THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826
Appellate Case No. 2015-001536

J. Scott Kunst, Respondent,

v.

David Loree, Appellant.

Respondent's Return to Appellant's Petition for Rehearing

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THE APPELLANT'S STATEMENT OF FACT

It is no accident that, even at this late date, the Appellant continues to misrepresent the central element of the business contract upon which all of the facts of this case turn.

Loree states on page 6 of his petition: "As is customary in the construction of residences, Kunstwerke would submit an invoice to Mr. Gaby for work thus far completed. Mr. Gaby would pay Kunstwerke the requested amount, with the understanding that Kunstwerke in turn would pay the subcontractors and vendors listed on the invoices." Loree references only his own trial testimony in the record – the testimony of an adjudicated liar and defamer - and not the actual contract or accounting records in the record. Loree had never even read the Gaby contract until trial (R. p. 126, lines 12-32).

In reality, the contract was anything but "customary" in the construction of residences. It was a genereous *reimbursement* contract (R. p. 304, lines 12-15) through which third party invoices incurred by Kunstwerke were bundled for reimbursement to Gaby on a weekly basis. By the time Mr. Gaby received and paid a weekly billing statement, Kunstwerke had already incurred significant new debt and had paid out large sums of cash for contractor invoices totaling on average $10,000 daily that Gaby would not yet be aware of until a future billing statement. The debt was *supposed* to be protected by lien laws.

This court's published opinion 5564 accurately summarizes the contractual evidence submitted at trial: "Because the company advanced credit to its clients, Kunstwerke required its clients to pay their weekly progress billing immediately upon

receipt to continue the construction of their homes." This Court also notes in footnote 2 of the opinion that Loree takes a converse position on the contract.

Everything that follows in Loree's petition is dependent on his continued misrepresentation that it was a pass-through billing contract with earmarked funds disbursed weekly only *after* received. He has been stuck with this false premise as a legal defense strategy ever since his own false testimony in the Gaby default damages hearing in 2007. There, he testified that earmarked money was missing and therefore must have been spent on something other than the Gaby project. The Gaby attorney in the default hearing objected to and excluded the actual records from that proceeding. In the present case, Loree's attorney unsuccessfully objected to the actual records being admitted into evidence claiming they were "hearsay, not the best evidence" (R. p. 166, lines 51-75). In the present trial, Loree's *actual* statements to others were fully litigated in the light of *all* evidence before a jury of his peers.

The jury learned that at the time Loree took over the project for his boss on March 3, 2006, the Gabys were in arrears for three weekly statements: 2/16/06 (R. p. 349), 2/20/06 (R. p. 350), and 3/3/06 (R. p. 351). Kunstwerke's accounting system can identify the exact reimbursement amount owed on any day of construction. On any day of construction, any Kunstwerke client had sufficient records to conduct a full audit of their account if they suspected anything was awry. There was not a dime missing or improperly accounted for. On February 16, 2006, the cost of Gaby construction incurred by Kunstwerke totalled $2,656,492 and the Gabys had reimbursed $2,554,087 (R. p. 307). None of these totals, nor the three unpaid statements above, nor any of the actual accounting records submitted into evidence have *ever* been contested by the Gabys or

Loree.

On page six of his "Statement of Facts," Loree references Judge Welmaker's default order without properly noting that it was a default order. The Gabys elected to have final judgment entered in the default case under only the breach of contract action. This court has already opined in a previously published opinion as to the value of the default judgment in this present case. *"Although Kunst participated in the damages hearing by cross-examining witnesses called by the Gabys, it appears he was not afforded the opportunity to testify or to call witnesses to testify on his behalf. Kunst was also not allowed to participate in any discovery on this matter. In addition, because Kunst was in default, the circuit court 'start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted.' Accordingly, we hold Kunst was not presented with a fair opportunity to 'actually litigate" the veracity of Loree's alleged statements to others."* (R. p. 78, lines 15-23)

Litigating the veracity of specific slanderous words that impute serious, indictable financial crimes to another man requires *all* evidence be heard and contested at law.

On the bottom of page 7 of his "Statement of Facts," Loree copies and pastes the following absurd quote from his appellant's brief: "Kunst, although a former CPA, was unable to keep his company, Kunstwerke, financially solvent." The accounting records submitted at trial showed a company better capitalized and increasingly profitable in 2003, 2004, 2005, and 2006 (R. p. 274). No company withstands the sudden default of $539,027 (R. p. 273) of client debt, slander actionable *per se*, threats, and subsequent lien fraud.

Loree concludes his "Statement of Facts" with the following outrageous false

statement: "Kunst had failed to pay vendors and subcontractors, overcharged on vendor invoices, and used funds paid by the Gabys to Kunstwerke (to be used for the payment to subcontractors and suppliers) for his personal use." The entirety of this statement is an abject lie. It is unconscionable that this statement can still be made under the protection of court proceedings twelve years beyond the events of 2006. If these same allegations were to be spoken or written by Loree or his attorneys to others beyond the conclusion of these proceedings they would be actionable per se and would be acted upon swiftly.

ARGUMENT

I. Did the court overlook or misapprehend the law and evidence related to the elements of slander per se?

Loree cites *McBride v. School District of Greenville County* as a controlling authority establishing that only embezzlement of public money affecting "society as a whole" can be deemed a crime of moral turpitude. This case established no hard line separating private matters versus society as a whole as a threshold to overcome in order to reach the level of crimes of moral turpitude. Such a threshold is found nowhere in the law and is not a restriction placed on finders of fact.

Loree confuses public affect with public sentiment in order to create his false threshold. In State v. Bailey, 275 S.C. 444, 272 S.E.2 439 (1980), the South Carolina Supreme Court addressed the general law regarding crimes of moral turpitude: *"...the question of moral turpitude depends not only on the nature of the offense, but also on the attendant circumstances. The standard is public sentiment, and this may change as the moral views and opinions of the public change."*

The commission of a crime of moral turpitude such as obtaining property by false pretenses. *See S.C. Code Ann. § 16-13-240 (2003) ("A person who by false pretense or representation . . . obtains from another person any . . . money . . . or other property . . . is guilty of a: (1) felony . . . if the value of the property is five thousand dollars or more . . . .").* *"Obtaining property under false pretenses is a crime of moral turpitude." (State v. Moore, 128 S.C. 192, 199, 122 S.E. 672, 674 (1924); Carruth v. Brown, 415 S.E.2d 470, 471 (Ga. Ct. App. 1992)).*

Loree also alleges that the specific defamatory statements referenced by the court in its opinion are "supported by the Record evidence as being true." But the standard here is whether there was more than one inference for the finders of fact.

On page 10 of his petition, Loree makes the outrageous claim that Kunst admitted to taking corporate funds for personal use and described it as an "illicit siphoning of corporate funds for improper uses." This is another instance when Loree simply ignores the actual accounting records and the reimbursement contract and lies again. The finders of fact saw Kunstwerke's "Summary of Fee Income, Personal Draws, and Personal Contributions" (R. p. 308). Kunst's draws/compensation came only from Kunstwerke's net income (Fee Income less operating costs) which flowed directly to Kunst's personal tax return from his S Corp. Kunst was paid a fraction of the earnings available to him in 2004, 2005, and 2006 and, in so doing, contributed $300,270 in total to the retained earnings on the balance sheet during those years. This was offset on the balance sheet by the large receivable asset balance owed from every Kunstwerke client. Every client owed net cash the week Loree came to town. There was never cash on hand from any client to use for "personal use." Any such implication that money was illicitly accounted for or

siphoned cash is an outrageous actionable lie.

All five Kunstwerke clients stopped paying their current weekly statements when Loree maliciously spread false rumors about financial crimes, despite the fact that these projects collectively owed $539,027 more than had been reimbursed. Two of these clients were attorneys Eugene Covington Jr. and Michael Parham who owed $137,634 and $70,906 respectively of the $539,027 debt owed Kunstwerke (R. p. 307).

The finders of fact heard testimony and saw evidence that in 2007, Kunstwerke sued those clients, including Covington and Parham, who abruptly stopped reimbursing in February 2006 for breach of contract in order to collect the $539,027 owed. Unlike the Gaby default action, the actual Kunstwerke accounting records were litigated in five corporate collection cases and *all* five defendants wrote checks (two mid-trial).

The most stunning thing about Loree's slander and this defamation case is that the opposite was true in every instance. For example, when Loree alleges money was taken by Kunst, it was Kunst and vendors who were stiffed hundreds of thousands of dollars in funds that were *supposed* to be secured by lien laws. There was no money missing or taken from any client as alleged in Loree's slander. Kunst's personal funds were retained in the corporation and used to advance cash credit that Kunst had to later sue to recover. Subcontractors, vendors, and Kunstwerke itself were *stiffed by the Gabys* (who also fraudulently avoided the lien process as part of their scam), not by Kunst.

Lastly, on page 10, Loree makes a bizarre statement that his "insurance policy" slander was not refuted because he claims the insurance agency error was never refunded to Gaby. This is another lie in his petition that ignores the actual accounting records and

depends on his misrepresentation of the credit/reimbursement nature of the contract. Such errors are automatically credited against the balance owed in the next billing after discovered.

Witness Tracey Hilton testified as to the underwriting situation involving the policy (R. p. 112, lines 1-23) and submitted an exhibit proving that Mr. Gaby was fully aware what was going on long before Loree's "investigation" (R. p. 280). Kunst also addressed this item specifically in his letter to those involved in the Gaby project on April 7, 2007 (R. p. 347). Motivated defamer Loree imputed criminal intent to Kunst personally for an insurance agency's simple clerical error.

II. Did the court overlook or misapprehend items in the trial Record concerning truth as a defense?

A. Kunst's Allegations in General.

Loree lists seven bullet point slanders and, strangely enough, he alleges that this court somehow *overlooked* that they had *all* already been proven true and that there were no other possible inferences for the finders of fact.

He relies on the testimony of Kunst witness Eugene Covington Jr. as his sole support for four of these bullet points. Covington was subpoenaed by Kunst as a hostile witness to testify as to the resolution of the Kunstwerke contract case against him. Loree quotes testimony that money was "taken" from Covington and spent on a personal item. The actual accounting records in evidence show that on the date that Kunst withdrew his

own capital to make this purchase, Covington owed Kunstwerke $110,080 net cash (Bates Kunst 000288) that Kunstwerke had paid out over what Covington had reimbursed to date. It was definitely never "Covington money" sitting on deposit as Loree's misrepresentation of the contract would have one believe. This was desperate, lazy rhetoric by a belligerent attorney who finally admitted that he (Covington) wrote a settlement check mid-trial (R. p.156, lines 88-100). That is what the jury was waiting to hear.

If Covington were to state outside of a witness chair that money was taken from him or that his money was converted by Kunst for personal use, such a statement would be an abject lie and would be actionable.

Loree notes that Kunst did not call other clients "Parham, Coco, and Hickey." In-state witness Parham would have taken the stand after Covington if he weren't dead. The other two witnesses were out-of-state and their depositions were taken before the resolution of their corporate cases. Kunst testified to the resolution of those cases and Loree could not refute it.

In his third bullet point on page 12 Loree makes a false representation that Select Stone and System Specialties were the subject of the "dummy invoices from dummy companies" slander. These are known companies, not made up companies.

In response to bullet point number six, Glenn Alfonso testified as to how the affidavit came about and he read it aloud to the jury (R. p. 121, line 76 – p. 122, line 25) exactly how he wanted his testimony to be recorded on the record. Enough said.

B. The Court Should Not Defer to "Explanations," But Rather Only Record Evidence.

Loree argues: "Kunst does not deny that he took money from Kunstwerke personal accounts. In fact, Kunst admits freely that he used Kunstwerke funds for personal purchases..." What are these "Kunstwerke personal accounts" as Loree calls them? Are there no Kunstwerke funds available in retained earnings to compensate the owner of a company that earned $274,000 in fee revenue against $106,573 of operating costs (R. p. 308)?

This argument is either unbelievably ignorant or intentionally deceptive. Again, this argument is based on Loree's misrepresentation of the contract.

A corporation that maintains a receivable balance for net client accounts owed as opposed to client cash on hand, funds those receivables through retained earnings and contributed capital. Kunstwerke did not, nor could not, have a separate bank account for fee revenue and expenses. Gaby didn't make a separate wire to a different account for Kunst's monthly fee. In the Covington example above, Kunstwerke had paid out $110,080 more cash than Covington had reimbursed as of that date. There was no Kunstwerke Covington personal cash account of Covington money to be taken from. That is not an "explanation," that is an unrefuted fact.

The accounting ledger and client account summaries and the contract itself admitted into evidence by Kunst are not "explanations." They are the actual accounting records that were used in this and all of the related cases.

Yet Loree concludes at the bottom of page 15 that "there is simply no evidence in

the Record to weigh on these issues." That is beyond absurd.

III. Did the court overlook or misapprehend items in the trial Record concerning truth as a defense?

A. No Actual Malice

Loree argues: "No witness testified that Loree had behaved in a reckless or wanton manner." That is not what the jury heard.

The jury heard Glen Alfonso testify that Loree prefaced his statement by saying: "I am not supposed to be telling you this, but..." (R. p. 122).

Alfonso was asked to confirm his deposition testimony regarding whether he and Loree were alone on this occassion. "It wasn't just between me and him, there were several others standing around. I can't remember who was standing around, but there were several other workers that were on the job site (R. p. 123, lines 58-69)." It was random and reckless and Loree reasonably should have known that it would be repeated by those who heard it.

B. Scope Was Not Exceeded

Loree exceeded the scope of his supposed "investigation" time and time again. This court is correct in finding that "Loree could have investigated the Gaby project without implicating Kunst's financial affairs with other clients." On page 12 of his pettion, Loree claims that Loree never spoke to Goad about any other projects. That is not true. Goad read and confirmed Slander #4: " ...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named

Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (R. p. 122)

Goad testified that he knew of no reason for Loree to make this statement to him:

Q. Kunst: "Did you provide windows and doors for this Hickey speculative project you reference in your affidavit?"

A. Goad: "We did not."

Q. Kunst: "Was Loree trying to get -- David Loree trying to get information from you about the Hickey project?"

A. Goad: "I don't believe so. I had no interest in that project in any way. We weren't working on it in any way.

Q Kunst: "Would there be any reason for David Loree to say anything to you regarding the Hickey project?"

A. Goad: "I don't know (R. p. 117, line 76 – p.118, line 2)."

Enough said.

IV. Did the court overlook or misapprehend the law in South Carolina regarding commingling of corporate and personal funds?

Not only does Loree deny the obvious terms of a Kunstwerke contract, and not only does he avoid ever referencing the company's actual financial statements and records,

but now it seems in this new argument that he is unaware that Kunstwerke was an S. Corp.

Every distribution to the S. Corp.'s lone shareholder was properly recorded throughout each year and deducted from shareholder equity. Kunstwerke's profits were taxed on Kunst's personal tax return. Distributions of funds to shareholders typically have no effect on shareholder tax liability. If a shareholder draws more than his equity basis, it is taxed as a capital gain. Shareholder distributions are not "commingling" of funds.

Kunst's capital basis in the company increased dramatically during 2004 and 2005 (R. p. 308) and he took only a fraction of the distributions available to him in order to fund an increasing receivable balance from clients. The funds that financed the daily expenses of client projects Gaby, Covington, and Parham were retained earnings that had already been taxed to Kunst personally. Those that stiffed Kunstwerke and had to be sued to collect from were not just stiffing a corporation, they were taking Kunst's personal funds.

There is nothing improper about the bookkeeping. The accounting system was indeed "unique" in the way it processed invoices and maintained a *credit* balance for each client. The corporate structure, bookkeeping methods, and shareholder equity of *C.T Lowndes & Company* in the case referenced by Loree have no relevance to Kunstwerke or their petition.

This last argument is disgraceful, even for Loree. Kunst did not "confess" to improper accounting. There is indeed a conflict in evidence between Kunst and Loree. Loree's entire defense has been based on a denial of the terms of a reimbursement contract while at the same time never refuting one dollar recorded in the actual accounting records in the Record evidence.

CONCLUSION

Based on the arguments above and the overwhelming Record evidence, Kunst respectfully requests that Loree's petition for a rehearing of opinion 5564 be denied.

Respectfully Submitted.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

J. Scott Kunst, Respondent,

v.

David Loree, Appellant.

RESPONDENT'S CERTIFICATION OF RULE 211(b) COMPLIANCE

The undersigned certifies that the Respondent's Final Brief filed this date complies with Rule 211(b) SCACR.

June 21, 2018,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

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J. Scott Kunst, Respondent

v.

David Loree, Appellant.

PROOF OF SERVICE

I, J. Scott Kunst, Respondent *pro se,* hereby certify that I have served the Respondent's Return to the Appellant's Petition for Rehearing and the Certificate of Compliance with Rule 211(b) on the Appellant by depositing a copy in the United States Mail, postage prepaid, on June 21, 2018, addressed to the Appellant's counsel of record as follows: V. Elizabeth Wright, P.A., 217 E. Park Avenue, Greenville, SC 29601, and Gregory K. Smith, Smith, Gambrell and Russell, 1230 Peachtree Street, Atlanta, GA 30309

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June 21, 2018

The Honorable Jenny Abbott Kitchings
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Re: *J. Scott Kunst v. David Loree,*
C.A No.: 2006-CP-39-1826

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Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and seven copies of the Respondent's Return to The Appellant's Petition for Rehearing and Certificate of Compliance with Rule 211(b). Please also find enclosed a Proof of Service of the above items.

Please feel free to contact me if you have any questions.

Sincerely,

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cc: V. Wright, Esq.
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