THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2017-UP-067 (S.C. Ct. App. filed Feb. 1, 2017)

William McFarland and Jennifer McFarland, Petitioners,

v.

Mansour Rashtchian and Amy Rashtchian, Respondents.

PETITION FOR A WRIT OF CERTIORARI

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PROLOGUE

[Q]: Now, what did you see while you were looking out the window before going outside?

[A]: . . . [M]y wife and I, we were looking, one of the[] [workers] . . . was here unloading the mulch. The other two workers, . . . [t]hey were going and dumping it wherever they were dumping it. The next thing I see, a car comes and stops right here (indicating). Mr. McFarland comes out from wherever he comes out. He comes out here and he direct this car to go on my grass.

[Q]: How many cars did Mr. McFarland direct to go over your grass?

[A]: Two cars.

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[Q]: Whenever you went outside, you say that Mr. McFarland was still in the road?

[A]: Yes, sir.

[Q]: Tell me what happened.

[A]: I told him, "Why are you so inconsiderate? These are the kind of crap you do. Nobody likes you around here."

–Excerpted trial testimony of **Mansour Rashtchian**[1]

[1] (R. pp. 445:15-446:23 (regarding the start of the April 26, 2011, incident that gave rise to this lawsuit, recounting the words that *he himself had used* to confront Mr. McFarland—the very *first* words exchanged between the two men that day).)

CERTIFICATE OF COUNSEL

The undersigned certifies that Petitioners, William and Jennifer McFarland,[2] timely petitioned the Court of Appeals for rehearing and that the court finally ruled on their petition on May 24, 2017. (*See generally* App. pp. 890-911.)

INTRODUCTION

This case came before the Court of Appeals on the McFarlands' appeal following defense verdicts in the trial of their defamation claims against the Rashtchians. The appeal centered on the trial court's jury charge on the Rashtchians' alleged affirmative defense of self-defense.[3]

Underlying this lawsuit is an April 26, 2011, incident that was not only *unpleasant* but also *unusual*—a mid-street row between these two sets of across-the-street neighbors wherein false and defamatory accusations, of a sort actionable *per se*, were imprudently cast at the McFarlands, with Jennifer being accused of adultery and Bill of having stolen his father-in-law's (Jennifer's father's) business. And it was wholly *unnecessary*, too: It happened when—and never would have happened had not—Mansour angrily charged out of his house to confront Bill over

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[2] Petitioners (Plaintiffs in this action) are hereinafter referred to individually as "Bill" and "Jennifer" and collectively as the "McFarlands;" likewise, Respondents (Defendants), Mansour and Amy Rashtchian, are "Mansour" and "Amy," and together they are the "Rashtchians."

[3] The trial court also used the terms "provocation" and "justification," incorrectly viewing them as interchangeable with "self-defense." (R. pp. 425:5-426:8, pp. 510:17-511:4, pp. 512:20-513:1.)

what was at most—at most—a minor transgression, a grand total of two vehicles crossing some portion of the "'right-of-way' grass"[4] on the Rashtchians' side of the street while the roadway was temporarily obstructed by a landscaping crew delivering mulch to the McFarlands, the record containing no evidence of any damage having actually been done to the Rashtchians' side thereby. Even Mansour himself admitted that the underlying incident was triggered by his "foolish" behavior and "should never [have] happened."[5]

Mansour's immediate and overt hostility, grossly disproportionate to the trivial slight he claimed to have prompted it, betrayed his long-simmering animosity and malicious intent—Mansour did not confront Bill in the street that day to respond in good-faith defense of some unprovoked defamatory attack, but rather to launch his own ill-willed offensive. Respectfully, the trial court committed reversible error in charging the jury that self-defense, which it incorrectly equated with provocation and justification, was an absolute defense to the defamatory statements at issue and, for that matter, by even charging the jury on self-defense to begin with; and the Court of Appeals erred in affirming the trial court.

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[4] (*See, e.g.,* [Mansour:] R. pp. 463:12-468:10; [Defense Counsel, Opening Statement:] R. pp. 63:19-64:5.)

[5] (R. pp. 459:24-460:1; *see also* [Mansour:] R. p. 450:6-15, pp. 469:4-471:9; [Defense Counsel, Opening Statement:] R. p. 65:13-18; [Defense Counsel, Closing Argument:] R. pp. 508:24-509:2.)

QUESTIONS PRESENTED

I. **Did the Court of Appeals err in affirming the trial court, misapprehending or overlooking the trial court's reversible error (A) in charging the jury that self-defense, which it (the trial court) incorrectly equated with provocation and justification, was an absolute defense to the defamatory statements at issue and, for that matter, (B) in even charging the jury on self-defense to begin with, when, by Mansour's own admission, the incident wherein the subject defamation occurred was triggered by his "foolish" actions and "should never [have] happened"?**[6]

II. **Did the Court of Appeals err by failing to address every point distinctly stated in the case necessary to the decision of the appeal as required by Rule 220(b), SCACR?**

STATEMENT OF THE CASE

The McFarlands filed this defamation lawsuit against the Rashtchians in Dorchester County on April 24, 2013. (*See* R. pp. 10-12.) Ultimately, their claims were premised on the publication of these two false and defamatory accusations, both of them actionable *per se*: (1) that Jennifer was unchaste/had engaged in extra-marital relations and (2) that Bill had stolen his father-in-law's business. (*See* R. pp. 13-15, pp. 38:23-40:18, pp. 54:25-57:20, pp. 159:20-164:12, pp.

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[6] As Petitioners explained in stating the issue before the Court of Appeals (App. p. 836 n.7), it would seem that the trial court's error is most efficiently viewed in terms of the jury charge, but nonetheless, to the extent that the trial court's mistaken notion of self-defense in the context of this case might also be viewed in terms of its relationship to the court's ruling on Bill's motion for a directed verdict (or other judgment as a matter of law) or verdict form (in that it even gave the option of a defense verdict) or the denial of the McFarlands' motion for a new trial, such sub or collateral points were intended to be included as issues on appeal, as they are in regard to the instant petition.

302:13-303:16, p. 521:6-9.) Among the affirmative defenses the Rashtchians asserted in response to the suit was what the trial court would come to denominate/equate with self-defense. (*See* R. pp. 16-19, pp. 57:18-58:1, p. 112:9-12, pp. 425:5-426:8, pp. 510:17-511:4, pp. 512:20-513:1.)

A jury trial was held from December 8-12, 2014, the Honorable Diane Schafer Goodstein presiding. (R. pp. 20-23.) At the close of all evidence, the McFarlands' counsel moved for a directed verdict as to Mansour's liability for defamation, actionable *per se*, for having wrongly accused Bill of stealing his father-in-law's business, so as to leave only damages for the jury's determination on this claim. (R. pp. 493:23-497:16, pp. 499:21-506:9.) The trial court determined as a matter of law that Mansour had made this accusation against Bill—indeed Mansour admitted he had—and that it was false, defamatory, and actionable *per se*; however, over the McFarlands' counsel's objection, the court nonetheless charged the jury that self-defense was an absolute defense available to Mansour on Bill's claim, included the option of a defense verdict on Bill's verdict form, and charged the jury likewise in regard to Jennifer's claim. (R. pp. 499:21-506:9, pp. 510:17-511:4, pp. 512:15-513:13, pp. 516:4-517:24, pp. 520:6-521:9, pp. 523:24-526:12, pp. 527:10-532:12; *see also* R. pp. 8-9.)

More specifically, the trial court charged the jury as follows regarding self-defense:

Ladies and gentlemen, I have made a determination as a matter of law, and that has to do with one of the statements. It is the statement regarding Mr. McFarland, and I have made a determination that that statement is a statement which is -- would meet the definition of slander per se.

Now, you do not have to concern yourself with whether or not Mr. McFarland has made out that claim for slander per se. There is an affirmative defense, which is a complete defense, and it is the – it's referred to in the law as self-defense, provocation or justification, and they're used interchangeably, depending on the case that you look at, sometimes depending on the state that you're looking at. It's maybe called more often justification, provocation. South Carolina, we call it justification or self-defense or provocation. We've called it that as well.

So you will consider that defense, because it is an absolute defense to slander per se. The defendants have the burden of proving self-defense. I'm going to talk about those elements in just a moment.

Now, as to the claim involving Mr. McFarland, again, don't worry about the defamation, his defamation action. You do, though -- would determine whether or not the defendants have met their burden regarding their affirmative defense of self-defense.[7]

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. . . . If you find that the statement was slanderous per se and that the defendants have failed to prove self-defense, then you -- or self-defense or truth, then you should return a verdict for the plaintiff and must award the plaintiff at least nominal damages.

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[7] (R. pp. 512:15-513:13.)

Nominal damages may be only a small or trivial sum, and nominal damages are required because the law presumes that some actual damage to the plaintiff's reputation and character directly and proximately resulted from the defendant's defamatory statement.

Now, ladies and gentlemen, I want to talk about self-defense. I want to talk about self-defense, which is an affirmative defense. Then I'm going to talk to you regarding truth. When you speak in terms of defenses to slander or slander per se, you talk about truth as an absolute defense is the term that's used.

Going to first talk about self-defense, then we're going to talk about truth as an absolute defense, and these are defenses that the defendants have pled to the defamation alleged by and shown by Mr. McFarland. Now, the defendants must maintain the burden of proof regarding these defenses. That burden of proof is by the greater weight or the preponderance of the evidence.
Self-defense, the defendants claim the defense of self-defense. Even if the statement was defamatory or statements were defamatory, the statement or statements will not support an action for defamation if the statement or statements were invited or brought about by the plaintiff that you are considering. And of course you do this for both plaintiffs.

If the plaintiff verbally attacked the defendant, the defendant is allowed to reply to that attack as long as the reply is made in good faith and without malice. However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

Self-defense, which is also referred to as provocation or justification, must have been so recent as to induce a fair presumption that the injury complained of, the slander, the slander per se, was inflicted during the continuance of

> feeling and passions, excited by the provocation. The cause and manner of speaking the slander and all the circumstances then and there existing ought to be considered by you, the jury, in determining whether or not the defense of self-defense exists.[8]
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> Ladies and gentlemen, if you find that the defendant has failed to meet the burden of proof regarding self-defense as it relates to Mr. McFarland, then you would award some amount of damage. And I'm going to talk to you about aggravating and mitigating circumstances in a moment, but if you find that the defendants have failed to meet their burden of proof regarding self-defense, provocation, justification, then you must award some amount of damages.
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> Now, ladies and gentlemen, if you find that Ms. McFarland has sustained her burden with regards to her claim for slander per se, and if you find that the defendants failed to meet their burden with regards to either truth or either self-defense, then, again, damages would be presumed and you would award some amount of damage. You would consider mitigation that I'm going to talk about in just a moment, but you would award some amount of damage.[9]

The jury returned defense verdicts on Bill and Jennifer's claims. (R. pp. 8-9, pp. 533:15-534:22; *see also* R. pp. 6-7.) The McFarlands promptly moved for a new trial; their motion was denied. (R. pp. 535:13-538:1.)

The McFarlands timely appealed via notice served January 9, 2015.

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[8] (R. pp. 516:4-517:24.)

[9] (R. p. 520:6-21.)

Having submitted this case for decision without oral argument, the Court of Appeals filed a per curiam opinion on February 1, 2017 (the "Subject Decision"), affirming the trial court pursuant to Rule 220(b), and the following string of authorities:

> *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence."); *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (providing an appellate court reviewing a jury charge "must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." (quoting *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995))); *id.* at 495-96, 514 S.E.2d at 574 ("A jury charge is correct if '[w]hen the charge is read as a whole, it contains the correct definition and adequately covers the law.'" (alteration by *Keaton*) (quoting *State v. Johnson*, 315 S.C. 485, 487 n.1, 445 S.E.2d 637, 638 n.1 (1994))); *id.* at 496, 514 S.E.2d at 574 ("The substance of the law is what must be instructed to the jury, not any particular verbiage." (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)); *Cartwright v. Herald Publ'g Co.*, 220 S.C. 492, 498, 68 S.E.2d 415, 417 (1951) ("Statements made in an honest endeavor to vindicate one's character or to protect one's interests are usually regarded as qualifiedly privileged, even though they are false, if they are made in good faith and without malice. Thus, it seems to be definitely settled that when one person assails another in the public press, the latter is entitled to make reply therein, and so long as the reply

> does not exceed the occasion, he cannot be held responsible for any resultant injury. . . . On the other hand, however, it is clear that a defensive communication will lose its privileged character if the person making it goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." (quoting 33 Am. Jur. *Libel and Slander* § 134)).

(App. pp. 888-89.)

Essentially, the Court of Appeals cited three cases in support of the Subject Decision: *Cole*, *Keaton*, and *Cartwright*.[10] Of these cases, only *Cartwright* addresses the substantive law of defamation; *Cole* and *Keaton* address the standard of review. This, then, would appear to be the Court of Appeals' reasoning: When read as a whole, the charge was correct, or at least "reasonably free from error," under the substantive law articulated in *Cartwright*.

As certified above, the McFarlands timely petitioned the Court of Appeals for rehearing, and the court finally ruled on their petition on May 24, 2017. (*See generally* App. pp. 890-911.) The instant petition for a writ of certiorari timely follows.

STATEMENT OF FACTS

The adverse parties are across-the-street neighbors—the street that separates them is called Flud Street. The Rashtchians' yard fronts on Flud Street directly

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

across from where the McFarlands' backs up to it.[11] Together with the strips of land on each side of its paved surface, Flud Street constitutes a 50-foot-wide zone of public right-of-way between the McFarland and Rashtchian properties. (*See* [Bill:] R. p. 68:8-17, p. 69:8-23, pp. 70:5-74:8, pp. 74:14-76:20, pp. 105:15-106:11; [Jennifer:] R. pp. 253:22-254:3, pp. 255:24-256:3, pp. 257:23-258:24; [Marissa McFarland:] R. p. 411:11-18; [Mansour:] R. p. 431:1-5, p. 442:13-20, p. 462:4-14, pp. 463:12-464:13; [Amy:] R. p. 475:5-12; R. pp. 539, 541.)

The incident that gave rise to this lawsuit happened on April 26, 2011, when a rather mundane—and undeniably tranquil—afternoon of yard work[12] was disrupted by Mansour storming from his house to confront Bill in the middle of Flud Street. By the time it was over, Mansour had, *by all accounts*, falsely—and loudly—accused Bill of having stolen his father-in-law's business[13] and, *according to the McFarlands*, both of the Rashtchians had flung baseless charges of marital

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[11] The McFarlands' place, Lot 3 (of 7 total lots) in the Live Oak Village subdivision, fronts on Oak Village Lane and, like the subdivision at large, is bounded to the west by Flud Street. On the other side of Flud Street, the Rashtchians' property is not in the Live Oak Village subdivision. (R. p. 539.)

[12] (*See, e.g.,* [Amy:] R. pp. 479:20-480:2; [Mansour:] R. pp. 441:19-442:5.)

[13] Mansour admitted accusing Bill of stealing his father-in-law's business, that he showed "poor judgment" in doing so, and that "[he] should have never said [it]." (R. p. 450:6-15, pp. 469:4-471:9; *see also* [Defense Counsel, Opening Statement:] R. p. 65:13-18; [Defense Counsel, Closing Argument:] R. pp. 508:24-509:2; Statement of the Case, *supra*, regarding the trial court's determination about Bill's claim as a matter of law.)

infidelity at Jennifer[14]—all within earshot of, among others, the McFarlands' two children, drawn out onto their back porch by the commotion. (*See* [Bill:] R. pp. 85:15-87:19, pp. 89:5-100:17, p. 101:4-12, pp. 107:17-108:15; [Stephon Johnson:] R. pp. 232:2-235:8, p. 237:17-22; [Jennifer]: R. pp. 265:10-271:2, pp. 305:23-306:4; [Lance Johnson:] R. pp. 341:11-355:23, p. 379:20-25; [Mansour:] R. p. 400:15-20, pp. 404:11-406:14, pp. 407:17-410:24, pp. 441:19-449:7, p. 450:6-457:18, pp. 459:24-460:1; [Marissa McFarland:] R. pp. 411:11-412:7, pp. 413:7-420:22, p. 422:2-13, p. 423:5-24; [Amy:] R. pp. 479:20-489:9; R. p. 542.)

Immediately prior to the incident, Bill had been outside with Lance Johnson and two other men from his (Lance's) landscaping company who were delivering mulch via the McFarlands' back gate. ([Bill:] R. pp. 85:15- 87:19.)[15] The incident

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[14] The McFarlands testified that both of the Rashtchians falsely accused Jennifer of adultery. ([Bill:] R. pp. 93:23-94:4, p. 97:12-13, p. 98:4-6, pp. 215:20-216:1; [Jennifer:] R. pp. 267:22-268:3, pp. 270:13-271:2; *see also* [Stephon Johnson:] R. pp. 239:21-240:5; [Lance Johnson:] R. p. 350:6-25, p. 371:1-7.) Mansour denied this outright. (R. p. 457:10-18, p. 459:9-17.) Amy acknowledged communicating a need for concern about visitors coming to the McFarlands' house but denied such concerns were in reference to adultery on the part of Jennifer. (R. pp. 487:10-489:2; *see also* [Defense Counsel, Opening Statement:] R. p. 66:10-18, p. 67:2-8.)

[15] A brick and wrought iron fence bounds the rear of the McFarlands' property. Slightly offset from where (on the other side of Flud Street) one of the entrances to the Rashtchians' circular driveway is located, there is a break in the McFarlands' fence in the form of a double-swinging gate and a short paved vehicular access to/from Flud Street, sort of a truncated driveway with its terminus a concrete pad emptying onto the McFarlands' back lawn. (*See, e.g.,* [Bill:] R. pp.

began when, according to Mansour's own testimony, he approached and, dispensing with any pleasantries, started right in on Bill: "*Why are you so inconsiderate? These are [sic] the kind of crap you do. Nobody likes you around here.*" (R. p. 446:18-23 (emphasis added).) And so it was that the peace was breached, and from this point of departure—or rather derailment—the affair continued, with both men's wives becoming involved before it was all said and done. (*See, e.g.,* [Lance Johnson:] R. pp. 368:1-369:15, pp. 397:23-398:25; [Mansour:] R. p. 448:17-22, p. 456:9-17, p. 472:8-13; [Amy:] R. pp. 483:10-485:25.)

As for the offense that drew his ire, according to Mansour, the landscapers' truck and trailer were blocking Flud Street—which, it should be noted, is not a thoroughfare but comes to a dead end, with but a modest number of houses situated along it[16]—and Bill had directed a total of exactly *two* vehicles around the obstacle so as to cross over a portion of the grass on the Rashtchians' side, albeit "'right-of-way' grass" near the pavement that was not actually Rashtchian property and, at

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75:14-76:6, pp. 102:23-104:1, pp. 105:15-107:12; [Mansour:] R. p. 402:22-24, p. 437:13-15, pp. 442:13-443:25; [Amy:] R. pp. 490:12-491:6; R. pp. 540-41.) Lance/his company had delivered Bill mulch a number of times prior, between two and four times a year since 2009, following the same procedure—using Flud Street and backing their mulch trailer into position on the concrete pad at the McFarlands' rear gate—without complaint from the Rashtchians. ([Bill:] R. pp. 85:15-87:19, pp. 89:5-91:19.)

[16] ([Bill:] R. pp. 87:20-89:4; [Jennifer:] R. pp. 257:23-258:5; *see also* [Stephon Johnson:] R. p. 236:17-19; R. p. 541.)

that, there being no evidence of property damage in any event. ([Mansour:] R. pp. 404:11-405:3, pp. 441:19-446:25, pp. 463:12-468:20; *see also* [Defense Counsel, Opening Statement:] R. pp. 63:19-64:5; [Stephon Johnson:] R. p. 248:3-12; [Lance Johnson:] R. pp. 365:18-367:7, p. 367:19-22, p. 379:6-13, p. 399:12-22; [Amy:] R. p. 790:12-17, p. 492:11-17.)

Besides this alleged impropriety, and even though the only evidence in the record is that the two couples had little interaction in the nearly ten years prior, both of the Rashtchians also testified about previous events reflecting a growing resentment of the McFarlands that they (the Rashtchians) brought with them to the events of April 26, 2011. (*See* [Mansour:] R. pp. 431:1-441:18; [Amy:] R. pp. 475:5-479:19.) To be clear, the McFarlands denied any past antagonism of the Rashtchians. ([Bill:] R. pp. 98:7- 99:11, p. 174: 9-17, p. 176:16-177:2, p. 184:12-14; [Jennifer:] R. pp. 258:10-265:9.) The Rashtchians' allegations in this regard are noted here only to make the point that—unwarranted as it was—as evidenced by their own testimony, the Rashtchians' bitterness toward the McFarlands pre-dated the incident giving rise to the defamation at issue.

STANDARD OF REVIEW

Trial-court decisions regarding jury charges are subject to an abuse-of-discretion standard of appellate review. *Cole*, 378 S.C. at 404, 663 S.E.2d at 33. "An abuse of discretion occurs when the trial court's ruling is based on an error of

law or is not supported by the evidence." *Id.*[17]

Where a trial court's erroneous jury instruction causes prejudice to the appellant, it has committed reversible error. *Id.* at 405, 663 S.E.2d at 33; *see also Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues."). "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." *Cole*, 378 S.C. at 404, 663 S.E.2d at 33.

Additionally, with regard to review of the denial of a motion for a directed verdict, the appellate court employs the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the

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[17] Likewise, trial court decisions regarding verdict forms and new-trial motions are subject to an abuse-of discretion standard. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 300-01, 641 S.E.2d 903, 906 (2007) ("The determination of whether a special verdict should be submitted to the jury is within the sound discretion of the trial judge, and an appellate court will only reverse upon a finding of an abuse of that discretion. An abuse of discretion occurs when a ruling is based on an error of law or a factual conclusion without evidentiary support. . . . The trial judge has the discretion to determine how a case is submitted to the jury.") (citations omitted); *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009) ("The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law.").

nonmoving party. *See, e.g., Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). In essence, the court must determine whether a verdict for the opposing party "would be reasonably possible under the fact as liberally construed in his favor." *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002). This rule does not, however, authorize submission of speculative, theoretical, or hypothetical views to the jury. *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997). The appellate court should reverse the trial court when there is no evidence to support the ruling below. *Steinke, supra*; *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997).

ARGUMENT

I. The Court of Appeals erred in affirming the trial court, misapprehending or overlooking the trial court's reversible error (A) in charging the jury that self-defense, which it (the trial court) incorrectly equated with provocation and justification, was an absolute defense to the defamatory statements at issue and, for that matter, (B) in even charging the jury on self-defense to begin with, when, by Mansour's own admission, the incident wherein the subject defamation occurred was triggered by his "foolish" actions and "should never [have] happened."

As the McFarlands argued to the Court of Appeals, the trial court's jury charge on self-defense reflects its misapprehension of both the relevant law and the evidence in the case. The trial court should not have charged the jury that self-defense was the same as provocation and justification; nor should it have charged

that self-defense was an absolute defense to the McFarlands' claims; nor, indeed, should it have charged the jury on self-defense at all. After it determined—properly—as a matter of law that Mansour had defamed Bill, in a manner actionable *per se*, the trial court should have sent Bill's case to the jury for a determination of damages only. (And, for the sake of completeness, the trial court erred by not granting the McFarlands a new trial on account of the above errors).

As, indeed, the Court of Appeals' own citation to *Cartwright* makes clear, the privilege afforded to "[s]tatements made in an honest endeavor to vindicate one's character or to protect one's interests" is *qualified*, not *absolute*. (App. p. 889 (quoting *Cartwright*, 220 S.C. at 498, 68 S.E.2d at 417).) The trial court, however, erroneously instructed the jury that it is an "absolute" defense;[18] but under the law of defamation, there is, of course, a material difference between absolute and qualified privileges. *Hainer v. American Med. Intern., Inc.*, 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (explaining no action lies for publication of an absolutely privileged communication, even when the communication is made with malice, but where a communication is only qualifiedly privileged, the plaintiff can recover upon showing it was actuated by malice). The trial court's mere linking of the word "absolute" to self-defense was therefore incorrect and confusing to the jury.

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[18] (R. p. 513:5-8.)

Moreover, the trial court incorrectly equated justification and provocation with self-defense and conflated these concepts in its charge. *Compare Cartwright*, 220 S.C. at 498, 68 S.E.2d at 417 *with Johnston v. Life & Cas. Inc. Co.*, 192 S.C. 518, 7 S.E.2d 463, 465 (1940) ("It is true that when the plea of *justification* is entered in an action of slander *there is no complete defense except by proof of the charge*, but in fixing the *amount of the verdict* we do not see why there may not be circumstances of aggravation or of mitigation in such case as well as in any other. Why may not the defendant say: 'I spoke the words, but under great *provocation*, or in sudden heat and passion,' . . . ? It is true that the defendant cannot avail himself of the defense which the truth of the charge affords without pleading *justification*; but it does not follow that in all such cases the verdict must be the same without regard to the facts and circumstances of aggravation or mitigation.") (emphasis added). As *Johnson* reflects, "justification" is simply another name for the defense of truth, i.e., that the alleged defamatory statement is true—what the *Johnson* Court referred to as "proof of the charge." But the defense of truth is not involved here; the trial court correctly determined as a matter of law that the charge that Bill stole his father-in-law's business—*which Mansour admittedly made*—was defamatory and actionable *per se*. (R. pp. 493:23-497:16.) And, as *Johnson* also reflects, "provocation" is not a *defense* but an argument in *mitigation of damages*.

Further still, as the Court of Appeals recognized, "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." (App. p. 889 (quoting *Cole*, 378 S.C. at 404, 663 S.E.2d at 33).) Under *Cartwright*, it is only "[s]tatements made in an *honest endeavor to vindicate one's character or to protect one's interests* [that] are usually regarded as qualifiedly privileged, even though they are false, if they are made in good faith and without malice[,]"and "a *defensive* communication will lose its privileged character if the person making it goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." 220 S.C. at 498, 68 S.E.2d at 417 (emphasis added); *see also Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) (qualified privilege "does not protect any unnecessary defamation" and, one operating thereunder, still "must be careful to go no further than his interests or his duties require").[19]

Thus, to be qualifiedly privileged under *Cartwright*, a statement must be defensive, for the purpose of vindicating one's character or protecting one's interests, and without malice. Here, by his own admission, it was clearly

[19] Also, it should be noted here, in this case between private citizens, common law malice applies, as opposed to the different, more restrictive, definition of "actual malice" that would apply were this case one involving a public official or public figure. *Id.* at 143, 542 S.E.2d at 750. Under the common law, 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." *Id.* at 142, 542 S.E.2d at 750.

Mansour's "poor judgment," his "foolish[ness]," that sparked the whole defamatory episode. (R. p. 450:6-15, pp. 459:24-460:1, pp. 469:4-471:9; *see also* [Defense Counsel, Opening Statement:] R. p. 65:13-18; [Defense Counsel, Closing Argument:] R. pp. 508:24-509:2.) Without question, Mansour was not in a defensive posture; there had been no unpleasantness at all that day until Mansour stormed from his house to confront Bill in the middle of Flud Street. (*See* [Mansour:] R. pp. 445:15-446:23.) At that, Mansour's defamatory statements were not made in an honest endeavor to vindicate his character or to protect his interests; nor can it reasonably be said that calling Bill a thief and Jennifer an adulteress could have possibly done so. Rather, the only evidence is that the Rashtchians' fuse, short and already dripping with an incendiary ill will, was lit by Mansour himself; and if anything, Bill was provoked, not the other way around.

Even further, even assuming, *arguendo*, that there had been an "original attack" on the Rashtchians, the defamation at issue certainly "goes beyond the scope of the original attack or indulges in language that is unnecessarily defamatory." *Cartwright*, 220 S.C. at 498, 68 S.E.2d at 417. Notwithstanding any unpleasant or disparaging words the Rashtchians may claim the McFarlands directed toward them on April 26, 2011,[20] exactly *none* of them were said before,

[20] The McFarlands, of course, deny the lion's share of the Rashtchians' allegations in this regard. (*See* [Bill:] R. pp. 98:7-99:11, p. 174:9-17, pp. 176:16-

nor would any of them have been said at all had not, Mansour—acting in a manner grossly disproportionate to the transgression he claims to have prompted him—angrily burst from his home to initiate that day's discord.

The trial court abused its discretion and unduly prejudiced the McFarlands, committing reversible error in failing to appreciate that, in light of the relevant law and indisputable facts, self-defense was misfit for this case and in charging—and confusing—the jury with irrelevant and inapplicable principles upon which to decide the McFarlands' claims. *See Cole*, 378 S.C. at 404, 663 S.E.2d at 33. And, respectfully, the Court of Appeals erred in affirming the trial court, misapprehending or overlooking the reversible error below.

II. The Court of Appeals erred by failing to address every point distinctly stated in the case necessary to the decision of the appeal as required by Rule 220(b).

Again, this appears to have been the Court of Appeals' reasoning in affirming the trial court: When read as a whole, the charge was correct, or at least "reasonably free from error," under the substantive law articulated in *Cartwright*. (*See* App. pp. 888-89.) The court did not address the McFarlands' points about the trial court's legal errors regarding absolute versus qualified privilege and conflation of self-defense, justification, and provocation. Nor did the court address

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177:2, p. 184:12-14, pp. 184:24-185:4; [Jennifer:] R. pp. 299:16-300:16; *see also* [Stephon Johnson:] R. p. 239:16-20, p. 242:8-15.)

the McFarlands' points about the charge being without evidentiary support and misfit for this case.

Rule 220(b) provides, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."[21] Respectfully, the Court of Appeals erred by failing to address every point distinctly stated in the case necessary to the decision of the appeal as required by Rule 220(b).

CONCLUSION

For the foregoing reasons, Petitioners ask that the Court grant this petition, reverse the Court of Appeals (as well as the trial court), and remand this matter for a new trial.

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[21] The McFarlands acknowledge that Rule 220(b)(2) provides this exception: "The Court of Appeals need not address a point which is manifestly without merit[;]" however, the McFarlands submit that the exception is inapplicable here and that their arguments were appropriately presented and developed for the Court of Appeals' consideration. (*See generally* App. pp. 830-53, pp. 890-99, pp. 905-10; *see also* Statement of the Case, Statement of Facts, and Argument I, *supra*.)

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Dated: 7/11/17

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Unpublished Opinion No. 2017-UP-067 (S.C. Ct. App. filed Feb. 1, 2017)

William McFarland and Jennifer McFarland, Petitioners,

v.

Mansour Rashtchian and Amy Rashtchian, Respondents.

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I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Petitioners, hereby certify that the foregoing **PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on July 11, 2017, properly posted for delivery to the following addressees:

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