless, to counsel's knowledge, no other individuals were investigated or charged.

Nevertheless, on June 15, 2011, Defendant Earles sent an email to the security supervisory staff stating that Plaintiff was not to have keys and would be assigned to the watch room – desk duty, essentially. The email, while marked confidential, was not safeguarded or kept confidential; rather, it was printed out and left in the open for all to see. Witness testimony demonstrates that those who saw the memo concluded that Mr. Kennedy was deemed "not to be trusted" and "was considered a thief."

Mr. Kennedy proceeded to work without incident; he requested that his promotion be reinstated, however, the request was denied. On October 2012, Plaintiff was terminated from Richland Two as a result of an allegation that he showed video footage of a student to the student's mother – Kim Jones, a Richland Two bus driver. Mr. Kennedy denied doing so.

On March 25, 2014 – over 3 years since the alleged theft at the AD's office – Mr. Kennedy was arrested and charged with a misdemeanor larceny charge. This is merely a charge; there has been no adjudication. The incident occurred while he was employed by Allied Barton as a security officer, working under its contract with SCANA. The charges allege that Mr. Kennedy stole a pair of safety goggles (valued at \$5.00) and \$10.00 in cash from a room at a SCANA location.

Legal Standard

"As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013). "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Furthermore, even if evidence is deemed relevant under Rule 401, SCRE, such evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Rule 403, SCRE.

Furthermore, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within [this] exception in Rule 404(b)." Id.

Finally, "specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." Rule 608(b), SCRE.

ARGUMENT

I. Trial by Ambush Is Not Allowed.

Bill Simpson of SCANA, identified as a witness on September 18th, should be excluded from testifying because it is highly prejudicial to the Plaintiff. See Amisub of South Carolina v. SC DHEC, No. 10-AJ-07-0767-CC (ALC Sept. 13, 2011) (granting motion to exclude witness on the basis that late identification and designation was prejudicial to the respondents).

At his deposition on September 17, 2013, Mr. Kennedy testified that he was employed at Allied Barton, working at a SCANA location. Pl. Dep. at p. 8. In June 2014, Defendants served a subpoena on Allied Barton, requesting that it produce all employment records related to Jeffery Kennedy. On July 17th, defense counsel forwarded copies of the records to Plaintiff's counsel pursuant to counsel's request. The records reflect that Plaintiff was on the payroll beginning in April 2013 through the pay period ending February 28, 2014. (See Bates No. DEFS 000753 thru DEFS 000758). The same records show that Mr. Kennedy returned his uniform to Allied Barton on February 26, 2014. (See Bates No. DEFS 000760). Accordingly, defense counsel had notice in July 2014 at the latest that Mr. Kennedy had not been receiving a paycheck from Allied Barton since February. However, Defendants failed to identify a witness related to the alleged SCANA

incident which led to his separation from Allied Barton until late in the day on September 18th, when it named Bill Simpson, a SCANA security official. This left Plaintiff's counsel no opportunity to examine the witness or conduct further investigation. Defense counsel failed to promptly investigate the reason for his separation in July 2014, and now seek to rehabilitate their position by naming the SCANA witness approximately ten (10) days prior to trial.

Furthermore, the exclusion of Mr. Simpson from testifying will meet the stated goal of discovery rules: "to prevent a trial by ambush." Walker v. West Publishing Corp., Civil Action No. 5:09-cv-00723 (S.D. W. Va. Aug. 19, 2011); See also Morris v. Ms USA, Civil Action No. 2:09-CV-1267-DCN (D.S.C. Jan. 11, 2011) (granting plaintiff's motion to exclude a witness and videotape on the grounds of "trial by ambush" because the witness and tape were identified one week prior to a discovery deadline and resulted in surprise and prejudice).

II. The SCANA evidence is not relevant as it concerns events that occurred 3 years into the future.

This case concerns a defamation – an accusation – that took place in March 2011. Therefore, it concerns WHO Jeffery Kennedy was in March 2011, and in the years leading up to that. How Mr. Kennedy acted in 2014 – 3 years later – cannot be relevant to his actions three (3) years prior. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (cited in State v. Gilchrist, 496 S.E.2d 424, 329 S.C. 621 (Ct. App. 1998)).

The truth is Mr. Kennedy was recommended for a promotion by Richland Two in February 2011. The evidence is that he was considered trustworthy by his peers and the "best candidate"

for a supervisory job by his supervisors. Actions taken in 2014 are irrelevant to who Mr. Kennedy was in 2011. Pending charges are inadmissible for the same reason. Furthermore, the SCANA events are not even in close proximity to the Spring Valley incident and clearly cannot speak to Mr. Kennedy's state of mind back in 2011. See State v. Gilchrist, supra (finding that evidence of a defendant's statement was relevant as it showed his state of mind when such statement was made in close proximity to the commission of the crime in question.). Here, there is no such temporal relation, as the SCANA incident is three years after the Spring Valley incident.

III. Even if relevant, the Evidence Is Unfairly Prejudicial and Must Be Excluded

"Evidence of similar acts has the potential to be exceedingly prejudicial." Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). Even if the Court were to determine that the evidence of the SCANA incident was relevant to how Mr. Kennedy acted – and his character – in 2011, the evidence is so prejudicial as to deem pointless the Plaintiff's case. In short, a jury cannot be expected to ignore this evidence as evidence of Mr. Kennedy's guilt in the 2011 incident.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003). Here, the Defendants seek to prove that Jeffery Kennedy was a thief in 2011 by seeking to admit evidence that he was charged with larceny of the safety goggles and \$10 in 2014. In Kennedy, the Court held it was error for evidence to be admitted that the plaintiff tested positive for marijuana at the time of the accident because there was no correlation between the between the marijuana and the accident. The Court held that the marijuana evidence was more prejudicial than probative, given that the test did not measure the quantity of marijuana in the plaintiff's system or how recently he had been

exposed to it. 595 S.E.2d at 251. See also USA v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) (“noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses”.)

Similarly, here, submitting the fact that Kennedy has been charged, three years later, with taking a pair of \$5 safety goggles and \$10 in cash is highly prejudicial to the jury given that these pending charges relate to a \$15 crime; are 3 years after the Spring Valley incident; and have not been shown to be true by clear and convincing evidence.

In State v. Lyle, the Supreme Court considered the exclusion of evidence which was from 10 days to 7 weeks removed from the crime charged. The Court asked, “what is there in the alleged passing of forged checks at widely separated points . . . prior to the commission of the crime charged that tends, in a legal sense, to identify the defendant as the man who uttered the forged paper....? True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter, but that is the precise inference the general rule was wisely designed to exclude . . . There is no connection of time and place . . .” 118 S.E. at 808 (holding evidence was improperly allowed).

IV. The “Evidence” Should Be Excluded As It is Not Sufficiently Similar To the Crimes Charged

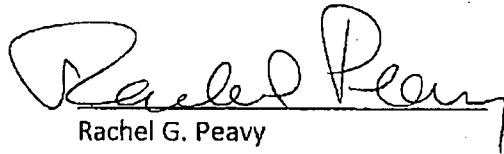
The Defendants seek to introduce evidence concerning an event that occurred three years after the Spring Valley incident in hopes of proving that 1.) Jeffery Kennedy was the Spring Valley thief and 2.) Jeffery Kennedy is a dishonest person of bad character. Because the SCANA events occurred subsequent to the Spring Valley incident and were dissimilar to Spring Valley in terms of scope and motive, the evidence of the SCANA incident should be excluded as unfairly

prejudicial. State v. Cope, 405 S.C. 317, 748 S.E.2d 194. In Cope, the Supreme Court held that there was no abuse of discretion in the trial judge's exclusion of evidence of other crimes under Rule 404(b) where the other crimes occurred subsequent to the murder at issue and there were "many distinctions" as well, although there were also some similarities. Furthermore, the subsequent crimes at issue in Cope occurred within 6 weeks of the underlying murder.

Here, the subsequent "act" was 3 years removed from the Spring Valley incident. Furthermore, the difference in the amount of money alleged to have been stolen (\$10 vs. \$1,000) is considerable. Finally, the Plaintiff respectfully reminds the Court that these SCANA allegations are just that – unproven allegations.

Respectfully submitted this 27th day of September, 2014.

GOODWYN LAW FIRM, LLC



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Attorneys for the Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Jeffrey Kennedy,)

☐ Plaintiff)

v.)

Richland Two County School District,)

Eric Barnes, and Chuck Earles)

☒ Defendants)

check box above indicating submitting party

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-40-01460

**MOTION INFORMATION FORM
AND COVER SHEET**

name, S.C. Bar no. and address of plaintiff's attorney

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e-mail: tbarlow@childs-halligan.net

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: **Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial Absolute, or in the Alternative, for New Trial Nisi Remittitur**

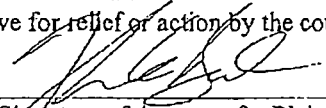
Estimated Time Needed: 30 minutes

Court Reporter Needed: YES

SECTION II: Motion Type

☒ Written motion attached ☐ Form Motion --

I hereby move for relief or action by the court as set forth in the attached motion.


Signature of Attorney for Plaintiff / Defendant

10/13/14
Date submitted

SECTION III: Motion Fee

☒ **PAID -- AMOUNT:** \$25.00

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)

☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☒ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE _____

CODE: _____

Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

☐ MOTION FEE COLLECTED:

☐ CONTESTED - AMOUNT DUE: _____

SCCA/233 (1/2003) (c&h)

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Jeffrey Kennedy,)

Plaintiff,)

vs.)

Richland Two County School District,
Eric Barnes, and Chuck Earles,)

Defendants.)

C.A. No. 2013-CP-40-01460

DEFENDANTS' MOTION FOR
JUDGMENT NOTWITHSTANDING THE
VERDICT OR, IN THE ALTERNATIVE,
FOR NEW TRIAL ABSOLUTE, OR IN
THE ALTERNATIVE, FOR NEW TRIAL
NISI REMITTITUR

TO: T. JEFF GOODWYN, ESQ. AND RACHEL G. PEAVY, ESQ., ATTORNEYS FOR
PLAINTIFF

Please take notice that pursuant to Rule 50 of the South Carolina Rules of Civil Procedure, Defendants, Richland School District Two, Chuck Earles, and Eric Barnes (Defendants) respectfully request that the Court enter judgment notwithstanding the verdict (JNOV) for the reasons set forth herein. In the alternative, Defendants respectfully request, pursuant to Rules 50 and 59 of the South Carolina Rules of Civil Procedure, that the Court grant Defendants a new trial absolute, or in the alternative, a new trial *nisi remittitur*.

The grounds for these motions are set forth below, and any grounds asserted during and prior to trial in this matter not herein listed or discussed should be considered renewed herein as if set forth verbatim.

I. PROCEDURAL BACKGROUND

A jury was selected on September 29, 2014, and the parties called the following witnesses:

Plaintiff: Jeffery Kennedy, Barry Mitchell, John Reid, Anthony Permenter, Eric Barnes, and Chuck Earles¹

Defendants: Tim Hunter, Larrine Jackson, Kim Jones, Jim Childers, Traci Batchelder, Roosevelt Garrick

The Court granted Defendants' motion for directed verdict on Plaintiff's claim for Intentional Infliction of Emotional Distress and his claim for defamation against Kim Jones at the close of Plaintiff's case. The Court granted Defendants' motion for directed verdict on Plaintiff's Negligent Supervision claim upon the close of all the evidence.

On October 3, 2014, the jury returned a verdict of \$100,000 in actual damages and \$150,000 in punitive damages against Defendant Eric Barnes and a verdict of \$100,000 in actual damages and \$200,000 in punitive damages against Defendant Chuck Earles.

The Court granted Defendants' request for ten days to file post-trial motions, with the consent of Plaintiff's counsel. Defendants timely file their post-trial motions and submit that they are entitled to the relief requested for the reasons set forth herein and during the trial of the case.

II. ARGUMENT

A. The Court Should Enter Judgment Notwithstanding The Verdict.

1. JNOV is Warranted Because Plaintiff Did Not Carry His Burden of Proving Each Element of His Defamation Claim.

A Motion for JNOV is a renewal of the directed verdict motion. *See Roland v. Palmetto Hills*, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992); *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993). Directed verdict is a test of the sufficiency of the evidence. *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d

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Plaintiff called Barnes and Earles in his case, and Defendants proceeded to direct examination with each witness.

774 (1972) (when evidence presented at trial raises no issue for the jury as defendant's liability, a motion for a directed verdict based on the sufficiency of the evidence-should be granted); *see also e.g., Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547 (1939) (remarking that review of a trial court's failure to grant directed verdict is a test of the sufficiency of the evidence). A court should grant a JNOV when the evidence presented at trial is insufficient to support the jury's verdict. *See Rogers v. Norfolk S. Corp.*, 343 S.C. 52, 59, 538 S.E.2d 664, 668 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 65, 71, 588 S.E.2d 87 (2003).

To prove a defamation claim, a plaintiff carries the burden of proving: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

Plaintiff did not meet his burden of proving an unprivileged publication by either Defendant Earles or Defendant Barnes. First, the only possible defamatory communication Plaintiff identified at trial was the June 15, 2011 email from Defendant Earles addressed to the following individuals: Angelia Permenter, Eric Barnes, Gerome Young, Lclith Zerzycki, and Rick Groves, with a copy to Traci Batchelder. It was undisputed that each of the recipients was a supervisory-level employee in the security department, with the exception of Ms. Batchelder, who was a director of human resources. The email, titled "**CONFIDENTIAL**," was admitted into evidence as Plaintiff's Exhibit 4 and reads as follows:

THE INFORMATION CONTAINED IN THIS EMAIL IS
CONFIDENTIAL AND WILL ONLY BE SHARED
WITH OTHER DISTRICT SECURITY SUPERVISORS,

AS NEEDED, WHEN THEY WILL BE SUPERVISING
MR. KENNEDY

Mr. Kennedy will be reporting to work tomorrow night
(Thursday, June 16) to work on third shift, weekdays. This
will be his permanent assignment.

I have told him that he will be assigned to work in
the watch room answering phones and performing
whatever other duties are necessary in the watch room.

He is NOT to be given any assignment that involves
having keys to any District facility.

Thank you.

Plaintiff and witnesses testified that they saw printed copies of the email in a security department truck as well as in an office in the Security Services building. No witness testified: (1) that Earles or Barnes² was responsible for distributing the email or placing it in the locations it was found; (2) that Earles or Barnes discussed the email or the subject matter of the investigation with any third party not addressed in the email itself; or (3) that Earles or Barnes knew the email was seen by others prior to this litigation. As the Court recognized during directed verdict arguments at the conclusion of the evidence, the mere fact that non-supervisor witnesses may have seen the confidential email is not sufficient evidence for the jury to conclude *ipso facto* that Barnes or Earles was responsible for its printing or circulation beyond the email's addressees. Proof of a defamatory publication requires publication by the defendant, not speculation that an addressee of the email may have ignored the directive of the email to maintain confidentiality. It is not a permissible inference to speculate that Barnes or Earles was responsible for issuing the communication to a third party (*i.e.*, outside the group of supervisory addressees) just because it was printed out and seen by Plaintiff and his witnesses.

The proof of publication offered by Plaintiff in this case was similar to the proof the Court of Appeals rejected in *Williams v. Lancaster Cnty Sch. Dist.*, 369 S.C. 293, 631 S.E.2d 286 (Ct. App. 2006). In that case, the plaintiff argued that because a rumor existed that the plaintiff coach was having an affair with a secretary, the school principal, who had confronted the plaintiff coach about being in a bathroom alone with the secretary, must have been responsible for publishing the rumor. However, the Court of Appeals found:

Based on the evidence of record, there were numerous individuals who were aware of the . . . incident besides [the Principal]. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were [the principal and the assistant principal]. Thus, the rumors cannot be said to have only been possibly attributable to [the principal] and the Williamses' argument concerning indirect evidence fails.

Williams, 369 S.C. at 304, 631 S.E.2d at 292.

At trial, Plaintiff offered no direct or circumstantial evidence that either Barnes or Earles was responsible for printing out the email or any further distribution of the email beyond the addressees. There was no evidence presented at trial regarding how or who printed out the email. In addition, Plaintiff's own witnesses testified that they first heard that Plaintiff had been accused of theft and was under investigation *from Plaintiff himself*. As such, Plaintiff failed to prove by a preponderance of the evidence any defamatory publication by Earles or Barnes and JNOV is warranted for that reason.

Likewise, the evidence introduced at trial did not establish the "fault" element on the part of either Defendant Barnes or Defendant Earles without proof that they published the email beyond the list of addressees. As a matter of law, the language of the email itself demonstrates

² There was no evidence at trial that Barnes contributed to preparation of the email, sent the email, printed the email, or copied the email.

that Earles took reasonable precautions to assure its confidentiality. The fact that Earles could have gone to each supervisor individually or not sent the email at all does not negate the reasonableness of the precautions demonstrated by Earles' testimony and the text of the email itself. Plaintiff offered no evidence to suggest that any of the addressees were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential. An employer is not obligated to maintain a "rumor free" workplace, particularly in the absence of any evidence that the email addressees were likely to disclose confidential information. Accordingly, there was insufficient evidence of a false and defamatory publication by Defendant Earles or Barnes, or fault on behalf of Earles or Barnes in any such disclosure made by another employee, to warrant submitting the defamation claim to the jury and Defendants are entitled to JNOV.

2. Any Allegedly False and Defamatory Statement Published by Either Defendant Regarding Plaintiff was Subject to a Qualified Privilege and Plaintiff Produced Insufficient Evidence to Support a Jury Verdict that Any Publication Was Made with Actual Malice.

The Court properly determined that a qualified privilege applied to communications by Defendants Earles and Barnes as a matter of law. A statement made in connection with an employer's bona fide inquiry into possible employee misconduct is qualifiedly privileged. *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 507 (Ct. App. 1989). "Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141 542 S.E.2d 743, 749 (Ct. App. 2001).

Where a Defendant is entitled to a qualified privilege, a Plaintiff can recover for defamation only if he or she can show that the Defendant was motivated by actual malice in the publication of the allegedly defamatory statements. *Richardson v. McGill*, 273 S.C. 142, 145, 255 S.E.2d 341, 342 (1979). In the defamation context in South Carolina, "actual malice" means

that the defendant acted "with ill will toward the plaintiff or that [he] acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights." *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). South Carolina law also requires, in order to prove actual malice, that "at the time of his act or omission to act, the tortfeasor be conscious, or chargeable with consciousness of his wrongdoing." *Id.* Both ill will and consciousness of wrongdoing must be shown by more than a scintilla of evidence. *See Austin v. Torrington Co.*, 810 F.2d 416, 425 (4th Cir. 1987) (applying South Carolina law). Relevant factors may include whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited, and whether the statement was sent only to the proper parties. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). The issue of malice is for the jury only when a reasonable juror could draw more than one inference from the evidence. Otherwise, the issue becomes a question of law for the court. *Bell v. Bank of Abbeville*, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947) ("*Bell I*").

It is clear that the plaintiff must show *the publication* was made with actual malice. *See Murray*, 344 S.C. at 143-44, 542 S.E.2d at 750-51. The South Carolina Supreme Court in *Bell II* framed the issue as follows:

Assuming the statements in question to be slanderous in character, were they uttered in good faith in the pursuit of the business of the bank by and to persons who had a right to hear and consider such statements, at a time and place and in a manner and under circumstances which effectually negative the existence of a purpose to injure and defame the respondent; or were the statements made maliciously, or without any proper occasion for the making of the same, and in such manner or under such circumstances that it may be reasonably inferred that the object of the parties was not to bona fide act in the pursuit of the business of the appellant, but to use the excuse of a meeting of the officers and directors to injure and defame the respondent?

Bell II, 211 S.C. at 173, 44 S.E.2d at 330 (1947).

Plaintiff has offered no evidence from which the jury could conclude that any statements were made with the design to injure him, as opposed to a design to communicate operational instructions for supervisory employees in the security department and advise them of the conditions of plaintiff's return to employment. South Carolina appeals courts and federal courts applying South Carolina law have not hesitated to grant summary judgment, directed verdict, or JNOV when evidence of actual malice was lacking. *See Wright v. Sparrow*, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989) (summary judgment granted for defendant; lack of evidence of actual malice). *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1985) (directed verdict upheld for lack of evidence of actual malice); *Bell II*, 211 S.C. 167, 44 S.E.2d 328 (1947) (reversal of jury verdict on appeal because evidence of mere false statement and strained relations was insufficient to send issue of actual malice to jury); *Austin v. Torrington Co.*, 810 F.2d 416 (4th Cir. 1987) (applying South Carolina Law and reversing lower court's denial of directed verdict because evidence insufficient to demonstrate actual malice as a matter of law).

As in those cases, Plaintiff offered no evidence that Earles, the drafter of the confidential email, was motivated by ill will or desire to injure Plaintiff, in either drafting the email or sending it to the addressees, as opposed to being motivated by legitimate operational concerns regarding Plaintiff's return to work from leave. Earles' undisputed testimony was that he communicated to the supervisors by electronic mail because security runs three round-the-clock shifts and in-person communication was too difficult. Even more tenuous is Plaintiff's claim that Barnes was motivated by malice or ill will in any communication, because Plaintiff simply did not offer any evidence of any communication by Barnes regarding Plaintiff's job status or suspected involvement in the Spring Valley thefts to any other employee other than the Spring Valley administrators, Hunter and Childers, or to law enforcement investigating the matter.

In contrast, the great weight of evidence negated any suggestion of ill will or desire to harm Plaintiff by way of the communications regarding Plaintiff's return to work. Prior to the

Spring Valley thefts, it was undisputed that Plaintiff had been recommended for promotion by Barnes and Earles. There was no evidence of prior animosity between the defendants and Plaintiff. Either Barnes' or Earles' mere unexpressed belief that Plaintiff had a role in the Spring Valley thefts and could not be trusted is insufficient to establish actual malice. *See Bell II*, 211 S.C. at 174, 44 S.E.2d at 330 (1947) ("in answering these questions we are not concerned with the guilt or innocence of the respondent in respect to the matters charged in the alleged slanderous statements quoted in the complaint and disclosed by the testimony.")³ It was further undisputed that upon his return to work at the same pay, same hours, and same benefits, Plaintiff did not receive any warnings or reprimands for the next 14 months and that the termination of Plaintiff's employment was not a defamatory communication. In summary, Plaintiff did not offer even a scintilla of evidence that Barnes or Earles acted with ill will or conscious indifference to Plaintiff's rights when Earles made a very limited, confidential email communication to the supervisors to whom Plaintiff would be reporting once he returned to work. JNOV is thus proper on qualified privilege grounds.

3. The Court Should Enter JNOV in Favor of Each Individual Defendant Because Plaintiff Produced Insufficient Evidence that Either Defendant Acted Outside the Scope of His Employment or with "Actual Malice" as Applied Under the Tort Claims Act.

The term "actual malice" under the Tort Claims Act has been interpreted by the courts to mean "constitutional malice." *See Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (Ct. App. 1994). In at least three other cases, courts in South Carolina have applied the constitutional "actual malice" standard when addressing immunity under the Tort Claims Act. *Thompson v. Univ. of S.C.*, No. 04-219, 2006 WL 2583595, at *15 & n. 6 (D.S.C. Sept. 5, 2006); *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 643 (S.C.1991); *Seaton v. City of N. Charleston*, 2:10-

³ In fact, that belief was also shared by Garrick, Childers, and Hunter, neither of whom Plaintiff sued in this action.

CV-03186-DCN, 2012 WL 6186158 (D.S.C. Dec. 12, 2012). To meet the constitutional malice standard, the plaintiff must show that at the time the alleged defamatory statement was made, either that the defendant knew the statement was false or that the defendant made the statement with reckless disregard of its falsity. *Gause*, 317 S.C. at 42, 451 S.E.2d at 409 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This is a higher standard than the common law “actual malice” standard which Plaintiff did not prove for the reasons set forth above. There was simply no showing that Barnes or Earles published any defamatory statement or insinuation about Plaintiff with either knowledge of its falsity or reckless disregard of its falsity under the actual malice standard applicable to the Tort Claims Act immunity. As such, Plaintiff did not carry his burden of proving “actual malice” sufficient to maintain individual capacity claims against Barnes and Earles under the Tort Claims Act. Plaintiff’s claims against Barnes and Earles in their individual capacities should not have been allowed to go to the jury under S.C. Code Ann. § 15-78-70(b) and they are entitled to JNOV on this additional ground.

4. The Court Should Enter JNOV Regarding Punitive Damages Because Plaintiff Did Not Prove by Clear and Convincing Evidence Any Defamation by Barnes or Earles That Was Willful, Wanton, or in Reckless Disregard of Plaintiff’s Rights.

Notwithstanding the unconstitutionality of the punitive damages award in this case, *see infra*, the Court should grant JNOV on the issue of whether there was sufficient evidence to allow the jury to consider punitive damages. In South Carolina, punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant’s actions were willful, wanton, malicious, or in reckless disregard of the plaintiff’s rights indicating a failure to exercise even the slightest care. S.C. Code Ann. § 15-33-135 (Supp. 1999): *Taylor v. Medenica*, 324 S.C. 200, 470 S.E.2d 35 (1996). A plaintiff cannot recover punitive damages based on merely negligent conduct. *See Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952). Recklessness is distinguished from negligence. *Berberich v. Jack*, 392 S.C. 278,

287, 709 S.E.2d 607, 612 (2011). While negligence is the failure to use due care, recklessness is a higher degree of culpability and responsibility and signifies a conscious failure to exercise due care. *Id.*

A finding of such conduct by Barnes or Earles is inconsistent with the Court's rulings granting directed verdict on Plaintiff's claim for intentional infliction of emotional distress and negligent supervision. In granting the directed verdict on the negligent supervision claim, the Court noted that the School District, through Earles, had a reasonable expectation that the email would be kept confidential and there was no reason to believe supervisors would violate the confidentiality directive. As with the actual malice analysis, the great weight of the evidence shows the lack of any willful, wanton, or malicious conduct by either Barnes or Earles, and certainly not reckless disregard of truth or falsity. Barnes and Earles had recommended Plaintiff for a promotion shortly before his implication in the Spring Valley thefts. Following the police investigation by the Richland County Sheriff's Department, Plaintiff returned to his job for 14 months without reprimand, warning, or negative impact on his pay, work hours, or benefits that can be attributed to Barnes or Earles. The ultimate termination of Plaintiff's employment for reasons not attributable to the theft investigation, or to Barnes or Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages. Accordingly, there was insufficient evidence to send the punitive damages issue to the jury and the punitive damages awards must be set aside as a matter of law.

5. The Jury's Identical Actual Damages Verdict Against Both Defendants Constitutes an Impermissible Double Recovery and Must be Reformed to a Single Recovery.

The Court instructed the jury that no double recovery would be permitted, but not to concern itself with awarding a double recovery because the Court would properly reform the verdict. Defendants submit that this resulted in an unduly liberal verdict for which, at a minimum, a new trial *nisi remittitur* is warranted (*see infra*). In the alternative, even without

consideration of a new trial *nisi remittitur*, Plaintiff can only recover once for a single wrong and the verdict must be conformed accordingly. It is "almost universally held that there can be only one satisfaction for an injury or wrong." *Truesdale v. S.C. Highway Dep't*, 264 S.C. 221, 235, 213 S.E.2d 740, 746 (1975), *overruled on other grounds* by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). *Collins Music Co. v. Smith*, 332 S.C. 145, 147, 503 S.E.2d 481, 482 (Ct. App. 1998) ("It is well settled in this state that there can be no double recovery for a single wrong and a plaintiff may recover his actual damages only once.") (internal quotation marks omitted)). The determination of whether a verdict grants a double recovery begins with the trial court's responsibility to interpret the verdict in order to ascertain the jury's intent. *Keeter v. Alpine Towers Int'l, Inc.*, 399 S.C. 179, 198, 730 S.E.2d 890, 900 (Ct. App. 2012). While it is difficult to ascertain what motivated the jury's verdict in this case, Plaintiff clearly cannot recover the same actual damages from both Barnes and Earles. Accordingly, Plaintiff's total actual damages award must be limited to \$100,000 total to prevent double recovery.

B. The Court Should Grant Defendants A New Trial Absolute.

1. Exclusion of Evidence or Cross-Examination Regarding Plaintiff's Thefts and the Resulting Termination of His Employment at SCANA Was Prejudicial Error.

Under Rule 59(a), the Court may grant a new trial, in an action tried by a jury, for any of the reasons for which new trials have been granted in actions at law in our courts, including prejudicial error in the admission or exclusion of evidence. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 450 S.E.2d 582 (1994). The Court granted Plaintiff's motion *in limine*, which was submitted on the first day of trial, barring any evidence or cross examination on specific instances of similar misconduct Plaintiff committed during recent employment with Allied Barton, his subsequent employer, while on duty at SCANA. On the same date they learned of the information, Defendants timely identified Bill Simpson, an investigator employed with SCANA, as a witness who would testify to his investigation of Plaintiff for thefts that

occurred at SCANA in February 2014, Plaintiff's confession to some of the thefts, Plaintiff's payment of restitution for the thefts, Plaintiff's termination of employment from SCANA and Allied Barton. Mr. Simpson was prepared to authenticate a video recording showing Plaintiff in the act of committing petty thefts during his third shift security work at SCANA. The Court excluded the testimony of Mr. Simpson and the desired cross-examination as inadmissible character evidence under Rules 404 and 403 of the South Carolina Rules of Evidence on the grounds that the evidence was not a "prior" bad act of Plaintiff; that it was unrelated in time to Plaintiff's alleged defamation by Defendants; that it would be more prejudicial than probative; and that Rule 404 requires clear and convincing evidence of other crimes, wrongs, or acts that are not the subject of a criminal conviction.

Defendants respectfully submit that the Court erred by excluding the evidence because Plaintiff's defamation claim placed his reputation and character for petty theft directly in issue under Rules 404 and 405, SCRE, and the evidence was highly probative to Defendant's truth defense, Plaintiff's damages for alleged loss of reputation, causation of Plaintiff's alleged damages for lost reputation and alleged special damages, and Plaintiff's failure to mitigate damages. Neither the South Carolina appellate courts nor any other court interpreting the identical federal rule have ever applied a "clear and convincing" standard under Rule 405 to cases in which character is a direct issue in the claim or defense. Because Plaintiff placed his character and reputation squarely in issue with his defamation claim, the evidence was not *unfairly* prejudicial to his claims under Rule 403, even though it was highly probative of his lack of character or trustworthiness and diminished reputation. *See State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.") (internal quotations omitted, emphasis in original). The exclusion of the SCANA evidence effectively allowed Plaintiff to extol his character and reputation and claim continuing damages allegedly suffered due to the Defendants' conduct,

while at the same time, insulating his character and reputation from legitimate questioning and attack based on a nearly identical theft committed at his place of work while his current lawsuit was still pending.

SCRE 405 provides:

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

The South Carolina appellate courts do not appear to have addressed the applicability of Rules 404 and 405 to a defamation case where character has been directly placed in issue. However, pre-rules cases clearly provide that a defamation claim puts character directly in issue and character evidence is admissible in defamation cases. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579 (1922) ("the plaintiff's character is directly put in issue by the action of slander, and the defendant may, in mitigation, give in evidence his general bad character . . .") (citing *Buford v. McLuny*, 1 Nott & McC. 268, 1818 WL 878 (Nov. 1818)). "This court expressly recognizes that an action for libel or slander is embraced within the exception to the general rule that 'reputation, good or bad, may not be pleaded or proved' in a civil action. *Id.*, citing *Smith v. Lafar*, 67 S.C. 495, 46 S.E. 333 (1903). Further, "[O]ne of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence." *Id.*

Cases from other states and federal courts interpreting the identical versions of Rule 405 uniformly recognize a clear exception from normal character evidence rules that applies to defamation or slander cases when character and reputation are directly placed in issue. *See State v. Doherty*, 437 A.2d 876, 878 (Me. 1981) ("A prominent example of 'character in issue' is the defamation action where, to support the defense of truth, the defendant may prove that his or her allegedly defamatory communication accurately depicted the plaintiff's character."); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) ("Character may be 'in issue,' as when a statute specifies the victim's chastity as an element of the crime of seduction, or when the defense to a defamation action is the truth of the allegedly defamatory statement."); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843 (1976) (Appellant Pierson brought suit to recover damages for respondents' publication of an alleged document concerning Pierson. Pierson contends the district court erred in admitting into evidence criminal acts committed by him more than 10 years before the alleged libel. Pierson's reliance is misplaced. Since Pierson's character was put in issue by respondents' defense of truth, the evidence was properly admissible.); *Holiday v. Cutchin*, 305 S.E.2d 45, 47 (N.C. Ct. App. 1983) *aff'd*, 316 S.E.2d 55 (N.C. 1984) ("Therefore, character evidence is admissible when character is directly in issue as in actions involving moral intent: seducing an innocent or virtuous woman, defamation, or malicious prosecution."); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554 at n. 5 (N.D. Ill. Oct. 8, 1996) ("It is rare that character is an essential element. The typical example of such a case is defamation where injury to reputation must be proven."); *Ajouelo v. Auto-Soler Co.*, 6 S.E.2d 415, 419 (Ga. Ct. App. 1939) ("It is generally held that the foundation of an action for defamation is the injury done to the reputation, that is, injury to character in the opinion of others arising from publication...."); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988) (Here the district court decided that specific instances of conduct were admissible under Rule 405(b) because they demonstrated the honesty of the defendant, which was an essential element of the

crime charged.); *Redfearn v. Thompson*, 73 S.E. 949 (Ga. Ct. App. 1912) (permitting the jury to consider plaintiff's bad reputation in mitigation of damages); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1371-72 (11th Cir. 1998) ("Since the plaintiff's character is substantively at issue in a libel case under Georgia law, Rule 405(b) permits the admission of evidence regarding specific instances of the plaintiff's conduct on that issue."); *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 511 n. 4 (3d Cir.1985); cf. *Longmire v. Alabama State Univ.*, 151 F.R.D. 414, 419 (M.D.Al.1992) (permitting discovery regarding specific incidents of misconduct because the libel plaintiff put his character in issue).

The rationale for admission of other acts evidence in defamation cases is that "The hazards of prejudice, surprise, and time consumption implicit in this manner of proof are more tolerable when character is itself in issue than when this evidence is offered as an indirect indication of how [the party] behaved on a specific occasion." *See Character in Issue*, 1 McCormick on Evidence, s 187 (7th Ed.). "[T]he possibility that specific acts may be inquired into on cross examination (which may prompt barring specific act evidence when character is not in issue) is hardly of concern, since the door to such evidence is already open." *Id.* "For example, testimony concerning a defendant's reputation for truthfulness is admissible in a defamation action, and evidence of specific instances of a plaintiff's conduct is admissible in a libel action because the plaintiff's character is substantively at issue." 32 C.J.S. Evidence § 664.

Plaintiff's complaint alleges that he suffered "loss of reputation in the security industry" as a result of Defendants' alleged defamatory statements. (Compl. ¶¶ 19, 26.) In addition to coming to trial with the door wide open, Plaintiff further opened the door to evidence of Plaintiff's loss of employment at SCANA, the reasons for that loss of employment, and accusations of theft at SCANA on multiple occasions by:

- 1) Introducing evidence regarding Plaintiff's subsequent, current employment at GEO without any testimony about his tenure at Allied Barton or SCANA.

- 2) Eliciting Plaintiff's hearsay testimony that he had "recently" overheard a former student saying that Plaintiff had stolen items from Spring Valley High School.
- 3) Cross-examining Defendants' witnesses on the issue of whether Plaintiff had been accused of other thefts after the Court had ruled to exclude such evidence.
- 4) Eliciting Plaintiff's testimony regarding alleged financial damages incurred following his October 2012 termination from Richland Two, the causation of which Defendants were unable to effectively challenge without being able to question Plaintiff as to his SCANA separation. The SCANA accusations and employment termination would be an obvious alternative cause of his alleged financial difficulties or current state of his reputation or character.
- 5) Closing argument seeking a wage-based damages award.

Finally, Rule 405 draws no distinction between "prior bad acts" and "subsequent bad acts." Federal and state courts interpreting the identical rule have noted this lack of a distinction and have not distinguished between prior and subsequent bad acts when evaluating admissibility under either Rule 404 or 405. *See State v. Weaverling*, 337 S.C. 460 523 S.E.2d 787 (Ct. App. 1999) (affirming admission of both prior and subsequent wrongful acts to show common scheme or plan); *U.S. v. Lighty*, 616 F.3d 321 (4th Cir. 2010) (no distinction between prior and subsequent bad acts for purposes of rule 404(b)); *U.S. v. Cardenas*, 32 F.3d 563 (4th Cir. 1994) (copy attached) ("We have consistently recognized that under Rule 404(b), a court may admit subsequent bad acts to establish prior intent or knowledge."); *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982) ("subsequent conduct may be highly probative of prior intent. That one has thought in a particular illegal way over a period of time is evidence that one's thought patterns had already been so developed and were so operating on another previous occasion."); *see also Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 930 (Miss. 1999) ("the analysis as to the admissibility of specific instances of conduct on cross-examination under Rule 405 appears to apply equally to prior and subsequent acts. Similar to Rule 404, Rule 405 makes

no distinction between prior and subsequent specific instances.”) (citing *United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997); *Bullock v. Commonwealth of Virginia*, 498 S.E.2d 433, 437 (1998) (holding that the same principle of admission of prior bad acts “applies equally in cases of subsequent bad acts.”)). In the context of defamation or slander, Plaintiff’s subsequent misconduct at SCANA was directly probative on the truth defense (that Plaintiff is not trustworthy/is prone to petty theft), as well as Plaintiff’s reputation at the time of the damages award, causation of his alleged reputational damages, and his failure to mitigate damage to his reputation. It was also relevant to show absence of mistake or common scheme or plan under Rule 404(b), as his third shift rifling through SCANA employees’ desks and cabinets was practically identical to the manner, method of operation, and type of thefts reported at Spring Valley in 2011. As a result of the exclusion of the evidence, Plaintiff was able to present himself as someone with a reputation of trustworthiness in the security industry who had only been accused of workplace theft in late February and early March 2011, without permitting Defendants to challenge that false representation or to challenge Plaintiff’s claim that Defendants, rather than another source, were the proximate cause of that alleged reputational injury. Accordingly, it was prejudicial error to exclude the evidence and a new trial is warranted.

2. Exclusion of Evidence of Prior Thefts at Spring Valley was also Prejudicial Error.

For the same reasons it was error to exclude subsequent bad acts committed at SCANA, it was error to exclude evidence of prior related thefts at Spring Valley. This was particularly the case because Plaintiff’s counsel repeatedly opened the door to such evidence by asking defense witnesses to confirm that Plaintiff had not been accused of any thefts prior to February 2011, and attempting to obtain agreement from defense witnesses that it would be unusual for Plaintiff to have started committing petty thefts in February 2011 when he had been working at the school for a number of years. This questioning clearly opened the door to such evidence of earlier thefts at Spring Valley and its exclusion prevented Defendants from challenging Plaintiff’s “no prior

thefts” argument. In addition, the exclusion of this evidence, despite Plaintiff’s counsel’s repeated “opening the door” to the evidence, left unnecessary redactions and interruptions to witness testimony that the jury apparently held against Defendants.

3. Plaintiff’s Counsel’s Wage-Based Damages Calculation Urged During Closing Deprived Defendants of a Fair Verdict.

As a general rule, inflammatory remarks which are calculated to appeal to the passions or prejudices of a jury should be affirmatively condemned. *South Carolina State Highway Dep’t. v. Nasim*, 255 S.C. 406, 411, 179 S.E.2d 211, 213 (1971). “[W]hether or not the particular arguments are so prejudicial as to constitute reversible error depends upon the nature of the utterances and the circumstances under which they were made.” *Id.* Under certain circumstances, this Court will grant a new trial despite the aggrieved party’s failure to contemporaneously object to the argument if the prejudice caused by the argument is clear. *Dial v. Niggel Assoc., Inc.*, 333 S.C. 253, 256, 509 S.E.2d 269, 271 (1998); *Toyota of Florence, Inc., v. Lynch*, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994).

It was completely improper for Plaintiff’s counsel to request a wage-based calculation of \$400,000 in damages – 10 years at \$40,000 per year where: (1) Plaintiff’s employment termination was not part of the case and no evidence of current or future lost wages was offered or proven; and (2) the Court’s complete exclusion of SCANA evidence was based on the representation and ruling that Plaintiff was not seeking damages for the current or future effects of Plaintiff’s alleged reputational injury.

The prejudice to Defendants from these arguments was compounded by the Court’s refusal to instruct the jury that Plaintiff’s termination from employment was not part of the case. These errors invited the jury to award damages based on matters outside the evidence and to “send a message” for reasons of passion or prejudice, rather than evidence presented at trial.

4. The Court Should Grant a New Trial Absolute Because the Size of the Verdict Demonstrates that it was Motivated by Caprice, Passion, or Prejudice.

“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 judge must grant a new trial absolute.” *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting *O’Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). “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 judge must grant a new trial absolute.” *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 241, 734 S.E.2d 148, 159 (2012). The Court should grant a new trial absolute when the verdict rendered is so “shockingly disproportionate to the injuries suffered” that it must have been motivated by passion, prejudice, and caprice. *See Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 762 (Ct. App. 2000).

The size of this verdict should shock the conscience of this Court. In this case, the undisputed testimony was that, despite being questioned and placed on administrative leave with full pay during a criminal investigation which did not result in charges, Plaintiff’s employment was not terminated. Rather, he was returned to his job with the same pay, benefits, and hourly schedule. Plaintiff received no warnings or reprimands for the next fourteen months until his employment was terminated. Plaintiff conceded that his ultimate termination was not part of the case and he had not been defamed in the process of or by the act of termination. During the fourteen months Plaintiff remained employed with Richland Two, he liked his job and did not apply for any positions outside Richland Two. Following his termination from Richland Two, Plaintiff immediately secured a job making a higher hourly wage at Allied Barton. He remained in that job until he “resigned” his employment in February 2014. He promptly found another job

at GEO. It was further undisputed that neither defendant gave Plaintiff a negative job reference or took any action to prevent him from securing comparable employment.

Plaintiff produced no witness testimony or other evidence that anyone's opinion of him had changed following Richland Two investigation and reassignment to a position in which he testified he was performing "supervisory" duties. Two of Plaintiff's three witnesses testified that *Plaintiff himself* was the source of their knowledge that Plaintiff had been accused of theft at Spring Valley and was under investigation.

Moreover, Plaintiff offered no testimony or evidence that either Barnes or Earles had told anyone other than the addressees of the CONFIDENTIAL email that Plaintiff was not a supervisor upon his return to work. It was also undisputed that Roosevelt Garrick, who was in charge of human resources, denied Plaintiff the promotion for which Defendants had selected him and that neither Defendant was responsible for the denial of the promotion. Plaintiff produced no evidence of special damages and testified only to his own hurt feelings and embarrassment at being accused of and investigated for the Spring Valley thefts. Any special damages alleged by Plaintiff (*i.e.*, cashing out retirement, living out of his car) would have been attributable to the termination of his employment from the School District or SCANA, and thus not recoverable as proximately caused by the alleged defamation. *See Wardlaw v. Peck*, 282 S.C. 199, 205-06, 318 S.E.2d 270, 275 (Ct. App. 1984) ("special damage must consist of some provable material loss to the plaintiff as a result of the injury to his reputation.")

Despite this paucity of liability and damages evidence, the jury awarded Plaintiff \$200,000 in actual damages and \$350,000 in punitive damages. Given the evidence presented at trial, the sheer amount of the verdict clearly shows forces at work other than a legitimate review and assessment of the evidence of liability and damages presented at trial. Accordingly, the verdict must be set aside and a new trial absolute granted under Rule 59.

5. The Cumulative Effect of all of the Above Issues Warrants a New Trial Absolute Under Rule 59.

Even if none of the individual grounds justifies a new trial, the cumulative effect of the reasons JNOV should be granted, the errors identified, and the passion, prejudice, caprice, and lack of evidence supporting the jury's verdict cumulatively justify a new trial absolute.

6. The Court Should Grant a New Trial Pursuant to the Thirteenth Juror Doctrine Because the Evidence at Trial Did Not Justify the Verdict.

South Carolina's thirteenth juror doctrine allows the circuit court judge to grant a new trial absolute when the judge finds the evidence does not justify the verdict. *Norton v. Norfolk S. Rwy. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851 854 (2002); *Trivelas v. S.C.D.O.T.*, 357 S.C. 545, 551 (Ct. App. 2004); *Duncan v. Hampton Cnty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999) ("[T]he trial court may grant a new trial absolute when, sitting as the thirteenth juror, it concludes the jury's verdict is not supported by the evidence."). The effect of this relief is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror essentially "hangs" the jury. When a civil jury fails to reach a verdict, a new trial is ordered. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). The trial judge need not explain his or her reasons for granting a new trial when sitting as the thirteenth juror. *Folkens*, 300 S.C. at 254-5, 387 S.E.2d at 267. For all of the reasons set forth above and out of fundamental fairness to the Defendants, the Court should invoke the Thirteenth Juror doctrine and order a new trial.

C. At A Minimum, Defendants Are Entitled To A New Trial Nisi Remittitur.

If the verdicts were not the result of passion, caprice, or prejudice, they were at least excessive and Defendants also submit that they are entitled to a remittitur. "The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993); *see*

also *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct. App. 1997) (stating “[t]he trial judge has the discretionary power to grant a new trial *nisi*”). When a party moves for a new trial *nisi*, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Vinson*, 324 S.C. at 404, 477 S.E.2d 715 at 723 (citing *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993)). Even assuming the award was not actuated by passion, caprice, prejudice, or matters outside the evidence, its undue liberality is patently obvious given that Plaintiff offered no evidence of special damages arising from the alleged defamatory publication and punitive damages were completely inappropriate for the reasons previously stated and for the reasons set forth below.

D. Defendants Are Entitled to A Reversal Or Reduction In the Amount Of Punitive Damages Because They Do Not Comport With Constitutional Due Process.

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Solanki v. Wal-Mart Store No. 2806*, 2012-213247, 2014 WL 4087911 (S.C. Ct. App., Aug. 20, 2014). The awards of punitive damages in this case do not comport with constitutional due process. *See Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). The practice of awarding punitive damages originated in principles of criminal law “to deter the wrongdoer and others from committing like offenses in the future.” *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d.206, 210 (1964) (internal citation omitted). Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); *see also Gore*, 517 U.S. at 568, 116 S. Ct. at 1595 (“The Due Process Clause of the Fourteenth

Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.”)
(internal quotations omitted).

The United States Supreme Court has set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. Those guideposts include: (1) the reprehensibility of the defendant’s conduct; (2) the ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and (3) comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598.

Reprehensibility is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” *Gore*, 517 U.S. at 75, 116 S. Ct. at 1599. “This principle reflects the view that some wrongs are more blameworthy than others.” *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

Each of the *Campbell/Fortis* factors demonstrates that the punitive damages the jury awarded Plaintiff were constitutionally impermissible. First, Plaintiff suffered no economic harm from the alleged defamation and certainly no physical harm. Second, there was no evidence of a reckless disregard for the health or safety of Plaintiff, who kept his job after the alleged thefts without reprimand, warning, or any desire on his part to leave the job. Third, while Plaintiff may have been financially vulnerable in a vacuum, the alleged defamation by

Barnes and/or Earles had no financial impact on him as shown above. Fourth, the alleged defamation was a one-time event and Plaintiff continued working for fourteen months after the alleged defamatory email to supervisors, segueing directly into another job with a better per-hour pay rate upon his discharge from Richland Two for unrelated reasons. Finally, there was no trickery, deceit, or intentional malice even if a jury could somehow find from the evidence that Earles or Barnes was responsible for any communications about Plaintiff's trustworthiness outside the supervisory chain addressed in the CONFIDENTIAL email. The conduct of Barnes and Earles was at worst, negligent. The evidence presented at trial was that other witnesses who were not named Defendants, including Roosevelt Garrick, Tim Hunter, and Jim Childers, similarly believed that Kennedy was responsible for the Spring Valley thefts and that they communicated that belief internally among supervisors who had a legitimate need to know the information. Moreover, the undisputed testimony was that it was the decision of Garrick, not Barnes or Earles, to deny Kennedy the promotion to lieutenant originally recommended by Barnes and Earles. Earles merely effectuated that decision by returning Kennedy to work and reassigning his position, which was communicated only to supervisors.

As to the second *Gore* factor, the Supreme Court has indicated that the reasonableness of a punitive damages award cannot be determined solely by comparing the punitive damages award to the actual damages award; rather, the touchstone of the inquiry is reasonableness. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. While the multiplier for punitive damages is low in this case, the unreasonable amount of actual damages based on the lack of evidence presented by Plaintiff makes the amount of the punitive damages award completely unreasonable.

As to the final *Gore* factor, *i.e.*, comparison of the punitive damages award to civil fines and criminal penalties that could be imposed for similar conduct, there are no criminal penalties for workplace defamation in South Carolina. Consequently, there is nothing to assess this particular factor against.

Moreover, application of the eight factors set forth by our own state Supreme Court, in *Gamble v. Stevenson* for a post-verdict review of due process of punitive damages awards also warrants reversal of the jury's punitive damages awards against Defendants.

The *Gamble* factors are:

- (1) defendant's degree of culpability;
- (2) duration of the conduct;
- (3) defendant's awareness or concealment;
- (4) the existence of similar past conduct;
- (5) likelihood the award will deter the defendant or others from like conduct;
- (6) whether the award is reasonably related to the harm likely to result from such conduct;
- (7) defendant's ability to pay; and
- (8) other factors deemed appropriate.

Id. at 111-12, 406 S.E.2d at 354.

Defendants' analysis of the *Campbell* reprehensibility factors disposes of the first four *Gamble* factors. Defendants' conduct was, at worst, negligent and numerous other employees participated in or made decisions regarding Plaintiff's employment and shared Defendants' belief that Plaintiff was not to be trusted; the alleged defamatory communication was a one-time event, as Plaintiff did not show any prior or subsequent defamation and could not sustain a negligent supervision claim as a matter of law. In fact, Plaintiff continued in his job without complaint or incident for another fourteen months after reinstatement. Any communications Defendants made were limited in scope to proper parties on a proper occasion and related to business operations.

With regard to the final four factors, Plaintiff offered no evidence whatsoever of the Defendants' ability to pay. As noted above, the punitive damages award is not likely to deter

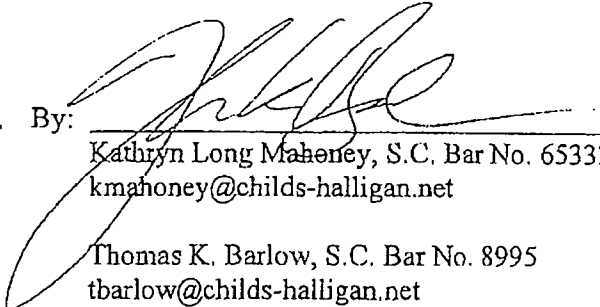
future workplace defamation because the award of punitive damages was completely unpredictable and bore no reference to the alleged culpability of Defendants, who were merely acting as part of a larger organizational decision. Finally, the award is not reasonably related to the harm likely to arise from the alleged defamatory communication in this case. As such, the punitive damages awards in this case do not comport with due process and should be set aside or reduced.

III. CONCLUSION

For all the foregoing reasons, Defendants are entitled to JNOV, or in the alternative, a new trial absolute or a new trial *nisi remittitur*, which should include striking the punitive damages award as unconstitutional based on the evidence at trial.

Respectfully submitted,

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October 13, 2014

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL ABSOLUTE, OR IN THE ALTERNATIVE, FOR NEW TRIAL NISI REMITTITUR** by serving a copy of same via hand-delivery to the following on this 3rd day of October, 2014:

T. Jeff Goodwyn, Jr., Esq.
Rachel G. Peavy, Esq.
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
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Lonna Coufal
Lonna M. Coufal

2014 OCT 13 PM 12:20
CHILDS & HALLIGAN
P.A.
COLUMBIA, SC 29205

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff,

vs.

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

Defendants.

IN THE COURT OF COMMON PLEAS

Civil Action No. 13-CP-40-01460

MEMORANDUM IN OPPOSITION TO
DEFENDANTS' POST-TRIAL MOTIONS

RICHLAND COUNTY
FILED
2014 OCT 20 PM 4:38
JANETTE W. MCBRIDE
C.C.P. & G.S.

The Plaintiff hereby submits this Memorandum in Opposition to Defendants' post-trial motions.

Factual Background

The trial of this matter commenced on Monday, September 29th and lasted through Friday, October 3, 2014. The jurors considered testimony from twelve (12) witnesses and numerous exhibits were entered into evidence. The Court heard and granted directed verdict to the Defendants on two of the three causes of action in the complaint; the sole cause of action that was considered by the jury was a claim for defamation against Eric Barnes and Chuck Earles, individually and as employees of Defendant Richland Two County School District. Most of Defendant's post-trial motions represent what is essentially a re-argument of the Defendants' directed verdict motions at trial; however, for purposes of preserving the record, Plaintiff will respond in kind. Plaintiff further incorporates by reference all prior arguments and memoranda that were before the Court at trial.

Argument in Response

I. Defendants' JNOV Motion Should Be Denied Because The Court Correctly Ruled That There Was Sufficient Evidence To Go To The Jury On The Defamation Claim.

"In ruling on a motion for directed verdict and JNOV, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." The trial court should deny the motion where either the evidence yields more than one inference or its inference is in doubt. [The appellate court] will reverse the trial court's ruling on a directed verdict motion only where there is no evidence to support the ruling or where the ruling is controlled by an error." Clark v. S.C. Dept. of Public Safety, 362 S.C. 377, 608 S.E.2d 573 (2005) (internal citations omitted).

Defendants argue that Plaintiff failed to "meet his burden of proving an unprivileged publication by either Defendant Earles or Defendant Barnes." Def. Motion at p. 3. This is the exact argument which the defense made in their motion for directed verdict and which the Court properly denied. At the trial, the undisputed testimony was that the email marked "confidential" was printed out and left out in the open for other Richland Two employees to see. While the Defendants (who were the author and a recipient of the email) testified that they didn't print out the email, the credibility of such testimony was for the jury to decide. Furthermore, Eric Barnes specifically testified at trial that he had to let everyone know that that Mr. Kennedy could not have keys in case there was a shift change and someone thought Mr. Kennedy should get keys. This testimony suggests either verbal or written communication to other staff members regarding the contents of the email.

Incredibly, the Defendants argue that "Plaintiff offered no evidence to suggest that any of the addressees [of the email] were likely to violate confidential confidentiality or had a tendency to ignore directives to keep employee information confidential." Def. Mot. At p. 6. This statement is in direct conflict with the evidence presented at trial – that Chuck Earles considered Richland Two's security division to be a rumor mill and both he and Eric Barnes required employees to sign a "Change of Culture" memorandum stating that they would not gossip, among other things.

Because there was testimony in the record from which the jury could have found that, by either the words or a combination of words and conduct, it was communicated to Richland Two employees that Messrs. Barnes and Earles considered Jeffery Kennedy to be a thief, there was sufficient evidence to constitute proof of publication and directed verdict was properly denied. See Mains v. K-Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (holding that the jury could have found that "words or conduct or the combination of words and conduct can communicate defamation" and therefore there was no error in the denial of defendant's motion for directed verdict or JNOV) (citing Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980)).

With respect to Defendant's second argument relating to the applicability of a qualified privilege, any qualified privilege which attached to communications by Defendants Earles and Barnes was exceeded (and therefore lost) when the memorandum was left out in the open for rank and file Richland Two employees to observe. See Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) (noting that whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege, was properly for the jury).

The undisputed testimony at trial was that the printed out email was left out in vehicles and in Richland Two offices for employees other than the recipients of the email to observe. Accordingly, directed verdict was properly denied and Defendant's JNOV motion should likewise be denied. See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986).

Furthermore, there was sufficient evidence of actual malice presented during the trial to go to the jury. "Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." Murray, 542 S.E.2d at 750. "Malice may be proved by direct or circumstantial evidence . . . Whether malice is the incentive for a publication is ordinarily for the jury to decide. Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury." Id. at 750-751.

During the trial, the Plaintiff submitted evidence that Richland Two security division was a veritable "rumor mill" and that both Chuck Earles and Eric Barnes conducted what could be characterized, at best, as an extremely limited investigation into the thefts. Both men testified that they never interviewed the other people who had opportunity and access to the athletic director's office when the theft allegedly occurred. Additionally, both Defendants testified that it would be harmful to Jeffery Kennedy if their "no keys" mandate became known beyond Mr. Kennedy's supervisors. Eric Barnes testified with great emotion that he strongly believed that Mr. Kennedy was responsible for the theft and should have been fired. Finally, it was undisputed that the Richland County Sheriff's Department did not believe that there was sufficient evidence to arrest and charge anyone in the theft, including Mr. Kennedy. Taken together, the jury could have found this evidence demonstrated a reckless disregard for Mr.

Kennedy's rights and reputation when the defendants let it be known that they believed Mr. Kennedy could not be trusted and was a thief. See Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999) (holding that the granting of directed verdict was in error when comments made by the defendant about the plaintiff's credit-worthiness could arguably be considered to have been made in bad faith and with an intent to mislead).

With respect to Defendant's third JNOV argument beginning on page 9 of their Motion, Plaintiff argues that Defendants are not entitled to JNOV because of a failure by the Plaintiff to prove "constitutional malice". This argument fails because the Defendant never argued or requested a charge on "constitutional malice" at the trial stage. Furthermore, the case upon which Defendants rely, Gause v. Doe, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994), is inapplicable because it concerns the standard applicable where the case involves defamation of a public official.¹ See also Goodwin v. Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (holding that defendant was not entitled to a "constitutional malice" charge because the plaintiff, an assistant school principal, was not a public official.)

With respect to Defendant's fourth JNOV argument beginning on page 10 of their Motion, the Defendants again re-argue their directed verdict motion in support of their JNOV motion as to punitive damages. "A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motives." Smalls v. SC Dept. of Education, 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000) (internal citations omitted). As previously discussed, the evidence in the record was that

¹ It goes without saying that no evidence was presented at trial the Mr. Kennedy was a public figure.

the investigation conducted by the Defendants – two longtime law enforcement employees – was minimal; that the security division was a “rumor mill”; and that no one else who had access to the Athletic Director’s office on the night in question was ever even questioned. The jury heard undisputed testimony that “everyone had keys” at Spring Valley; that Chuck Earles and Eric Barnes did not even know who had keys to which offices on the dates in question; and that no one had even saved the majority of the video footage which was apparently so crucial in their targeting of the Plaintiff. The jury also heard testimony that the Defendants did not even speak with the shift supervisor, Lt. Gerome Young, who was on duty on the night in question.

Finally, there was evidence that there was a “right” way to conduct such a sensitive investigation, as demonstrated by the testimony of Assistant Principal Jim Childers regarding his dealings with Larraine Jackson, the night custodian. Human Resources Director Roosevelt Garrick testified that Richland Two strived for a “culture of excellence” which was demonstrated by the discretion and sensitivity of Assistant Principal Childers. Taken together, the glaring contrast between the actions of Messrs. Earles and Barnes and the “best practices” espoused by Richland Two were certainly sufficient to show recklessness on the part of the Defendants. Messrs. Earles and Barnes let it be known that they thought Mr. Kennedy was a thief and could not be trusted, regardless of the fact that he was never arrested or convicted of any crime. This shows maliciousness on the part of the Defendants.

Furthermore, Mr. Kennedy’s own testimony, which was apparently believed by the jury, could accurately be described as heartbreaking and certainly sufficient to support an award of punitive damages. Mr. Kennedy testified that because of the smear on his reputation – because he was branded a thief – his marriage of 14 years broke down; he was essentially

"shunned" at church; and he was the subject of stares and gossip. He further testified that he lost his house, cashed in his pension, and was forced to live in his car. This testimony and supporting exhibits were entered without objection from the defense.

The Defendants argue that the "ultimate termination of Plaintiff's employment for reasons not attributable to the theft investigation, or to Barnes or Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages." Def. Mot. At p. 11. Again, the Defendants ignore the evidence which showed that Mr. Kennedy was already considered untrustworthy (due to the theft investigation) by Mr. Garrick and Ms. Batchelder at the time when Kim Jones made her allegations. Accordingly, the Richland Two administration was predisposed to discount Mr. Kennedy's rendition of events surrounding the video, and the testimony supported this scenario. The jury could have reasonably concluded that one of Mr. Kennedy's damages as a result of the defamation was that the administration believed Kim Jones instead of him.

With respect to Defendant's fifth JNOV argument beginning on page 11 of their Motion, Plaintiff argues that the verdict is proper and full payment of the judgment would not represent a double recovery. The Defendants were named separately in the lawsuit and the evidence before the jury as to each defendant was separate and distinct. Defense counsel specifically requested that the verdict form reflect two separate, individual defendants, with separate questions as to whether the individual acted with actual malice, hence the two verdict forms. There was no single, general verdict form for precisely this reason. The trial judge specifically charged the jurors that they were to consider each defendant individually and repeated this charge in response to a question by the jury during deliberations.

Defendants now argue that because the jury awarded actual damages against each Defendant in the amount of \$100,000, there is an impermissible "double recovery". However, the Defendants fail to address what is crystal clear - that the jury awarded Plaintiff \$300,000 against Chuck Earles and \$250,000 against Eric Barnes — two different dollar amounts. Therefore, the only reasonable interpretation of the verdict is that the jury intended to award damages against each Defendant based upon his specific culpability.

The undisputed testimony showed that Defendant Earles was clearly the supervisor and Mr. Barnes was his deputy. The jurors could have elected to award greater damages against Mr. Earles because he was the boss, or perhaps because they chose to believe that Mr. Earles printed out the "confidential" email. The jurors could have elected to have award more punitive damages against Defendant Earles because he was the author of the "Change of Culture" directive. Whatever the case, there were two separate defendants who came across differently to the jury. Put simply, there is no "single act" here and therefore the verdicts against both defendants are proper. See Boiter v. S.C. Dept. of Transportation, 393 S.C.123, 712 S.E.2d 401 (2011) (holding that identical jury award against the DOT and the Department of Public Safety did not constitute a "double recovery" because the jury could have found DOT negligent, and DPS not negligent, and the verdict against the one defendant would still stand). Just like the situation presented in Boiter, here the jurors were free to consider the evidence and culpability of both defendants just as the Court instructed them to do. In the event the jury felt only one man had defamed Mr. Kennedy and acted with actual malice, it was free to enter

verdicts reflecting such a decision. There was no double recovery and the individual verdicts must stand.²

Furthermore, any "defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later." Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 560 S.E.2d 894 (2002). Defendants did not object to the verdict form at the time the verdict was published and therefore any objection is waived. "Once the jury in a civil case is discharged, the trial judge has little power to correct or amend a jury's verdict which, on its face, is unambiguous." Vinson v. Jackson, 327 S.C. 290, 491 S.E.2d 249 (1992). As a result, Defendants' Motion for JNOV on this basis should be denied.

II. The Trial Court Properly Excluded Evidence As to the Alleged SCANA Theft Pursuant to Rules 403, 404, and 405 of the Rules of Evidence.

Again, the Defendants reargue that Plaintiff's *Motion in Limine* should have been denied. Because the Court correctly ruled that the SCANA evidence should be excluded, the Defendants' Motion for a New Trial Absolute should be denied.

On March 25, 2014 – over 3 years since the alleged theft at the AD's office – Mr. Kennedy was arrested and charged with a misdemeanor larceny charge. The incident occurred while he was employed by Allied Barton as a security officer, working under its contract with SCANA. The charges allege that Mr. Kennedy stole a pair of safety goggles (valued at \$5.00) and \$10.00 in cash from a room at a SCANA location. The case is pending and Mr. Kennedy has

² Defendants' reliance upon the case of Collins Music Co. v. C.W. Smith, 332 S.C. 145, 503 S.E.2d 481 (Ct. App. 1998) is misplaced. In Collins, the plaintiff sued two defendants – one with which it had a contract, and one which it alleged interfered with such contract. The Court found that Collins was only entitled to the damages which he had proved – those which were the direct and natural consequence of the breach of contract. Therefore, the Court essentially held that the plaintiff had not submitted sufficient evidence to collect awards against both Defendants because the contract and tort claims were "co-extensive". In the instant case, the Plaintiff specifically pleaded and proved each Defendant's defamatory conduct and accordingly, there is no double recovery.

pleaded not guilty. At trial, the Defendants sought to introduce evidence of the SCANA investigation, and the Plaintiff sought to exclude any mention of the SCANA incident pursuant to a *Motion in Limine*.

Plaintiff argued that that any mention of the SCANA incident and the pending charges would result in extreme prejudice and, further, were irrelevant as they concerned future events – three years down the road – that were not in existence at the time this action arose. Plaintiff further argued that the Defendants were trying to prove what they were unable to prove (or even charge) over three years ago. The Court granted the Plaintiff's *Motion in Limine* and excluded any mention of the SCANA incident.

"The trial judge has wide discretion in determining the relevancy of evidence, and [the court's] decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion." Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004).

In the instant case, the Court determined that even if it were to assume that the evidence of the SCANA incident was relevant under Rule 401, SCRE, such evidence was properly excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." Rule 403, SCRE.

Furthermore, the Court properly considered whether the SCANA evidence fit within the exceptions found in Rule 404, SCRE. "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." State v. Billy Wayne Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). "However, such evidence may be admissible to show

motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Id.

The Court specifically reviewed Rule 608(b), SCRE, which holds that “specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility... may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the witness’ character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.”

Finally, the Court held that the SCANA evidence was not admissible under Rule 405, SCRE, because it was neither relevant to the case nor could it be deemed to not be unfairly prejudicial to the case.

This case concerns a defamation – an accusation of theft – that took place in March 2011. “Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE (cited in State v. Gilchrist, 496 S.E.2d 424, 329 S.C. 621 (Ct. App. 1998)).

The SCANA events were not in close proximity to the Spring Valley incident and clearly cannot speak to Mr. Kennedy’s state of mind back in 2011. See State v. Gilchrist, supra (finding that evidence of a defendant’s statement was relevant as it showed his state of mind when such statement was made in close proximity to the commission of the crime in question.).

Here, there was no such temporal relation, as the SCANA incident is three years after the Spring Valley incident.

Even if relevant, the Court Properly Ruled the Evidence Was Unfairly Prejudicial and Must Be Excluded

"Evidence of similar acts has the potential to be exceedingly prejudicial." Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5 (2010). Even if the Court were to instruct the jury otherwise, the evidence was so prejudicial as to deem pointless the Plaintiff's case. In short, a jury could not be expected to ignore this evidence as evidence of Mr. Kennedy's guilt in the 2011 incident.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." Kennedy v. Griffin, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003). In Kennedy, the Court held it was error for evidence to be admitted that the plaintiff tested positive for marijuana at the time of the accident because there was no correlation between the between the marijuana and the accident. The Court held that the marijuana evidence was more prejudicial than probative, given that the test did not measure the quantity of marijuana in the plaintiff's system or how recently he had been exposed to it. 595 S.E.2d at 251. See also USA v. Queen, 132 F.3d 991, 996 (4th Cir. 1997) ("noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses".)

Similarly, here, submitting the fact that Kennedy has been charged, three years later, with taking a pair of safety goggles (valued at \$5.00) and \$10 in cash is highly prejudicial to the jury given that these pending charges relate to a \$15 crime; are 3 years after the Spring Valley incident; and have not been shown to be true by clear and convincing evidence.

In State v. Lyle, the Supreme Court considered the exclusion of evidence which was from 10 days to 7 weeks removed from the crime charged. The Court asked, "what is there in the alleged passing of forged checks at widely separated points . . . prior to the commission of the crime charged that tends, in a legal sense, to identify the defendant as the man who uttered the forged paper....? True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter, but that is the precise inference the general rule was wisely designed to exclude . . . There is no connection of time and place . . ." 118 S.E. at 808 (holding evidence was improperly allowed).

The "Evidence" Should Be Excluded As It is Not Sufficiently Similar To the Crimes Charged

The Defendants seek to introduce evidence concerning an event that occurred three years after the Spring Valley incident in hopes of proving that 1.) Jeffery Kennedy was the Spring Valley thief and 2.) Jeffery Kennedy is a dishonest person of bad character. Because the SCANA events occurred subsequent to the Spring Valley incident and were dissimilar to Spring Valley in terms of scope and motive, the evidence of the SCANA incident should be excluded as unfairly prejudicial. State v. Cope, 405 S.C. 317, 748 S.E.2d 194. In Cope, the Supreme Court held that there was no abuse of discretion in the trial judge's exclusion of evidence of other crimes under Rule 404(b) where the other crimes occurred subsequent to the murder at issue and there were "many distinctions" as well, although there were also some similarities. Furthermore, the subsequent crimes at issue in Cope occurred within 6 weeks of the underlying murder.

Rule 405 Still Requires That Evidence Be Relevant And Not So Unfairly Prejudicial

Defendants do not cite a single case from South Carolina which is on-point with the facts presented here. Instead, the Defendants seek to circumvent the plain language of Rules 403 and Rule 404, SCRE.

The Defendants sought to introduce evidence of other petty thefts at Spring Valley High School which occurred in Spring 2010 and Fall 2010 (theft of air freshener aerosol can), and again beginning in February/March 2011. The trial court, for the reasons addressed *supra*, properly excluded any evidence of the 2010 thefts. The Plaintiff argued that Spring Valley High School was a huge physical plant, with thousands of people going in and out of its doors every day.³ The allegations of these other petty thefts were unproven, were never investigated by law enforcement, and were never proved (i.e. no charges were ever brought, no conviction ever secured). Accordingly, they were not relevant to whether Mr. Kennedy was properly the focus of the District's "investigation" into the allegedly missing money from the Athletic Director's Office in March 2011. Furthermore, even if deemed relevant by the Court, they are highly prejudicial as they "muddy the proverbial waters" by injecting further, unproven allegations into the jurors' minds. Finally, the 2010 thefts all occurred before Jeffery Kennedy was recommended for the promotion to supervisor; therefore, Jeffery Kennedy must **not** have been considered a suspect in the eyes of Richland Two at that time, otherwise he wouldn't have been promoted. The Plaintiff argued that by using these allegations now, the defense was seeking to prove Jeffery Kennedy was a habitual thief even while they were promoting him in February 2011.

³ Indeed, at trial, Jim Childers estimated there were probably 100 thefts a year at Spring Valley.

Furthermore, this “prior bad act” evidence does not fit within an exception in Rule 404(b). First, “if the [party] was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008). “The connection between the prior bad act and the crime must be more than just a general similarity.” State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (Ct. App. 2005). It must fall within the purview of the “common scheme and plan” exception under Rule 404(b). Id. at 583. Furthermore, the timing of the prior bad acts is crucial. Here, the District sought to present a laundry list of reported petty thefts that began in Spring 2010 – almost a full year prior to the Athletic Director’s report. See, e.g., State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997) (finding that the space of one year made evidence of prior act inadmissible under the common scheme or plan exception.) As a result, Defendant’s Motion for a New Trial Absolute on this basis should be denied.

The Closing Argument of Plaintiff’s Counsel Was Proper

In response to Defendant’s argument that Counsel’s closing argument was not proper. (Def. Motion at p. 19). Plaintiff’s counsel would argue that Defendant’s objection has been waived, and further that the argument was entirely proper. The general rule is that the lack of a contemporaneous objection to an improper argument acts as a waiver. Varnadore v. Nationwide Mutual Ins. Co., 289 S.C. 155, 345 S.E.2d 711 (1986). Without a contemporaneous objection as is the case here, Defendant must show that the argument was a flagrant violation and the vicious or inflammatory nature of the argument resulted in clear prejudice. South Carolina Highway Dept. v. Nasim, 255 S.C. 406, 179 S.E.2d 211 (1977). The argument made by Plaintiff’s counsel in this case was neither vicious nor inflammatory. Counsel asked the jury to

return a verdict that would send a message: that it believed that the Defendants were wrong and that Jeffery Kennedy had been unfairly slandered. Plaintiff's counsel asked the jury to look back at the evidence, to look back at Jeffery Kennedy's tearful testimony, when it considered whether to award a verdict. Plaintiff's counsel also asked that the jury consider what would be a reasonable amount, an amount that sent a message. To assist the jury in its calculations, Plaintiff's counsel suggested a figure of \$400,000, and to help them put this amount in perspective, suggested that they could view it in terms of being approximately 10 years of Kennedy's salary at Richland Two. Mr. Kennedy testified that he was earning approximately \$1,700 to \$1,800 every pay period. This suggested amount was certainly reasonable in light of the evidence before the jury.⁴ The jury ignored counsel's suggestion, apparently finding the conduct of the Defendants even more reprehensible and choosing to award \$550,000. As a result, Defendant's Motion for a New Trial Absolute on this basis should be denied.

In response to Defendants' fourth argument for a new trial absolute beginning on page 20 of their motion, Plaintiff would show that the size of the verdict did not demonstrate improper motive. The Plaintiff testified that he lost his marriage, his standing at Church, and his position with a youth mentor group, among other damages, when he was accused of being a thief by Mr. Barnes and Mr. Earles. The credibility of the witnesses was for the jurors to consider: the jurors sat and listened as Mr. Barnes became quite distraught over what he believed to be Richland Two's deficiencies in failing to immediately fire Mr. Kennedy. The jurors sat and listened as Chuck Earles stated that he never interviewed anyone else about the

⁴ Counsel would note that the Defendants apparently never considered this case to be a serious matter and, in fact, represented to Plaintiff that mediation would be fruitless. Plaintiff did make a demand in the amount of \$300,000 prior to trial, to which Defendants responded with an offer of judgment in the amount of \$5,000. In short, Plaintiff's counsel made the argument in closing that the defamation was extremely serious and should be addressed accordingly. This is the same argument that was made throughout the trial.

AD department theft, despite there being other people with "access and opportunity" (to quote the Richland Two HR director, Roosevelt Garrick). Perhaps the jurors thought Mr. Earles and Mr. Barnes were smug. Perhaps the jurors thought that their "investigation" was a sham and conducted maliciously. Perhaps the jury thought the Defendants printed out the email and posted it themselves for all to see because they were angry that Mr. Garrick chose not to fire Mr. Kennedy. Whatever the reason, the jury chose to award an amount which spoke to the seriousness of the claim and their perception of the wrongdoing perpetrated by the Defendants. Case law abounds of \$500,000 + verdicts in defamation lawsuits which were upheld on appeal. See, e.g., Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding award of \$250,000 actual damages and \$500,000 in punitive damages); Constant v. Spartanburg Steel Prods., 316 S.C. 86, 447 S.E.2d 194 (upholding jury verdict of \$400,000 in actual damages and \$100,000 in punitive damages); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397 (Ct. App. 1987) (upholding an award of \$1 million in actual damages and \$45,000 in punitive damages). For these reasons, Defendants' Motion for a New Trial Absolute should be denied.

In response to Defendants' 6th argument for a new trial absolute beginning on page 22, Plaintiff argues that the 13th Juror Doctrine is not warranted because the verdict is properly supported by the evidence. Under the 13th juror doctrine, the trial court may take its own view of the evidence and grant a new trial if it disagrees with the jury's verdict. Parker v. Evening Post, 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). Here, again, the Defendants essentially ask the Court to grant their directed verdict motion on the defamation cause of action. Because there was sufficient evidence for the jury to consider the defamation claim and award damages

that spoke to the seriousness of the allegations and the pain inflicted upon Mr. Kennedy, the Court should deny the request for a new trial pursuant to the 13th juror doctrine.

III. A New Trial *Nisi* or a Remittitur Is Unsupported Because The Damages Award Is Proper.

"There is no formula or standard that can be used as a measure for assessing punitive damages." Austin v. Specialty Transportation Svs., Inc., 358 S.C. 298, 594 S.E.2d 867, 875 (Ct. App. 2004). Addressing the suggested factors for the Court to consider – as outlined in Gamble v. Stevenson and BMW v. Gore and relied upon by the Defendants in their Motion - Plaintiff again submits that there was clear evidence of the reprehensibility of the Defendants' conduct and of the Plaintiff's damages for the jury to consider.⁵ Furthermore, the Plaintiff would submit that the ratio of actual damages to punitive damages in this case is well within the "single digit multiplier" espoused by both State and Federal Courts. See Austin, supra at p. 877 – 878 (and cases cited therein) (noting that single-digit multipliers, while not binding, are more likely to comport with due process and finding that a punitive damages award of 2.5 times actual damages was not excessive).

While the Defendants apparently didn't see their actions as serious or harmful, the evidence before the jury was that Mr. Kennedy suffered greatly as a result of being labeled a "thief" in a workplace environment that was best described as a "rumor mill" according to the "Change of Culture" memo distributed by Defendants. Mr. Kennedy testified that his marriage broke down; he lost his position as a youth mentor at his church; he lost the trust and faith of his fellow parishioners; he was forced to cash in his retirement; and he was subject to rumor

⁵ The Plaintiff would note that the South Carolina Supreme Court has characterized the *Gamble* factors as factors to "provide guidance" and are not to be considered "hard and fast" requirements. See Frazier v. Badger, 361 S.C. 94, 603 S.E.2d 587, 5963 (2004).

and innuendo that continued to this day. In short, just because the Defendants apparently never took the case seriously does not mean that the jury was not free to do so. See Wilhoit v. WCSC, Inc., 293 S.C. 397, 358 S.E.2d 397 (Ct. App. 1987) (holding that the trial judge properly refused to set aside the award of \$1 actual damages and \$45,000 punitive damages where there was no evidence that the jury was motivated by passion, caprice, or prejudice and, in fact, the evidence showed that the defendants falsely implied that plaintiff committed a crime). The facts in the instant case were essentially undisputed at trial: the Defendants focused their investigation solely on Jeffery Kennedy to the exclusion of all other suspects and, when law enforcement declined to press charges, chose to go ahead and let everyone know that they considered Kennedy guilty regardless. They failed to safeguard confidential information and they failed to control the very "rumor mill" that they acknowledged existed at Richland Two. Furthermore, the argument that the Defendants' conduct was not reprehensible because "Plaintiff continued in his job without complaint or incident for another fourteen months after reinstatement" is not supported by the evidence. See Def. Mot. at p. 26. In fact, Mr. Kennedy tried to get his promotion reinstated and had his lawyer write letters to Roosevelt Garrick to that effect.

Finally, the jury heard testimony that the night custodian, Ms. Jackson, was also subject to an investigation due to having opportunity and access, but her investigation was kept strictly confidential and her reputation survived intact. The jury could have compared and contrasted the actions of Jim Childers with the actions of Defendants Barnes and Earles.

Furthermore, there is substantial precedent for large verdicts in defamation lawsuits, including punitive damages, given that one's reputation can be damaged irrevocably through a

single action that reverberates for years. See, e.g., Lynch v. Toys R Us, 375 S.C. 654 S.E.2d 541 (Ct. App. 2007) (upholding jury award of \$50,000 in actual damages and \$250,000 in punitive damages); Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding verdict in the amount of \$250,000 actual damages and \$500,000 punitive damages as appropriate where defamatory (and unsupported) statement that police officer had sexually harassed a co-worker effectively destroyed his reputation and ended a distinguished career); King v. Santee Resort Condominium Association, et al., 2013 WL 8691349 (S.C. Com. Pl. Clarendon County Dec. 5, 2013) (\$890,000 verdict in favor of the plaintiff on defamation claim arising out of defendants' erroneous, and repeated, identification of plaintiff as a registered sex offender).⁶

In Lynch v. Toys R Us, the Court of Appeals upheld the trial court's denial of Toys R Us's motion for JNOV or *nisi remittitur* based on the jury's award of \$50,000 in actual damages and \$250,000 in punitive damages. The Court of Appeals noted that the plaintiff was arrested without justification and in full view of customers, and the combination led to humiliation, sleeplessness, and emotional pain, which constituted actual damages. Further, the punitive damages award was upheld "as a warning and example to deter the wrongdoer and others from committing like offenses in the future." 654 S.E.2d at 552. In the instant case, the jury may have wanted the punitive damages award to send a message that the Defendants needed to be much more careful in the future when handling sensitive information related to their employees.

⁶ A copy of the verdict form in the Santee Resort case is attached as Exhibit A and incorporated herein.

Similarly, in Miller v. City of West Columbia, the Court of Appeals held that the trial court properly denied the defendants' motion for a new trial and to strike the punitive damages award where the evidence showed that the city administrator carelessly investigated a dispatcher's claims of sexual harassment against the plaintiff, a longtime city police officer, and furthermore made a statement, not based on evidence and in the presence of others, that the plaintiff had, in fact, harassed the dispatcher. Based upon the evidence, the Court held that the jury award in the amount of \$250,000 actual damages and \$500,000 punitive damages was "appropriate and necessary" under Gamble.

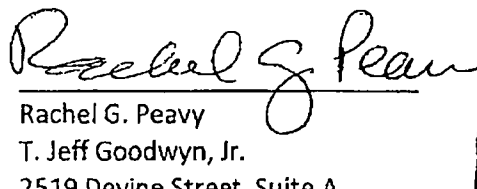
Here, the jury awarded actual damages of \$200,000 and punitive damages of \$350,000. This is well within the bounds of constitutionality, is reasonable given the evidence, and is in line with other jury awards for defamation.

Conclusion

Wherefore, for the reasons above-stated, the Plaintiff respectfully request that the Court DENY the Defendants' post-trial motions.

Respectfully submitted this 20th day of October, 2014.

GOODWYN LAW FIRM, LLC



Rachel G. Peavy
T. Jeff Goodwyn, Jr.
2519 Devine Street, Suite A
Columbia, SC 29205
(803) 251-4517
Attorneys for the Plaintiff

VERDICT FORM

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF CLARENDON

) CASE NO. 2011-CP-14-00541

James E. King,

Plaintiffs,

VS.

Santee Resort Condominium Association, Inc., Leah Londeree, and James Kinser,

Defendants.

BEULAH G. ROBERTS
CLERK OF COURT
CLAREMONT COUNTRY, SC
2013 DEC -5 PM 2:24

VERDICT

1. On the sole cause of action of defamation as to the defendant Leah Londeree, we unanimously find for

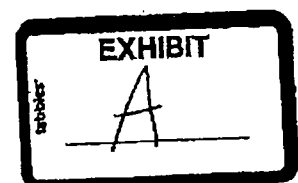
the plaintiff in the amount of \$ 350,000.00 actual damages.

the defendant Leah Londeree.

2. On the sole cause of action of defamation as to the defendant, James Kinser, we unanimously find for:

✓ the plaintiff in the amount of \$ 200,000.00 actual damages.

the defendant James Kinser.



3. Do you find that the plaintiff has established by clear and convincing evidence that he is entitled to an award of punitive damages against James Kinser?

_____ No.

✓ Yes, in the amount of \$ 100,000.00 punitive damages

4. Do you find that the plaintiff has established by clear and convincing evidence that he is entitled to an award of punitive damages against Leah Londerree?

_____ No.

✓ Yes, in the amount of \$ 240,000.00 punitive damages.

I certify that this decision is the unanimous decision of the jury.

Sylvia McFadden
Sylvia McFadden, Foreperson

December 5, 2015
Date

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2013-CP-40-01460

Jeffrey Kennedy,

Plaintiff,

vs.

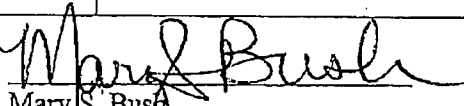
Richland Two County School District, Eric
Barnes and Chuck Earles,

Defendant(s).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on **October 20, 2014**, a copy of the foregoing **Memorandum in Opposition to Defendants' Post-Trial Motions** has been served on the following party(s) via hand delivery to the addresses as follows:

Thomas K. Barlow, Esquire Kathryn Long Mahoney, Esquire Childs & Halligan 1301 Gervias Street, Suite 900 Columbia, SC 29211	The Honorable Alison Renee Lee Richland County Judicial Center 1701 Main Street, Room 324 Columbia, SC 29202
The Honorable Jeanette W. McBride Clerk of Court Richland County Judicial Center 1701 Main Street Columbia, SC 29202	


Mary S. Bush
Paralegal to U. Jeff Goodwyn, Jr. and Rachel G.
Peavy
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205

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

C.A. No.: 2013-CP-40-01460

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

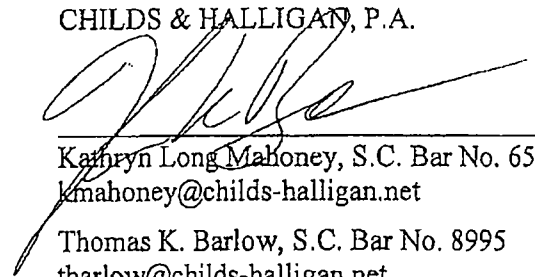
v.

Jeffrey Kennedy Respondent.

NOTICE OF APPEAL

Defendants, Richland School District Two, Eric Barnes and Chuck Earles appeal the Order of the Honorable Alison Renee Lee denying their Motion for Judgment notwithstanding the Verdict, or in the Alternative for a New Trial Absolute, or in the Alternative, a New Trial *Nisi Remittitur*, filed February 24, 2015. Appellants received written notice of the entry of this order on March 2, 2015.

CHILDS & HALLIGAN, P.A.


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

Thomas K. Barlow, S.C. Bar No. 8995
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1301 Gervais Street, Suite 900
P.O. Box 11367
Columbia, SC 29211
(803) 254-4035

Attorneys for Appellants

March 13, 2015

Other Counsel of Record:

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

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013CP4001460

Jeffrey Kennedy

Richland Two County School District

PLAINTIFF(S)

Katie Brochu

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 24 February 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Thomas Jefferson Goodwyn Jr.

Thomas Kennedy Barlow

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Jeffrey Kennedy,

Plaintiff,

v.

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

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2013-CP-40-01460

ORDER

2015 FEB 24 AM 9:45
FILED
RICHLAND CO. CLERK
JANET L. BROWN

This matter comes before the Court on Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial Absolute, or, in the alternative, for a new Trial Nisi Remittitur. This case came to trial on September 29, 2014. The jury returned a verdict of \$100,000 in actual damages and \$150,000 in punitive damages against Defendant Barnes and a verdict of \$100,000 in actual damages and \$200,000 in punitive damages against Defendant Earles. Defendants filed this motion pursuant to Rules 50 and 59(e), SCRCF, on October 13, 2014. After careful consideration of the motions made, memorandum submitted, and the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Defendants' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial Absolute, or, in the alternative, for a new Trial Nisi Remittitur. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

Additionally, regarding awards of punitive damages, this Court shall conduct a post-trial review to ensure that a punitive damage award is proper. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991). "Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution." *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004). The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punishments on tortfeasors. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996).

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The United States Supreme Court set forth three guideposts for the trial courts to consider when assessing whether an award of punitive damages violates due process. *BMW of North America v. Gore, supra*. Those guideposts are: (1) the reprehensibility of the defendant's conduct; (2) the ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and (3) comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at 574.

Reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

The South Carolina Supreme Court previously employed an eight factor post-verdict review that trial courts were required to conduct to determine if a punitive damages award comports with due process. *See Gamble, supra*. However, following *Gore, supra*, and *Campbell, supra*, as well as other United States Supreme Court opinions, in *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009), the Court "articulate[d] the following test for our courts in conducting a post-judgment review of punitive damages awards":

1. Reprehensibility

First, any court reviewing a punitive damages award should consider the degree of reprehensibility of the defendant's conduct. ... In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

2. Ratio

Second, the court should consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the

and
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punitive damages award. ... Although the Supreme Court has been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award, and has consistently declined to adopt a bright line ratio or simple mathematical test, the Court has remarked that in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. ... With this instruction in mind, we note that a court, when determining the reasonableness of a particular ratio of actual or potential harm to a punitive damages award, may consider: the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay. Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award.

3. Comparative Penalty Awards

Third, the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. When identifying "comparable cases" a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.

Id. at 587-89, 686 S.E.2d at 185-86. Applying the reprehensibility factors, Plaintiff suffered no physical harm from the defamation, other than perhaps distress and embarrassment. Second, there was no evidence of a reckless disregard for the health or safety of Plaintiff. Evidence was presented that Plaintiff was financially vulnerable; for example, after his termination, he cashed out his retirement. Fourth, the alleged defamation was a one-time event; however, there was repetitive conduct of rumors being spread in general in the department. Finally, Plaintiff argued, and the jury could have inferred from the evidence presented that the harm was the result of intentional malice, trickery, or deceit.

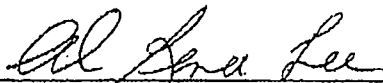
As to the ratio factor, although there is no bright-line test regarding the ratio of the actual damages to the punitive damages, the multiplier for punitive damages is low in this case, being 1.5 for Barnes and 2 for Earles. This factor weighs in favor of finding the punitive damages award appropriate.

As to the comparative penalty awards factor, there are no criminal penalties for workplace defamation in South Carolina. Consequently, there is nothing against which to assess

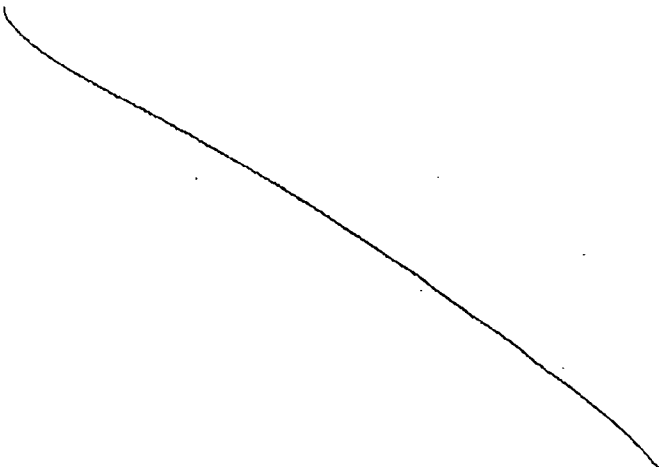
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this particular factor. Based upon all of these factors and the evidence presented, the punitive damages award does not violate constitutional due process. Defendants are not entitled to a reversal or reduction in the amount of punitive damages.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

February 23, 2015
Columbia, South Carolina


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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

C.A. No.: 2013-CP-40-01460

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

v.

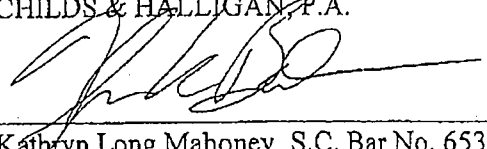
Jeffrey Kennedy.....Respondent.

PROOF OF SERVICE

I certify that I have served the NOTICE OF APPEAL on counsel for Respondent, by depositing a copy of it in the U.S. Mail, postage prepaid, on March 13, 2015, addressed to counsel of record as follows:

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

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

1 with the trial. We should hopefully be concluded with
2 our legal issues at that time.

3 When you come back from lunch, I'll explain to
4 you about how the trial will progress; and then we will
5 actually get started. If you'll report back to this
6 jury room at 2:45. Thank you.

7 (The jury panel is excused at 1:05 P.M.)

8 THE COURT: I believe we have some pretrial
9 issues which we need to take up at this time?

10 MS. PEAVY: Yes, Your Honor.

11 THE COURT: Yes, ma'am.

12 MS. PEAVY: Good afternoon, Your Honor.

13 Rachel Peavy here on behalf of the plaintiff,
14 Mr. Jeffrey Kennedy. We have submitted two motions in
15 limine. I will start with the motion in limine as to
16 excluding testimony and related documents related to
17 Bill Simpson of SCANA.

18 Your Honor, we're moving to exclude all
19 evidence and testimony related to pending charges and an
20 alleged theft at SCANA which arouse out of plaintiff's
21 employment with Allied Barton, which had a security
22 contract with SCANA.

23 The SCANA witness was identified by defense
24 counsel in the late afternoon of September 18, 2014. We
25 promptly objected as it being late on the eve of trial.

1 Furthermore, we contend that because these alleged SCANA
2 events -- and these are pending charges. Nothing has
3 been adjudicated.

4 THE COURT: So they are formal criminal
5 charges?

6 MS. PEAVY: There is a pending charge, yes,
7 ma'am, for, I believe, it's petty larceny for the theft
8 of a pair of safety goggles valued at \$5, and \$10 in
9 cash.

10 These SCANA events occurred three years after
11 the events which formed the basis of this lawsuit. We
12 would submit, Your Honor, that any mention of this SCANA
13 incident and the pending charges would result in such
14 extreme prejudice to our client, Mr. Kennedy, that we
15 would be unable to properly present our case to the
16 jury.

17 Furthermore, we would contend that they are
18 irrelevant because they concerns events that happened
19 three years in the future. This lawsuit is about what
20 happened in March of 2011, who Jeffrey Kennedy was in
21 March of 2011.

22 Your Honor, I think what this demonstrates,
23 this newly named witness, is that the defendants are now
24 trying to prove, by seeking to admit evidence of these
25 pending charges, what they were unable to prove or even

1 charge Mr. Kennedy with over three years ago.

2 Mr. Kennedy was never convicted of any crime,
3 hasn't been convicted of any crime. He hasn't had his
4 day in court for the SCANA charges, and he is innocent
5 obviously until proven guilty.

6 I've written a section on the background of
7 this case. I can certainly go through that, Your Honor,
8 if you'd like.

9 THE COURT: I've read that part.

10 MS. PEAVY: Okay. Then I'll go straight to
11 the rules of evidence which we believe support our
12 motion, Your Honor.

13 THE COURT: Let me just ask this: As I
14 briefly went through the complaint, we're talking with
15 causes of action, negligent supervision.

16 MS. PEAVY: As to Richland County School
17 District.

18 THE COURT: Outrage and defamation, slander.

19 MS. PEAVY: Yes, defamation, slander, yes.

20 THE COURT: All right. What is next?

21 MS. PEAVY: First, Your Honor, as a threshold
22 matter, the trial court is charged with determining
23 whether the evidence is even relevant under Rule 401.
24 Even if the evidence is deemed relevant under Rule 401,
25 it can be excluded if the probative value is

1 substantially outweighed by the danger of unfair
2 prejudice, confusion of the issues, or misleading the
3 jury.

4 I can't think of another example of something
5 that would be more misleading for the jury, if in this
6 lawsuit here where we're saying that he was accused
7 in 2011, his reputation was ruined, if now they are able
8 to present evidence that there are new charges pending
9 against him three years later.

10 Evidence of a crime or other act or wrong is
11 not admissible to prove the character of a person in
12 order to show that they acted that way. Here you don't
13 even have a crime. You just have a pending charge. It
14 can show motive, identity, existence of a common scheme;
15 but you still have to show that it fits within the
16 exception under Rule 404(b).

17 Finally, Your Honor, we think that specific
18 instances of conduct in this case, trying to attack
19 Mr. Kennedy's credibility by putting in these charges
20 that happened three years after the allegation that's
21 the crux of this lawsuit, it's just not probative.

22 First, Your Honor, as well, I'd like to point
23 out that we received information regarding that they
24 wanted to name Mr. Simpson of SCANA as a witness on
25 September 18th, the eve of trial.

1 The case law is clear that a motion to exclude
2 a witness's testimony is properly excluded on the basis
3 that the late identification of the witness was
4 prejudicial. That is Amisub of South Carolina versus
5 DHEC.

6 Some background about Mr. Kennedy's employment
7 history since leaving Richland Two, he was deposed on
8 December 17th of last year, a year ago. He testified
9 that he was employed at Allied Barton and was working at
10 SCANA as their security contractor.

11 In June of 2014, June of this year, defendants
12 served a subpoena on Allied Barton requesting all of the
13 records relating to Jeffrey Kennedy. On July 17th we
14 received copies of what defense counsel had received
15 from Allied Barton.

16 The records showed that plaintiff,
17 Mr. Kennedy, had been on the Allied Barton payroll
18 beginning in April of 2013 through the pay period ending
19 February 28, 2014. The same records show that
20 Mr. Kennedy returned his uniform to Allied Barton on
21 February 26th of this year.

22 Accordingly, Your Honor, we would submit that
23 this is a classic case of trial by ambush because the
24 defense counsel had noticed that he was no longer
25 working at Allied Barton as of July at the latest, but

1 they failed to pursue that.

2 They failed to identify any witness to testify
3 about his separation from Allied Barton until late in
4 the day on September 18th when they named Bill Simpson,
5 a SCANA security official. Along with naming
6 Mr. Simpson, they also produced records they received
7 from SCANA pursuant to a subpoena and provided those to
8 us as well.

9 Plaintiff's counsel has had no opportunity to
10 examine the witness or conduct a further investigation.
11 Defense counsel had plenty of time to investigate the
12 separation back in July at the latest. Now they're
13 seeking to rehabilitate their position by naming the
14 SCANA witness about ten days prior to trial.

15 The stated purpose of the discovery rules are
16 to prevent situations such as this. We would request
17 that because this information is only coming out,
18 they've only followed up on it, we're only being
19 notified September 18th, we would ask that the Court
20 limit the testimony, exclude it.

21 Our second point, Your Honor, which I'll go to
22 is that we don't believe it's relevant what SCANA is
23 alleging. We don't believe these pending charges are
24 relevant because they happened three years after the
25 incident which is the crux of this lawsuit.

1 This case concerns an accusation that
2 Mr. Kennedy was a thief when he was working at Richland
3 Two as a member of the School District. So it's about
4 who he was in March of 2011. The evidence is going to
5 show Richland Two, the security leadership, had actually
6 recommended him for promotion prior to this allegation.

7 Your Honor, I would submit to you pending
8 charges in 2014, three years later, don't speak to who
9 Mr. Kennedy was, what his character was, who he was in
10 March of 2011.

11 All it's going to do is have the jury look at
12 it and say, "Well, gosh, looks like they were accusing
13 him of this in February 2011. They couldn't prove it.
14 Here is someone else accusing him of it."

15 It's pending charges, never been proved, no
16 adjudication, in 2014. "Well, he must have done it in
17 2011 if he did it in 2014. They must have been right to
18 say he was a thief in 2011 because SCANA brought charges
19 in 2014." It's just so prejudicial, Your Honor, and
20 it's so confusing for the jury.

21 Your Honor, I would just address your
22 attention to the fact that our Supreme Court has stated
23 black letter law: Evidence of similar acts has the
24 potential to be exceedingly prejudicial. That's exactly
25 what this is.

1 No juror is going to be expected to ignore the
2 SCANA charges when they are considering whether my
3 client was defamed in 2011. Again, Your Honor, I would
4 say that the nexus of this case, the claims in this
5 case, are about who Mr. Kennedy was in 2011. I would
6 request that Your Honor exclude this evidence.

7 THE COURT: Thank you.

8 Mr. Barlow?

9 MR. BARLOW: Yes, Your Honor. I'll address
10 the timing issue first. One of our witnesses actually
11 found out about this SCANA investigation on
12 September 18th, the day that Ms. Peavy mentioned.

13 We didn't know about it until one of our
14 witnesses brought it to our attention when we were
15 preparing. As soon as we found out about this, we
16 provided notice. I will note that Ms. Peavy named a
17 damages witness, who is the plaintiff's ex-wife, on the
18 very same day. We haven't objected to that at all.

19 Of course, they've had time to talk to
20 Mr. Simpson. I spoke to Mr. Simpson recently. He
21 mentioned he had a call from Mr. Peavy and discussed
22 what he was likely to testify to as well.

23 We did not receive in the subpoena response
24 that we got from Allied Barton any separation paperwork
25 with regard to Mr. Kennedy. So we didn't know he had

1 been fired from Allied Barton.

2 Going back and looking at the pay records, we
3 did see that he had been terminated in February; but
4 then again that's something Mr. Kennedy has known about
5 since February.

6 There is no prejudice here at all except
7 Mr. Kennedy may not have bothered to share this with his
8 legal counsel until we named Bill Simpson, but he has
9 known that he has been under investigation.

10 We would proffer that Mr. Simpson is going to
11 testify that Mr. Kennedy confessed to these events back
12 in February or March in this timeframe. So the fact
13 that he has known about it since February and we are
14 just finding out about it last week or the week before,
15 there is no prejudice at all that he has notification of
16 Bill Simpson as a potential witness in this case.

17 THE COURT: So what exactly did he allegedly
18 confess to? Taking the things or not returning them or
19 what?

20 MR. BARLOW: Confessed to stealing the safety
21 glasses and the \$10.

22 MS. PEAVY: Your Honor, I would object to that
23 being labeled a confession. There are typewritten notes
24 in the SCANA documents provided to us prepared by SCANA
25 which --

1 THE COURT: I'll give you a chance to respond.

2 MS. PEAVY: Okay.

3 MR. BARLOW: Anyway, that would be an
4 admission by a party opponent. Certainly, Mr. Simpson
5 is free to testify as to what Mr. Kennedy's response was
6 when he interrogated him.

7 There is also a video where Mr. Simpson was
8 able to position a camera. It shows the plaintiff
9 actually taking items from cabinets in the linemen's
10 supply room. So that's what Mr. Simpson will offer.

11 Now, Ms. Peavy mentioned briefly that this was
12 his reputation at issue. That's really what this turns
13 on, Your Honor. You can't claim defamation and argue
14 that your character and reputation have been ruined and
15 then insulate that from any possible attack.

16 The case law is very solid on that. We
17 submitted a memorandum of law. We just got the motion
18 in limine today but anticipated that this was going to
19 come up. We submitted a memorandum of law today on this
20 very issue.

21 It is uniform in the cases that we cited in
22 there that under Rule 405, it says: "Methods of proving
23 character, reputation, or opinion." It says, "In all
24 cases in which evidence of character or a trait of
25 character of a person is admissible, proof may be made

1 by testimony as to reputation or by testimony in the
2 form of an opinion. On cross examination inquiry is
3 allowable into relevant specific instances of conduct."

4 THE COURT: Well, the question becomes at what
5 point in time? I mean, if the allegations are that
6 in 2011, when the allegations by the School District
7 were made against him, certainly whatever information
8 may have existed at that particular time regarding other
9 similar acts, prior bad acts, or other character
10 evidence at that particular time would be relevant.

11 How is this relevant to his allegations that
12 at the time that the School District made these
13 allegations, "You know, I have a good reputation and
14 therefore I was defamed."

15 MR. BARLOW: It goes directly to his damages.
16 He is claiming that we have caused him reputational
17 injury by what we did -- okay -- when there is an event
18 that happened this year, less than two years from his
19 termination.

20 THE COURT: Well, that's after the fact.
21 Isn't his damages --

22 MR. BARLOW: It's a failure to mitigate them.
23 He can't claim that his reputation and character are
24 solid when this is out there. I mean, it goes
25 directly -- he is going to ask the jury to award him

1 damages because, "They called me a thief, and they said
2 I'm not trustworthy."

3 We have a truth defense. We should be
4 entitled to prove that this gentleman is not
5 trustworthy. He has put his character directly in issue
6 in this case, as all the cases we have cited, cite
7 Rule 405 to 7.

8 THE COURT: So basically what you're saying is
9 that because something happened two years later, it
10 should refer back to what happened in March of 2011 and
11 therefore he should not be able to ask for any damages?

12 MR. BARLOW: Certainly. It's his reputation
13 that he is putting in issue. We think this goes
14 directly to that reputation and his character and
15 whether he ought to get damages.

16 He is asking the jury, "Award me damages for
17 what Richland Two did to me." Okay. The jury needs to
18 know that's not the only thing out there that may be
19 affecting his reputation and character in the community.
20 He has got a pending charge.

21 You know, whether there is a charge or not, we
22 can certainly get into this evidence without saying,
23 "Are you up for trial on October 9th with regard to that
24 specific charge," which is the case. They didn't ask
25 for a continuance of this case. They're ready to go

1 forward with it. So that's what it goes to.

2 There is a way to ask these questions without
3 getting into criminal aspects. It also bears mentioning
4 that it's the very same scheme or plan that we suspected
5 he was doing at Richland Two at Spring Valley. We'll
6 introduce evidence to that effect.

7 So it's just not fair to the defense, Your
8 Honor, to let him come in here claiming that he's got
9 good character, good reputation; and any damage to it at
10 all is totally our fault. That's what all the cases
11 that look at this say.

12 THE COURT: And so the allegations and the
13 charges as it relates to SCANA did not occur until this
14 year; is that correct?

15 MR. BARLOW: They occurred --

16 MS. PEAVY: Yes, Your Honor.

17 MR. BARLOW: That's right.

18 THE COURT: So he would have damages
19 presumably from Richland County if he is able to prove
20 that up until this year.

21 MR. BARLOW: Right. But how is the jury going
22 to know that unless we're allowed to introduce evidence
23 of that fact? He has failed to mitigate. If you are
24 claiming that somehow Richland Two injured you, you have
25 to act in conformance with what you think your character

1 and reputation are.

2 If he goes out and does something to further
3 injure his reputation, that's a failure to mitigate
4 damages. Mr. Kennedy went out, right as soon as he left
5 Richland Two, and got a job at Allied Barton making
6 about the same amount of money that he made at Richland
7 Two.

8 Yet he's claiming Richland Two injured his
9 reputation. Allied Barton fired him. I mean, certainly
10 we're allowed to get into the fact that Allied Barton
11 fired him.

12 That is directly what he is claiming, that we
13 injured his reputation by terminating him when, in fact,
14 he has been terminated by another company; and
15 presumably his reputation would be injured by that as
16 well.

17 THE COURT: Anything else?

18 MR. BARLOW: I think that speaks to that
19 particular issue. It's Rule 405 that controls this.
20 The cases are clear that when you put your character and
21 reputation in issue, the defendant is entitled to attack
22 that character and reputation at issue.

23 THE COURT: Any response, Ms. Peavy?

24 MS. PEAVY: Briefly, Your Honor, if I may.
25 They talk about that they're entitled to get into this.

1 They are entitled to get into it even if they don't get
2 into the criminal aspect, if they don't say that his
3 hearing date on the SCANA charges is October 9th.

4 Your Honor, they are neglecting to note that
5 this case, where we are today, the allegations against
6 Richland Two, that's March of 2011. Yes, he was
7 terminated from Allied Barton in February of 2014.

8 So we are saying he was damaged by Richland
9 Two. We are saying his reputation was damaged. We are
10 going to ask for damages. That's our, right. In March
11 of 2011, there were no SCANA charges.

12 They're talking about projecting out into the
13 future to prove that he was something three years prior.
14 That's not what the rule is for. The rule is for
15 contemporaneous, timely instances, not for projecting
16 into the future, not for prejudicing the jury by
17 presenting evidence where the jury is going to look at
18 it and say, "You know what? Gosh, Richland Two said
19 this in 2011; and they're saying SCANA is saying it
20 again in 2014. That's a pretty big coincidence."

21 Your Honor, I don't think that's what Rule 405
22 provides for at all.

23 THE COURT: I'll consider it. I can tell you
24 that I'm having a pretty hard time making the
25 connection. I understand -- I've heard the argument

1 about mitigation of damages, and I've heard the argument
2 about you being terminated.

3 I'm not sure that the allegations of what
4 occurred three years later is directly relevant to what
5 his character was at the time that these events occurred
6 in 2011.

7 I may need to hear some testimony. I'll be
8 happy to hear a proffer at the appropriate time. But at
9 this particular point, I'll give it some thought; but
10 I'm leaning towards limiting some of it, if not all of
11 it. I'll review the rules and look at it in light of
12 the arguments.

13 Let's go to the other motion.

14 MS. PEAVY: Thank you, Your Honor.

15 MR. GOODWYN: Just for the record, can you
16 make a ruling on the timeliness of the offer to make
17 the -- as to when they offered the witness ten days
18 before the trial just for the record?

19 THE COURT: From what's been stated is that
20 when they learned of it, they put everybody on notice.
21 I understand that certainly he was employed at Allied
22 Barton at the time they deposed him.

23 Apparently he wasn't fired from Allied Barton
24 or he wasn't terminated, whatever, until after his
25 deposition was taken in the first part of this year.

1 MR. GOODWYN: It was the discovery responses
2 that they sent us and the subpoena they got back in July
3 that showed he had been terminated. They didn't
4 investigate back in July, what the reason for his
5 termination was. They wait until ten days before the
6 trial to bring this in. We haven't had a chance to
7 depose him.

8 MR. BARLOW: Your Honor, in response to that,
9 I would just state that we had an interrogatory
10 proffered to them basically asking: Name all your
11 employers, all your supervisors, the reason you were
12 terminated.

13 We didn't get any supplement under Rule 26(e)
14 to show that he had been terminated from Allied Barton.
15 Again, the Allied Barton paperwork had nothing about him
16 being terminated.

17 It showed a pay log that looked like his pay
18 might have ended in February, but that's not the same as
19 notice that he was terminated from Allied Barton, which
20 they knew about since February.

21 THE COURT: As I indicated, I understand that
22 it may be late, but there are remedies for that. I
23 understand that the parties -- you have talked to
24 Mr. Simpson about his proposed testimony? He may not
25 have been under oath but you talked to him?

1 MS. PEAUVY: Your Honor, when I received the
2 notice from Mr. Barlow, that was the first I had heard
3 of it. I too had received the records indicating that
4 Mr. Kennedy was no longer employed at Allied Barton and
5 that his uniform had been returned.

6 I did call Mr. Simpson at SCANA, asked him
7 what this was about. He told me that his legal
8 department was hooked in with it and just gave me
9 general -- general statements about the allegation.

10 THE COURT: And what other steps did you take
11 after you learned that information?

12 MS. PEAUVY: What other steps did I take?

13 THE COURT: Yes, ma'am.

14 MS. PEAUVY: I wrote to Mr. Barlow to let him
15 know that we objected on the grounds of the late
16 identification and also on the grounds that are outlined
17 in the motion in limine. Obviously, we think three
18 years down the road, it's not properly before the jury.

19 MR. BARLOW: I'm going to let this go, Your
20 Honor, I promise. The three years down the road, part
21 of what they are claiming is when he was terminated in
22 October 2012, he was also defamed by that. So it's not
23 really three years down the road. It doesn't go all the
24 way back --

25 THE COURT: Okay. So it's two years, three

1 years?

2 MR. BARLOW: Eighteen months.

3 THE COURT: Let's just agree --

4 MR. BARLOW: Sure.

5 THE COURT: -- that the information as it
6 relates to Allied Barton is after any incidents with the
7 School District and any allegations made by the School
8 District and after his employment with the School
9 District.

10 MR. GOODWYN: I think we do have one more
11 motion.

12 THE COURT: Yes, sir.

13 MS. PEAVY: Your Honor, thank you. We also
14 filed a motion in limine concerning reports of petty
15 thefts at Spring Valley High School. We're looking to
16 exclude reports that were generated of petty thefts at
17 Spring Valley High School prior to the Athletic Director
18 incident, which allegedly occurred on the evening of
19 March 3rd, into the early morning hours of March 4,
20 2011.

21 The defendants are seeking to introduce
22 testimony and witnesses, written statements, as exhibits
23 that are all dated March 24, 2011, which attest to
24 reports of petty thefts which occurred at Spring Valley
25 beginning in the Spring of 2010.

1 They concern thefts that occurred in
2 Spring 2010; Fall 2010; February 14, 2011; February 25,
3 2011; and sometime between February 28th and March 2nd
4 of 2011.

5 These reports, Spring Valley High School has a
6 huge physical plan. You have got a couple thousand
7 students going to school there. You've got
8 administration, staff teachers, coaches, everything.

9 Accordingly, you can expect, as part of being
10 a huge company, essentially a huge company, a huge
11 plant, thousands of people, that there are going to be
12 petty thefts that occur.

13 I don't know if it's on a regular basis. I
14 don't know if it's every other month. People misplace
15 things. Things go missing. I don't dispute that. But
16 they're not relevant to whether Mr. Kennedy was properly
17 the focus of the District's investigation into the
18 missing money from the Athletic Department Office.

19 The reason why is because on February 28,
20 2011, Mr. Kennedy was recommended for a promotion by the
21 defendant, Chuck Earles, the security head that he
22 reported to.

23 Mr. Earles signed off on this promotion. He
24 has testified in his deposition he thought Mr. Kennedy
25 was the best man for the job. So at that point a lot of

1 these petty thefts apparently had already taken place.

2 On February 28, 2011, they thought Mr. Kennedy
3 was the best man for the job. We can assume they
4 thought he was trustworthy. We can assume they didn't
5 think that he was responsible for these thefts because
6 they were promoting him.

7 He was going to get a better assignment,
8 better hours, more pay. He was moving up at Richland
9 Two. So, Your Honor, after the theft at the Athletic
10 Director's Office reported on March 4, 2011, they start
11 to look around.

12 They start to say, "Wow, Jeffrey was working
13 that night." What do they do? They go and gather
14 statements from all these Richland Two employees
15 attesting to petty thefts that occurred months or years
16 prior.

17 And now they want to say, "Well, that's why we
18 looked at Jeffrey so hard. That's why we took away his
19 keys. That's why we pulled the promotion. That's why
20 we thought he was a thief."

21 Well, no, they didn't because on February 28,
22 2011, they thought he was promotable. They thought he
23 was trustworthy. So, again, they're trying to inject
24 after the fact evidence into what really is a very
25 discrete time period.

1 February 28, 2011, Chuck Earles, Director,
2 signs off on the promotion. Eric Barnes, his deputy,
3 another defendant, he agrees with the promotion, thought
4 Jeffrey was the best man for the job. That's their
5 testimony.

6 March 4, 2011, the Athletic Director says he
7 left \$1,000 out in his office unsecured, came in the
8 next morning, it was gone. What links Jeffrey to the
9 Athletic Director's Office staff is one thing.

10 He was on night duty. He was in the building
11 that night. That's undisputed, undisputed. Other than
12 that, no video of Jeffrey or anyone else going into the
13 AD's Office, no recovery of any cash. They referred the
14 matter over to the Richland County Sheriff's Department.

15 The investigation went nowhere. No charges
16 were brought, nothing. So now after the fact, they're
17 trying to put in these statements of these other
18 Richland Two employees saying that their desks were
19 rifled through, \$15 was missing, a ring from the lost
20 and found went missing, what have you.

21 We don't think it's relevant to what happened
22 on March 4, 2011, when Jeffrey was targeted. So we
23 would ask Your Honor that because Jeffrey, as of
24 February 28, 2011, wasn't a suspect in these prior
25 thefts at the time he was promoted, they can't now go

1 back and say, "Oh, wait. No, we wanted to throw light
2 on these thefts; and we think we can link Jeffrey to
3 them because he was working that night, because he was
4 in the building that night."

5 He was supposed to be in the building. He was
6 a security guard. He is supposed to be there at night.
7 He works the third shift. So, Your Honor, we would
8 again say that these statements and testimony as to
9 these prior petty thefts should be excluded.

10 THE COURT: Mr. Barlow?

11 MR. BARLOW: All right, Your Honor. First of
12 all, there is nothing from the Spring of 2010 that has
13 anything to do with this case. We're not trying to
14 introduce any evidence of petty thefts that occurred in
15 the Spring of 2010. Okay.

16 The Fall of 2010, air freshener starts going
17 missing. A couple of witnesses are going to testify
18 that they noticed an air freshener was going missing.
19 They looked at the video. They saw Mr. Kennedy leaving
20 with what looked like a can of air freshener. That
21 would be the Fall of 2010.

22 Everything else they are going to testify
23 about as to why they were not trusting Jeffrey Kennedy
24 at this time happened in a about a two or three-week
25 timeframe between February 24th and the March 3rd,

1 March 4th wherein \$1,000 went missing from Tim Hunter's
2 office.

3 So we're not talking about a huge spread of
4 time. It's like about two weeks where things started
5 going missing in the administrative hall at Spring
6 Valley. The administration at Spring Valley starts
7 looking at the cameras.

8 They're going to say, "Look. What is Jeffrey
9 Kennedy doing in this particular area for this amount of
10 time on the security camera?" That's where the stuff
11 went missing. He happened to be in there.

12 Then eventually Mr. Kennedy is asked to
13 explain his actions. He gives an explanation to
14 Mr. Garrick here that is not consistent with what was
15 observed on the video. This is all late February 2011.
16 Okay.

17 The main incident that they're talking about
18 is the theft from Tim Hunter's office, the Athletic
19 Director, which happens over the evening of March 3rd,
20 March 4, 2011. So there's really only about a couple of
21 week's timeframe there.

22 The witnesses really need to testify about
23 this because it's the whole picture. We start seeing
24 things go missing late February. We look back and then
25 we remember, "Hey, he was the guy taking the air

1 freshener back in the fall. Maybe we should look a
2 little more closely at him."

3 So then there is scrutiny coming on him as of
4 that timeframe, late February, which culminates in the
5 missing money that goes out of Tim Hunter's office.
6 Again, the witnesses will testify that based on what
7 they observed on the videotape, Mr. Kennedy is engaging
8 in irregular activity; and he needs to be able to
9 explain what he was doing in there.

10 So that's kind of where that testimony comes
11 in. It's not a big timeframe. It's all needed to
12 address why these people were suspicious of Mr. Kennedy
13 and why they did not trust him at that time and transfer
14 him to a different position.

15 MS. PEAVY: Your Honor, they have submitted
16 exhibits, proposed exhibits, that are statements that
17 reference thefts that occurred in the Fall of 2010,
18 going into -- they reference Spring of 2010.

19 These are typewritten statements that
20 reference prior dates, not dates that are right up smack
21 against March 4, 2011. Specifically what I'm referring
22 to -- and I'm trying to put my hands on it...

23 MR. BARLOW: I see the statement here that
24 there is a reference in a Dorothy Loiodice statement,
25 "Had money taken at the end of the previous school year,

1 May 2010, in the amount of \$15, same location, my desk."
2 We're happy to redact that or take that out.

3 MS. PEAVY: Your Honor, they're talking about
4 February 14th. They're talking about in Chuck Earles's
5 notes. They're talking about February 24th.

6 MR. BARLOW: These are all the same year.
7 They're two weeks prior to the theft from Tim Hunter's
8 office.

9 MS. PEAVY: Jim Childers, who is an Assistant
10 Principal, made a statement to the defendant, Eric
11 Barnes dated March 24, 2011: "We have been experiencing
12 a number of thefts. It began last spring -- the Spring
13 of 2010 -- when Dorothy Loiodice reported that \$15 was
14 missing. This is Fall 2010. So these documents are not
15 contemporaneous with March 4th, Your Honor.

16 February 25th they're saying Dorothy Loiodice
17 reported \$20 cash missing, of this year, February 25th
18 of 2011. Three days later they're recommending Jeffrey
19 for a promotion, signing off on February 28th.

20 So they can't have it both ways. They can't
21 admit that they put in a recommendation for a promotion,
22 thought he was trustworthy, thought he was a good guy,
23 thought he was the one for the position, and then come
24 back and say, "Oh, no, no. We suspected him in a
25 February 25th theft."

1 I mean, it's just so prejudicial and it
2 doesn't make sense to the jury, Your Honor. I don't
3 think it's relevant because their actions are such that
4 they did not allege he was a thief until after
5 March 4th, on and after March 4th.

6 THE COURT: Your motion references an Exhibit
7 A which I did not receive in any of the documents
8 attached.

9 MS. PEAVY: And I apologize for that, Your
10 Honor.

11 THE COURT: I need to look at it. Then on
12 these statements, are all the witnesses who made these
13 statements coming in to testify?

14 MR. BARLOW: We were not planning to bring all
15 of the witnesses in if counsel would stipulate to that.
16 That would be four or five ten-minute witnesses.
17 They're all part of the investigation.

18 They were submitted to Mr. Childers and
19 Mr. Earles in the course of the investigation.
20 Certainly, you know, the fact that these statements are
21 dated March 24th, I mean, this is all during the course
22 of investigating something that happened earlier that
23 month.

24 THE COURT: Sure.

25 MR. BARLOW: It wasn't wrapped up in a couple

1 of days. There were criminal charges pending at that
2 time. They're trying to take a look and evaluate what
3 was going on.

4 MS. PEAVY: There was no criminal charges
5 pending. He was never charged.

6 MR. BARLOW: Well, they were thinking about it
7 at least, that he would be investigated by the police as
8 well.

9 THE COURT: And I understand that the
10 statements relating to the March incidents would be
11 after that fact. I'm just looking at...

12 MS. PEAVY: If I can hand up the exhibits that
13 may be helpful, Your Honor.

14 I'll just let Mr. Barlow quickly look at them.
15 (Attorneys confer.)

16 MS. PEAVY: This is what was supposed to be
17 attached as Exhibit A. I apologize, Your Honor.

18 (Hands to Court.)

19 THE COURT: Okay. Any further arguments at
20 this time?

21 MR. BARLOW: I would say that it's all part
22 and parcel of an investigation of Mr. Kennedy, and it's
23 necessary to the testimony of the people who were in
24 charge of employees and security of the School District
25 to be able to testify as to why they didn't trust

1 Mr. Kennedy and moved him to a different position to
2 give him an opportunity to get their trust back.

3 THE COURT: I'll review the information. I'll
4 defer a ruling at this particular point as to both of
5 the motions.

6 I would suggest that you make sure that they
7 are not mentioned during the course of the opening
8 statements or any information relating to these
9 witnesses. I'll consider those. We'll take a lunch
10 break, and we'll come back at 2:45.

11 MR. BARLOW: Just to clarify that, the
12 February incidents, there is to be no mention of the
13 February incidents during opening statement?

14 THE COURT: You can --

15 MR. BARLOW: February of 2011? I mean, I'm
16 certainly happy not to mention anything that happened
17 prior to February 14, 2011, which is, you know, three
18 weeks before the money goes missing in Tim Hunter's
19 office; and there are other items going missing during
20 that timeframe.

21 MS. PEAVY: Your Honor, those are thefts that
22 occurred before he was recommended for the promotion on
23 February 28th. So it's just --

24 MR. BARLOW: By people who -- sorry. I'm
25 sorry.

1 MS. PEAVY: You know, this is Richland Two
2 security. Supposedly they're getting -- they have
3 knowledge of reported petty thefts. They have knowledge
4 of what's going on in their own physical plant.

5 They're in charge of security. February 28,
6 2011, after these petty thefts occurred, they're
7 promoting Jeffrey. I'm assuming they are not promoting
8 him if they thought he was a thief.

9 THE COURT: What I'm telling you is that
10 during your opening statements, you shouldn't talk about
11 any of these. You can talk about whatever incident with
12 the Athletic Director but not talk about specific
13 instances.

14 I'd talk in generalities because I have not
15 had a chance to review them to determine whether or not
16 they should be admissible and under what circumstances.
17 So there could be some problems as to whether or not
18 statements made during opening would be prejudicial to
19 the point where the jury could be tainted.

20 MS. PEAVY: Thank you, Your Honor.

21 THE COURT: I am not making a ruling as to
22 whether or not those statements are admissible at this
23 particular point. I'm just telling you for purposes of
24 your opening statement, and that should get us
25 through -- we'll probably get through some of the

1 being first duly sworn, testifies as follows:

2 THE CLERK: State your full name for the
3 record.

4 THE WITNESS: My name is Jeffrey Kennedy.

5 (Plaintiff's Exhibits Number 1-9 are marked
6 for identification.)

7 DIRECT EXAMINATION

8 BY MS. PEAVY:

9 Q Mr. Kennedy, can you state your full name for the
10 record for the jury.

11 A Jeffrey William Kennedy.

12 Q And where were you born, Mr. Kennedy?

13 A Columbia, South Carolina.

14 Q Okay. Did you go to school here?

15 A Yes, I went to high school here.

16 Q Where did you graduate from?

17 A W.J. Keenan High School.

18 Q And after high school, what did you do?

19 A Went in the military, Army.

20 Q Oh, okay. Where were you stationed?

21 A I did basic at Fort Benning, Georgia. Then I also
22 went to jump school, airborne school. Then from
23 there to Korea and back here.

24 Q How long were you in the military for?

25 A Two years.

- 1 Q Okay. And discharged honorably?
- 2 A Yes, ma'am.
- 3 Q Since getting discharged from the Army, what have
- 4 you been doing professionally?
- 5 A Mostly security work.
- 6 Q Did you go to college at all or did you just do the
- 7 military?
- 8 A Just military, yes, ma'am.
- 9 Q Okay. And were you previously married?
- 10 A Yes, ma'am.
- 11 Q And do you have any kids?
- 12 A Yeah, I got two sons.
- 13 Q What are their names?
- 14 A Jeremy and Jeffrey.
- 15 Q Any grandkids?
- 16 A I've got six grandkids, five boys and one girl.
- 17 Q One girl?
- 18 A One girl.
- 19 Q I bet she is spoiled. Have you been a member of a
- 20 church here in the Columbia area?
- 21 A Yes, ma'am.
- 22 Q In 2008 you applied for a security job at Richland
- 23 Two; is that correct?
- 24 A Yes, ma'am.
- 25 Q You got the job; correct?

- 1 A Yes, ma'am.
- 2 Q Okay. Who interviewed you?
- 3 A Chief Propst and Captain Z.
- 4 Q Do they call her Captain Z --
- 5 A Yes, ma'am.
- 6 Q -- because her last name is hard to pronounce?
- 7 A Yes, ma'am.
- 8 Q What shift were you given when you were hired on?
- 9 A Third shift.
- 10 Q And what is that shift?
- 11 A That is 11:00 to 7:00 in the morning.
- 12 Q What was your rate of pay back when you were hired?
- 13 A Probably I think maybe 11.77 or something like
- 14 that.
- 15 Q An hour?
- 16 A Yes.
- 17 Q Okay. Were you entitled to earn overtime if you
- 18 worked extra events?
- 19 A A lot of overtime, yes, ma'am.
- 20 Q Was that part of your earning capability?
- 21 A Yes, ma'am. I used to do traffic, and traffic is
- 22 like an extra \$30 a pay period. So I did traffic
- 23 at Joseph Keels.
- 24 Q For special events and tournaments?
- 25 A Yeah.

1 Q And did the job at Richland Two, did that come with
2 retirement benefits?

3 A Yes, ma'am.

4 Q Okay. Did you take advantage of that?

5 A Yes, ma'am.

6 Q And did you also receive health insurance through
7 the District?

8 A Yes, ma'am.

9 Q I'm going to show you what's been marked as
10 Plaintiff's Exhibit 1. It's titled an Offer of
11 Employment. Does this accurately reflect when you
12 came on at Richland Two as a security officer?

13 A Yes, ma'am.

14 Q Okay. And what date is that dated?

15 A May 15, 2008.

16 Q Okay. Let's talk about the third shift, 11:00 to
17 7:00, or thereabouts. I'd like you to describe for
18 the members of the jury what your responsibilities
19 are as a member of the third shift, who the people
20 are that you're working with, and kind of what you
21 do during those hours.

22 A Third shift normally is the lockdown shift. When
23 we come in, because most schools have a lot of
24 activities -- you've got custodians in the building
25 and stuff like that -- so we come in at 11:00 to

1 7:00.

2 We have to go around and check all the doors,
3 check all the windows, cut the alarms on. We also
4 answer alarms. If we have a burglar alarm or a
5 fire alarm or something at night, we're the first
6 to respond. We also open up all the schools in the
7 morning and be the ones to do traffic in the
8 morning.

9 Q All right. So when you're inside a building at
10 night, when you come to put the alarm on, when
11 you've come to make sure the outside doors are
12 locked, do you also check all the inside doors to
13 see if the people who work in those offices have
14 locked the doors?

15 A No, ma'am, we just check the outside doors.

16 Q So that's not part of a security person's
17 responsibility?

18 A No, ma'am.

19 Q And in order to get this position at Richland Two
20 as a member of the Security Division, you had to
21 prevent -- you had to present to Richland Two that
22 you had a clean SLED record; correct?

23 A Yes, ma'am. Yes, ma'am.

24 Q So you had passed a SLED check and a background
25 check when you were hired at Richland Two; correct?

- 1 A Yes, ma'am.
- 2 Q Okay. When you're on this third shift, can I say
- 3 that you're essentially the night watchman?
- 4 A Yes, ma'am.
- 5 Q Is that fair?
- 6 A Yes, ma'am.
- 7 Q Okay. You're driving around in a District truck;
- 8 correct?
- 9 A Yes, ma'am.
- 10 Q You're wearing a District uniform?
- 11 A Yes, ma'am.
- 12 Q Okay. Is every night the same or is every night
- 13 different?
- 14 A No, every night is different. We have different
- 15 activities and different things going on, different
- 16 games. Every night is different.
- 17 Q Okay. And what about when there's not a game? Do
- 18 you have an established pattern or do you kind of
- 19 mix it up every night?
- 20 A No, try not to set no set patterns, try not to go
- 21 the same route every night, try not to check the
- 22 same schools in order. You do it differently.
- 23 Q Okay.
- 24 A Just so you don't have no pattern.
- 25 Q Okay. So you don't want to have a pattern because

1 you don't want people to be able to track your
2 movements; is that right?

3 A Yes, ma'am.

4 Q And sometimes when you get inside a building and
5 you're inside a building, do you walk the halls?

6 A Sometimes a lot of lights are on. We have to turn
7 the lights off. Basically when you get to a school
8 and the alarm is not set, then you don't know if
9 nobody is in the school or not. So you want to
10 walk through the school, check bathrooms and stuff
11 like that, make sure ain't nobody in there, and
12 then check outside doors.

13 Q So when you're on your shift, you're going around
14 to all these different Richland Two schools?

15 A Yes.

16 Q And I had mentioned to the members of the jury, but
17 why don't you tell me what schools you would go to
18 on a regular basis?

19 A Spring Valley High School is my base school. I had
20 Polo Road. I had Lonnie B. Nelson, had E.L.
21 Wright. I had Spears Creek Elementary, and I had
22 the adult ed off Clemson Road, and I had Windsor
23 Elementary and Polo Road.

24 Q Okay. So you were out and about going to different
25 buildings all the time every single shift? Is that

1 fair to say?

2 A Yes, ma'am.

3 Q Is it also fair to say that some nights you might
4 be in the Administration Building for five minutes?
5 Some nights you might be there for two minutes? Is
6 that correct?

7 A Correct.

8 Q Okay. And that's because there might be a light on
9 one night or you might have to hear a sound and
10 investigate and what have you?

11 A Yeah. Also, in the Administration Building that's
12 where our spare batteries for the radios are kept.
13 That's where the phone is being charged and the
14 phone is on the charger. So we have to go in there
15 every night to change batteries and get the phone
16 off the charger.

17 Q Okay. When we're talking about an administrative
18 building, is that like what we would consider where
19 the school office is?

20 A By the Principal office, Assistant Principal and
21 all that, yes, ma'am.

22 Q Are there classrooms there too?

23 A No, ma'am, just administrative offices.

24 Q All right. And over the course of this shift --
25 it's about an eight-hour shift, I think you

1 testified -- do you try to space things out a
2 little bit?

3 A Yes, ma'am.

4 Q What's the reason for that?

5 A Because you don't want to finish too fast. Then
6 you don't have nothing to do. You'll be in one
7 place too long. You space things out so you don't
8 get to the same school at the same time every
9 night. You don't finish at the same time. You
10 just don't set no pattern or no routine.

11 Q And when you're on third shift and you're visiting
12 these different schools, checking things out, et
13 cetera, occasionally do you use the rest room?

14 A Yes, ma'am.

15 Q Occasionally, will you, you know, grab a soda or
16 flip through a newspaper someone has discarded?

17 A Yes, ma'am.

18 Q So there's some downtime where maybe you take a
19 couple minutes, check your phone, what have you?

20 A Yes, ma'am. They want you to spend at least, say,
21 anywhere from 45 minutes or so at a school.

22 Q Okay.

23 A Some schools, like an elementary school, you might
24 can check that school in like 15 minutes.

25 Q Okay. So they want you to do a thorough job when

1 you get to that school?

2 A Yes, ma'am.

3 Q And what's the reason for that?

4 A They want to make sure everything is locked up and
5 everything is secured.

6 Q During the time you were working for Richland Two,
7 starting in May of 2008, you were supporting your
8 family; is that correct?

9 A Yes, ma'am.

10 Q Okay. Who was staying with you and your then wife?

11 A Me and my wife, my baby son and his son, my
12 grandson.

13 Q So you were a family of four at that time?

14 A Yes, ma'am.

15 Q And was you son contributing to the household or
16 were you guys kind of --

17 A No, ma'am, he was going to school.

18 Q Okay. So you were helping him by providing a place
19 to live and all that?

20 A Yes, ma'am.

21 Q Okay. Now, you mentioned previously when you got
22 hired at Richland Two originally back in May
23 of 2008, you were hired by someone named Chief
24 Propst?

25 A Yeah, Chief Propst.

1 Q And you were also hired by Captain -- I will call
2 her Captain Z -- it's a Polish last name and it's a
3 little difficult to pronounce.

4 A Yes, ma'am.

5 Q At some point the leadership in the Security
6 Division at Richland Two changed; is that correct?

7 A Yes, ma'am.

8 Q Okay. Who left?

9 A Chief Propst.

10 Q Did he tell you why he was leaving?

11 A Yeah, they fired him.

12 Q They did?

13 A Yes, ma'am.

14 Q Okay. Who came on?

15 A Chuck Earles was already there, but he took the
16 position as being in charge.

17 Q And after Mr. Earles assumed the leadership
18 position of the Security Division, did he send out
19 a notice to everyone in the Security Division,
20 which I've marked as Plaintiff's Exhibit 2?

21 A Yes, ma'am.

22 Q Is that your signature on the bottom there?

23 A Yes, ma'am.

24 Q Okay. And Mr. Earles sent out this Change of
25 Culture memo to the Security Division staff; is

- 1 that correct?
- 2 A Yes, ma'am.
- 3 Q And he wanted y'all to sign it; right?
- 4 A Yes, ma'am.
- 5 Q And you did sign it; right?
- 6 A Yes, ma'am.
- 7 Q Okay. Will you read for the members of the jury
- 8 just the underlined portion?
- 9 A "Mind your own business. Do your job. Leave your
- 10 personal life at home. Do not listen to or repeat
- 11 rumors. Always be honest."
- 12 Q And this is entitled Change of Culture from this
- 13 day forward?
- 14 A Yes, ma'am.
- 15 Q So this is Mr. Earles's mandate at this point --
- 16 A Yes, ma'am.
- 17 Q -- in your opinion?
- 18 A Yes, ma'am.
- 19 Q And your impression. Okay. And you were working
- 20 under Mr. Earles now; right?
- 21 A Yes, ma'am.
- 22 Q Did he bring on anyone with him?
- 23 A Eric Barnes came on.
- 24 Q Was he his sort of deputy?
- 25 A Yeah, and they used to work together prior to that.

1 Q Okay. What was the change when Mr. Earles and
2 Mr. Barnes took over?

3 A They pretty much tried to run the security company
4 like the Richland County Police instead of
5 security.

6 Q Okay. And there's a -- you worked in security a
7 long time?

8 A Yes, ma'am.

9 Q So you know there's a big difference between the
10 Richland County Sheriff's Department and Richland
11 Two School District Security Department?

12 A Yes, ma'am.

13 Q Is that fair?

14 A Yes, ma'am.

15 Q Okay. Y'all aren't tasked with making arrests,
16 hunting down suspects, and banging out suspicious
17 vehicles and all that, are you?

18 A No, ma'am.

19 Q Okay.

20 A We carry a flashlight.

21 Q All right. What did you say? You have a
22 flashlight?

23 A We carry a flashlight.

24 Q All right. Back in February of 2011, can you tell
25 the jury what was going on with your position at

1 Richland Two?

2 A When?

3 Q Back in February 2011.

4 A Oh, that's when I applied for the lieutenant

5 position that came open.

6 Q Okay.

7 A And it was given to me.

8 Q Okay. This was a promotion obviously to

9 lieutenant?

10 A Yes, ma'am.

11 Q What was better about this job than where you moved

12 from?

13 A I was coming off third shift going to supervise

14 second shift, a pay raise.

15 Q Okay.

16 A I got a little more time home instead of being away

17 at night.

18 Q What is second shift?

19 A Second shift is from 3:00 to 11:00.

20 Q Okay. So it's a little more family friendly. Who

21 recommended you for the promotion?

22 A Chuck Earles.

23 Q Okay. Who else did you meet with about the

24 promotion?

25 A Eric Barnes and Captain Permenter.

1 Q Angela Permenter?

2 A Yes, ma'am.

3 Q So you met with Chuck Earles, who was the head of
4 security, you met with Eric Barnes, who was his
5 deputy, and you met with Captain Permenter --

6 A She was captain of the second shift.

7 Q Who was the supervisor?

8 A Yes.

9 Q And they all thought you were the best guy for the
10 job?

11 A Yes, ma'am. After my interview they said they had
12 three more people to interview, but they called me
13 before I got home and told me the job was mine.

14 Q Okay. Must have been a good day?

15 A Yes, it was.

16 Q And part of the way Richland Two works is that they
17 put in the recommendation for a promotion to the HR
18 Department; is that correct?

19 A Yes, ma'am.

20 Q Okay. I'm going to show you Plaintiff's Exhibit 3
21 and ask you to identify what this is, not the
22 handwriting, but just the typewritten form.

23 A It's the recommendation for my promotion.

24 Q Okay.

25 A To lieutenant.

1 Q Okay.

2 A Patrol supervisor.

3 Q And what day is that dated?

4 A It's dated the 28th of February, 2011.

5 Q So you knew Chuck Earles was putting this in for
6 you after y'all had met; right?

7 A Yes, ma'am.

8 Q And it says you were supposed to start on
9 March 7th; is that correct?

10 A Yes, ma'am.

11 Q Okay.

12 A I had already started going to supervisor meetings
13 and stuff.

14 Q Had they introduced you as, Hey, we gave the job to
15 Jeffrey. He is going to be moving up?

16 A Yes, ma'am.

17 Q So your colleagues knew you had been recommended?

18 A Yes, ma'am. They had gave me the photos of all my
19 employees, all the information, and everything,
20 notes from prior meetings.

21 Q So you must have been feeling pretty good?

22 A I was.

23 Q Okay. Let's talk about Spring Valley High School.

24 Did the Security Division of Richland Two, which
25 Chuck Earles was the head of, the manager of, did

1 security control who had the keys to Spring Valley
2 based on your experience?

3 A No, ma'am.

4 Q Who controlled that?

5 A I don't think they had no control. Everybody had
6 keys. You asked for keys, they gave them to you.

7 Q Okay. Who would you go to as the person at Spring
8 Valley, either a staff member or a parent or
9 student? Who would you go to?

10 A Either the Principal or Assistant Principal.

11 Q The Principal or the Assistant Principal. Okay.
12 So the Security Division, Richland Two security,
13 y'all didn't know who had keys to what; is that
14 correct?

15 A No, ma'am.

16 Q Okay.

17 A Spring Valley was run different from any other
18 school.

19 Q I'm sorry?

20 A Spring Valley was run different from any other
21 school.

22 Q In Richland Two?

23 A Yes, ma'am.

24 Q Was that because the Principal's Office controlled
25 the keys?

1 A Yeah, they were special.

2 Q Okay. Based on your three years of experience
3 working at Richland Two -- we're now into 2011 --
4 did it appear to you that everyone had keys at
5 Spring Valley?

6 A Yes, ma'am.

7 Q Did custodians?

8 A Yes, ma'am.

9 Q Teachers?

10 A Yes, ma'am.

11 Q Administration obviously?

12 A Yes, ma'am.

13 Q Members of security when they were on shift;
14 correct?

15 A Yes, ma'am.

16 Q All right. Did coaches have keys?

17 A Coaches had keys.

18 Q Okay. Did you observe kids having keys?

19 A Yes, ma'am. You would see the coaches give their
20 kids or the teacher give the keys to the kids. You
21 would see them going in and out of buildings, going
22 in and out of classrooms.

23 Q What about parents? Did you ever see any Spring
24 Valley parents with keys?

25 A The booster club, yes, ma'am.

1 Q All right. Now, I want to get into what happened
2 next, what happened after February 28, 2011. Okay.
3 Sometime on or after March 4, 2011, did you receive
4 a call from Eric Barnes?

5 A I did.

6 Q And you weren't working that day; correct?

7 A No, ma'am, I was off. I worked Thursday through
8 Sunday. I was on Fridays and Saturdays.

9 Q Where were you on the day when Eric Barnes called
10 you?

11 A On my way to Charleston, me and my wife.

12 Q So y'all were just going to get away for the night?

13 A Yes, ma'am.

14 Q And that was your day off?

15 A Yes, ma'am.

16 Q Okay. What did Eric Barnes say?

17 A He called me and told me he wanted to talk to me,
18 needed me to come in about my promotion.

19 Q Sometime after that did you learn that, in fact,
20 Eric Barnes wanted to talk to you about what Tim
21 Hunter was saying went missing in the Athletic
22 Department?

23 A Yes, ma'am. My mother called me and said there was
24 about three or four carloads of police at the
25 house. Eric Barnes, she put Eric Barnes on the

1 phone; and he told my momma he was there to talk to
2 me about my promotion.

3 So she called me and put him on the phone. He
4 was talking about he was there because he needed to
5 see me. I asked why he had the police with him.
6 He told me he couldn't talk to me right then. He
7 told me he would call me back. About 20 minutes
8 later he called me and told me that I was on
9 administrative leave until further notice.

10 Q Did he tell you that was because Athletic Director
11 Hunter was reporting this \$1,000 --

12 A No, ma'am.

13 Q So you didn't know at that point?

14 A No, ma'am, I didn't know.

15 Q But some time after that, after Eric Barnes reached
16 out to you, you learned that Tim Hunter was
17 reporting that he had left a thousand dollars out
18 in his office sometime the evening of March 3rd,
19 into early morning March 4th?

20 A Yes, ma'am.

21 Q And that when he came back, it was missing; is that
22 correct?

23 A Yes, ma'am.

24 Q So that's what you knew at that point?

25 A Yes, ma'am.

1 Q Okay. I'd like to take us back to the night of
2 March 3, 2011. Tell me about it, to the best of
3 your recollection, what your movements were as they
4 related to the Athletic Department building.

5 A I normally used to work anywhere from 30 to 20
6 minutes early every night. So I got there early
7 and Lieutenant Reid -- he was Officer Reid then --
8 he was second shift. He was working and he hadn't
9 checked Spring Valley High School yet.

10 So I walked the school with him. We checked
11 the school. We walked over to the Bates Hall.
12 That's where the Athletic Director office is. I
13 opened the door and cut the alarm on. Then me and
14 him went on around and finished checking the doors.

15 We talked for a little bit. He left at 11:00
16 o'clock. So I finished, go ahead and do the rest
17 of my checks.. I guess about 11:30 or a quarter to
18 12, I got a call from Lieutenant Young saying that
19 the alarm was going off over at Bates Hall.

20 Q Where the Athletic Department is?

21 A Where the Athletic Director office is, yes, ma'am.

22 Q Where you had set the alarm with the coworker
23 earlier that evening?

24 A Yes, ma'am. So I drove over there and I seen the
25 bus and the baseball team coming back, which

1 Officer Reid already told me that the baseball team
2 was coming back late. They had an away game.

3 So they was over there. A couple of players
4 was going in the school. The coaches went in the
5 school. I sat out in the truck until they all came
6 out. They came out. I seen the coach set the
7 alarm. They came out and left.

8 I walked around and checked the doors. I went
9 back and parked back down by Spring Valley until it
10 was time for me to leave and go check my other
11 schools.

12 Q Okay. So the baseball team comes back. They set
13 the alarm off. You're called from the shift room
14 saying, "Hey, the alarm is going off at Bates Hall
15 where the Athletic Department is"?

16 A Yes, ma'am.

17 Q You come over in your truck and you observed that
18 baseball team is in there?

19 A Yes, ma'am.

20 Q Okay. About how many people did you see at that
21 time?

22 A In all or just inside the building?

23 Q It was the whole bus emptying out?

24 A Yeah, it was the whole baseball team.

25 Q All right.

1 A Some of them was getting in their personal cars.
2 Parents was there to pick them up. So a lot of
3 parents were out there waiting, yes, ma'am.

4 Q And some kids and coaches were inside the building?

5 A Yes.

6 Q Okay. Did you -- you weren't the one to cut that
7 alarm off though; right? The coach knew how to do
8 that?

9 A The coaches had codes, yeah.

10 Q All right. So that's around midnight or so to the
11 best of your recollection?

12 A Yes, ma'am.

13 Q And then you're out back on your shift back
14 visiting the schools, and then it's around
15 5:45 A.M.?

16 A Yes, ma'am.

17 Q So that's towards the ends of your shift? Right
18 about the end?

19 A It was about the time we start opening up the
20 schools, yes, ma'am.

21 Q All right.

22 A We started opening up. That's when I leave Spring
23 Valley and go start opening up the rest of the
24 schools.

25 Q What did you do then?

1 A When I first do that, when I'm at Spring Valley, I
2 open up all the gates. I go cut the alarm off in
3 the main school. Then I go to Bates Hall and cut
4 the alarm off, and then I leave there and go out to
5 the other schools.

6 Q On the night in question, you went back to the
7 Athletic Department and turned off the alarm; is
8 that correct?

9 A I did, yes, ma'am.

10 Q Now, you testified it only took about a minute, 30
11 seconds to turn the alarm on; is that correct?

12 A Yes, ma'am.

13 Q When you came back, Richland Two says you were in
14 the building five or six minutes.

15 A Yes, ma'am.

16 Q You were cutting the alarm off? What were you
17 doing?

18 A I cut the alarm on and the light was on in the
19 waiting room. The waiting room was back there by
20 the alarm. So I went in the weight room and cut
21 the light off. By that time Lieutenant Reid -- I
22 mean, excuse me -- Lieutenant Young called me and
23 told me I need to go open up the gate at Polo Road.

24 Q Okay.

25 A For the cafeteria I'm managing.

1 Q Did you take a break that night while you were at
2 the Athletic Department -- I mean -- that early
3 morning when you got there? Did you take a break?

4 A Yeah. When I cut the light off, I was in the
5 waiting room a few minutes. Then the phone rung.
6 I talked to Lieutenant Young. Then I came out and
7 went to Polo Road and opened that gate.

8 Q So you were in the waiting room? You had a glass
9 of water or something?

10 A Yes, ma'am.

11 Q Is that pretty standard to take a couple minutes
12 throughout the night and maybe have water or look
13 at the newspaper?

14 A Yes, ma'am.

15 Q Okay. So that's what happened that night; right?

16 A Yes, ma'am.

17 Q Okay. You've already testified but you were
18 instructed by your supervisors that you were to be
19 locking the halls of these buildings; is that
20 correct?

21 A Yes, ma'am. They don't want you sitting in the
22 truck with the truck just running. So you can go
23 in the school, check the school. You can go in
24 like the break rooms and take a break until it's
25 time for you to leave.

1 Q Now, when you went in to the Athletic Building that
2 night to turn the alarm off and turn off that light
3 in the waiting room, did you go into the Athletic
4 Director's Office?

5 A No, ma'am.

6 Q And do you check the inside doors of the Athletic
7 Department?

8 A No, ma'am.

9 Q So you had no idea if that door was locked or
10 opened --

11 A No, ma'am.

12 Q -- to that office; is that correct?

13 A That's right.

14 Q Do you know if the baseball coaches went into the
15 Athletic Director's Office?

16 A I didn't see them go in there so I can't speak on
17 that.

18 Q And you don't know if anyone else did; right?

19 A No, ma'am.

20 Q Okay. At this point Eric Barnes has called you.
21 You're headed down to Charleston with your wife,
22 get away for a night. He is telling you you're on
23 administrative leave. Then I assume you meet with
24 Richland Two security with Human Resources. And
25 what do they say to you?

- 1 A That they had some money missing from the AD
2 Office.
- 3 Q Okay. And did they ask you if you took it?
- 4 A Yes, ma'am.
- 5 Q What did you tell them?
- 6 A I told them I didn't.
- 7 Q Okay. What else did you tell them? Did you tell
8 them that, you know, yeah, you were in the building
9 that night?
- 10 A Yes, ma'am, yeah.
- 11 Q But you didn't take the money?
- 12 A Yes, ma'am.
- 13 Q So did they say to you that they had viewed the
14 videotape; and they saw that you were in the
15 building for five minutes, instead of 30 seconds?
- 16 A They didn't tell me that at that time, no, ma'am.
- 17 Q Did they ask you about other people you had seen in
18 the building that night?
- 19 A No, ma'am, they asked me about nobody.
- 20 Q Okay. Did they ask you if you knew who else had
21 keys?
- 22 A No, ma'am, they didn't ask.
- 23 Q Did they ask about the baseball team?
- 24 A No, ma'am.
- 25 Q Okay. All right. To your knowledge did they ever

1 question anyone else about this Athletic Director's
2 Office theft?

3 A No, ma'am.

4 Q Okay. Now, at a certain point, they referred the
5 matter over to the Sheriff's Department, didn't
6 they?

7 A Yes, ma'am.

8 Q Did you meet with the investigator from the
9 Sheriff's Department?

10 A Yes. Investigator Joe Clark called me and told me
11 he wanted to meet with me about --

12 MR. BARLOW: Objection, Your Honor, hearsay.

13 THE COURT: He can talk about having a
14 meeting. He can't talk about what was discussed during
15 the meeting.

16 MS. PEAVY: Okay.

17 THE COURT: He can certainly tell who he met
18 with.

19 MR. BARLOW: Sure.

20 BY MS. PEAVY:

21 Q You met with a Richland County Sheriff's Department
22 investigator; is that correct?

23 A Yes, ma'am. Yes, ma'am.

24 Q And what was the result of that?

25 A Nothing was found. I wasn't accused of nothing or

1 charged with nothing.

2 Q Okay.

3 A He said only that he did two days investigation and
4 he didn't see nothing that --

5 MR. BARLOW: Your Honor, hearsay objection.

6 THE COURT: I sustain.

7 MR. BARLOW: Move to strike.

8 BY MS. PEAVY:

9 Q No charges were brought by the Sheriff's
10 Department; right?

11 A No, ma'am.

12 Q And, in fact, at that point did you hope that
13 things were going to move on?

14 A Oh, yes, ma'am.

15 Q Did you hope that you were going to move forward in
16 your new position?

17 A Yes, ma'am.

18 Q At that point what did happen?

19 A To me I was punished for something I didn't do. I
20 couldn't go into my school no more. They took me
21 from Spring Valley, and they put me over in the
22 control office.

23 I was doing the work that the supervisor did.

24 So I felt like I didn't get the promotion, but I
25 still did the work because my supervisor was doing

1 the job that they gave me. That's what he was
2 doing.

3 Q Okay. Did you start hearing things?

4 A Oh, yes, ma'am.

5 Q I know this might be difficult, but I'd like you to
6 tell the members of the jury what you started to
7 hear at Richland Two following this incident.

8 A I heard that I didn't get my promotion. They said
9 I was the thief. I was the one that stole the
10 money out of the Athletic Director's Office.

11 Q Okay. I'm going to show you an exhibit, and I've
12 enlarged it so the jury can take a look at it.
13 This is marked as Plaintiff's Exhibit 4. I'd like
14 you to take a look at that. Over here, this is
15 just a blowup of it.

16 A Yes, ma'am.

17 Q At some point on or after June 15, 2011, which is
18 the date of this confidential memo, did you see
19 that lying around?

20 A Yes, ma'am.

21 Q Where did you see it?

22 A I seen it lying around in the security vehicle, and
23 I also seen it lying around in the offices.

24 Q And it says you are not to have keys anymore;
25 correct?

1 A Yes, ma'am.

2 Q Who wrote that memo?

3 A Chuck Earles.

4 Q Okay. When you read that memo, what does it tell
5 you?

6 A It tells me that they didn't trust me, and they
7 thought that I took the money from Spring Valley.
8 So they was punishing me, which they said they
9 wasn't, but it was obvious. I couldn't go back to
10 my regular job. If they felt I was innocent, I
11 could have went back to Spring Valley.

12 Q So this was lying out. You said you saw it in the
13 break room and in the truck?

14 A In the security vehicle.

15 Q And in the security vehicle. When y'all are on
16 shift, y'all are in Richland Two vehicles; correct?

17 A Yes, ma'am.

18 Q So they're not your personal car?

19 A No, ma'am.

20 Q Okay. So people are in and out of those vehicles;
21 is that correct?

22 A Yes, ma'am.

23 Q Okay. So in 2010 we have a Change in Culture:

24 "Don't ever discuss anyone else's personal life or
25 situation. Do not ever discuss another employee's

1 job performance with anyone, other than that
2 employee or the supervisor and never do it where
3 others can hear it." Is that the Change in Culture
4 memo?

5 A Yes, ma'am.

6 Q Okay. And June 15, 2011, this is sitting out in
7 the break room?

8 A Yes, ma'am.

9 Q Okay. Now, you weren't just meeting with
10 Mr. Earles or Mr. Barnes at this point. You were
11 also meeting with Mr. Roosevelt Garrick; is that
12 correct?

13 A Yes, ma'am.

14 Q And Mr. Garrick is the gentleman sitting here in
15 the courtroom today?

16 A Yes, ma'am.

17 Q At the time when this all was happening, he was the
18 Human Resources person; is that correct?

19 A Yes, ma'am.

20 Q Okay. I'm going to show you what's been marked as
21 Plaintiff's Exhibit 5, which is a letter to you
22 from Mr. Roosevelt Garrick. I'd like you to take a
23 look at it. I'm going to ask you about it.

24 A Yes, ma'am.

25 Q Okay. So in this letter Mr. Garrick is saying you

1 have behaved suspiciously. "And you've given us
2 answers that we don't think are trustworthy." Is
3 that the essence of it?

4 A Yes, ma'am. Yes, ma'am.

5 Q And specifically it looks like he is asking you --
6 or he is telling you that he asked you about
7 certain instances when you went out a back door
8 instead of a front door or when you were in a
9 building for 18 minutes instead of whatever minutes
10 they wanted you there on that specific day. He is
11 saying that he met with you May 15th and June 15th
12 of 2011?

13 A Yes, ma'am.

14 Q Is it fair to say that on those dates you might not
15 remember what exact door you went out of and what
16 exact building back in February when someone said
17 that a ring was taken from the back of a desk? Is
18 that fair to say?

19 A Yes, ma'am.

20 Q And is it also fair to say that you change up your
21 routines, and you don't check with your supervisor
22 first before you decide to do an extra round?

23 A No, ma'am.

24 Q You don't check with your supervisor first if you
25 decide that you're going to pick up your radio

1 battery and go back out the back door and then loop
2 back around instead of going out the front door; is
3 that correct?

4 A Well, that back door where we go get the radios,
5 that's where we go in. To get the radios and the
6 phone, you have to drive around to the front
7 because that's where the keypad is at to set the
8 alarm.

9 Q Okay. So this letter is saying that they have
10 shown you these videotapes and you don't really
11 have a good explanation for what you were doing on
12 those nights; is that correct?

13 A Yes, ma'am.

14 Q Okay. What did you tell them?

15 A I told them just what I just said. I said I would
16 go in that back door to get the battery for the
17 radio and get the phone and have to go around to
18 the front of the school to set the alarm.

19 They have a lot of lights on in front of the
20 school sometimes. So Captain Z wants you to cut
21 those lights off, go upstairs or whatever and cut
22 those lights off, then come back and set the alarm
23 and come out.

24 Q Okay. And if you told them that you thought you
25 went through one door one night and, in fact, the

1 videotape showed that you went through a different
2 door, would you be surprised by that?

3 A I mean, I go through all kinds of doors. I could
4 forget. I go through a bunch of doors at night.

5 Q Right, right. And in this letter Mr. Garrick tells
6 you something else, doesn't he? Does Mr. Garrick
7 write you that he has found that other individuals
8 did enter into many of these areas, with some of
9 them having keys to the appropriate secured areas;
10 is that correct?

11 A Yes, ma'am.

12 Q So he is acknowledging in the letter to you that
13 you're not the only one?

14 A Yes, ma'am.

15 Q That other people have keys. That other people
16 were there. Correct?

17 A Yes, ma'am.

18 Q He doesn't like your answers. He thinks you --
19 what you're responding to two months after the fact
20 doesn't match up with what he is looking at on the
21 videotape. But he is acknowledging, Yeah, there
22 are other folks; correct?

23 A Yes, ma'am.

24 Q Okay. At some point you had hired a different
25 attorney, a Mr. Brown, to communicate with

- 1 Mr. Garrick; is that correct?
- 2 A Yes, ma'am.
- 3 Q Okay. Did you direct your -- Mr. Brown to ask to
- 4 get your promotion reinstated?
- 5 A Yes, ma'am.
- 6 Q Okay.
- 7 A And I had him go in there to the Sheriff's
- 8 Department with me.
- 9 Q And Mr. Garrick still said no; is that correct?
- 10 A Yes, ma'am.
- 11 Q Okay. That was his decision. So at this point
- 12 you've been denied the promotion. You're on desk
- 13 duty?
- 14 A Yes, ma'am.
- 15 Q There's a confidential memo sitting out. You're
- 16 testifying you're hearing people talking about you?
- 17 A Yes, ma'am.
- 18 Q That must have been pretty stressful?
- 19 A It was.
- 20 Q Pretty upsetting actually?
- 21 A Yes, ma'am.
- 22 Q But you stayed, didn't you?
- 23 A Yes, ma'am, I needed a job.
- 24 Q And jobs aren't that easy to come by, are they?
- 25 A No, ma'am, they're not.

1 Q I say that. Jobs with health insurance, State
2 retirement benefits, those aren't that easy to come
3 by; right?

4 A That's right.

5 Q At that point you've got you wife, your son who is
6 in school and your grandson. They're all staying
7 with you?

8 A Yes, ma'am.

9 Q Let's talk about Ms. Kim Jones and what happened in
10 October of 2012. I want you to tell the jury in
11 your own words what happened with you and
12 Ms. Jones.

13 A Ms. Jones used to come in in the mornings when I
14 was working in the office in there. She drove a
15 bus. She stopped by in the mornings. We have to
16 check. As a matter of fact, we changed phone
17 numbers and we used to talk.

18 So this particular morning she came in. She
19 said her son had got in something at school, and
20 they said that he was on camera. She wanted to see
21 it. I told her I don't know how to run the cameras
22 back and do that.

23 Lieutenant Young, my supervisor, I asked
24 Lieutenant Young could he do it. He messed with
25 the computer a little while. He said he couldn't

1 do it. I asked my Captain Groves that night could
2 he get it.

3 Captain Groves didn't come in that night so I
4 didn't ask him. So she came in that morning. I
5 told her we couldn't get it. I'm the one who told
6 her to go talk to the Principal and, "See if the
7 Principal might show it to you since you're a
8 mother." I mean, here is his mother.

9 She left. Then Lieutenant Young told me he
10 could do it but he wasn't going to do it because
11 he, like, got in trouble doing that one time
12 before. I didn't know how to do it. So I never
13 showed her a film.

14 Q Okay. Since she was a mother, she was a work
15 colleague, she was a fellow Richland Two employee,
16 y'all were friendly the way coworkers are. She had
17 to get there early in the morning. You were there
18 early in the morning. Did you feel you had to try
19 and help her?

20 A If I know how to do it. Like I told them, if I
21 know how to do it, I would have showed her because
22 I didn't know I wasn't supposed to show her.
23 Didn't nobody tell me that, I wasn't supposed to.
24 But if I know how to pull that video up, I would
25 have showed it to her.

1 Q Because she was the mom and you felt she had a
2 right to see what was going on?

3 A I didn't know of no policy or nothing. Nobody
4 never told me that. They just gave me that job.
5 They didn't tell me nothing about that.

6 Q But you had never been trained on that system?

7 A No, I wasn't trained on nothing.

8 Q And you tried to get a couple of other people to
9 show her. They all said they didn't know how to do
10 it either; correct?

11 A Yes, ma'am.

12 Q But at some point Ms. Jones told the
13 administration -- she told you that she told the
14 administration that, in fact, she had seen the
15 video?

16 A Yes, ma'am.

17 Q Okay. Do you know why she did that?

18 A She did that -- she said she did that because she
19 thought the Principal might would show her the
20 video herself since she had seen it.

21 Q Oh, okay. So she told you she wanted it to appear
22 like she had already seen it?

23 A Yes, ma'am.

24 Q In hopes that the Principal would actually show it
25 to her?

- 1 A Yes, ma'am.
- 2 Q But she wasn't supposed to do that, was she?
- 3 A No, ma'am.
- 4 Q So y'all both didn't really understand what the
- 5 Richland Two policy was about viewing these
- 6 videotapes?
- 7 A I didn't.
- 8 Q Okay. And then Ms. Jones realized that maybe she
- 9 had done something?
- 10 A Yeah.
- 11 Q Is that correct?
- 12 A She said, "The Principal must have called Chuck
- 13 Earles in security." Then they had called her in,
- 14 Traci Batchelder and them, had called her in and
- 15 questioned her about that. So she found that, you
- 16 know, she was going to get in trouble.
- 17 Q So she told you that?
- 18 A Yes, ma'am.
- 19 Q Okay. So she was worried because she had kind of
- 20 breached this protocol; correct?
- 21 A She wanted to know had they called and talked to
- 22 me, and I told her nobody had talked to me at that
- 23 time.
- 24 Q Okay. Do you think she told them that you showed
- 25 her the video because she was nervous about her

1 job?

2 A Yes, ma'am.

3 Q Okay. And that's based on your communications with
4 her; correct?

5 A Yes, ma'am.

6 Q She was nervous?

7 A Yes, ma'am.

8 Q Okay. Now, at that point in October 2012, Richland
9 Two told you that you had breached their policy
10 about showing this video allegedly?

11 A Yes, ma'am.

12 Q And they told you that they weren't happy with the
13 answers you gave when they interviewed you about
14 the video incident; is that correct?

15 A Yes, ma'am.

16 Q And they gave you the opportunity to resign, didn't
17 they?

18 A Yes, ma'am.

19 Q Okay. What did you say when they told you that?

20 A That I wasn't going to resign. They had to fire me
21 because I hadn't done nothing.

22 Q Okay.

23 A And I asked why they believed her word over mine.

24 Q Did they tell you?

25 A No, they didn't say nothing.

1 Q Okay. So in October 2012, you're terminated from
2 Richland Two?

3 A Yes, ma'am.

4 Q Okay. How did that impact your life? Can you
5 describe that for the jury a little bit?

6 A Yes, ma'am. My wife was already going through a
7 few things. After I lost my job, we got evicted
8 out of the house. I got my car repossessed. She
9 moved in with her mother, with the grandbaby and my
10 son. I slept on my couch for a while until I got
11 my retirement back, and then I found me an
12 apartment.

13 Q Okay. So you weren't seeing your son and your
14 grandchild the way you did?

15 A (Indicating in the negative.) No, ma'am.

16 Q And your marriage was really under stress?

17 A (Nods in the affirmative.)

18 Q And did you and Mia ended up splitting?

19 A Yes, ma'am.

20 Q How long had y'all been married for?

21 A We was together 28 years and we was married 14.

22 Q That's a long time. Okay. Let's talk about
23 church. You used to be a mentor in the Godly Men's
24 Project; is that correct?

25 A Yes, ma'am.

1 Q Or Godly Men's Program, I'm sorry.

2 A Yes, ma'am, from boys to Godly men.

3 Q Can you describe for the jury what that is, what it
4 means to be a mentor in the Godly Men's?

5 A It was like a group of young boys, teenagers, that
6 most of them was in single parent homes. A bunch
7 of guys at the church, we got together and started
8 the ministry.

9 Because, you know, if a child never seen a
10 man, how does he know how to be a man. We tried to
11 help them out, show them what it is to be a strong
12 man and how they're supposed to be, how they're
13 supposed to act.

14 Q And at this church where the Godly Men's Program
15 was, was there a Richland Two employee who
16 worshiped there?

17 A There's several employees at Spring Valley went to
18 church there, yes, ma'am.

19 Q And what happened?

20 A It got back to the church about the incident in the
21 AD Office that I was accused of stealing that
22 money. I also was security for the pastor and I
23 used to be security for the offering when they
24 picked it up.

25 Q Okay.

1 A They stopped putting me on the schedule.

2 Q Okay.

3 A Nobody said nothing. They stopped putting me on
4 the schedule.

5 Q So they kind of froze you out?

6 A Yes, ma'am.

7 Q That must have been painful to have given so many
8 hours and then suddenly --

9 A Yes, ma'am.

10 Q -- you're just not welcome anymore. Things got
11 pretty bad. I think you did testify that you did
12 end up getting evicted?

13 A Yes, ma'am.

14 Q Is that correct?

15 A Yes, ma'am.

16 Q Was you property manager at that time for your
17 house Blue Bird Property Management?

18 A Yes, ma'am.

19 Q And I'm going to show you what's marked as
20 Plaintiff's Exhibit 7. Does this show how you had
21 fallen behind on the rent?

22 A Yes, ma'am.

23 Q So you all had to leave that?

24 A Yes, ma'am.

25 Q And, in addition, you made a decision that you

1 needed to get some cash, get some money. You
2 weren't working. Did you cash out your retirement
3 fund?

4 A Yes, ma'am.

5 Q I'm going to show you Plaintiff's Exhibit 6. Does
6 that accurately reflect what you received?

7 A Yes, ma'am.

8 Q Okay. Had you been planning on cashing out this
9 retirement?

10 A No, ma'am.

11 Q Okay. Now, you're currently working now; correct?

12 A Yes, ma'am.

13 Q Where are you employed?

14 A GEO Care.

15 Q Are you working security at GEO Care?

16 A Yes, ma'am.

17 Q And even though you've left Richland Two, even
18 though you were terminated, you're working now at
19 GEO Care, still a security officer. Do you get
20 benefits or retirement with GEO Care?

21 A No, ma'am.

22 Q Okay.

23 A You get stock, 401(k), but there is no retirement
24 or nothing like that.

25 Q Okay. No kind of pension?

1 A No, ma'am. Insurance is so high you can't afford
2 it.

3 Q Was there an occasion a few months ago when this
4 Spring Valley incident popped up in your life again
5 in a very real way?

6 A Yes, ma'am.

7 Q Okay. Did that happen at Wal-Mart?

8 A Yes, ma'am.

9 Q Can you tell the jury what happened at Wal-Mart?

10 A I was in Wal-Mart and I seen a couple of students
11 that were going to Spring Valley. I heard one of
12 them say, "Yeah, that's the man that they accused
13 of stealing the money at the Athletic Department."

14 Q Okay. Looking back on everything that happened at
15 Richland Two here today, do you feel like you were
16 treated fairly?

17 A No, ma'am.

18 Q Do you feel like they conducted an investigation?

19 A Against me, nobody else.

20 Q Did you ever hear about anyone else being
21 investigated?

22 A No, ma'am. Even after I told them about the other
23 people, they still didn't talk to them.

24 Q Even though Roosevelt Garrick, their Chief Human
25 Resources person, is telling you there are other

1 people, that wasn't good enough for them; correct?

2 A That wasn't good enough for them, yes, ma'am.

3 MS. PEAVY: Okay. I beg the Court's
4 permission for just a minute to check my notes.

5 THE COURT: Okay.

6 MS. PEAVY: One moment.

7 (Pause.)

8 BY MS. PEAVY:

9 Q Mr. Kennedy, sitting here today, how does it make
10 you feel to know that Richland Two, Chuck Earles,
11 Eric Barnes -- they're not here today -- but they
12 consider you to be a thief?

13 A It makes me feel bad.

14 Q Do you walk around with that every day?

15 A Yes, ma'am.

16 Q Okay. And I want to talk a little bit more about
17 the way things worked at Richland Two, the way
18 things worked at Spring Valley. Because
19 Mr. Garrick is telling you that you aren't the only
20 one, that other people had access, other people had
21 keys. He recognizes that. He knows that.

22 You're testifying and other witnesses have
23 testified there were a lot of other people there
24 that night, a lot of other people. So I want to
25 talk to you about the fact that there are these

1 other people who have access, and that includes the
2 custodial staff; is that correct?

3 A Yes, ma'am.

4 Q Okay. What time does the custodial staff come on
5 usually?

6 A They normally start coming in about 5:30, 5:45.

7 Q In the morning?

8 A Yes, ma'am.

9 Q Okay. So they try to clean before the kids get
10 there?

11 A Yes, ma'am. Whatever they can't do that night,
12 they try to get there early in the morning and do
13 it.

14 Q So they have to have some keys on them; correct?

15 A Yes, ma'am.

16 Q And do you have any knowledge of what time the
17 first people arrive in the Athletic Department
18 building or you're already gone?

19 A I'm already gone to my other school by the time
20 they come.

21 Q Okay.

22 A I usually get back there probably right at 6:45,
23 something like that. You see some cars over there.

24 Q Okay. And this confidential e-mail that was
25 printed out, Mr. Earles wrote this to people who

1 were supervisors; is that correct?

2 A Yes, ma'am.

3 Q Okay. But it wasn't just in an office where
4 supervisors went; correct?

5 A No, ma'am.

6 Q Okay. It was in an office where?

7 A Everybody goes.

8 Q Everybody goes?

9 A Everybody takes a break, yes, ma'am.

10 Q And it was in cars that the staff drives?

11 A Yes, ma'am.

12 Q Not just supervisors?

13 A Yes, ma'am.

14 Q Mr. Kennedy, I appreciate your time today. I'm
15 going to turn you over to the defense. Thank you.

16 THE COURT: Ladies and gentlemen, this would
17 be a good time to take a break for the evening. I'm
18 going to remind you of the instructions I have given
19 you; that is, not to begin to discuss this matter among
20 yourselves as you still don't have all the evidence that
21 has to be presented in this matter.

22 Please remember as you come and go from the
23 courthouse not to allow anyone to approach you to
24 discuss this matter with you. Again, if someone
25 attempts to do that, please tell them that you are a

1 juror. You cannot discuss it. I ask that you report it
2 as soon as possible.

3 Please also remember not to listen to
4 conversations that you may hear in the hallways, again
5 for the reason, that you have to make decisions based
6 upon the evidence that you've heard here in this
7 courtroom and not based upon conversations that you
8 overhear.

9 Now, additionally, ladies and gentlemen, I'm
10 going to ask that you follow some additional
11 instructions overnight. I know that your family and
12 friends will want to know what you're doing on jury
13 duty, whether you've been selected.

14 Certainly you can tell them you've been
15 collected as a juror in the case, but I ask that you not
16 discuss the testimony that you heard or seen at this
17 particular point.

18 Oftentimes, when you discuss things with
19 family and friends, they may ask you questions. They
20 may make comments to you. That has the potential to
21 influence how you view the evidence.

22 While they are not strangers that come up to
23 you and talk to you about the case, it's still
24 inappropriate for you all to have a conversation with
25 them about what you've heard or seen.

1 So, please tell them that I have asked you not
2 to discuss the matter with them at this particular time.
3 When you all have rendered a verdict in this case, you
4 can discuss it as you see fit. Please tell them I've
5 asked you not to discuss it until that time.

6 Additionally, ladies and gentlemen, I don't
7 believe that there will be any media reports. But if
8 there's anything on television or in the paper or radio,
9 I ask that you not listen to, watch, or read any of
10 those reports.

11 Again, that's someone else's recitation of
12 what they have heard, what they have seen. Again, you
13 have to be guided by what you have heard and what you
14 have seen so far throughout the course of this trial. I
15 ask that you not listen to, watch, or read any of these
16 reports.

17 Finally, ladies and gentlemen, I ask that you
18 not engage in any independent research or investigation.
19 To the extent that you may have access to either
20 individuals or through your computer or other searches
21 or other information that you may have available to you
22 about some of the things you have heard so far in this
23 trial, I ask that you not go out and look at that
24 material, search for, or ask questions of any
25 individuals who may have access or resources available

1 to them for you to gain additional information about
2 this matter.

3 The things that you need to know about this
4 trial will be presented to you throughout the course of
5 the trial. It's inappropriate for you all to engage in
6 any independent research or investigation.

7 That's not evidence in this case and cannot be
8 considered by you all in rendering your verdict in this
9 particular matter. Again, you have to base your
10 decision based upon the evidence presented here in this
11 courtroom and not based upon outside information.

12 Ladies and gentlemen, I'm going to ask that
13 you report tomorrow morning to the same jury room where
14 you reported this afternoon. When you come into the
15 building, they will scan your bandages on the first
16 floor. Do not stay there. Come on up to the second
17 floor and come back to the same jury room.

18 When you all assemble at 9:30 tomorrow
19 morning, we'll be ready to continue on with the trial of
20 this matter. Thank you. Have a good evening. We'll
21 see you at 9:30.

22 We may run a little bit later tomorrow,
23 between 5:00 and 6:00 just to give you an idea. I try
24 not to do that on the first day, but I like to give you
25 a heads up. If there are any conflicts, please let me

1 know in the morning; but that's the plan, to stay a
2 little bit later tomorrow. Thank you.

3 (Whereupon the jury is excused for the day at
4 5:06 P.M.)

5 THE COURT: Mr. Kennedy, during this break,
6 I'll remind you that you have not concluded your
7 testimony. So it will be inappropriate for you to
8 discuss it with anyone, including your own attorneys,
9 this evening. So I ask that you not discuss your
10 testimony overnight or with anyone. Thank you.

11 Anything we need to take up before we break
12 for the evening?

13 MR. GOODWYN: Just one issue. I'd like to
14 move to admit exhibits that were introduced. I don't
15 think they were actually formally offered to be
16 admitted.

17 MS. LONG-MAHONEY: There's no objection from
18 the defendant on that.

19 MR. BARLOW: We are not objecting to the
20 exhibits.

21 THE COURT: So numbers 1 through 6, I believe.

22 MR. GOODWYN: One through 7.

23 (Plaintiff's Exhibits Number 1-7 are received
24 into evidence.)

25 MR. BARLOW: Your Honor, I would just note

1 that I believe they opened the door to the testimony
2 about SCANA. They left out a whole employer, talking
3 about GEO Care and a Wal-Mart incident that happened
4 very recently, as in months ago.

5 The SCANA stuff all happened February 2014. I
6 think they're putting him up on a pedestal for his
7 reputation and character. I think that's directly
8 relevant to that.

9 THE COURT: I'll consider the information, and
10 I'll give you a ruling tomorrow.

11 MR. BARLOW: Thank you, Your Honor.

12 MS. PEAVY: Your Honor, I would like to note
13 that the Wal-Mart incident concerns one specific student
14 who went to Spring Valley. It's totally unrelated to
15 SCANA.

16 I'd also like to note that I think I am
17 entitled to establish that Mr. Kennedy is currently
18 employed. Obviously, whatever happened at SCANA,
19 whatever those allegations are, he is gainfully employed
20 now.

21 The reason he is is because the charges are
22 pending and he's got a clean SLED record. So, again,
23 Your Honor, we would just renew our motion strongly to
24 exclude the evidence of SCANA.

25 THE COURT: As I stated, I'll give you an

1 answer in the morning.

2 MS. PEAVY: Thank you.

3 THE COURT: I'll see you back tomorrow at
4 9:30. Thank you.

5 (Court Reporter's Note: Plaintiff's Exhibits
6 8 and 9 are withdrawn.)

7 (Whereupon the proceedings are concluded for
8 September 29, 2014.)

9 (The following proceedings are reported on
10 September 30, 2014.)

11 THE COURT: Counsel, I have had the
12 opportunity to consider the arguments that were made
13 yesterday in reference to the admission of evidence
14 relating to an event that occurred at SCANA after
15 Mr. Kennedy's employment with the Richland School
16 District.

17 I considered it under Rules of Evidence 404,
18 as well as 405. My conclusion is this. I do not
19 believe that the information relating to what occurred
20 at SCANA is -- while it may be relevant -- I don't
21 believe that it's admissible under 404 or 405.

22 Under 404 basically it has to be what we call
23 Lyle type of evidence. It has to go to show certain
24 things: Motive, intent, identity, common scheme or
25 plan. I can't remember the other one off the top of my

1 head.

2 But I have looked at the allegations that were
3 discussed as to what occurred at SCANA; and I find that
4 it does not meet any of those qualifications, not even
5 under common scheme or plan because it's not -- common
6 scheme or plan seems to denote that the proof of one is
7 proof of the other.

8 Certainly, it requires that acts that are not
9 subject to a conviction must be proven by clear and
10 convincing evidence, and also basically where the case
11 law describes it that the proof of one is absolutely
12 proof of the other.

13 I find that it's not temporally related to the
14 events that occurred in 2011. The acts at SCANA
15 occurred in 2014. They are not so similar in nature
16 that one, in fact, proves the other.

17 Additionally, while in a defamation case, the
18 character traits of the plaintiff may be at issue in
19 terms of -- in this particular case -- truth, veracity,
20 honesty -- the case law that seems to allow admission of
21 other acts, those acts usually occur before the alleged
22 defamation.

23 Because what is important in defamation cases,
24 the character, the person's character, as it existed at
25 the time that the defamation occurred. These events,

1 the ones at SCANA, occurred a number of years
2 afterwards.

3 Additionally, the thrust of the defamation
4 case is the publication. Certainly, the defendant can
5 present witnesses who can testify as to what the
6 plaintiff's character was at the time of the event, the
7 alleged event, occurred as it relates to the School
8 District and what his traits were as to honesty and
9 truthfulness.

10 Certainly, that would be relevant. But to
11 have an employer come in and testify as to what their
12 investigation may have yielded about certain events,
13 first of all, that's not a publication. So it's not for
14 the general public and not related to what his
15 reputation in the community might have been.

16 So I would have to agree with the plaintiff.
17 But it tends to go more towards those prohibitive
18 inferences that because he is accused of doing acts with
19 SCANA or SCANA may have found that there was reason to
20 send it to the police and the police may have
21 information to warrant going forward, therefore he did
22 the same thing back in 2011.

23 That's exactly what 404 prohibits. And let's
24 just say even if the higher court were to determine that
25 it would be relevant and probative, I think the

1 prejudicial value outweighs the probative value for this
2 reason.

3 Number one, the danger that there is an
4 improper inference by the jury that because of any
5 instances related to SCANA, therefore he must have
6 committed the offense. He must have taken the money
7 from the School District or the other acts that have
8 been discussed or will be discussed.

9 I think while the defense has argued that it
10 goes to his damages and it goes to how he was damaged,
11 the essence of the defamation damages is really the
12 publication, what damage the publication has.

13 And to be able to tell the jury: Well, you
14 can only consider this information to show in terms of
15 determining whether or not he has any continuing damages
16 or there has really been damage to his reputation after
17 2014, I think the jury would not be able to make the
18 distinction. I think it's too confusing to try to
19 explain to them what they can consider it for and what
20 they can't consider it for.

21 Additionally, while I am ruling that the
22 specific instances with SCANA cannot come in, certainly
23 there can be cross examination relating to his
24 employment and when he was employed, what he did at
25 SCANA, what his pay were, those things that would tend

1 to show that he was not in any worse position than he
2 was when he was with the School District because he made
3 the same pay. He had the same type of job.

4 I would even go so far as to allow cross
5 examination that he was terminated from SCANA but just
6 not the reasons for the termination. So I think that's
7 my ruling with respect to the information on the
8 admissibility of other instances of plaintiff's
9 misconduct.

10 I think anything that occurs -- let me also
11 say in the memorandum that the defense provided, I
12 looked at several of the cases that were cited. Most of
13 the ones that I looked at -- I looked at four or five or
14 six of them -- most of the information was prior bad
15 acts.

16 For example, in Pearson versus Robert Griffin,
17 even in the parenthetical it says: "There are criminal
18 acts committed by the plaintiff more than ten years
19 before the alleged libel."

20 In the United States versus Manus, which is a
21 Seventh Circuit Case, the prior bad act consisted of a
22 timecard reprimand which occurred in 1982, when there
23 were crimes that occurred in 1984, and then trial was in
24 1986.

25 In other cases they talk about what the

1 opinions that are relevant for purposes of defamation
2 and libel are for the opinions of others arising from
3 the publication.

4 That's what we are focused on here is the
5 publication. The Redfern versus Thompson case, a 1912
6 case, was prior acts existing at the time the event that
7 led to the trial. So I think there is a reason why they
8 call it prior bad acts. It's prior bad acts, not
9 subsequent bad acts.

10 While the case law seems to indicate that on a
11 occasion subsequent acts can be used, I don't believe
12 that this is one of those cases in which the subsequent
13 act is relevant to the issues specifically. It usually
14 occurs in criminal cases in which one of the Lyle
15 criteria is a factor, and I don't think that's a factor
16 in this particular case.

17 Are there any questions at this point?

18 MR. BARLOW: Yes, Your Honor. I have got one.
19 The testimony that we expect for why he left SCANA is
20 that he quit. They were going to reassign him somewhere
21 else, and he just quit. So I'm assuming the ruling
22 would apply if asked, "Why did you leave SCANA?"

23 "I quit," but he didn't go into why he quit.

24 MS. PEAVY: In fact, he wasn't employed
25 directly by SCANA. He had been employed at Allied

1 Barton through the SCANA contract.

2 THE COURT: I will let you weigh in. Are you
3 going to respond?

4 MR. BARLOW: Our information we have is that
5 he was terminated from Allied Barton. As far as SCANA,
6 whether he was terminated from SCANA or not --

7 THE COURT: Well, when I say SCANA, I am
8 referring to the SCANA incident, that particular job
9 when he worked. Whether it was for Allied Barton or for
10 SCANA, it's the same thing in my view.

11 MS. PEAVY: Yes, ma'am.

12 THE COURT: It's an incident that arose out of
13 working at SCANA or working at those facilities,
14 regardless of whether his employer was SCANA or his
15 employer was Allied Barton.

16 MR. BARLOW: Sure. At least as far as for
17 mitigation and other issues related to his post Richland
18 Two employment, I am allowed to inquire as to his
19 employment at Allied Barton; correct?

20 THE COURT: Sure. I think it is proper to ask
21 questions as to what he did there and what his pay scale
22 was and what his responsibilities were. I think all
23 that is relevant in terms of whether or not he was
24 sufficiently damaged after leaving Richland School
25 District.

1 MR. BARLOW: And whether he said he quit or it
2 was a forced quit, I think is relevant too.

3 MS. PEAVY: Your Honor, I would object to
4 that. The fact is that our client's testimony will be
5 that Allied Barton offered him another position at a
6 lower pay rate and he declined that, and the employment
7 ended. As a result, he resigned. I think it's valid
8 and relevant for that, "You worked at Allied Barton.
9 You were under a contract there, and you changed jobs --

10 MR. BARLOW: But it's --

11 MS. PEAVY: Well --

12 COURT REPORTER: One at a time, please.

13 THE COURT: I think it's relevant as to
14 whether he quit or whether he was terminated. The
15 reasons for the termination --

16 MS. PEAVY: -- are not --

17 THE COURT: -- I'm not going to allow. Simply
18 as it relates to what I called the alleged theft is not,
19 but I think that it is relevant. I think that clearly
20 goes to credibility and what the jury determines whether
21 he calls it a quit and Allied Barton says he was fired,
22 I think that is relevant.

23 MR. GOODWYN: As a practical matter, I don't
24 think anybody from Allied Barton is prepared to testify.
25 The witness they have identified, Bill Simpson, he can't

1 testify as to whether he was terminated or quit.

2 MR. BARLOW: The SCANA witness certainly can.

3 MS. PEAUVY: He is not Allied Barton.

4 MR. BARLOW: He works with Allied Barton. He
5 recommended him for termination.

6 MS. PEAUVY: He didn't want him working at
7 SCANA anymore, but he doesn't direct Allied Barton.
8 Allied Barton directs --

9 THE COURT: I think your information is going
10 to have to come from someone who has direct knowledge.

11 MS. PEAUVY: So that would be Allied Barton?

12 THE COURT: I don't have the information. You
13 all have the information.

14 MS. PEAUVY: His paycheck came from Allied
15 Barton.

16 THE COURT: It has to be information, direct
17 knowledge, or it has to be documentation that indicates
18 that he has received it, that he is aware of. So
19 however you all handle it, let's make it clear.

20 MS. PEAUVY: Thank you.

21 THE COURT: If it's a witness, it's a witness.
22 If it's documentation that he has seen that he is aware
23 of, then it can be documentation that he would have
24 received. I mean, there are papers that say, "You are
25 relieved," in his personnel file or whatever.

1 Anything else?

2 MR. GOODWYN: This is our next witness. Does
3 he need to sit outside?

4 MR. BARLOW: He think he needs to sit outside.

5 THE COURT: If that's what you all agree on.

6 There has been no motion to sequester the witnesses.

7 (Attorneys confer.)

8 THE COURT: Ms. Peavy, oftentimes when your
9 client was answering, when the witness was answering
10 questions, you also talked over the witness. I did
11 notice it a few times yesterday. I know for a fact that
12 the court reporter can only record one person.

13 MS. PEAVY: I apologize for that, Your Honor,
14 I will look out for it today.

15 THE COURT: I want to make sure you are aware.
16 I'm not trying to call you out specifically.

17 MS. PEAVY: That's okay.

18 THE COURT: You were asking the questions
19 yesterday.

20 MS. PEAVY: I think I have that tendency. So
21 I appreciate it, Your Honor.

22 THE COURT: Anything else?

23 MR. BARLOW: No, Your Honor.

24 MS. PEAVY: No, Your Honor.

25 THE COURT: We can ask the jury to come in

1 please.

2 (The jury returns to the courtroom at
3 9:45 A.M.)

4 BAILIFF: The jury panel is all accounted for,
5 Your Honor.

6 THE COURT: Good morning, ladies and
7 gentlemen.

8 THE JURY: Good morning.

9 THE COURT: Mr. Kennedy, you may resume the
10 witness stand. I remind that you are still under oath
11 from yesterday.

12 THE WITNESS: Yes, ma'am.

13 JEFFREY WILLIAM KENNEDY,
14 having been previously duly sworn, resumes the witness
15 stand and testifies as follows:

16 THE COURT: Any further questions by plaintiff
17 before we go on?

18 MS. PEAVY: No, Your Honor.

19 MR. BARLOW: May it please the Court.

20 THE COURT: Yes, sir.

21 CROSS EXAMINATION

22 BY MR. BARLOW:

23 Q Good morning, Mr. Kennedy.

24 A Good morning. How are you doing?

25 Q I'm doing fine. Before you started working at

1 Richland Two, you had a job at Providence; is that
2 right?

3 A Yes, I worked at Providence.

4 Q And you got terminated from that job at Providence?

5 A Yes, sir.

6 Q For excessive absenteeism and tardiness; right?

7 A Yes, sir.

8 Q And after you left Richland Two, you got a job with
9 Allied Barton; is that right?

10 A Yes, sir.

11 Q You didn't testify about that yesterday at all, did
12 you?

13 A I don't think so.

14 Q You worked for Allied Barton Security until
15 February of this year; right?

16 A Yes, sir.

17 Q Of 2014?

18 A Yes, sir.

19 Q Is that right? You got fired from Allied Barton
20 too, didn't you?

21 A No, sir, I resigned.

22 Q You resigned in lieu of termination, didn't you,
23 sir?

24 A No, I resigned.

25 Q Because you were asked to either resign or --

1 MS. PEAVY: Objection, Your Honor.

2 MR. GOODWYN: Objection. We just went through
3 this.

4 THE COURT: You can ask the question, and
5 that's the last time you can ask the question.

6 BY MR. BARLOW:

7 Q Your last paycheck from Allied Barton was
8 February 28, 2014? Does that sound right?

9 A I don't recall. It could be.

10 Q You made \$13.26 an hour at Allied Barton?

11 A Yes, sir.

12 Q And you worked security at the SCANA campus?

13 A Yes, sir.

14 Q You worked the third shift there too?

15 A Yes, sir.

16 Q Now, you have not sued Allied Barton?

17 A No, sir.

18 Q Didn't sue Providence?

19 A No, sir.

20 Q Have not sued SCANA either?

21 A No, sir.

22 Q Now, let's talk about Spring Valley. When you
23 worked the third shift, you were alone for the
24 entire shift?

25 A Yes, sir.

1 Q There was no one else there?

2 A Sometimes the captain came and ride around with you
3 and walk the school with you or either the
4 lieutenant.

5 Q But most of the time you are the only one there for
6 the entire shift?

7 A Unless you are training somebody, yes, sir.

8 Q Sure. And you don't dispute that you went in the
9 back door of the administrative hall at Spring
10 Valley High School and stayed in there for more
11 than 20 minutes on February 24, 2011?

12 A I did that on a regular basis. That's where we
13 kept the batteries and the telephone, and that's
14 where we did our breaks at Spring Valley.

15 Q You did the same thing on March 1, 2011?

16 A I can't recall if I did that. Like I said, it was
17 basically a lot of occasions.

18 Q All right. And there was a theft from the Athletic
19 Director's Office?

20 A Yes, sir.

21 Q You don't dispute that money was taken over there,
22 do you?

23 A I didn't say that money was taken.

24 Q You are not accusing Tim Hunter of stealing that
25 money, are you?

1 A I'm not accusing nobody of taking that. I don't
2 know nothing about it.

3 Q You are not accusing the custodian of taking that
4 money, are you?

5 A I'm not accusing nobody.

6 Q There is not a camera on the Athletic Director's
7 Office?

8 A I wouldn't know.

9 Q You work in that building, don't you?

10 A Yes, I work in the building. You can see the
11 camera, but...

12 Q So your testimony is you did not know there was a
13 camera --

14 A There's a camera right by the door. There's three
15 cameras in that area.

16 Q Sir, let me finish my question.

17 A I'm sorry.

18 Q Your testimony is that you did not know that there
19 was no camera showing Tim Hunter's door?

20 A I said there's three cameras in the building in
21 that area. Whether they show his door or not, I
22 don't know where the camera is pointing at.

23 Q The Athletic Director's Office is about three or
24 four steps from the keypad, isn't it?

25 A Yes, sir, right across from it.

1 Q And you have a master key that opens the Athletic
2 Director's door or at least you did when you worked
3 there?

4 A I don't know if it fit that door. I have a master
5 key to all the doors at Spring Valley.

6 Q Your key opened all the doors at Spring Valley?

7 A As far as I know, yes, sir.

8 Q All right. And it takes about 20 seconds to arm
9 and disarm an alarm in a school?

10 A I guess so, yes, sir.

11 Q You punch four keys?

12 A Yes, sir.

13 Q And that's all do and then you are gone? Open the
14 door back up and leave?

15 A It depends on if you've got to do something, if
16 they got something going on where you cut the
17 lights or something like that or the alarm. It
18 varies. If there is something is going on in the
19 building you need to check, you go and check it
20 out.

21 Q The weight room is about two or four steps from the
22 keypad?

23 A Yes, sir.

24 Q And you were at Bates Hall before 6:00 A.M. for
25 more than five minutes on the morning of March 4,

1 2011, weren't you?

2 A Yes, sir.

3 Q It was still dark outside?

4 A Yes, sir.

5 Q The weight room is right across from the AD's

6 Office, isn't it?

7 A Yes, sir, smack across.

8 Q You knew there was a big soccer tournament at

9 Spring Valley that weekend?

10 A They have it every year.

11 Q And you knew specifically at that time there was a

12 soccer tournament going on?

13 A I don't know if I knew about it because I wasn't

14 working that weekend.

15 Q After March 4th or that particular day, you went to

16 Charleston, didn't you?

17 A Yes, sir.

18 Q And that wasn't a planned trip, was it?

19 A No, it was just a spare-of-the-moment trip. We

20 talked about it. We wasn't sure we was going.

21 Q Where did you stay?

22 A We normally stay at the Marriott.

23 Q Do you know where you stayed that time?

24 A It was like three years ago. I don't know exactly.

25 Q Where did you eat?

1 A A lot of places, Hyman's down there on Meeting
2 Street, went to RB's in Mount Pleasant, different
3 places.

4 Q Is that where you ate that particular time?

5 A I can't recall.

6 Q What did you do down there at that time?

7 A Laid around, relaxed, enjoyed my wife's company.

8 Q There was an investigation into the Spring Valley
9 money that went missing from Bates Hall; right?

10 A If you want to call it an investigation, yes, sir.

11 Q You were on administrative leave; is that right?

12 A Yes, for four months.

13 Q You got paid the whole time, didn't you?

14 A Yes, sir.

15 Q You told coworkers that you were being investigated
16 for what was going on at Spring Valley, didn't you?

17 A No, sir.

18 Q You didn't tell any of your coworkers?

19 A No, sir.

20 Q You didn't tell Anthony Permenter that?

21 A That what?

22 Q That you were being investigated for Spring Valley?

23 A I told him that they accused me of taking the money
24 out of that office.

25 Q Right. You told Anthony Permenter that?

- 1 A Yes, sir.
- 2 Q And you told Barry Mitchell that too, didn't you?
- 3 A I talked to him.
- 4 Q Yes?
- 5 A Yes.
- 6 Q Now, you met with the police and your lawyer?
- 7 A Yes, sir.
- 8 Q You had a lawyer at that time, didn't you?
- 9 A Yes, sir, I hired a lawyer at that time.
- 10 Q That was Franchot Brown?
- 11 A Yes, sir.
- 12 Q You didn't do any investigation yourself on your
- 13 own, did you?
- 14 A No, sir.
- 15 Q Now, in the spring you met with Chuck Earles,
- 16 Mr. Garrick, and Ms. Batchelder?
- 17 A Yes, sir.
- 18 Q And you told Mr. Garrick that you did not enter the
- 19 front of the building after you had been in the
- 20 administrative hall for 20 minutes, didn't you?
- 21 A No, sir, I don't recall.
- 22 Q You don't recall telling him --
- 23 A I don't recall. If I cut the alarm on, I went
- 24 through the front door. That's where the alarm pad
- 25 is at.

1 Q Did you tell Mr. Garrick that you not do that, that
2 you only went in the back of the administrative
3 hall --

4 MR. GOODWYN: I will object. Can we be clear
5 on which event we are talking about? There's a lot of
6 different little events. It's not clear to me what day
7 he is referring to here.

8 THE COURT: Rephrase the question.

9 MR. BARLOW: Sure.

10 BY MR. BARLOW:

11 Q On March 1st did you tell Mr. Garrick that the
12 night of March 1st that you -- after going into the
13 administrative hall through the back door and
14 stayed for 20 minutes that you did not come back
15 around the front and set the alarm?

16 A I don't recall.

17 Q After you were transferred to Support Services --
18 you testified about that yesterday?

19 A Yes, sir.

20 Q The same pay?

21 A Not the same pay. I didn't get the overtime I got.
22 I got a lot of overtime when I was at Spring
23 Valley.

24 Q Your testimony is you didn't get any overtime when
25 you worked --

1 A Not the overtime I used to get.

2 Q But you got overtime, didn't you?

3 A Some, yes, sir.

4 Q Sure. You were allowed to work football games and
5 other things like that?

6 A Yes, sir, the ones I didn't have to have a key. I
7 couldn't go fill in at a school like I used to. I
8 couldn't work another shift like I used to.

9 Q Same base pay? Worked the same shift?

10 A Yeah. But if you work overtime, you make 19.23 an
11 hour. It's a big difference.

12 Q But you did get paid overtime, didn't you?

13 A Yeah. I worked 51 to 60 hours of overtime when I
14 was working at Spring Valley. Again, I dropped
15 down to just getting 30 or 20 after I went to
16 Support Services.

17 Q You stayed at that job until October 2012?

18 A Yes, sir.

19 Q You didn't apply for a job anywhere outside of
20 Richland Two for that whole time?

21 A I enjoyed my job. I needed a job. I had a family
22 to support.

23 Q You liked your job, didn't you?

24 A I like working with kids.

25 Q You liked it even after you got transferred over?

1 A Not really but I needed a job. I didn't like the
2 way they did it. I was doing the supervisor job
3 that I was promoted for and wasn't getting paid for
4 it. I was doing the job my supervisor was doing
5 before they put me in there.

6 Q Are you saying you didn't like that job?

7 A I said I needed a job.

8 Q Do you recall giving a deposition in this case?

9 A Yes, sir.

10 Q Do you remember talking to me on September of 2013?

11 A Yes, sir.

12 Q About your employment and whether you looked for a
13 job anywhere else after Spring Valley?

14 A Yes, sir.

15 Q Do you remember telling me that you liked your job
16 out at --

17 A I told you I liked the job. I liked my job.

18 Q You didn't get any reprimands or warnings between
19 June 2011 and October of 2012, did you?

20 A I don't recall.

21 Q October 2012, your employment ended with Richland
22 Two, October 2012; right?

23 A Yes, sir.

24 Q You tried to show Ms. Jones a video of a fight?

25 A No, I did not.

1 Q You would have if you could have though?

2 A If I could have, I would have.

3 Q Because you thought Ms. Jones was cute, didn't you?

4 A She was cute.

5 Q And you were happy to watch the movie and give her
6 details of it?

7 A I did not watch the movie. I did not watch the
8 video. I didn't know how to watch the video.

9 Q You did not give Ms. Jones details of that video?

10 A No, I did not.

11 Q While you were on administrative leave or after a
12 meeting, you called Ms. Jones and told her, "You
13 can't tell them you talked to me because I didn't
14 show you a video."

15 A Ms. Jones had called me and I returned her call.
16 When I came out the meeting, I had a missed call
17 from her. I told her that I read her statement.
18 She told me -- I read her statement that she say I
19 showed her a video, and she know I didn't show her
20 a video.

21 Then she told me to go ahead and say that I
22 showed her the video. I said, "I'm not going to
23 say that because they are trying to terminate me by
24 showing you a video. You know I didn't show you no
25 video." That's when she hung up in my face, and

1 then she told Chuck Earles that I called her.

2 Q Your testimony is she called you?

3 A Yes, sir.

4 Q You told Traci Batchelder and Chuck Earles that she
5 called you too?

6 A Yes, she did call me.

7 Q You tried to intimidate her though, didn't you?

8 A No, I did not. No, sir.

9 Q After you left Richland Two, you don't have any
10 reason to believe that anybody at Richland Two gave
11 you a bad job reference?

12 A Yes, they did. Every time I put Richland Two down
13 when I applied for a job, I didn't get it,
14 especially when I put Eric Barnes or Chuck Earles
15 name down.

16 Q We talked about that deposition, sir?

17 A Yes, sir.

18 Q That you gave back in September?

19 A Uh-huh.

20 Q September of 2013. I was there. The court
21 reporter was there taking down my questions and
22 your answers?

23 A Yes, sir.

24 Q Ms. Peavy was there also?

25 A Yes, sir.

1 MR. BARLOW: Your Honor, may I approach?

2 THE COURT: Yes, sir.

3 (Counsel opens the deposition.)

4 BY MR. BARLOW:

5 Q I provided you a copy of that deposition
6 transcript. I want you to turn to page 62.

7 A (Witness complies.)

8 Q Line 14. I will read this and I want you to follow
9 along with me. "Question: Do you have any
10 knowledge of what was communicated by anybody at
11 Richland Two to anywhere you inquired?"

12 Your answer is: "I wish I knew, no."

13 Did I read that right?

14 A Yes, sir.

15 Q Now, after you left you started working for Coastal
16 International Security in October of 2012?

17 A Yes, sir.

18 Q And they later became Allied Barton?

19 A Yes, sir.

20 Q So your job started in October?

21 A It didn't really. I mean, I had to go through drug
22 screen and orientation and all that. So I didn't
23 really get a first check until after January.

24 Q Mr. Kennedy, are you on LinkedIn?

25 A On where?

1 Q LinkedIn. It's a website that professional people
2 put their sort of résumé and professional
3 information on, that sort of thing.

4 A I don't know. I could be. I was applying for
5 jobs. I might have did that.

6 Q I will show you something here and ask you to take
7 a look at that. This says, "Jeffrey Kennedy,
8 security officer at Coastal International
9 Security." Is that you?

10 A Yes, sir.

11 Q And it has experience on here. It says, "Security
12 officer, Coastal International Security"?

13 A Yes, sir.

14 Q October 2012 to the present, two years; right?

15 A Yes, sir.

16 Q Right below that it says, "Richland School District
17 Two, February 2007 to October 2012." is that right?

18 A Yes, sir.

19 Q And that job paid more than Richland Two, didn't
20 it?

21 A Not without the overtime. It paid more an hour,
22 but I made more at Richland Two. I'd bring home
23 like 900-and-some-dollars every two weeks there.
24 I'd bring home 16-, \$1,700 at Richland Two.

25 Q When you applied with Coastal, you said that you

1 left Richland Two because you wanted a better job;
2 isn't that right?

3 A I can't recall what I put.

4 Q Let me see if I can refresh your recollection about
5 that. I will show you what I would represent to
6 you is an Allied Barton Security Services
7 application. I want you to look at the third page
8 of that document, page 3 of 8.

9 A (Witness complies.)

10 Q Okay. I want you to look at where it says,
11 "Position held." Do you see where that is?

12 A SCANA.

13 Q That's rate. Pay rate, 12.77 hourly?

14 A Yes, sir.

15 Q And look a couple of line down there, "Reason for
16 leaving." What does what it say on there?

17 A "Career advancement." I was looking for a job. I
18 was looking for a better job.

19 Q So you left Richland Two for career advancement?

20 A I left Richland Two because they fired me.

21 Q Now, if something goes missing at Spring Valley
22 during the nighttime between 11:00 P.M. and
23 7:00 A.M., that's on your watch, isn't it?

24 A That's my hours of working, yes, sir.

25 Q That's all I have for you.

1 A Yes, sir.

2 MS. PEAVY: A few questions on redirect.

3 THE COURT: I'm sorry?

4 MS. PEAVY: A few questions on redirect.

5 THE COURT: Yes, ma'am.

6 REDIRECT EXAMINATION

7 BY MS. PEAVY:

8 Q Mr. Kennedy, we went over this yesterday. When
9 Mr. Garrick was asking you in his meetings with you
10 in May of 2011 and June of 2011 about your actions
11 on specific nights in February and March, did you
12 specifically recall those evenings?

13 A Not exactly, no, ma'am.

14 Q Okay. So if you testified or told Mr. Garrick that
15 you thought you had gone in one door at one time,
16 but in fact the videotape showed you going through
17 a different door, you didn't say that
18 intentionally, you had just forgotten because it
19 was several months ago; correct?

20 A Yes, ma'am.

21 Q Now, you testified about Ms. Jones. You wanted to
22 help her. You thought she was a cute lady; is that
23 correct?

24 A Yes, ma'am.

25 Q She was also a mother and a coworker; correct?

1 A Yes, ma'am.

2 Q Okay. In fact, you have no way of knowing what
3 Richland Two told the people who called for a
4 reference; is that correct?

5 A Correct.

6 Q So in your deposition when you said, "I wish I knew
7 but, no," what you are saying is maybe you had a
8 feeling?

9 A Yes, ma'am.

10 Q Okay.

11 MS. PEAVY: That's all I have. Thank you.

12 THE COURT: Thank you.

13 MR. BARLOW: No recross, Your Honor.

14 THE COURT: You may step down.

15 (Witness leaves the witness stand.)

16 THE COURT: You may call your next witness.

17 MS. PEAVY: Your Honor, the plaintiff calls
18 Mr. Barry Mitchell.

19 (The witness comes forward.)

20 BARRY MITCHELL, being
21 first duly sworn, testifies as follows:

22 CLERK: Have a seat in the witness stand,
23 please.

24 MR. GOODWYN: Your Honor, would you mind if I
25 step out to call our next witness.

1 THE COURT: No, sir.

2 CLERK: State your name for the record.

3 THE WITNESS: Barry Mitchell.

4 DIRECT EXAMINATION

5 BY MS. PEAVY:

6 Q Mr. Mitchell, thank you for being here today.

7 A Yes, ma'am.

8 Q We have met before at your deposition. I'm Rachel
9 Peavy, the attorney for Mr. Kennedy. I believe
10 Mr. Barlow, sitting there, was the attorney for the
11 defense at your deposition. I would like to just
12 introduce you to the jury a little bit. Where were
13 you born, sir?

14 A Washington, DC.

15 Q And where do you currently reside?

16 A In Irmo, South Carolina.

17 Q Okay. How long have you been living in South
18 Carolina?

19 A March of '90 when I got out of the military.

20 Q And obviously you graduated from high school. Was
21 that in Washington, DC?

22 A Yes, ma'am.

23 Q And where did you enlist in the military? What
24 division?

25 A Second AD, Second Army Division in the Army.

1 Q And how many years were you in the military for?

2 A Just a little under six.

3 Q Okay. Did you receive an honorable discharge?

4 A Yes, ma'am.

5 Q During your time in the military, where were you
6 stationed?

7 A I did my basic training at Fort Dix in New Jersey,
8 did my AIT, advance training, in Aberdeen,
9 Maryland. From there I went to Fort Hood, spent a
10 little bit of time in Wisconsin validating TMs,
11 technical manuals, for about six months. Then I
12 went to Fort Hood, and I spent my time at Fort Hood
13 until I DTS'ed out of Fort Hood.

14 Q And after your military service, were you employed
15 at the Alvin S. Glenn Detention Center?

16 A Yes, ma'am.

17 Q How many years were you a corrections officer
18 there?

19 A I worked there about 15 months.

20 Q And following Alvin S. Glenn, where did you become
21 employed?

22 A I was part-time at the School District. During
23 that time I have been part-time at the School
24 District since, I think, around 2007.

25 Q When you say the School District --

1 A Richland School District Two. When I left Alvin S.
2 Glenn, I took a full-time position at the School
3 District at Spring Valley High School.

4 Q So we are here today because Jeffrey Kennedy has
5 brought a lawsuit against the School District and
6 against Mr. Chuck Earles, Mr. Eric Barnes, and
7 Ms. Kim Jones regarding the loss of his reputation
8 arising out of certain incidents that occurred back
9 in the Spring of 2011. None of those individuals
10 are sitting here today, but do you know Mr. Chuck
11 Earles?

12 A Yes, ma'am.

13 Q Do you know Mr. Eric Barnes?

14 A Yes, ma'am.

15 Q Did you know Ms. Kim Jones?

16 A No.

17 Q Okay. Now, you had occasion to work or overlap
18 with Jeffrey Kennedy at Richland Two; is that
19 correct?

20 A Yes, ma'am. He relieved me. I worked the 3:00 to
21 11:00 shift. He came on at 11:00 o'clock and
22 relieved me.

23 Q Did you also work games together?

24 A Yes, ma'am.

25 Q Okay. When you started at Richland Two, who was

1 the head of security?

2 A Chief Propst. I might not be saying or pronouncing
3 it correctly, but Chief Propst.

4 Q Was Captain Z, was she a supervisor at that time?

5 A Yes, ma'am.

6 Q At a certain point, did Chief Propst leave Richland
7 Two?

8 A Yes, ma'am, very abruptly.

9 Q What happened next? Who came on?

10 A One day he left and Mr. Earles came in in his
11 position. No one ever really know why he left. No
12 one told us. They just told us that he was gone,
13 and Mr. Earles was placed in that position.

14 Q And did Mr. Earles bring along Eric Barnes with
15 him?

16 A I think about a few months later he brought Eric
17 Barnes with him. They both came from the Sheriff's
18 Department, Richland County Sheriff's Department.

19 Q Okay. So they were -- I guess you would refer to
20 them -- as ex-law enforcement?

21 A Yes, ma'am. Their boss, Rick McGee, who also was
22 terminated after Chief Propst, he was also from
23 Richland County. So he brought Chuck Earles over,
24 hired him, and then Earles hired Mr. Barnes.

25 Q Sometime in February of 2011, did you learn that

1 Jeffrey Kennedy had been recommended for a
2 promotion?

3 A Yes, ma'am.

4 Q And do you recall that he was introduced as a
5 supervisor?

6 A My recollection is that once he had gotten
7 promoted, they brought him into the supervisor's
8 meeting and introduced him as the new supervisor.

9 Q Okay. And going back to that same time period,
10 March 2011, thereabouts, do you recall hearing that
11 a theft of a thousand dollars was being reported
12 from the Athletic Director's Office?

13 A Yes, ma'am.

14 Q Did you speak to Mr. Tim Hunter, the Athletic
15 Director, about it?

16 A Kind of indirectly, you know.

17 Q You chatted?

18 A Yeah. It was one of those things where Tim Hunter
19 was the only who knew the money was gone. No one
20 else could really verify it because he was the only
21 one that claims the money was missing.

22 So he claims he went in his office and, you
23 know, that general thought was -- well, for me,
24 let's say -- was if you went in your office with
25 that kind of money, why would you not put it in the

1 safe? Why would leave it out? Just that in itself
2 seemed suspicious. Your safe is less than two feet
3 from you.

4 Q Okay.

5 A Why would you leave it out?

6 Q So you were a little bit baffled by it?

7 A Yes, pretty much. A lot of people were.

8 Q Oh, okay. And based on your years of experience at
9 Spring Valley and your observations in the daily
10 course of your routine business, were there a lot
11 of keys circulating at Spring Valley?

12 A Yes, ma'am.

13 Q Okay.

14 A There were a lot of keys circulating. You had
15 staff that let students hold their keys to go open
16 doors. You had keys that were generated pretty
17 much and flowing around.

18 Q So coaches had keys?

19 A Yes.

20 Q Some children would have keys at certain times?
21 Custodians? Is that all accurate?

22 A Yes.

23 Q Okay. And getting back to Mr. Hunter's report that
24 this thousand dollars that he says he left out went
25 missing, did you have occasion to hear about this

1 from certain supervisors at Richland Two that
2 Jeffrey Kennedy was considered the person who had
3 taken that money?

4 A Indirectly, yeah.

5 Q Okay.

6 A Not even that. It was the fact, you know, that he
7 was promoted and then put in the office. So
8 everybody, you know -- it was kind of common
9 knowledge once he got put in the office from being
10 promoted and he couldn't work schools anymore. So
11 it was kind of common knowledge.

12 Q Okay. So it was obvious to you and other members
13 of the security staff that Jeffrey Kennedy had been
14 taken down a notch?

15 MR. BARLOW: Objection, Your Honor. I don't
16 think he can testify to what was obvious to everybody
17 else.

18 BY MS. PEAVY:

19 Q It was obvious to you --

20 A Yes, ma'am.

21 Q -- that they considered Jeffrey Kennedy persona non
22 gratis; is that correct?

23 A Yes, ma'am.

24 Q And continuing from that was it obvious to you,
25 based on your professional experience, based on

1 your years at Richland Two, your years at Spring
2 Valley, that Mr. Earles and Mr. Barnes considered
3 Jeffrey to be a thief?

4 MR. BARLOW: Objection, Your Honor. What they
5 considered is not something he can testify to.

6 MS. PEAVY: I'm asking him to testify to his
7 impression based on personal knowledge of what they were
8 demonstrating to the staff members who they supervised.

9 THE COURT: Rephrase the question so that it's
10 based upon his personal knowledge and what he saw and
11 what he observed and what he did.

12 BY MS. PEAVY:

13 Q Based on your personal knowledge, going back to
14 those days and months around March 2011, personally
15 was it obvious to you that Mr. Earles and
16 Mr. Barnes thought that Jeffrey was not to be
17 trusted?

18 A Yes, ma'am. Once they promoted him to lieutenant
19 and then demoted him to a desk job, it was rather
20 obvious that he was under investigation for it.

21 Q I am going to show you what has been previously
22 marked as Plaintiff's Exhibit 4.

23 A Yes, ma'am.

24 Q You have seen that before; correct?

25 A Yes, ma'am.

1 Q Where did you see this before?

2 A There is an office in the support service center
3 where we have a file cabinet where we keep our time
4 sheets.

5 Q Okay.

6 A And I was going in to do my time sheet, and it was
7 laying on the desk.

8 Q So that office is not a secure area?

9 A No.

10 Q Staff goes in and out of there?

11 A Yes, ma'am.

12 Q How did you interpret this letter that was lying
13 out?

14 A I interpreted it as some specific instructions for
15 the supervisor as far as Mr. Kennedy's working
16 situation from that day forward.

17 Q And so the letter says that he is not to have keys?

18 A Yes, ma'am.

19 Q Are you interpreting that how?

20 A He was not to be trusted.

21 Q A security guard without keys really isn't a
22 security guard?

23 A Worthless.

24 Q I'm sorry?

25 A Is worthless, for what we do. If you can't use

1 keys, you can't work.

2 Q Okay. And you yourself at some point ended up
3 resigning from Richland Two after several years; is
4 that correct?

5 A Yes. Mr. Barnes and Mr. Earles, I just had some
6 differences of opinions as to where they were
7 taking the District and kind of voiced it. One day
8 I was training someone and Traci Batchelder called
9 me to tell me that this supposedly trainee had
10 taped our full eight-hour day unknowing to me,
11 taped, you know, our day of training.

12 They felt that my behavior was unprofessional,
13 as they say; but it was things that I spoke with
14 the trainee concerning, you know, training
15 Mr. Barnes had with us concerning searching
16 suspicious vehicles.

17 It was something we have never done before.
18 We would always, if there was a suspicious vehicle
19 on the campus, we would get on the radio or our
20 cell phone and call the office and have them send a
21 deputy out.

22 But they wanted us to go up to a vehicle, you
23 know, in the dead of night with a flashlight; and I
24 didn't see where that made any sense when it comes
25 to my safety or any other officer's safety. So I

1 had some differences of opinions.

2 When Mr. Earles came over, traffic is one of
3 the things we do at all of our schools. He came
4 over with this notion that there were schools he
5 didn't feel necessarily needed an officer to do
6 traffic; and Dent Middle School was one.

7 Once they removed the officer, a child was
8 struck by a car a few weeks later and died,
9 subsequently died. I really had some issues with
10 that. Then after this incident happened, then they
11 put the officer back, which was a four-lane highway
12 with a median on Decker Boulevard.

13 Q Which is the intersection of Decker and North
14 Trenholm?

15 A Yes, ma'am.

16 Q Okay.

17 A So I had some issues with where they were trying to
18 take the District, the security part of it. It was
19 like they wanted us to act as though we were
20 deputies.

21 Q Okay.

22 A And we weren't trained for that nor were we
23 equipped for that. I somewhat became...

24 Q You were dissatisfied?

25 A I was dissatisfied, and I think they were

1 dissatisfied with me.

2 Q Okay.

3 A And they put me in a situation where it was like I,
4 you know, saw what was coming. They were going to
5 attempt to terminate me; so I just resigned.

6 Q So you decided to move on?

7 A Yes, ma'am.

8 Q At the time when Mr. Kennedy -- and this may seem
9 obvious because you just testified he had been
10 promoted back in February or so of 2011 -- but at
11 the time when Tim Hunter said that this money had
12 gone missing, was it your opinion as a fellow
13 coworker that Mr. Kennedy was a good employee for
14 Richland Two?

15 A Yes, ma'am.

16 Q And he had a reputation of being a good, valued
17 security guard in your opinion?

18 A Yes, ma'am.

19 Q In fact, you would recommend him for other
20 positions down the road; correct?

21 A Yes, I have. The position he holds now is one that
22 I recommended him to my boss that I have.

23 Q And that was Mr. Kennedy is working at what is GEO
24 Care now?

25 A Yes, ma'am, and been there going on about a year

1 now.

2 Q Mr. Mitchell, thank you so much. I believe
3 Mr. Barlow may have some questions for you.

4 THE COURT: Any cross?

5 MR. BARLOW: Yes, Your Honor.

6 CROSS EXAMINATION

7 BY MR. BARLOW:

8 Q Good morning.

9 A Good morning. How are you doing?

10 Q I'm doing fine. I wanted to show you the
11 Exhibit 4. You have that in front of you already;
12 right?

13 A Right.

14 Q Now, this document should not have been left out by
15 anybody because it says confidential; right?

16 A Yes, sir.

17 Q One of the supervisors that it's addressed to could
18 have possibly walked out and left it?

19 A Possibly, yes, sir.

20 Q Sure. You never heard anybody else say that they
21 had received this e-mail?

22 A No. Not particularly, no.

23 Q Right. Because you weren't supposed to see it?

24 A I wasn't supposed to see it. When I saw it, I
25 didn't tell anybody I saw it until I spoke to you

1 all.

2 Q So the first time you told anybody that you had
3 seen this confidential memorandum e-mail was when
4 you gave the deposition?

5 A Yes, sir.

6 Q Now, Mr. Kennedy was -- he talked openly with you
7 about being investigated at Spring Valley, didn't
8 he?

9 A Yes, we talked about it at some later time.

10 Q In fact, he's the first person you have ever talked
11 to?

12 A As far as him being investigated by it?

13 Q Sure, or that he had been accused.

14 A Yeah. Pretty much, yeah, because he relieved me;
15 so we talked in briefing.

16 Q And you didn't have any communication with Chuck
17 Earles about the accusations or investigation, did
18 you?

19 A No.

20 Q Or with Eric Barnes?

21 A No.

22 Q You were not part of the investigation?

23 A No.

24 Q You didn't offer to give a statement or anything
25 like that?

1 A They didn't ask and I didn't offer.

2 Q You're not saying Tim Hunter took the money, are
3 you?

4 A What I'm saying is that Tim Hunter is the only one
5 that can attest that the money is gone.

6 Q Do you have any reason to believe that Tim Hunter
7 is lying about that or making that up?

8 A No.

9 Q You never filed a grievance or anything like that
10 at Richland Two?

11 A No.

12 Q So you resigned in lieu of being terminated? Is
13 that fair?

14 A I resigned because I saw where they were taking it
15 to, which I figured, you know, if you don't want
16 me, I'm not going to stay around for you to
17 terminate me. So I just decided to leave.

18 Q Sure. You'd agree that supervisors are bosses and
19 have the right to call shots on how things are
20 around you?

21 A Sure.

22 Q Right. Now, at one time you got a reprimand,
23 didn't you, for putting a sticky note over a
24 camera?

25 A At Richland Northeast where our office was, I don't

1 even know why -- it was a common break area -- why
2 they would have a camera up there. It was late at
3 night. It was where we kept our radios and whatnot
4 in there.

5 Q Richland Two security takes video cameras
6 seriously? Is that fair?

7 A You could say that.

8 Q Thank you. I appreciate it.

9 A Uh-huh.

10 THE COURT: Any redirect?

11 MS. PEAVY: No, Your Honor. We would ask that
12 Mr. Mitchell be allowed to be excused.

13 THE COURT: You may step down and you may be
14 excused.

15 THE WITNESS: Thank you.

16 (Witness leaves the witness stand.)

17 THE COURT: You may call your next witness.

18 MR. GOODWYN: Like to call John Reid, Your
19 Honor.

20 (The witness comes forward.)

21 JOHN HOWARD REID, being
22 first duly sworn, testifies as follows:

23 CLERK: Have a seat in the witness stand,
24 please, and state your full name.

25 THE WITNESS: John Howard Reid.

1 DIRECT EXAMINATION

2 BY MR. GOODWYN:

3 Q Mr. Reid, my name is Jeff Goodwyn. I'm one of the
4 attorneys representing Jeffrey Kennedy in this
5 case. I will ask you a few questions about what
6 you know about this case and the situation that is
7 going on. I will ask a few background questions
8 first. Where did you grow up?

9 A I grew up in Marlboro County, Bennettsville, South
10 Carolina.

11 Q How old are you now?

12 A I'm 58.

13 Q And where did you go to high school?

14 A Right there in Marlboro County, Bennettsville High
15 School.

16 Q Did you graduate?

17 A Yes, I did.

18 Q Do you have any other degrees?

19 A I have an Associate's degree in general studies.

20 Q Where did you get that?

21 A I did it in Europe while I was in the military.

22 Q Did you go in the military right out of high
23 school?

24 A No, about two years after I got out.

25 Q How long were you in the military?

- 1 A Twenty years and six days.
- 2 Q Did you travel around the world?
- 3 A Yes, quite a bit.
- 4 Q Did you retire from the military?
- 5 A Yes, I did.
- 6 Q Were you honorably discharged?
- 7 A Yes.
- 8 Q Since leaving the military, what did you do work
9 wise?
- 10 A I worked for 15 and a half years at the Alvin S.
11 Glenn Detention Center.
- 12 Q Out there on Bluff Road?
- 13 A Yes.
- 14 Q What did you do for them?
- 15 A I worked in the intake area.
- 16 Q All right. And you have 15 years. Did you retire
17 from there as well?
- 18 A I'm came out at 55, yes.
- 19 Q So you got some retirement?
- 20 A Yes.
- 21 Q What did you do after that?
- 22 A I took a month off, and then I went to work for
23 School District Richland Two.
- 24 Q Richland Two?
- 25 A Yes, sir.

1 Q Are you currently there?

2 A Yes, sir.

3 Q When you first started, in what capacity did you
4 work?

5 A I was a security officer at Spring Valley, second
6 shift.

7 Q Did you work just at Spring Valley or did you work
8 some of the other schools as well?

9 A Worked some of the other schools also.

10 Q Spring Valley was like a base?

11 A Yes.

12 Q You said you are still there?

13 A Yes.

14 Q Who is your boss now?

15 A I worked for Captain Permenter, second shift.

16 Q Do you work under Chuck Earles's general security?

17 A Yes. He's the manager and Eric Barnes is the
18 assistant manager.

19 Q What is your current position?

20 A I'm a lieutenant on the second shift.

21 Q So you received a promotion?

22 A Yes.

23 Q What was your position in February 2011? Had you
24 gotten the promotion to lieutenant yet or were you
25 still --

- 1 A No, I was just a security officer.
- 2 Q A security officer?
- 3 A Yes.
- 4 Q And do you know Jeffrey Kennedy?
- 5 A Yes. Mr. Kennedy, he was on third shift. He
- 6 relieved me. At that particular time, he would
- 7 relieve me.
- 8 Q Back in 2011?
- 9 A Yes.
- 10 Q February and March of 2011?
- 11 A Right.
- 12 Q And how long had you known Jeffrey prior to that?
- 13 A I started there in, I think it was February; and I
- 14 met him during that timeframe. But they would
- 15 relieve us and we would work different events and
- 16 stuff for the District.
- 17 Q So you knew him for a month or two?
- 18 A It wasn't very long, four or five months maybe,
- 19 something like that.
- 20 Q Obviously, it was before the theft in Mr. Hunter's
- 21 office?
- 22 A A couple of months or so.
- 23 Q What did you see in Jeffrey as a person during that
- 24 time as you got to know him?
- 25 A He was an outstanding officer. If he could help

1 you, he would. He can always be counted on to do
2 any odds and ends. If they needed him, he was
3 there.

4 Q Did he help you out?

5 A Yes, he did. The night in question -- in fact, he
6 would always show up for work early and relieve
7 you. That particular night he and I walked Spring
8 Valley together and armed it inside.

9 Q Okay. Did he ever teach you how to walk Spring
10 Valley in a quicker way?

11 A That's what he did that particular night, sir.

12 Q What do you mean? He showed you how?

13 A He just showed me how easy it was to walk the
14 school and do it in a less timeframe than what I
15 was doing it in.

16 Q Did you appreciate that?

17 A Sure.

18 Q And during that time did you have any reason to not
19 trust Jeffrey Kennedy?

20 A Never.

21 Q Do you have any reason to think he was a thief?

22 A Never.

23 Q Now, after -- well, let me back up. Did you hear
24 or did anybody ever tell you that Jeffrey Kennedy
25 had gotten promoted to lieutenant around that time?

1 A Yes. I had talked -- he was supposed to have been
2 the lieutenant to come to second shift. We didn't
3 have a lieutenant at that time. He had told me
4 that he had gotten selected and would be coming to
5 the shift the following week.

6 Q Is that the job you currently hold?

7 A Yes.

8 Q Did you get that job after Jeffrey -- the promotion
9 was withdrawn?

10 A I got the job, yes, after all that had went down.

11 Q So had none of this gone down, Jeffrey would have
12 your job?

13 A More than likely, yes.

14 Q You may have gotten promoted somewhere else but not
15 this job; correct?

16 A Correct, sir.

17 Q Was it generally known that Jeffrey had been
18 promoted to the second shift supervisor?

19 A It was a word that was going around, yes, sir.

20 Q Let me ask you about the key situation. There has
21 been a lot of testimony that there were a lot of
22 keys to Spring Valley floating around. Was that
23 your experience back in February and March 2011?

24 A Yes, it was.

25 Q Can you explain to the jury kind of what your

1 experience with the key was -- the keys were?

2 A Well, I think the incident in question went on that
3 Friday night. Then that Monday I came to work, and
4 I started at my base. Then I took off from there
5 and went out to my outlying schools, like six or
6 seven schools.

7 I got a call from Captain Permenter about 6:30
8 or 7:00 o'clock, which he told me to meet
9 Mr. Barnes back at Spring Valley at Bates Hall. I
10 met Mr. Barnes, and he and I started a
11 conversation.

12 He asked me how I was doing and everything.
13 Then he asked me what had took place when
14 Mr. Kennedy and I had entered the building. I told
15 him we came to the building. We were talking.

16 We had already walked that particular area.
17 So we went on and armed the building and went back
18 out and continued to walk the base. While he was
19 talking to me about it, he asked me did we go into
20 the office. I told him no, that we armed it at the
21 keypad.

22 Q When he said, "Did you go to the office," was he
23 pointing out --

24 A It's the office right behind the keypad,
25 Mr. Hunter's office.

1 Q Okay.

2 A I told him no, we didn't go in the office. We went
3 out and walked the rest of the school. While he
4 and I was having the conversation, a custodian came
5 up, reached in his pocket and took a key out and
6 opened the office.

7 Q Mr. Hunter's office?

8 A Yes, he did. He asked him, "Wait a minute. You
9 got a key to the office too?" And the guy say yes.
10 He say, "Good Lord."

11 Then I went on and proceed to tell him what
12 had -- what me and Mr. Kennedy did, which was
13 nothing more than walk the school; and he relieved
14 me and I went home.

15 Q Did Mr. Barnes get this custodian's name?

16 A No.

17 Q Did he ask him: Were you there the night of
18 March --

19 A He didn't ask him that. He was just surprised that
20 the custodians had keys.

21 Q Did he ask the custodian who was working that night
22 or morning?

23 A Yes. He asked me, said -- no, he didn't ask him in
24 front of me. Then he said, "Do you all have keys?"
25 The guy was going, "Yes, we have keys to different

1 areas and stuff." It wasn't nothing but a master
2 key. That one master key would open all the doors
3 at the school.

4 Q So the custodian had a master key?

5 A Yes, he did.

6 Q You don't know if Eric Barnes even questioned him
7 about --

8 A Not -- the only thing he did was ask him, "Did you
9 all have keys?" He asked him right there in front
10 of me. He was surprised. The guy told him, "Yes,
11 we have keys." And he said, "Jesus Christ," and
12 then me and him went on with our conversation.

13 Q All right. So I was asking you about the key
14 situation generally. Obviously, there is a -- we
15 know the custodians have a master key?

16 A They did at that particular time.

17 Q What about coaches to the sports teams? Do they
18 have keys to the Athletic Director's Office?

19 A Yes, they would.

20 Q Who else would have keys to that building?

21 A Well, I knew the Principal had one. We had one
22 because we had to do the security, but I did not
23 know the custodians had one either until that
24 particular night.

25 Q Was there a list anywhere?

1 A No, not to my knowledge.

2 Q There was no list saying, "These are people that
3 have keys --

4 A No.

5 Q -- and should have access to any building"?

6 A Not to my knowledge.

7 Q Did any parents have keys to the buildings?
8 Boosters?

9 A I have no idea.

10 Q Have you ever seen a parent go into one of those
11 buildings with a key?

12 A No. I mean, I just worked there as a security
13 guard. I did my thing, which was walk the
14 premises, lock doors, and escort kids out the
15 building. I wasn't there for special events and
16 stuff like that, sir.

17 Q What about the other employees that worked in the
18 AD building itself?

19 A There never was a set number of -- set individuals
20 that worked there. It was just whoever was
21 designated down there. They were given the key
22 from the head custodian to go up there and clean
23 the building.

24 Q No, I'm talking about employees, like officers who
25 were in that building.

1 A Yes, they would have keys also, sir.

2 Q Do you know a time of day the doors were unlocked?

3 A No, I don't. I work second shift; so I couldn't
4 answer that.

5 Q You never worked third shift?

6 A No.

7 Q Or first shift?

8 A No, sir, I didn't.

9 Q I'm saying, to know that you would have to be
10 there --

11 A Right, be there on that shift to know what time
12 they opened the door back up. I wasn't there for
13 that.

14 Q Do you think is a wise practice for the security
15 team, security office, not to even know who has
16 keys?

17 A No, I don't.

18 Q I think you might have answered some of these
19 questions but just to kind of go through it. You
20 testified earlier about Eric Barnes interviewing
21 you about the thousand dollar theft?

22 A He asked me questions about it.

23 Q When did you first learn about the theft?

24 A That evening when I met him there. When he called
25 that was the following Monday.

1 Q So the theft was a Friday night?

2 A Friday night supposedly it happened, and I came on
3 shift that evening, went out to do my schools from
4 the base, which was Spring Valley. I was called
5 and told to meet him there, and that's when he
6 started and briefed me and told he what was going
7 on.

8 Q That was on Monday?

9 A Right.

10 Q So he told you about the theft?

11 A Right.

12 Q And asked you what you and Jeffrey did?

13 A Right.

14 Q When did you first find out that Jeffrey was being
15 investigated for the theft?

16 A Well, I mean, after he asked me about it, he didn't
17 come to the shift to take the supervisor's
18 position. They moved him into the office, and all
19 he could do was answer the telephone, wasn't to
20 have any keys, wasn't to drive any vehicles.

21 Q How did you find out that he wasn't supposed to
22 have keys or drive vehicles?

23 A It was told to us. Because he came in on third
24 shift and he would relieve us, and sometimes he
25 would beat the shift supervisor to work himself.

1 So it became an issue with him relieving us. We
2 was turning over keys and stuff to him. So that's
3 when we were informed.

4 Q Who told you that he was not supposed to have keys?

5 A It was put out by Mr. Barnes.

6 Q What did you think of that?

7 A Well, you know, it's pretty obvious. I mean, a guy
8 supposed to get promoted; and all of a sudden, they
9 move. He didn't get promoted, and then he is
10 brought into the office. All he can do is answer
11 telephones. Evidently he was under suspicion for
12 something.

13 Q Was it clear to you that he under suspicion for the
14 thousand dollar theft?

15 A That's when it started. So, I mean, put one and
16 two together.

17 Q So you ended up getting the job that Jeffrey had
18 been promoted to and that was revoked?

19 A Yes, sir.

20 Q There has been some testimony that some of the work
21 that Jeffrey had been resigned to after this
22 investigation was part of that job anyway: Office
23 work, looking at the security cameras, that kind of
24 thing. Is that accurate? I am trying to figure
25 out: Did Jeffrey's job overlap with what you

1 thought your job was supposed to be as the second
2 shift supervisor?

3 A I didn't get the job until later on. But, I mean,
4 if he is there working the desk and stuff, the
5 cameras are there. He's got someone called in to
6 say there is an alarm at a school, the guy that is
7 working the desk would pull up and review the
8 cameras.

9 Q Is that something you would have -- that you would
10 do as second shift --

11 A Yes.

12 Q -- from time to time?

13 A Yes. Before you send a guy back to school, you
14 want to make sure that there is no one in there.

15 Q So Jeffrey was doing that?

16 A He relieved me. I was second; he was third.

17 Q So he was still third shift?

18 A Right.

19 Q Doing some of the supervisor type work?

20 A Yes.

21 Q If an alarm -- let's just say you are on duty. An
22 alarm goes off in a building and you are not next
23 to that building. You can't hear it going off.
24 Would that be something that the supervisor would
25 see an alarm going off?

- 1 A No. You get a call from the company that monitors
2 the alarm. They tell you that the alarm is going
3 off at it.
- 4 Q So there is a separate company that monitors --
- 5 A Right.
- 6 Q -- and it's not someone on the staff?
- 7 A No.
- 8 Q I got it.
- 9 A They call in and then you can bring the cameras up
10 and check that area.
- 11 Q Who is that company?
- 12 A It used to be ADT. Now it's Tyco. They've got a
13 couple of them. You got Tyco, you've got Simplex,
14 and you have Industrial.
- 15 Q Do you remember who was monitoring the alarms back
16 in February, March of 2011?
- 17 A I want to say ADT.
- 18 Q And ADT would have a record of the alarms?
- 19 A They should have.
- 20 Q So you could call and ask them every time the alarm
21 was set off; correct?
- 22 A They would always call you and tell you, You have
23 an alarm going off.
- 24 Q I'm saying in hindsight if you wanted to find out
25 when the alarms went off, you could just call and

1 ask for the record; correct?

2 A We have a book also that you would annotate alarms
3 and stuff like that. The person working the desk
4 would just annotate it in the book.

5 Q What is that book called, the alarm log?

6 A It just's a log book where you got all your
7 schools. They got -- the custodians are supposed
8 to call when they are leaving. You annotate that.
9 They you have a section also where if you had an
10 alarm or a motion or something at the school, you
11 would annotate that in the book also.

12 Q All right. Jeffrey testified that he got a call
13 the night that the money went missing, that the
14 alarm had been set off at the Administrative
15 Building. He got called and went over there and
16 seen the baseball team there. Have you heard about
17 that?

18 A I heard some of it, that the baseball team had came
19 back late; and he had went over to answer -- check
20 the alarm.

21 Q So there should have been a log though, both with
22 ADT and --

23 A And it should have been with the office also.

24 Q And whoever got it. I guess I'm not clear on this.
25 If ADT sees an alarm go off, do they call Jeffrey

1 to come down or would they just call --

2 A No, they calling the building at the support
3 service center. Whoever is on the desk would
4 answer the phone, and they tell you that an alarm
5 is going off at Spring Valley, Bates Hall, this
6 area or that area.

7 Q So that's what Jeffrey was doing --

8 A He was answering the desk.

9 Q -- after this?

10 A Right.

11 Q He would be the guy that received the call from
12 ADT?

13 A He was the man working the desk.

14 Q Out at Spring Valley and say, "Hey, go check it
15 out"?

16 A Right.

17 Q So if somebody investigated this theft and wanted
18 to see if the alarm had gone off that night, all
19 they'd have to do is either go to the log book or
20 call ADT?

21 A They should be able to do that.

22 Q All right. Is that very complicated?

23 A No, it's not.

24 Q In the weeks and months after the theft of the
25 thousand dollars, were there rumors going around

1 that management thought Jeffrey was a thief?

2 A Well, not so much that they thought he was a thief;
3 but, I mean, after the incident happened, the only
4 thing he could do was answer the telephone. So he
5 wasn't allowed to do anything else.

6 Q Was it implied from their conduct that they thought
7 he was involved in this robbery?

8 A Well, I mean, they just -- I'm not going to say it
9 was implied that he knew specifically, but he was
10 the only one that had got some kind of punishment
11 or had been brought down.

12 Q Did you put one and one together?

13 A Yes, because I was questioned specifically about
14 what me and him had done.

15 Q Do you think Jeffrey stole this thousand dollars?

16 A No.

17 Q Have you done any investigation of your own or
18 heard the results of anybody else's investigation?

19 A No.

20 Q From your experience with the key situation and
21 everything else you know about the custodians, do
22 you think there were plenty of people that could
23 have taken this money, other than Jeffrey?

24 A At that particular time, yes.

25 Q Did you think it was a little suspicious that

1 Mr. Hunter didn't put the money in the safe?

2 A I mean, I was just surprised that he had left it
3 out. All of a sudden it came up missing, and all
4 of a sudden Mr. Kennedy was brought into the
5 office. He wasn't allowed to have keys and he
6 wasn't allowed to do anything.

7 MR. GOODWYN: That's all I have.

8 THE COURT: Any cross?

9 MS. LONG-MAHONEY: Yes, Your Honor.

10 CROSS EXAMINATION

11 BY MS. LONG-MAHONEY:

12 Q Mr. Reid, I'm Kathy Mahoney and I represent the
13 defendants in this lawsuit. I just have a few
14 quick questions for you. It's my understanding
15 that you were with Mr. Kennedy on the night of
16 March 3rd at Spring Valley High School. He was
17 relieving your shift; is that correct?

18 A Correct.

19 Q That would be just before about 11:00 P.M. that
20 night?

21 A It was earlier than that. He would always get
22 there early on Friday night. That particular night
23 he got there early. I told him I walked all the
24 schools, except that one. So he said, "Come on.
25 We can walk it together. We got enough time."

- 1 Q Okay. And it doesn't take long at all to set the
2 alarm to the Athletic Department over at Bates
3 Hall, does it?
- 4 A No, ma'am.
- 5 Q It's just a matter of going to the keypad and
6 entering a four-digit code, and that's it; right?
- 7 A Yes, ma'am.
- 8 Q So on that particular night, you and he went in,
9 entered the four-digit code, and came right back
10 out?
- 11 A Yes, ma'am.
- 12 Q So you were there in that building no more than,
13 say, a minute?
- 14 A Maybe a minute at the most, something like that.
- 15 Q And you then after that went home?
- 16 A No, we walked the rest of school.
- 17 Q Right. But after that?
- 18 A After that.
- 19 Q After you walked the rest of school?
- 20 A I went home, yes, ma'am.
- 21 Q You went home. You had no further -- you were not
22 back at Spring Valley at all that evening?
- 23 A No, ma'am.
- 24 Q Or the next day?
- 25 A No, ma'am. I didn't work on weekends. That was

1 Friday night.

2 Q You also didn't see Kennedy, Mr. Kennedy, again the
3 rest of that evening --

4 A No, ma'am.

5 Q -- before you went home or the next day; is that
6 right?

7 A Correct.

8 Q If I can show you what is marked as -- approach the
9 witness -- Plaintiff's Exhibit 4. I believe this
10 e-mail that was sent from Chuck Earles to some
11 supervisors was shown to you at your deposition.
12 Do you recall that?

13 A I remember this.

14 Q Right. And in your deposition, I believe, you
15 said --

16 A I never seen it.

17 Q -- you had never seen that?

18 A Yes, ma'am.

19 Q Okay. And there has been reference to keys. Is it
20 true that there are different types of keys? There
21 are keys to the outside of his office, what is
22 called an A-key? Are you familiar with that?

23 A Back at that particular time. At one particular
24 time they had keys for every door; but since that
25 particular time, they have went to and changed

1 where you have a master key that fits all outside
2 doors and inside doors.

3 Q So at that time there was not a key that was
4 referred to as the A-key?

5 A No, ma'am. I mean, there was a key -- I don't know
6 if it was an A-key or whatever, but you had a
7 keyring for every school.

8 Q But you agree there's different types of keys?

9 A Yes, ma'am.

10 MS. LONG-MAHONEY: Nothing further.

11 THE COURT: Any redirect?

12 MR. GOODWYN: No, Your Honor.

13 THE COURT: You may step down.

14 (Witness leaves the witness stand.)

15 THE COURT: Ladies and gentlemen, this would
16 be a good time to take a morning break. I remind you of
17 the instructions I have given you, not to begin to
18 discuss this matter among yourselves. You have still
19 not heard all of the evidence that is to be presented.
20 Let's take a brief break, and then we will come back.

21 (The jury retires to the jury room.)

22 MS. PEAVY: Can we approach about scheduling?

23 THE COURT: Yes, ma'am.

24 (Whereupon there is a bench conference off the
25 record.)