THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Alison Renee Lee, Circuit Court Judge

2017-UP-040 (S.C. Ct. App. filed January 25, 2017)
Case No. 2013-CP-40-1460
Appellate Case No.: 2017-001160

Jeffrey Kennedy ..... Petitioner,

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

1. Do the factors set forth in SCACR 242(b) support a writ of certiorari?

2. Did the Court of Appeals properly apply the qualified privilege standard to the evidence in this case and reverse the trial court's ruling denying a directed verdict?

II. STATEMENT OF THE CASE

Respondent, Jeffrey Kennedy, is a former employee of Respondent 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. (App. pp. 154-159.) Prior to trial, the parties stipulated to the dismissal of Dr. Brochu, Mr. Garrick, and Ms. Batchelder. (App. p. 167.) 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. (App. p. 742 l. 22 - p. 745 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. (App. p. 1084 l. 8 - p. 1089 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 allegedly defamatory. (App. p. 1055 l. 20 – p. 1057 l. 2; p. 1069 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. Respondents timely submitted post-trial motions on October 13, 2014. (App. pp. 187-216.) The trial court denied post-trial motions on February 24, 2015, and a Notice of Appeal was timely filed on March 13, 2015. (App. pp. 241-249.) By decision dated January 25, 2017, the Court of Appeals reversed the trial court in a *per curiam* opinion and held that the trial court erred in refusing to grant a directed verdict to Respondents. (App. pp. 1-2). Petitioner filed a motion for rehearing with the Court of Appeals, which was denied on April 17, 2017. (App. p. 21.) Petitioner timely filed a Petition for Certiorari to the Court of Appeals on May 17, 2017.

III. STATEMENT OF FACTS

Mr. Kennedy began working third shift as a security guard in Richland Two's security department in May 2008. (App. pp. 281-283.) His starting rate of pay was $11.77 per hour. (App. p. 282.) In his position, he was essentially the night watchman. (App. p. 285.) Spring Valley High School ("SVHS") was his base school. He was also responsible for security at seven other schools on nightly rounds. (App. p. 286.)

At relevant times, Mr. Earles was Richland Two's Emergency Services Manager. (App. p. 553 l. 22 – p. 554 l. 1.) Mr. Barnes was Richland Two's Assistant Security Manager. (App. p. 428 ll. 13-20; p. 554 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. (App. p. 293.) He was to move to the second shift and would have received an unspecified pay raise. (App. pp. 556-557, 1156.) 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. (App. pp. 560.)

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. (App. pp. 751, 1172.) Mr. Hunter left the money under his desk in a cash box after collecting it from a sporting event the previous night. (App. pp. 755, 1172.)

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. (App. p. 654 l. 14 – p. 660 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. (App. pp. 635, 654-659, 763-765.)

Mr. Kennedy was placed on paid administrative leave during the investigation and the matter was referred to the Richland County Sheriff's Office. (App. p. 351 ll. 11-14.) Mr. Kennedy was not criminally charged for the theft. (App. p. 308 ll. 9-11; p. 492.) He was returned to full duty security work with Richland Two on or around June 16, 2011. (App. p. 910 l. 16 – p. 911 l. 9; pp. 1157-1159.) 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. (App. pp. 970-986, 1158-1159.)

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.

(App. pp. 568-572; p. 662 l. 15 – p. 664 l. 25; p. 1157.) Two of Mr. Kennedy's former coworkers testified that they saw Mr. Earles' confidential email printed out at the security office. (App p. 370 l. 21 – p. 372 l. 1; p. 415 l. 16 – p. 416, 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. (App. p. 376 ll. 6-23; p. 417 l. 23 – p. 418 l. 1.) Mr. Kennedy testified that he also saw the email "lying out" in security vehicles and in offices. (App. p. 309.) No evidence was presented at trial that Mr. Earles or Mr. Barnes had further distributed or published 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 seen by Mr. Kennedy or his co-workers until Mr. Kennedy alleged it by way of his lawsuit. (App. p. 449 l. 11 – p. 453 l. 4; p. 573 ll. 2-7; p. 663.)

After returning to work in June 2011, Mr. Kennedy did not look for another job for the next fourteen months. (App. p. 354.) He testified that he continued to enjoy his job. (App. pp. 354-355.) Mr. Kennedy did not receive any reprimands or warnings after reinstatement to his position in June 2011. (App. p. 355.) His at-will employment with Richland Two was ultimately terminated in October 2012. (App. p. 354.)

IV. ARGUMENT

A. Petitioner Has Not Identified Any Special And Important Reasons For This Court To Grant A Writ of Certiorari.

SCACR 242(b), **Considerations Governing Review**, provides as follows:

> A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

None of these criteria are met. First, the application of the qualified privilege in a defamation case arising out of an at-will employment relationship is not a novel issue and has been continuously well settled for almost seventy years. *See Bell v. Bank of Abbeville*, 211 S.C. 167, 172, 44 S.E.2d 328, 329-30 (1947) ("*Bell II*"); *Conwell v. Spur Oil Co. of Western S.C.*, 240 S.C. 170, 178-81,125 S.E.2d 270, 275-76 (1962); *Harris v. Tietex*, 417 S.C. 533, 540-42, 790 S.E.2d 411, 415-16 (Ct. App. 2016).

Second, there was no dissent, or even a concurring opinion in the Court of Appeals. Third, Mr. Kennedy has not identified any decision of the Supreme Court which is in conflict with the Court of Appeals' decision in this case. Numerous Supreme Court and Court of Appeals decisions have overturned defamation verdicts or affirmed summary judgment when insufficient evidence existed to support a jury finding that the qualified privilege had been exceeded. *See Bell II*, 211 S.C. at 176-79, 44 S.E.2d at 331-333; *Conwell*, 240 S.C. at 182; 125 S.E.2d at 276; *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 562, 459 S.E.2d 315, 317 (Ct. App. 1995); *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 506-07 (Ct. App. 1989). Fourth, it is undisputed that no constitutional issues or federal questions are involved in this case. Finally, Respondents respectfully submit that the Court of Appeals made a full review of the record in this case

and certiorari review is not needed to read behind the Court of Appeals. Thus, the factors set forth in SCACR 242(b) strongly support a denial of certiorari in this case.

B. The Court Of Appeals Properly Applied The Qualified Privilege Standard To The Evidence In This Case In Reversing The Trial Court's Denial Of Directed Verdict For Defendants.

Mr. Kennedy argues that the Court of Appeals should have found some evidence in the record to support the jury's verdict that Respondents had exceeded the qualified privilege in communicating to Mr. Kennedy's supervisors his transfer to a different work location. Fundamentally, the Court of Appeals was not required to indulge or treat as evidence every possible theory Mr. Kennedy has suggested regarding why the jury may have concluded that Mr. Barnes and/or Mr. Earles were responsible for distributing Mr. Earles' confidential email beyond the group of addresees. This Court has determined that a "scintilla" of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. *See Howle v. Woods*, 231 S.C. 75, 83, 97 S.E.2d 205, 210 (1957). As the Court noted in *Bell II*, "[The] [s]cintilla of evidence on which a case should be sent to jury must be real, material, pertinent, and relevant evidence, and not speculative and theoretical deductions.'' *Bell II*, 211 S.C. at 173, 44 S.E.2d at 330. Both Mr. Earles and Mr. Barnes denied providing the confidential email to any non-addressee. No other witness testified to any circumstance that would make it more likely than not that Mr. Barnes or Mr. Earles further published the confidential email. Moreover, no reasonable juror would conclude that the author of the email, Mr. Earles, who made the effort to label it "Confidential" and limited its distribution, would then intentionally violate his own directive, and leave it in a vehicle or the office for non-supervisors to see. As such, the Court of Appeals properly rejected

Mr. Kennedy's attempt to equate theory and conjecture with the material evidence required to overcome a directed verdict.

Next, Mr. Kennedy argues that the jury's mere disbelief of Respondents' testimony that they did not disseminate the email at issue beyond the group of addressees was sufficient to support the verdict. Counsel for petitioner conceded at oral argument that additional evidence beyond the jury's mere disbelief of Respondents' testimony was needed to meet the scintilla standard. 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.
>
> 9B Fed. Prac. & Proc. Civ. § 2527 (3d ed.)

The opinions Mr. Kennedy cites for the proposition that credibility of witnesses and the belief or disbelief of their testimony is the sole province of the jury are inapposite. In *Black v. Hodge*, 306 S.E.2d 196, 410 S.E.2d 595 (Ct. App. 1991), and *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997), significant circumstantial evidence presented at trial cast doubt on the plaintiffs' claimed damages, including witness testimony regarding the extent of a car accident out of which damages allegedly arose and testimony regarding a prior, similar accident for which the same damages were claimed. No similar, material evidence was presented in the case at bar that would negate Mr. Barnes' and Mr. Earles' undisputed testimony that they did not leave the confidential email in view of non-supervisory employees. Conjecture, speculation, and theory to the contrary does not establish the scintilla of material evidence that could be believed by a reasonable juror, which was needed to defeat Respondents' directed verdict motion.

Finally, Mr. Kennedy continues to assert that "conduct" of Mr. Barnes and Mr. Earles could have, in combination with the confidential email, communicated a defamatory message about Mr. Kennedy. As at trial and before the Court of Appeals, however, Mr. Kennedy could not point to any specific conduct of Mr. Barnes or Mr. Earles that allegedly communicated a message to and was understood by Mr. Kennedy's co-workers as defamatory, or otherwise exceeded the qualified privilege. Accordingly, even if the issues in this case were worthy of certiorari review, it is clear that the Court of Appeals did not commit error and certiorari should be denied.

V. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the **RESPONDENTS' RETURN TO PETITION FOR CERTIORARI** on counsel for Respondent, by depositing a copy of it in the U.S. Mail, postage prepaid, on June 26, 2017, addressed to T. Jeff Goodwyn, Esq. and Rachel G. Peavy, Esq., Goodwyn Law Firm, LLC, 2519 Devine Street, Suite A, Columbia, SC 29205.

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