

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

JOCELYN NEWMAN, CIRCUIT COURT JUDGE

CASE No. 2012-CP-40-02456
APPELLATE CASE No. 2017-001124

RECEIVED

JUN 15 2018

SC Court of Appeals

REGINALD ANDRE BLANDING, WANDA
BLANDING, AND BRITTANI BLANDING,
BY AND THROUGH HER GUARDIAN AD
LITEMS, REGINALD ANDRE BLANDING
AND WANDA BLANDING,

PLAINTIFFS,

OF WHOM REGINALD ANDRE
BLANDING WANDA BLANDING, AND
BRITTANI BLANDING ARE

APPELLANTS,

V.

LEON LOTT, IN HIS OFFICAL
CAPACITY,

RESPONDENT.

RECORD ON APPEAL, VOLUME II

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1 motion in its entirety. Based on our conversation in
2 chambers earlier, what I understand a portion of the
3 Plaintiff's argument to be is that while there may have
4 been a determination that probable cause existed to take
5 some of these actions, specifically that's based on
6 hearsay, et cetera, that the sheriff's department or
7 deputies had reason to believe that criminal activity
8 occurred. That is different from proof that the activity,
9 in fact, occurred. The probable cause standard being
10 different than proof of the truth and accuracy of those
11 allegations. At least that's what I understand his
12 argument to be.

13 So with that being said, I just wanted to make sure
14 you address that and I'll hear from you.

15 **MR. GARFIELD:** Okay. Thank you.

16 Your Honor, may it please the Court? I would like to
17 begin by putting on the record and providing an overview of
18 the procedural background in this case. This case was
19 originally -- this case was originally brought in April of
20 2012 in this court by the Plaintiff against Sheriff Lott
21 and Chris Cowan and the Richland County Sheriff's
22 Department. The causes of action were State court causes
23 of action for negligence, gross negligence, negligent
24 supervision, negligent training, trespassing, assault and
25 battery, false imprisonment and defamation.

1. About a year and a half later in December of 2013,
2 following a motion granting an amendment, the Plaintiffs
3 filed an amended complaint and this time against the
4 Richland County Sheriff's Department, Sheriff Lott and
5 Chris Cowan, but they also identified members of the drug
6 suppression team, and these would include several
7 individuals, which I'm not gonna name, but some being Ricky
8 Johnson, Frieda Wyatt and others. Upwards of eleven, I
9 believe -- ten or eleven total party defendants, and at
10 this time in December of 2013 they additionally pled
11 allegations of constitution deprivation; that being the
12 Fourth Amendment, their constitutional rights they allege
13 were violated, and that's how they got to where they named
14 the individual defendants pursuant to Section 1983 and they
15 kept all the State causes of action.

16 February of 2014 we moved the matter to district
17 court. Judge Michelle Childs was the presiding judge and
18 at that time this was litigated in Federal court for
19 approximately a year and a half. During this time we moved
20 for summary judgment and during the Court's briefing period
21 the Plaintiffs conceded summary judgment. Judge Childs
22 noted in her order that that was a concession, they
23 conceded summary judgment for not only the Fourth Amendment
24 claims, but also several State court claims including
25 negligence, negligent supervision and the like.

1 In August of 2015, Judge Childs issued a fairly
2 comprehensive order. We have included that as Exhibit A
3 in our -- as a supplemental document for our memorandum in
4 support. Judge Childs grants summary judgment and she
5 declined to exercise supplemental jurisdiction over those
6 remaining State law claims that were not conceded to, so
7 we're talking about gross negligence and defamation. Those
8 were remanded -- those causes of action were remanded to
9 this court for adjudication. We then moved for summary
10 judgment and a hearing was held earlier this year in
11 January 2016 before G. Thomas Cooper.

12 In March of this year, Judge Cooper enters an order
13 granting in part, denying in part our summary judgment,
14 dismissing the gross negligence claim with prejudice,
15 denying our motion as to the defamation cause of action.
16 Finally, all of the individual officers were dismissed with
17 prejudice and substituted at that time as the only party
18 defendant was Sheriff Lott in his official capacity, and
19 that's Exhibit B that we've furnished the Court.

20 We filed a motion to reconsider at that time pursuant
21 to 59(e) in March. March 18th to be exact. We addressed
22 several items that we respectfully contended at that time
23 that Judge Cooper did not take into account with respect to
24 defamation. We believe that he didn't take into account
25 several items, number one, being truth as a defense, as

1 well as some other factual background. The Court did issue
2 an order denying our motion the following month. So, of
3 course, our current position for trial is rather limited in
4 scope to a singular claim against a singular party
5 defendant, that being the defamation against the sheriff.

6 The events in this case -- and when I recite the
7 events, Your Honor, I take it and lift it almost directly
8 from Judge Childs' findings of fact that's included in her
9 -- the Exhibit A, her amended order and opinion. These
10 events took place over a one-week period in October of
11 2011. The way I've sort of got it into my mind, this is a
12 Friday to Friday, Friday, October 14th, to Friday,
13 October 21st.

14 On October 14th, the Richland County Sheriff's
15 Department Drug Suppression Team received notification
16 from a Richland County council person -- then council
17 person in that office named Valerie Hutchinson. Counsel
18 person Hutchinson relays to the DST that there is a
19 complaint involving illegal drug activity in a residential
20 neighborhood that's in her district. She specifically
21 identified two trailers and both of these trailers are in
22 close proximity to the Plaintiff's residence on Gibbs Road.
23 The trailers not being on Gibbs Road, but the Plaintiff's
24 residence on Gibbs Road.

25 We are now getting into the weekend days, October 14th

1 to October 17th. Taking, again, the facts in the light
2 most favorably to the Plaintiffs, the drug suppression team
3 formulated an investigation plan. Senior Deputy Ricky
4 Johnson was assigned to formulate the plan. He headed this
5 up pursuant to and at the request of Council Person
6 Hutchinson in her complaints and Johnson began collecting
7 information with respect to these two trailers.

8 On the following Monday, October 17th, the drug
9 suppression team then dispatched their narcotics unit to
10 these two trailers and they conducted what is known as a
11 knock and talk investigation. It's more of a first tier or
12 first phase of a narcotics investigation as Your Honor is
13 probably aware. This knock and talk in this case entailed
14 Johnson and other drug suppression team members going to
15 two trailer locations. Uniformed officers were making
16 contact with these individuals. They addressed concerns
17 presented in Hutchinson's complaint. No arrests were made
18 at this point; however, officers did interact with folks in
19 and around the trailers, some of whom were in possession of
20 paraphernalia, including crack pipes.

21 Tuesday, October 18th, the DST initiated a controlled
22 buy in the neighborhood, also known as a controlled
23 purchase investigation. Johnson employed his CI, his
24 confidential informant, in this investigation. As Judge
25 Childs noted in her order, this confidential informant had

1 been involved in approximately thirty narcotics
2 investigations in which law enforcement was successful in
3 not only procuring arrests, but they considered him a
4 successful internal informant. Judge Childs also noted
5 that this CI was considered to be extremely trustworthy
6 given his past results.

7 On this particular day, Your Honor, the CI was
8 directed to inspect what drug activity might be taking
9 place at the trailers and he was provided instructions that
10 if the opportunity presented itself that he could pursue
11 the purchase of drugs. The CI returned twenty to thirty
12 minutes later and upon being debriefed by the drug
13 suppression team members the investigators learned that he
14 -- several things. That the CI had a conversation with a
15 male on a bicycle concerning the purchase of drugs, the
16 informant then made a purchase on the back porch of the
17 residence at 402 Gibbs Road and that he bought from a black
18 -- quote unquote, black male named Peanut. The informant
19 also produced a white rock-like substance that he was able
20 to confirm to the investigators that he purchased from
21 Peanut. The investigators and the CI double-checked to
22 make sure that the location from where the CI indicated he
23 bought drugs was, indeed, 402 Gibbs Road. They were able
24 to do this. The substance was field-tested and it returned
25 positive results for cocaine base. And it was at that

1 point based on the information from the controlled purchase
2 investigation that provided law enforcement the ability to
3 pursue and obtain a search warrant in this case.

4 So on Tuesday, October 18th, what law enforcement
5 officers did in due diligence they cross-referenced their
6 information with Geographic Information Systems, usually
7 used for tax purposes. They were able to determine that
8 402 Gibbs was, indeed, that same location where drugs
9 were bought. They returned to the location. They
10 ascertained that that was the correct place. They found
11 out that the owner's name of the house was named Blanding
12 and a search warrant affidavit was prepared and paperwork
13 was generated for Judge Caroline Streater, the Richland
14 County magistrate judge, her consideration. October 20th,
15 on that Thursday, Judge Streater did issue the search
16 warrant around 12:20 in the afternoon. The search warrant
17 allowed law enforcement -- and really they obtained it
18 for the search of the premises itself, rather than the
19 occupants. Immediately thereafter, within minutes of the
20 issuance, they executed the search warrant at 402 Gibbs
21 Road. DST, drug suppression team, members executed the
22 search warrant. The search of the premises yielded
23 negative results.

24 Again, all the facts I'm presenting are taken in the
25 light most favorably to the Plaintiff and recognized by

1 the Court for these facts that I'm about to put on the
2 record. One of the adult plaintiffs, Wanda Blanding, she
3 returned home following the execution of the search
4 warrant. I think, to put it mildly, she was not very
5 pleased with the circumstances and she contacted two local
6 television news stations. She arranged for one of the
7 news stations, WIS Television, to come to her house. She
8 invited an investigative journalist, Jody Barr, into her
9 house with a news camera. She permitted them to film the
10 interior. She permitted the news to publicize and air
11 personal information about her family providing her name,
12 her husband's name, their place of employment, information
13 with respect to the minor children.

14 Which, finally, Your Honor, and I appreciate the
15 Court's indulgence and patience on this because this is
16 exactly where we get to the pertinent background, which is
17 October 20th of 2011, Jody Barr after having had an
18 encounter with the Plaintiffs at their house contacts the
19 Richland County Sheriff's Department. He contacts, I
20 understand, first Curtis Wilson, who is with the public
21 information officer. Curtis Wilson advises Chris Cowan,
22 who is the commander over the public information office,
23 that Jody Barr is interested in discussing these events
24 with law enforcement. Again, taking the facts from the
25 Plaintiff's perspective, Chris Cowan knew nothing of the

1 background, Chris Cowan knew nothing about the Plaintiffs.
2 He did his due diligence. He spoke with Lieutenant Wilson,
3 he spoke with the supervisor, the head of the drug
4 suppression team, Frieda Wyatt. I think he spoke with some
5 of these individuals two times. He spoke with Jody Barr
6 once or twice before ever having a substantive conversation
7 with him.

8 So Chris Cowan learned a couple of things being fresh
9 to this information. The first thing he learned was that
10 Peanut is also known as Gregory Samuels, who is the
11 Plaintiff Reginald Blanding and the Plaintiff Wanda
12 Blanding, their nephew; that he -- that Peanut was a
13 family member. He also learned that -- based on their
14 investigation that Peanut had walked out the back door of
15 the residence where the incident location took place and
16 sold drugs off of the back deck.

17 Barr goes down to headquarters, Richland County
18 headquarters, Richland County Sheriff's Department's office
19 building on Two Notch, he had a face-to-face conversation
20 with Major Cowan. Major Cowan is only answering direct
21 questions from Jody Barr and, quite honestly, this part we
22 will state in good faith that we believe this is the way
23 the evidence will present itself, although this was not
24 in Her Honor's order, Cowan believed he was having a
25 one-on-one conversation with Jody Barr and did not know

1 his comments were being recorded, but his statements were
2 captured on camera and the statement was just very simply
3 that the drugs we purchased out of the home we purchased
4 from a family member of the homeowner.

5 This comment was only reported based on objective
6 facts known to him. There's no allegations that Chris
7 Cowan was speculating or giving opinions or an editorial.
8 No one at the Richland County Sheriff's Department summoned
9 the media. No one at the sheriff's department initiated
10 any kind of contact. There was no press release, there was
11 no invitation for the media to come to headquarters for any
12 kind of press conference, there's no evidence that Chris
13 Cowan personally knew these Plaintiffs, that he ever had
14 any previous dealings with them, that there is no
15 indication he was familiar with anything. Nothing that he
16 said on camera revealed these Plaintiffs' names, address,
17 where they worked, where their family members went to
18 school.

19 **MR. BUTCHER:** Excuse me, Your Honor.

20 **THE COURT:** I'm sure you disagree. I'll hear from you
21 in a moment.

22 **MR. BUTCHER:** I understand, but where is this -- where
23 are the merits of that just dealing with issue preclusion
24 because --

25 **THE COURT:** I hear you.

1 **MR. BUTCHER:** And I'm a little tired. I apologize for
2 being --

3 **THE COURT:** I'd like to hear Mr. Garfield's argument.

4 **MR. BUTCHER:** Yes, ma'am. I'm sorry.

5 **THE COURT:** Thank you.

6 **MR. GARFIELD:** And I will agree that what I was just
7 explaining were some of the parameters that give you a
8 preview of what we intend to show. But Mr. Butcher is
9 exactly right. The last portion of what I stated that I
10 prefaced was outside of Her Honor's order, what it was, her
11 order and also Judge Cooper in his order ruling on summary
12 judgment both determined the same thing, is that what we
13 were really talking about is one statement or one phrase,
14 a sound bite, if you will, from Chris Cowan, okay? So,
15 again, I -- and I appreciate what Mr. Butcher said for
16 these reasons. The first -- the first argument we have --
17 and just one moment, Your Honor -- was that we're asking
18 the Court to preclude certain evidence in light of an
19 earlier final judgment that was valid and decided on the
20 merits. We have two grounds to preclude this evidence, the
21 first being collateral estoppel and the second being
22 judicial estoppel.

23 Your Honor, collateral estoppel has been outlined in
24 several cases and I won't burden the Court too much. These
25 were addressed in our memorandum. One is the Carolina

1 Renewal case. Carolina Renewal versus South Carolina
2 Department of Transportation. It's a Court of Appeals
3 case that was decided in 2009 and cert was denied in 2011.
4 And in this case, what the Court stated, and I direct Your
5 Honor's attention to the fourth printed page, first column,
6 under law and analysis, which the Court of Appeals say that
7 the collateral estoppel, also known as issue preclusion,
8 prevents a party from relitigating an issue that was
9 decided in a previous action regardless of whether the
10 claims in the first and the subsequent lawsuits are the
11 same. The party asserting collateral estoppel must
12 demonstrate that the issue in the present lawsuit was,
13 number one, actually litigated in the prior action, number
14 two, directly determined in the prior action and, number
15 three, necessary to support the prior judgment.

16 Another parameter set forth to the Court was a 1997
17 case. This is Shelton versus Oscar Meyer Food Corporation,
18 325 South Carolina 248.

19 **MR. BUTCHER:** This is Jinks.

20 **MR. GARFIELD:** Did I give you Jinks?

21 **MR. BUTCHER:** Yes, sir.

22 **MR. GARFIELD:** And in the Shelton case, the third
23 printed page, Your Honor, the Supreme Court held that
24 collateral estoppel or issue preclusion prevents a party
25 from relitigating in a subsequent suit an issue actually

1 and necessarily litigated and determined in a prior action.

2 The third case, Your Honor, is the -- I believe it's
3 the Laughon case. It's a Court of Appeals. Laughon versus
4 O'Braitis, O-B-R-A-I-T-I-S, 360 South Carolina 520. It's
5 a 2004 case where cert was denied in 2006. And in the
6 fifth printed page, top of the first column, the Court of
7 Appeals ruled that under the doctrine of issue preclusion
8 if an issue of fact or law was actually litigated and
9 determined and necessary to a valid and final judgment,
10 the determination is conclusive in a subsequent action on
11 that claim or a different claim.

12 The last one that I did want to bring to the Court's
13 attention is the Garris case. That's the Supreme Court of
14 South Carolina. Garris versus Governing Board of South
15 Carolina Reinsurance Facility, and this is a 1998 case.
16 And the importance of these cases, Your Honor, is that I
17 wouldn't say that the definition evolved, but the Court
18 was really applying certain facts in looking at law and
19 providing different definitions for ways to explain
20 collateral estoppel. The tenth printed page, top left,
21 the Supreme Court stated that the primary purposes of the
22 doctrine commonly known today as the claim preclusion are
23 to bring an end to litigation to prevent a defendant from
24 being forced to defend the same act repeatedly.

25 I would also just cite for the record Jinks versus

1 Richland County only because my law partner went to the
2 U.S. Supreme Court on this case. I'll give him the assist
3 here. It was decided in 2003 and that was 355 South
4 Carolina 341 that referenced and upheld or affirmed the
5 Shelton versus Oscar Meyer Food Corporation case. The
6 importance here, Your Honor, is that in Judge Childs'
7 order she made specific findings of fact. She made
8 determinations as far as factually of the narcotics
9 investigation, the credibility of the confidential
10 informant, the reliability of the confidential informant,
11 the controlled purchase transaction at the residence, the
12 establishment of the buy location on the property and she
13 even went to, as a finding of fact, to include the familial
14 connections and the physical proximity of Peanut, the
15 suspect, distributing crack cocaine. The factual issues
16 relevant to the allegations in the Plaintiffs' amended
17 complaint were actually litigated and determined by the
18 Federal court, Judge Childs.

19 And more importantly in anticipating one of the
20 arguments or one of the inquiries that Your Honor might
21 present for counsel based on what was suggested before was
22 that the facts determined by Judge Childs were not only
23 necessary but essential to support the granting of summary
24 judgment. I mean, put differently these factual issues
25 were necessarily determined by the Federal judge in the

1 same action. This order was never appealed by the
2 Plaintiffs. This is considered and constitutes final
3 judgment. We would -- we would argue that the District
4 Court's findings are entitled to a preclusive effect based
5 on the doctrine of collateral estoppel, but there's a
6 second part of this, Your Honor, because I think they have
7 to be taken in context with each other, and the second part
8 is judicial estoppel. And the two cases in South Carolina
9 that address judicial estoppel is Wright versus Craft and
10 the Hayne Federal Credit Union case. Wright versus Craft
11 is 372 South Carolina 1. It's a Court off Appeals case
12 from 2007.

13 Just one moment, Your Honor. In Wright versus Craft,
14 and I don't have it noted or highlighted on this, but it's
15 Page 506, 640 Southeast Second 486, at 506 -- and this is
16 highlighted; I'm sorry. It's Page 12 in the first column
17 where the court noted that judicial estoppel is an
18 equitable concept that prevents a litigant from asserting
19 a position inconsistent with or in conflict with when the
20 litigant has previously asserted in the same or related
21 proceeding.

22 The Supreme Court of South Carolina in Hayne Federal
23 Credit Union versus Bailey, it's a 1997 case -- and this is
24 the last case, I believe, I'll hand up on this point, Your
25 Honor. I apologize for the paper cuts. But the Supreme

1 Court in this case -- there were some interesting points on
2 Page 6, and it starts where it says judicial estoppel, and
3 what the Supreme Court stated was that judicial estoppel
4 precludes a party from adopting a position in conflict with
5 one earlier taken in the same or related litigation and if
6 you go farther down to the last full paragraph on that
7 side, the Supreme Court states we now explicitly adopt the
8 doctrine of judicial estoppel as relates to matters of
9 fact, not law. And there is other language, but I did want
10 to direct Your Honor's attention to the last portion where
11 it says; however, the truth-seeking function of the
12 judicial process is undermined if parties are allowed to
13 change positions as to the facts of the case unless
14 compelled by newly discovered evidence.

15 The doctrine of judicial estoppel prohibits the
16 Plaintiffs from asserting any different position now in
17 the present litigation. Everything they challenged in the
18 amended complaint, everything from the constitutionality of
19 the warrant, pursuing and executing the search warrant,
20 what did -- the acts or omissions or acts and inactions by
21 officers at the place they executed the warrant, all of
22 those things, those are the things they challenged but in
23 the Federal phase of this case they conceded, and I'm gonna
24 quote, consisting of -- conceded that all Defendants
25 consisting of Sheriff Lott, as well as the DST

1 investigators who participated in the relevant events,
2 were, quote, entitled to summary judgment as to all Federal
3 claims brought pursuant to 42 U.S.C. Section 1983, also
4 conceding summary judgment as to the State law claims.

5 In conceding the dispositive grounds that form the
6 basis of our summary judgment, they now, with all due
7 respect, relinquish or even abandon any and all claims as
8 it pertains to Fourth Amendment, false arrest, probable
9 cause, challenging the sufficiency of the confidential
10 informant, any negligent-based theory that they would want
11 to say that the officers deviated from the standard of
12 care, that they didn't follow their own internal policy and
13 procedure guidelines, that they were careless, anything
14 that they've done, they've abandoned, they've conceded that
15 in this case. The entire search warrant process and
16 everything that flowed therefrom, which we go over in
17 detail in our brief on Pages 10 and 11, the elements of
18 judicial estoppel are met, and for them to raise an
19 inconsistent -- for them to raise that here, that is
20 clearly what the Supreme Court is guarding against in
21 requiring the litigants not to go back and relitigate it
22 because they basically abandoned it. They would be taking
23 an inconsistent position now than what they clearly
24 conceded with the same -- with the same fact pattern in
25 Federal court. So we would allege in this case that the

1 Plaintiffs should not be permitted to go back and argue any
2 of these things; that our officers' actions were illegal or
3 substandard or both.

4 And it's important to note, Your Honor, that Judge
5 Cooper's March 4th, 2016, order and judgment, it's not just
6 an order. You can see on Exhibit B this is a Form 4 and
7 judgment. This is another final judgment in this case that
8 the Court -- this Court determined that these factual
9 findings are either the law of the case or have established
10 a finding of fact that based on what the Supreme Court in
11 the Hayne Federal Credit Union is not requiring for us to
12 relitigate. So what we have done very meticulously is we
13 have looked at Judge Childs' order with her findings of
14 fact and we have tried to identify which issues have
15 already been determined in this case and based on that we
16 outlined -- and we believe we were being conservative, but
17 we were trying to be economical as well -- we have outlined
18 fourteen issues of fact that's been addressed sort of
19 bulletproof laundry list style in Pages 6 and 7 of our
20 memorandum asking the Court to preclude the Plaintiffs from
21 challenging or contesting or disputing in any manner any
22 of those facts because as we all know, and as Mr. Butcher
23 rightfully stood up to say that I was going beyond the
24 Court's finding of facts in their order, and as Your Honor
25 knows that the triable issue in this case is that the jury

1 should only hear and the jury should only consider facts
2 relevant to the purported defamation. That -- that is the
3 one portion that I wanted to say.

4 Now as far as Your Honor's concerns that you had in
5 this particular case, you know, from that sort of thing
6 what he would -- what he appears to want to do, and I'm
7 taking this based on our unofficial conversation in
8 chambers and Your Honor's inquiry, and I'll let Mr. Butcher
9 point out if I'm not saying things correctly or
10 articulating his point, but to go back and challenge the
11 confidential informant would be to go back and challenge
12 what has already been conclusory determined in this case.
13 The confidential informant, there's already been a finding
14 of fact that he was trustworthy and reliable. That he has
15 participated in approximately thirty investigations.
16 That's a finding of fact. Moreover, in a motion to compel,
17 as we discussed back in chambers, sometime, I think, maybe
18 three years ago, in 2013, the Plaintiffs moved to compel
19 the Defendants to produce and identify the name of the
20 confidential informant, all of the information related to
21 that informant, his investigations, sort of the good, bad
22 and the ugly of the confidential informant's file. We
23 represented to the Court at the time that that confidential
24 informant is one who's been associated with not only the
25 Richland County Sheriff's Department but the City of

1 Columbia going back maybe twenty years or more that is an
2 individual that is still associated and still works as a
3 confidential informant. So we raised privacy concerns, not
4 only in his behalf, but we also raised safety issues in his
5 behalf. Judge Lee agreed with us at that time and believed
6 that all -- his identity and his information should be kept
7 confidential.

8 Now I understand what Mr. Butcher's point is. His
9 point is more -- and his point at the time of the hearing
10 -- was do I not have a right to confront the accuser? Do I
11 not have a right based on Sixth Amendment considerations to
12 try to do any type of discovery because he's making that
13 accusation? The distinction there is that that would be in
14 a criminal case in which the confidential informant should
15 appear and testify because the subject or the criminal
16 defendant's attorney should have a right to confront him
17 and cross-examine him on certain things. This is not this
18 kind of case. With this kind of -- what Judge Lee agreed
19 is that his identity and his information should remain
20 confidential. Mr. Butcher never challenged that order, he
21 never took it back up in front of circuit -- circuit court.
22 That has been a judgment that has stuck with us until this
23 -- until today. For him to go back and try to attack not
24 only the credibility or the reliability or say that certain
25 things are hearsay that he did would be to fly in the face

1 of what -- of the findings of fact.

2 And one thing that we've wrestled with is that we
3 would alternatively take the position that Judge Childs'
4 findings of fact and even Judge Cooper's findings of fact
5 that basically adopts the Federal court's findings of fact
6 that that's the law of the case. That is something that's
7 already been conclusory decided and as Your Honor can see
8 from the authority that we've presented in this case goes
9 back to Laughon versus O'Braitis where it says under the
10 doctrine of issue preclusion one of the things was -- to
11 decide whether it was actually litigated and determined to
12 a final judgment is an issue of fact. So to nitpick about
13 these things requires the litigants, not only from his
14 side, but our side to relitigate those issues and it's --
15 it's a fundamental unfairness that I think that the law
16 is very clear that he's estopped from doing, so both
17 factually, issue preclusion, law of the case, res judicata.

18 However, if the Court wants to digest what has
19 happened up to now has been conclusory decided and
20 determined and there's been no appeal, and as Your Honor is
21 aware an unappealed order requires an affirmance. And as
22 Your Honor is also aware, with all due respect to the
23 process, one circuit court judge cannot overturn another
24 circuit court judge. The same way one Federal court judge
25 cannot just overturn it without it going up and being

1 challenged on appeal because it would be the same circuit
2 court judge that would review. So if what Judge Lee has
3 already determined is that that confidential informant's
4 identity is to be protected and protected throughout this
5 trial, for him to get -- say otherwise would certainly be
6 in contradiction to what clearly established law is.

7 There are other points to my motion in limine, but I
8 have a feeling that Your Honor might want to take them one
9 at a time. I appreciate Your Honor's indulgence.

10 **THE COURT:** Yes, sir. Mr. Butcher.

11 **MR. BUTCHER:** Your Honor, you know, when I first saw
12 his summary judgment, and I haven't read the whole thing
13 yet but I was listening, one of the things that drove me
14 crazy was I couldn't find anything similar regarding
15 1983 cases that have come down from district court into
16 state courts. And you do have some prisoner cases where
17 they'll get kicked out of -- or they'll lose in district
18 court and then they'll re-file a new case in
19 state court and then we've got issue preclusion and
20 res judicata. Those two happened. But, Your Honor, one
21 thing that is true is in 2012 up to district court and
22 back down this has been one case. There have been no
23 re-filings. It has been one case going on, okay?

24 Something else about Judge Lee's order, and this is
25 the whole motivation for this res judicata, collateral

1 estoppel. They're in a pickle, all right? We start with
2 the jury tomorrow. They have no way to produce any
3 evidence for the CI because everything -- every police
4 officer can only say hearsay. That's all they know.
5 That's why we've got this big complicated argument about
6 res judicata because by hiding the CI, which they've done
7 and they've never decided to -- they have no way to produce
8 any evidence that the CI made a buy, they didn't even
9 videotape it or audiotape it, so that's why they're trying
10 to reach up and grab this, you know, make these changes to
11 the doctrine of issue preclusion and res judicata.

12 Something that's important, I think, that the Court
13 should recognize is the standard of review for summary
14 judgment in Federal court versus State court, all right?
15 One of the things that we have here in State court is a
16 scintilla of evidence where in Federal court they're using
17 a much different standard of review, Your Honor. They look
18 at -- they're definitely looking at things differently.

19 The other thing that I would argue -- or that I will
20 argue is if you read Judge Childs' order one of the things
21 that she doing is she is looking at the frame of mind and
22 what the officer knew regarding the Fourth Amendment
23 violations because that is part and parcel to the Court's
24 review in a 1983 claim. We don't -- you know, so when the
25 Court looks at what these officers knew before they applied

1 for a search warrant and before they entered my client's
2 house, the Court is allowed to consider the hearsay that
3 their CI gave them. The Court is allowed to give all sorts
4 of things all related to probable cause, Your Honor, and
5 none of that -- none of that -- those issues go towards the
6 truth of the matter and they also don't forbid us from
7 talking about probable cause in the case. I mean, sure,
8 the judge signed the warrant and they had probable cause,
9 but that doesn't mean we can't -- we can't talk about their
10 investigative practices, especially when it comes to --

11 I apologize. I didn't get much sleep last night,
12 Your Honor.

13 **THE COURT:** Well, tell me how investigative practices
14 are relevant to a defamation claim.

15 **MR. BUTCHER:** Your Honor, because in their depositions
16 and in their sworn statements they have lied. That's why
17 that -- that information is coming in. It goes towards
18 their character, it goes towards that operation, it goes
19 towards all of the false information going around. And
20 when Robbie starts to give a sob story about how, you know,
21 Mr. Cowan was taken -- you know, taken by surprise and
22 didn't mean to say what he said, Your Honor, when you have
23 this culture of lying and in this organization from all of
24 these witnesses who are going to -- you know, from the --
25 from Richland County who are gonna bolster the story that

1 my clients either are drug dealers or allow drug dealers to
2 deal from their home, I think that it's important that it
3 goes towards their character, so I think that information
4 comes in.

5 The other thing is that, you know, in the past
6 depositions and the way that the defense had framed it was,
7 you know, my client, Ms. Blanding, was seeking attention by
8 going to the news and in some way this was -- this is what
9 happens when you go to the news. And, Your Honor, I think
10 from the perspective of my client's reasoning for going to
11 the news was not only -- was how upset they were that their
12 house was invaded by the police, that all their neighbors
13 saw this. They -- you know, immediately their goal was to
14 start trying to clear their name and so I think it's very
15 important from the perspective of being able to provide the
16 jury with some type of background as to what happened, you
17 know, where my clients were that day, how they lived, you
18 know, who was allowed in the house, all those things
19 related to showing what -- you know, what the truth is and
20 that my clients are -- have good character and that they
21 were defamed, so I think from that perspective.

22 But, Your Honor, a couple -- a couple of other things.
23 There are -- I think with Judge Lee's order -- I don't
24 think, Your Honor, that -- that has nothing to do with --
25 with anything today other than that is the motive for them

1 trying to get you to rule that we're collaterally estopped
2 from visiting any earlier issues. Your Honor, the issue is
3 -- it is about defamation, but what they're trying to do is
4 they're trying to take this probable cause and have you
5 tell the jury that this is truth. And they're trying to
6 get the Court to establish certain facts as truth that were
7 merely at the most probable cause and at -- at the best we
8 can show that, one, these officers are -- were wrong and
9 mistaken, Your Honor, and that's what the Fourth Amendment
10 arguments were about.

11 So the question under the Fourth Amendment was did
12 the officer have probable cause. Well, the Federal court
13 thought there was probable cause, but when we go to the
14 truth of the matter as to whether or not my clients were
15 slinging dope out of the back of their house or allowing
16 people to do it, then I think that's -- that's certainly
17 open. And, you know, I just don't -- I do not see how --
18 the other thing is I don't see how the Federal court can
19 find the facts and find how a State court can develop facts
20 in its own case, Your Honor, you know, so does that mean --
21 I mean, you know, these were facts that were, you know, in
22 part of a summary judgment motion, Your Honor, but that --
23 that does not mean that the Court is always bound by those
24 facts. Those facts sometimes change. They change with
25 testimony. I mean, Your Honor, if you make a -- if you

1 make a finding in summary judgment two months before trial
2 and the facts develop during trial to be the opposite, does
3 that mean the Court -- does that mean someone can make a
4 motion and say, Your Honor, we're precluded from having
5 that fact because you ruled it in your summary judgment
6 motion? I think that would be -- that would be unfair and
7 it would be unjust and it would be ridiculous. So I think
8 from that perspective, you know, if I had -- if I had said
9 these are the facts, Your Honor, and -- and those were part
10 of my exhibits and everything, Your Honor, but they -- they
11 weren't, you know. And so I just -- I still don't see
12 where -- where this comes from, so. Thank you, Your Honor.

13 **MR. GARFIELD:** Briefly, Your Honor, just on these
14 points.

15 **THE COURT:** Yes, sir.

16 **MR. GARFIELD:** First of all, Mr. Butcher said he just
17 can't see or feel how we can make those arguments, it
18 doesn't sound right to him, so I understand that. He's not
19 offered the Court any authority to say otherwise. In this
20 case, most of the case law that I've provided, the Court of
21 Appeals, the Supreme Court, they issued -- they ruled the
22 way they did oftentimes when they were two different cases.
23 I think it's very significant to note that it is even more
24 to the point, more persuasive, that this is the singular
25 case. I do understand Mr. Butcher's argument that if Your

1 Honor rules in summary judgment and whatever findings of
2 fact that Your Honor -- of the motions, Judge, you know,
3 finds during that way. The argument is that is not a final
4 judgment because something else can present at trial that
5 the findings of fact do not take any kind of precedence, it
6 doesn't have a preclusive effect. I understand that
7 argument.

8 I do think it's interesting, however, that Judge
9 Cooper did do his order and that he put it as a Form 4
10 order and judgment, but let's just take his argument for a
11 moment that in State court, as I've ready said, one judge
12 can't overrule another judge similarly situated. Let's
13 also take his argument that in State court that that does
14 not have a preclusive effect, but that's not what I'm
15 saying here, Judge. Your Honor, in -- there is a Federal
16 court in this same case, ruled on these same facts with the
17 same litigants, that there was a finding of fact. That
18 order, the amended order and opinion by Judge Childs, was
19 an unappealed order. There was no -- we filed a 59(e)
20 motion asking Her Honor to take a look at the facts to
21 make sure -- more of a housekeeping motion and Her Honor
22 amended the order. There was no 59(e) motion filed by
23 Mr. Butcher on his clients' behalf, there was no appeal of
24 that.

25 And then also it is very important to note when

1 Mr. Butcher does represent to the Court that the Federal
2 court determined there was probable cause I cannot
3 understate the point enough that he conceded in this case
4 Fourth Amendment, he conceded that the search and seizure
5 with respect to law enforcement officers all the way from
6 the investigatory phase to the search warrant procurement
7 phase to the search warrant execution phase that that
8 search and seizure was lawful. In fact, he even dismissed
9 -- conceded to summary judgment Fourth Amendment, but he
10 also conceded false arrest. And he then -- he is now
11 asking the Court that he should be allowed to take an
12 inconsistent position, that he should be allowed the lack
13 of probable cause when clearly he conceded the point that
14 his -- that the arrest or the imprisonment or the actions
15 were taken -- were undertaken pursuant to lawful authority.

16 The last point I wanted to make is when he said that
17 we were in a pickle, what he is trying to say is that how
18 on earth are we ever gonna get into evidence that the CI or
19 the investigators learned certain things along the way in
20 the investigation? First of all, there's no hearsay issue
21 with respect to Chris Cowan. We would take the position
22 that's non-hearsay. It's an effect on the hearer. It's a
23 defamation claim, he reported what he learned, okay, but
24 what I think he's trying to state is that we are in a
25 pickle because we're unable to establish -- hearsay

1 precludes us from being able to relay what was learned
2 along the lines of the investigation. Well, we would
3 respectfully ask based on what we've argued here today is
4 that there are really one or two ways that Your Honor can
5 look at this. Number one is law of the case doctrine.
6 There's a finding of fact. Judge Childs is very clear in
7 describing -- and this isn't just a narrative, this isn't
8 just as Mr. Butcher, my friend, who's saying back to me
9 that, you know, I'm trying to whine about this, but there
10 is a finding of fact that Judge Childs described what
11 happened, when it happened and what the Court can rely on.
12 Your Honor could very well provide some type of prefatory
13 remark to say ladies and gentlemen -- I'm just stating this
14 as in sort of a vacuum when he says we're in a pickle. I'm
15 not suggesting Your Honor do certain things. But the law
16 of the case doctrine would certainly permit the presiding
17 judge at trial to read off portions for all of the findings
18 of fact and say ladies and gentlemen, this is what's
19 already been determined in this case from the Federal
20 court. Your job is now to determine defamation because
21 what that does is it acknowledges, it recognizes what the
22 findings of fact under the Laughon versus O'Braitis case
23 that can be read off to the jury. Alternatively, it could
24 be issue preclusion. However Your Honor wants to -- wants
25 to approach it. The issue preclusion is we're not even

1 going to decide whether the CI provided this because this
2 has already been determined. Your job is to do otherwise.
3 And be that as it may, I guess I'm just thinking back on my
4 old days of being a narcotics prosecutor way back before
5 the law changed, but it's been kind of clearly established
6 law that a law enforcement officer can testify to the
7 results and conclusions of what he learned in an
8 investigation or what she learned in an investigation in
9 order to do certain things. For instance, when we went to
10 get a search warrant this is what we learned. When we went
11 to -- you're not offering it for the truth of the matter
12 asserted. For instance, State versus Brown, 1994, and I
13 guess co-counsel is helping me with this. It's also been
14 addressed in State versus King, which is a court of appeals
15 case decided 2015, cert was granted 2016. This old law
16 still applies. I'm just glad to know that maybe I'm old,
17 but an oldie but a goodie. The Supreme Court explained
18 that an out of court statement is not hearsay if it is
19 offered for the limited purpose of explaining why a
20 government investigation was undertaken and these
21 statements were not entered for the truth, but rather to
22 explain why the officers began their surveillance. So for
23 purposes of what they learned or what they gleaned from the
24 investigation, I think there can be a non-hearsay kind of
25 point. Alternatively, once again, coming back, it could be

1 for Your Honor's preference as to how to explain that is
2 the law of the case.

3 We don't feel like we're in a pickle. We feel like,
4 quite frankly, we've prevailed in this case and we have a
5 findings of fact and whether the findings of fact are to
6 our benefit or to our detriment only we'll know that when
7 the jury comes back, but there's already been a conclusive
8 determination and so that was the point I was gonna make.
9 And thank you, Your Honor.

10 **THE COURT:** Well, and I'll give you an opportunity
11 before I take a break to address this. As to your last
12 point about hearsay, I understand that law enforcement
13 officers can testify to certain things that may sound like
14 hearsay when not offered for the truth of the matter, which
15 I guess would make it not hearsay, to explain why they took
16 certain actions. In this case, however, would that
17 testimony not be offered specifically for the truth of the
18 matter asserted? I assume that one of -- at least one of
19 your defenses to the defamation is truth so if the
20 officers' testimony is going to be that a purchase of drugs
21 was made on the porch or deck of this house, is that not
22 offered for the truth of the matter and nothing else? That
23 is the reason that it's being offered; is it not?

24 **MR. GARFIELD:** I'm gonna have to think about that.
25 It does make sense though if we're offering it for that

1 purpose, but it depends on how Your Honor -- how this is
2 couched in terms of the case because what's this has been
3 about has been about the investigation and it's been about
4 search warrant and it's been about facts known to the
5 officers. If it came out that the officers learned that an
6 individual sold crack named -- you know, and the individual
7 was named -- going by the name Peanut and where it was,
8 information that was relevant to this case, yes, but it was
9 also relevant for purposes for providing the affidavit as a
10 basis for the search warrant. If Your Honor -- it cuts
11 both ways. If Your Honor is inclined to narrow the issues
12 to where it's just about defamation, then the entire issue
13 of the investigation doesn't necessarily come in, but the
14 jury would still know that a warrant -- in a very
15 rudimentary kind of way or a limited kind of scope that a
16 search warrant was executed at the house, a search warrant
17 was obtained. Well, how did they even know to go to that
18 house? How did they even know -- and on that search
19 warrant it says we established it here, we established it
20 here, we double-checked it here, and this is what we knew
21 at the time for limited purposes.

22 You know, again, I understand Your Honor's concern in
23 a vacuum looking at this as to we're trying to prove truth,
24 but if the jury is already going to hear evidence that a
25 search warrant was pursued and it was issued and it was

1 executed, although we now and subsequently you'll hear
2 argument based on our motion in limine, a lot of that
3 shouldn't come in as far as what -- what happened during
4 the execution, but the fact that it was executed I think it
5 goes to that. But I think the very easy remedy is, once
6 again, if there is a concern from opposing counsel is that
7 it's a written right here in Judge Childs' findings of fact
8 and she says that it is determined that a CI or this was
9 gleaned as a result of the investigation or during the
10 debriefing the CI represented these facts and it was on
11 that basis. I don't understand, quite frankly, the
12 argument that they're saying on the one hand that the
13 standard for obtaining a search warrant, whether or not
14 it's hearsay, is different than the probable cause for
15 summary judgment. I think when you get into the weeds of
16 all of that without any case law to back it up, I think,
17 once again, it is entirely inconsistent with the weight of
18 authority precluding certain issues to be relitigated in
19 this case. And I know that these facts are a little odd
20 and I know that this has been somewhat of a tortured
21 history, but this case is four and a half years old and we
22 are now here, you know, at the precipice of the trial and
23 for us to go back in is -- is exactly what I -- we would
24 respectfully submit and what the Supreme Court is guarding
25 against and is advising or admonishing against, which is

1 relitigating the issues of fact. So I do understand that
2 hearsay concern and I would like at the appropriate time to
3 look at that a little more and I appreciate Your Honor's,
4 you know, inquiry because we're really talking
5 philosophically on that point. But, you know, I don't even
6 want to even begin to suggest that I have a magic bullet
7 for the -- for the Court here. I just know that whether
8 Your Honor wants to digest this is the law of the case that
9 it is -- it is clear, the factual recitation before us
10 today, and I think that that is preemptive on these issues.

11 **THE COURT:** Okay. Let's take a fifteen minute break.

12 **MR. BUTCHER:** Okay.

13 (Recess taken.)

14 **THE COURT:** All right. Let's get started.

15 Mr. Garfield, the problem -- the question that I keep
16 struggling with because I really am persuaded by your
17 argument for the most part, I want to be with you, but
18 where I get stuck every time is why then did Judge Cooper
19 deny summary judgment as to the defamation claim if it is
20 a determined fact that this purchase occurred on the porch
21 of 402 Gibbs Road from Peanut, who is the Plaintiff's
22 nephew?

23 **MR. GARFIELD:** Let me just get one thing, Your Honor.

24 **THE COURT:** If that is a fact, is that not a one
25 hundred percent absolute truth defense? In other words,

1 are you not asking me to overrule Judge Cooper?

2 **MR. GARFIELD:** Let me check one cite, Your Honor.

3 **THE COURT:** Yes, sir.

4 **MR. GARFIELD:** Thank you, Your Honor. I wanted to
5 make sure I was kind of centered on -- on your question.
6 Our summary judgment motion with -- on defamation wasn't
7 just for the truth of the matter asserted. Obviously
8 that's an affirmative defense that needs to be pled and
9 proved as far as the truth. One of the issues that we
10 brought up, dispositive grounds for defamation, is that we
11 are entitled and we would be in this trial taking the
12 similar position that we were entitled to a qualified
13 privilege for this statement being made. The qualified
14 privilege is sort of akin to the fair reporting privilege
15 in which, as Your Honor is aware -- and the defamation law
16 is -- it kind of wraps around itself to some degree, but
17 this could be a case where a public official comments about
18 a public -- something of a public interest with a
19 corresponding interest to the hearer, which would be the
20 media, about a drug deal going on in a residential
21 neighborhood and that that would in and of itself be more
22 of a good faith argument.

23 As Your Honor can see, Judge Cooper in his order,
24 although he does not specify why he says it, he explains
25 that in order to establish a defamation claim what he does

1 is sets forth the elements based on the Erickson case and
2 at the appropriate dispositive motion, Your Honor, in this
3 trial, specifically at the directed verdict stage, we will,
4 once again, ask the Court rule as a matter of law that
5 Major Cowan is entitled to a qualified privilege. But what
6 this judge noted is that under the law of defamation
7 certain communications give rise to qualified privileges,
8 including the privilege to publish fair and substantially
9 accurate reports of judicial and other governmental
10 proceedings without incurring liability. The Court
11 although admittedly doesn't explain or give his rationale,
12 that he does say based on the arguments of counsel and
13 other items he believes there's disputed issues of fact
14 regarding the defamation claim, so our point would really
15 be two things.

16 First of all, summary judgment is to the defamation.
17 First of all, the defamation itself, the question is, was
18 that -- you know, we bought from a family member out of
19 that home. Number one, is that truthful, that it was --
20 that drugs were sold on the residential property? Was it a
21 family member? All right. We argued that -- that Judge
22 Cooper should determine as a matter of law that we're
23 entitled to a qualified privilege, that there's no -- that
24 there's been no facts in the light most favorably to the
25 Plaintiff for which the Plaintiff could overcome the

1 privilege to show that it was an abuse, to show that we
2 didn't do it in good faith. While I don't see it
3 specifically in writing here, what I would glean from this
4 as a ruling is that there are issues of fact with respect
5 to the defamation because, frankly, we would need to show
6 in the trial of this case that we are entitled to a
7 qualified privilege and that once that has been ruled as a
8 matter of law at the directed verdict stage or some other
9 time, then I think the burden shifts to the Plaintiff to
10 try to establish why we should not be entitled for the
11 qualified privilege or whether it was abused or exceeded.
12 Those things are not in the realm of summary judgment.

13 The second point I was gonna make is that the summary
14 judgment is as to the defamation. So much for the truth of
15 the defense in the qualified privilege, but what he relied
16 upon was all the undisputed factual issues that have
17 already been determined in this case that were unappealed
18 that was considered as the law of the case. That
19 specifically was addressed. So what the judge decided was
20 I find that there is a matter of law as an issue of fact as
21 to whether all these factors or criteria of the defamation
22 hasn't been met. But from what I'm looking at in his order
23 he was unsatisfied that we made a showing for qualified
24 privilege.

25 And then one other point. Everything in the facts,

1 if you look at the findings of facts in summary judgment,
2 none of that really has much to do with the defamation
3 anyway. All that has to do with the investigation, the
4 search warrant, the execution, that really transcends
5 beyond any sort of issue. So I think -- I think that is --
6 from looking at his order, looking at the four corners of
7 his order, that was his ruling.

8 **THE COURT:** Okay. Mr. Butcher.

9 **MR. BUTCHER:** Yes, Your Honor. I just -- I couldn't
10 get that much out of Judge Cooper's order. I just don't --
11 I don't see all that written in Judge Cooper's order on
12 what he was trying to do or anything. It says what it
13 says.

14 The other thing, have you seen the video and the words
15 that were said? Do you know the exact words that were
16 said --

17 **THE COURT:** I do.

18 **MR. BUTCHER:** -- where he says a family member of that
19 house was selling drugs out of that house? And so from
20 that perspective, Your Honor -- Your Honor, we -- I'm
21 sorry. I got kind of lost because I think your original
22 question was whether -- you know, did Judge Cooper already
23 consider this issue when he ruled, did he consider the
24 issue that the -- of the estoppel and everything else
25 because he did make the finding that there was some type of

1 -- there are contested facts and that's just a -- that's a
2 standard summary judgment statement. I mean, it doesn't
3 say one way or the other who's favored when, you know,
4 there are issues of fact to be heard on the defamation
5 claim, Your Honor, so from that perspective at the end of
6 his order when he said based on the arguments of counsel
7 and the parties, pleadings, memorandum of law and related
8 documents, this Court determines there are disputed issues
9 of fact regarding Plaintiff's defamation claim. That's
10 almost standard in every type of summary judgment when --
11 when they say that there are issues, so that's -- you know,
12 is for a jury to decide, not a -- not the judge.

13 So I -- I think also this issue for preclusion and
14 res judicata has already been argued before Judge Cooper
15 and he passed on it, so I -- I would also add that.

16 The other thing --

17 **MR. GARFIELD:** May I speak to that one point, Your
18 Honor?

19 **THE COURT:** Let him finish.

20 **MR. GARFIELD:** Thank you.

21 **MR. BUTCHER:** The other thing, Your Honor, is if you
22 do go with -- if you do lean towards the Defendant, I would
23 also ask that you look at the evidence that was submitted
24 in the summary judgment because one of the things that
25 there is -- there is no evidence that would be admissible

1 that goes towards the heart of this matter as to any of
2 these issues regarding whether drugs were sold. I mean,
3 it's still -- we're still doing nothing more than the
4 Defendant is relying on hearsay. I mean, that's it.
5 That's all we have. There is no indirect or direct source
6 of evidence that shows drugs were sold, just hearsay
7 evidence, Your Honor, just the words and honor of a snitch.
8 That's it. So, you know, that's all that the State's doing
9 and so I really do not think they're -- I think they're
10 different animals, you know. When we've got the Fourth
11 Circuit -- I mean, you know, the 1983 burden of proof and
12 you've got the burden of proof down here, I think all those
13 things are completely different and I don't think that the
14 Court can pass on -- on that and so, Your Honor, I just ask
15 that you deny the motion.

16 **THE COURT:** Yes, sir.

17 **MR. GARFIELD:** Just briefly. I think we can all agree
18 and I think we have in our Request to Charge Number 6 some
19 of the law and I -- I really just took this, Your Honor,
20 right from Anderson's request to charge, Section 14-16,
21 where it says defamation, defense of privilege. I think we
22 can all agree that there is -- it's incumbent on us as the
23 proponent of the remarks or the alleged slander to try to
24 determine a set of facts or to lay a foundation so that we
25 could probably avail ourselves of a qualified privilege. I

1 think we know that in this trial we have to do certain
2 things. Those things were not established at the summary
3 judgment level. When he said we are trying to read into
4 what the judge said, yes, it is a little bit unclear as to
5 his final rationale, but he's very clear about -- when he
6 says however, under the law of defamation that there's
7 certain things that need to be done. In fact, looking back
8 at this now I really misread it when I did our motion to
9 reconsider because I was sort of narrowly focussed on the
10 truth issue, but if you -- from what I've seen on this and
11 see what we need to lay out in this case, we need to show
12 things like good faith and what kind of corresponding
13 interest each side has. So I think from that standpoint
14 Judge Cooper's summary judgment was based on a set of facts
15 towards qualified privilege. To establish qualified
16 privilege would be based on a set of facts not necessarily
17 determined in the summary judgment findings of fact, if you
18 will, or the factual basis. We still need to show that,
19 but it's absolutely separate and apart.

20 The last point was he said if you would go back and
21 look at the summary judgment itself. We do argue in our
22 memorandum in support, and I know that it was on the
23 record, it was Page 12 of our memorandum in support, that
24 we do aver, if you will, under the law of defamation,
25 however, certain communications give rise to qualified

1 privileges, including the privilege to publish fair and
2 substantially accurate reports of judicial and other
3 governmental proceedings without incurring liability, we
4 cite the Padgett News -- Padgett versus Sun News, but there
5 is nothing laying a foundation in our motion about why we
6 should receive qualified privilege and I don't see that
7 rationale, but that's what he's pointing to before he does
8 that.

9 I think it's clear that he was relying on a set of
10 facts for summary judgment. The entire issue, once again,
11 is whether that one sound bite has -- is either true or
12 substantially true and everything else as far as the snitch
13 and the CI, again, he abandoned the negligence claim, he
14 abandoned the unlawfulness claim, and it is not for this
15 jury, as Your Honor's has already told the jury it's about
16 defamation, it's about slander. Okay. Thank you, Your
17 Honor.

18 **THE COURT:** Okay.

19 All right, gentlemen. I need to wrap my brain around
20 this and will let you know something tomorrow. Is there
21 anything else? I know that some of these other issues that
22 you've not addressed specifically, Mr. Garfield, are to
23 some extent tied to the issue that I've yet to determine;
24 is that correct?

25 **MR. GARFIELD:** Some yes, some no.

1 **THE COURT:** Some no? Okay.

2 **MR. GARFIELD:** Yes, ma'am.

3 **THE COURT:** Okay. So to the extent that they are not
4 tied to this issue, let me hear you on those other factors.

5 **MR. GARFIELD:** Okay. And thank you, Your Honor.

6 **MR. BUTCHER:** What page are you on? Oh, never mind.

7 **MR. GARFIELD:** They are just more -- more or less --
8 more or less points for preclusion; if we're talking about
9 defamation what's considered to be relevant. Irrespective
10 of Your Honor's decision in this case, we understand that
11 they still would want or from my understanding they still
12 could attempt to challenge or take issue with the method
13 that we conducted the investigation, not so much as far
14 as what's already been settled in the case, but they're
15 looking at this more from an expert standpoint, and here's
16 where I'm going with this.

17 I understand -- and I'm really getting this
18 information from my notes in mediation, is that they
19 would want to challenge or take issue with the fact that
20 we did not do certain things during the course of the
21 investigation and if they did want to criticize or critique
22 the manner in which we did it, that would be -- we would
23 say that they would need an expert witness for this, this
24 could just be very easily identified and cleaned up, this
25 is testimony that would require special skill and

1 experience, they can't just say that there was an
2 investigation that was substandard and here's why. It
3 would be unduly prejudicial. And, you know, if they want
4 to criticize the quality of the investigation, it would not
5 only be not relevant to a defamation claim and not only all
6 the things that we argued, that if the issue's about
7 slander they can't go there without an expert, no expert
8 has been identified in this case, so it kind of is a, you
9 know, bird of a different feather than what I was arguing
10 before.

11 **THE COURT:** Okay.

12 **MR. GARFIELD:** But the next point we were gonna argue
13 as far as -- or ask the Court to preclude evidence or
14 testimony is everything that took place with respect to
15 the execution of the search warrant on October 20th. One
16 of the things they want -- if you look at the amended
17 complaint and if you hear Mr. Butcher's sort of description
18 of the case or his theory of the case, it all stems on --
19 on the allegation that the sheriff's deputies from the time
20 they decided to execute the search warrant to the time they
21 actually cleared that they did basically a lot of bad
22 things and a lot of wrong things and a lot of substandard
23 things and unlawful things. We think all of those things
24 are absolutely not relevant to the defamation. In fact, I
25 think what can come in for the jury -- again, it's not even

1 about the law of the case, but the events about the
2 execution, whether that be that we went in the house, which
3 rooms we searched, how many officers were actually in the
4 house, the manner in which they searched, the fact that a
5 drug dog did and did not hit on something, the fact that
6 drugs were and were not found, that there was alleged
7 damage to the interior of the house, what the sheriff did
8 and didn't do as a response, all of that really goes into a
9 Fourth Amendment and negligence context. I think the fair
10 thing to do to give the jury enough background is to say a
11 search warrant was applied for, a search warrant was
12 executed, you know, in relation -- or, you know,
13 corresponding with the search warrant, and then we can go
14 on to the statement. I think anything else about that is
15 absolutely -- again, I'm not talking about what was
16 settled, it's more of a relevancy issue, and they're --
17 they do run the risk of it being unduly prejudicial because
18 it really doesn't have any probative value to go into
19 anything beyond what I'm suggesting.

20 On that note, when Mr. Butcher asked, he inquired,
21 Your Honor, have you looked at the videos? There are two
22 WIS news segments and there's also a raw footage video.
23 Now I don't know what was on the cutting room floor and I
24 don't know if that was pursued by his firm or mine, but
25 that's all we have, we have three or four videos with

1 respect to that, and it shows the events immediately
2 following the execution of the search warrant. On these
3 videos, Your Honor, to the -- if Your Honor is inclined
4 to review them, the Court will plainly note that the media
5 has developed a narrative almost exclusively from the
6 Plaintiffs' perspective. You have adult plaintiffs giving
7 certain allegations that really are unfounded or in dispute
8 to negligence and Fourth Amendment. There's editorial
9 comments by the Plaintiff, there's editorial comments by
10 Jody Barr, the investigative reporter. When you look at
11 the videos, what you'll see is sort of a room by room tour
12 that is -- sort of takes you -- of the Plaintiffs'
13 residence with these voiceover editorials by the
14 investigative reporter and then the viewer hears complaints
15 about how hostile the investigators were, the sheriff's
16 position that he would or would not pay for the door being
17 damaged. There's commentary, all the emotional distress,
18 and specifically emotional distress with respect to the
19 alleged overstepping their bounds with the execution of the
20 search warrant, which has absolutely nothing to do with the
21 defamation case. If they're upset about their house being
22 -- you know, law enforcement getting in their house and
23 doing what they did, okay, I get it, but that has nothing
24 to do with any sort of damages as a result of our
25 statement. So when you look at the video, they sort of

1 call into question the propriety and legality of everything
2 we do, the physical damage, so our argument is to show that
3 would not be relevant, it wouldn't be material, it
4 certainly would be inflammatory and only to arouse the
5 passions and the prejudices of the jury and it would
6 mislead them to the issue.

7 Another video is interesting because the second video
8 is a follow-up by Jody Barr and that contains inadmissible
9 hearsay throughout it, not just prejudicial. You have one
10 -- the story line there is well, these nice folks that have
11 had their house violated and trampled on by the police now
12 are considering getting a lawyer and we are now going to
13 interview a local attorney, which invariably was my good
14 friend Harrison Saunders. Harrison is trying to answer
15 questions and giving his, you know, two cents, and he's not
16 been identified or qualified as an expert in this case.
17 I'm not sure he wants to be. He's giving sort of his --
18 his initial blush view of what happened and then you will
19 hear lots of unsupported and paraphrased commentary
20 attributable to Cowan.

21 **MR. BUTCHER:** Excuse me. We're fine with the second
22 video being out. Is that cool?

23 **MR. GARFIELD:** That's cool.

24 **MR. BUTCHER:** If you want to go one by one --

25 **MR. GARFIELD:** Well, and the reason why I brought that

1 point up is I want to narrow the focus and streamline for
2 the jury. If we're talking about the one sound bite, Your
3 Honor, the twelve or thirteen seconds where we bought the
4 drugs from a family member out of the home, if we're
5 narrowing it to that, then I'll go beyond it. I was
6 concerned that all those other quotes attributable to him
7 is just paraphrased by the reporter. So if that's where we
8 are, I'll go ahead and move to the next one. So anything
9 that has to do with the search warrant itself is highly
10 prejudicial -- or, excuse me, search warrant execution is
11 highly prejudicial.

12 He also purports to get in evidence or testimony with
13 respect to drug results. He has produced in discovery drug
14 testing results. If this happened in October of 2011, then
15 next month apparently based on -- they had a random drug
16 test or something similar at their work that they had a
17 hair drug sample collection, both Reginald and Wanda, that
18 the results would show that the Plaintiffs were drug-free
19 at a particular time. Once again, whether Ms. Blanding or
20 Mr. Blanding ever ingested crack cocaine, whether they ever
21 tried it or used it then or at some other point is not
22 relevant to the issues in this trial. The sole issues in
23 this trial are whether drugs were sold on their residential
24 property. You know, I think it's pretty much undisputed
25 they weren't even at home during this time, so, you know,

1 the commentary -- you know, if Cowan made this commentary
2 and whether that's true or in good faith is a completely
3 different issue. And then my only point here is, you know,
4 assuming for argument that they tested for positive, that
5 would have no bearing or impact as to whether drugs were
6 sold on a particular day. I'm not sure I'd be able to get
7 that in. So the parent Plaintiffs being drug-free at a
8 particular time also has nothing to do with whether the
9 minor Plaintiff -- I'm not suggesting she ever did drugs,
10 there's no drug test with her or other people accessible to
11 the residence.

12 The last point I would just make in motion in limine,
13 and I thank the Court, once again, for Your Honor's
14 patience throughout this, it's more of a housekeeping
15 matter, and this was really just sort of -- just sort of
16 tweaked this a little bit in mediation. One of the
17 presentations were -- quite frankly, was the argument or
18 the insinuation which was if, you know, the Plaintiffs
19 would be treated differently if they lived in a different
20 neighborhood or alternatively, you know, some sort of
21 insinuation that residents in a different socioeconomic
22 neighborhood would have had more favorable treatment by law
23 enforcement, commentary along these lines, beyond just
24 being not relevant to a defamation claim is baseless and
25 inflammatory and it's prejudicial and it's more

1 housekeeping and I just wanted to alert the Court to that
2 before he does his opening. It's just not -- not necessary
3 and, particularly, it's not relevant to a defamation claim.
4 Thank you.

5 **THE COURT:** Okay. Mr. Butcher.

6 **MR. BUTCHER:** Okay. One, regarding the neighborhood,
7 the Defendant's produced 120-something pages of incident
8 reports dating back to 2000 and during the deposition of
9 Mr. Blanding there was a huge focus on the bad neighborhood
10 that they lived in. So from the perspective of -- I don't
11 -- I don't think I should be restrained from -- from
12 commenting or arguing that to the jury if it's an argument,
13 but from the perspective of if I am, then I think certainly
14 that the Defendant should not be allowed to say my client's
15 neighborhood was a drug neighborhood or a bad neighborhood
16 because that has nothing to do with whether or not they
17 were selling dope and I don't think it's relevant at all to
18 the heart of the matter. Now if they -- if they want it,
19 then I can certainly -- I think I ought to be able to get
20 the opportunity that maybe some neighborhoods are better
21 serviced by the sheriff's department, you know, because I
22 certainly do think that certain --

23 **THE COURT:** Not relevant to defamation.

24 **MR. BUTCHER:** Okay. But, Your Honor, I also -- you
25 know, I would ask that the Defendant be restrained from

1 offering any -- or attempting to offer any evidence related
2 to incident reports or the type of neighborhood my client
3 lives in. I think it's the same issue. My client needs to
4 be judged on their character and it doesn't matter what
5 neighborhood you're in as to whether or not a drug dealer
6 sets up shop. I mean, obviously there are some -- a lot
7 more in certain neighborhoods, but, Your Honor, it has
8 nothing to do with this case. So from that perspective I'd
9 like to -- that to be restrained.

10 I sent a request to admit in February of, I don't
11 know, this year I think, asking the Defendants to admit or
12 deny that -- and I'll read it specifically about the drug
13 tests because I think it is relevant. Hold on. Hold on.
14 May I approach, Your Honor?

15 **THE COURT:** Yes, sir.

16 **MR. BUTCHER:** Admit that the documents are authentic
17 and accurately report the results of the drug test for
18 Reginald and An -- it should have said Andre Blanding and
19 Wanda Blanding, it's a scrivener's error, and attached are
20 the drug test results. Your Honor, it's 11-7 and the
21 other one was collected 11-9. Yes, it is about fifteen,
22 twenty days -- this was after I'd met my clients. They're
23 hair follicle tests, Your Honor, you know, so it is what it
24 is. I'd ask that --

25 **THE COURT:** Tell me how the results of drug tests,

1 which would test for the ingestion of drugs, are relevant
2 to the determination of whether it is true or false that
3 a family member sold drugs from that house on that day.

4 **MR. BUTCHER:** Because they're two of the family
5 members in that house, Your Honor.

6 **THE COURT:** That's -- and a drug test tests for drug
7 use.

8 **MR. BUTCHER:** Yes, Your Honor.

9 **THE COURT:** You could never use drugs a day in your
10 life and still sell them.

11 **MR. BUTCHER:** I've had a couple of clients like that.
12 Don't quote me though.

13 **THE COURT:** So how is the drug test relevant to the
14 sale of drugs on that day?

15 **MR. BUTCHER:** I think it -- it goes -- but I've also
16 had clients that use and -- and sell, you know.

17 **THE COURT:** Exactly. Which means that the results of
18 the drug tests neither make the fact or the issue of
19 whether drugs were sold neither more probable nor less
20 probable, which is the test of relevance. I find that the
21 drug tests are not relevant, not admissible.

22 **MR. BUTCHER:** Okay. Your Honor, the first video,
23 again, I would like to emphasize that the -- the context
24 and -- oh, I think several things from -- from the first
25 video should not be allowed. Hold on for a second and let

1 me pull it up. Your Honor, I think a couple of things.
2 My clients' comments during the news reports, any
3 statements, I think that's -- that's entirely admissible.
4 I think they can be cross-examined on them. The other
5 thing, I think it shows why my client -- I think the state
6 of the house shows why my clients put themselves out there,
7 all right? My client went to the news and it -- you know,
8 it says he just wants an apology and his door fixed, and --
9 and that's what he wanted and instead the sheriff's
10 department gets on the news and says that, you know, a
11 family member who lived in that house was selling drugs --
12 of that house was selling drugs, so that's what they got
13 instead, Your Honor, and -- but that's all they wanted and
14 I think it's important because they didn't stick their neck
15 out, they just wanted a little bit of -- of justice after
16 what happened and they really got hit hard. So I think
17 from that perspective it -- it shows -- it shows how upset
18 they were and it also shows how harmful a statement like
19 that can turn out to be when you've got folks who just want
20 -- who were just seeking the right thing, so I think it's
21 entirely relevant to show their mind state into what they
22 -- into why they sought the -- the help from the news, you
23 know, why they stuck their necks out in public, Your Honor,
24 so it provides context. If the Court will review the
25 video, I think you ought to because this is also the video

1 that their friends and family saw, it's what their bosses
2 saw, it's what their teachers saw, so it's what folks in
3 the community saw, you know, and so when the Court -- when
4 the jury needs to evaluate defamation and any damages, they
5 need to be able to see the whole context of how that report
6 was, Your Honor, I think it's important, not just isolate
7 it to -- what is it -- about fifteen words that Cowan
8 uttered.

9 **THE COURT:** That is the crux of the claim.

10 **MR. BUTCHER:** It is the crux of the claim, but I also
11 -- I also think that the context of -- Your Honor, I think
12 that that statement by itself versus that statement versus,
13 you know, my client's already -- you know, in the context
14 of the drug bust, in the context of people going into their
15 home, I think it's very important to -- for the jury to
16 look at that. And, you know, there may be a way -- I don't
17 know if the Court will do this, but I -- I mean, I would
18 also ask the Court to look at the -- the written article by
19 -- you know, which quotes Cowan, and what's interesting is
20 to look at what -- the folks commenting on it and how they
21 perceive it and maybe, you know, that -- I mean, from that
22 perspective to see the different perspectives and why I
23 think it's relevant that the jury be able to see the whole
24 thing.

25 **THE COURT:** I'll withhold ruling on that until I've

1 watched the video. I assume that that is the CD that is
2 attached to Defendant's motion for summary judgment. Is
3 that correct, Mr. Garfield, what this DVD is?

4 **MR. GARFIELD:** I believe so. I don't know what all
5 that's on it. We're talking about -- I stood corrected. I
6 think we're talking about three separate videos. But I
7 think as far as my summary judgment would be the one sound
8 bite that we allege should be the triable issue here, that
9 one comment from Chris Cowan edited, pared or distilled
10 down to that.

11 **THE COURT:** Okay.

12 **MR. GARFIELD:** Two extremely brief points, Your Honor.
13 Number one, Chris Cowan never said on that video, the one
14 Your Honor has, talked about the house. He talked about
15 the home, talking about the property. That's the first
16 point.

17 The second point is we are talking about three videos.
18 The first news story, the second news story that I
19 understand that they're conceding not to put up, and the
20 third would be the raw footage which basically Ms. Blanding
21 just went room to room to provide to the media. That would
22 similarly be not relevant because that would be part of the
23 execution of the search warrant, so my motion in limine
24 really extends to all three of those, Judge, just for
25 clarification. Thank you, Your Honor.

1 **MR. BUTCHER:** Your Honor, I'd like to -- let's see
2 here -- for your consideration to provide the Court some
3 context when looking at this. I've got the written article
4 and what I've done is I have one with the comments redacted
5 and one without them redacted. Oh, wait. That's the
6 original. Let me have both of those, if I may. And
7 they're -- and I've marked them both alike because I
8 figured -- you know, I was hoping you'd rule on one of
9 them. Do you want me to give the original or the copy?

10 **THE COURT:** The copy.

11 **MR. BUTCHER:** Okay. But -- and the other thing I
12 have are cuts of the first video. One has the -- Cowan --
13 all of Cowan's comments -- I mean, one is the whole news
14 report from WIS. One has all of Cowan's statements, one
15 has the defamatory statement by Cowan and the other one has
16 the defamatory statement by Cowan with subtitles that I
17 would like to use in arguing, so that's -- you have the
18 opportunity to look at that.

19 Okay. A couple of other things. I'd ask that the --
20 I'm sorry, I kind of want to give it to you -- do you want
21 me to do it one by one and let Robbie talk or --

22 **THE COURT:** What are we talking about?

23 **MR. BUTCHER:** I was just about to move on to some
24 other stuff.

25 **THE COURT:** Well, what is the other stuff is what I'm

1 asking?

2 **MR. BUTCHER:** One is the search warrant, Your Honor.
3 I'd like certain things redacted from it. Two things. One
4 is the phrase "confidential reliable informant" because
5 there's nothing to show that he's reliable and I think he's
6 -- you know, he's got to come in and I think that's -- and
7 the other thing -- yeah. Yeah, they've got this part of
8 the search warrant that talks about what a great CI he is
9 and I don't think -- I think that just pumps them up and he
10 -- he needs to put that in. That's hearsay from -- from an
11 employee of the Richland County Sheriff's Department.

12 **THE COURT:** Okay. I'm going to interrupt you here --

13 **MR. BUTCHER:** Yes, ma'am.

14 **THE COURT:** -- and I think that this is a good
15 stopping point for today because some of my rulings on
16 those issues may be tied to my determination of this
17 greater issue that we've discussed at the -- earlier
18 today. So we're gonna break here for today. There may
19 be additional motions in limine tomorrow, but I want to
20 read through these orders, the case law, watch the video,
21 et cetera, and make a decision on the greater issue when
22 we resume tomorrow and that may resolve some of the
23 smaller issues as well.

24 **MR. BUTCHER:** And, Your Honor, may I have a page and
25 a half to respond in writing to the fifteen-page motion and

1 case law that got handed up today?

2 **THE COURT:** Sure.

3 **MR. BUTCHER:** Nine point font. Just kidding.

4 **THE COURT:** Absolutely. Keeping in mind that I will
5 need time to read it.

6 **MR. BUTCHER:** Yes, Your Honor. And I have to sleep,
7 too, because I'm kind of --

8 **THE COURT:** So we will resume at 1:00 tomorrow.

9 **MR. GARFIELD:** Yes, ma'am.

10 **THE COURT:** And I'll let you know something about all
11 of this, okay?

12 **MR. GARFIELD:** Thank you, Your Honor.

13 **MR. BUTCHER:** Thank you, Your Honor.

14 (Recess taken.)

15 (Whereupon, the proceedings were concluded for
16 November 28, 2016, at 2:50 PM.)

17 (Whereupon, the following proceedings were held on
18 November 29, 2016, beginning at 1:02 PM.)

19 **BAILIFF:** All rise. Court's now in session.

20 **THE COURT:** All right. You can be seated.

21 All right. I have reviewed -- re-reviewed Defendant's
22 motions in limine and the supporting memorandum. I've
23 also reviewed the Plaintiff's response in opposition to
24 those motions and the Defendant's reply. I've also read
25 through a good bit of case law in preparation for making

1 my decision, and that decision is as follows.

2 Based on the previous rulings in both the Federal
3 court and in this court by Judge Cooper, I do find that a
4 number of these factual topics have been determined as a
5 matter of law, they are the law of the case, and that both
6 Plaintiff and -- well, Plaintiff, in particular, will be
7 estopped from attempting to relitigate those issues, and
8 I'll enumerate those issues momentarily. But as to the
9 defamation cause of action because that is the only cause
10 of action that remains, it is clear from Judge Cooper's
11 order that one of the factual issues that was not actually
12 and necessarily determined in any previous ruling is
13 whether the statement made by Chris Cowan was, in fact,
14 true. Because if it was determined that that was a true
15 statement, then Judge Cooper would have granted summary
16 judgment on the defamation claim. As everyone knows, truth
17 is an absolute defense to defamation. So that is a
18 matter -- it's an element of the Plaintiff's claim, the
19 Plaintiff's cause of action for defamation, and it's
20 something that the Defendant must prove if that is their
21 defense, that it was, in fact, a true statement.

22 Also we talked about this portion of Judge Cooper's
23 order that discusses privilege and I would agree as both
24 parties asserted yesterday that there is a great deal
25 of discussion within Judge Cooper's order, but there's

1 certainly a reason that he cited the case that he cited
2 about privilege; that is Padgett versus Sun News in that
3 portion of his order, so I read that case, and that case
4 discusses qualified privileges in defamation claims.

5 So as I see it, Plaintiff clearly claims that -- that
6 some false and defamatory statement was made, et cetera.
7 Defendant's defense appears to be that the statement was
8 true or in the alternative if it was not true that it is a
9 privileged statement, and I say all of that because that
10 then -- if those are the defenses, that requires the
11 Defendant to prove either the truth of the statement or
12 that it is a privileged statement that wasn't abused -- or
13 that the privilege wasn't abused in making the statement.

14 And so as to the privilege issue though, privilege may
15 be asserted when a statement is published on an occasion
16 making the statement conditionally privileged and that
17 privilege is not abused. As to the first prong of that,
18 whether it was published on an occasion making it
19 conditionally privileged, that is a matter of law for the
20 Court to determine. Whether the privilege was abused is a
21 question of fact for the jury.

22 Having read the pleadings, memoranda and based on my
23 understanding of the facts in this case, the facts and
24 circumstances, I do find as a matter of law that the
25 statement made by Lieutenant Cowan was published on an

1 occasion making it conditionally privileged, which then
2 would require the Plaintiff to show if you so choose that
3 the publication -- or that privilege was abused by the
4 sheriff's department or by Lieutenant Cowan or that
5 entity -- by the Defendant.

6 So for those reasons, turning back to Defendant's
7 motions in limine, and there's a lot here, but in the first
8 section when -- where Defendant's request that Plaintiffs
9 be precluded for contesting, disputing, et cetera, these
10 fourteen issues of fact, I generally agree and grant the
11 Defendant's motion as to those fourteen issues except that
12 -- I don't want to make it a per se exclusion. I think
13 there has to be some wiggle room, some ability of the
14 Plaintiff to discuss, for example, the reliability or
15 credibility of the information received by the sheriff's
16 department to the extent that it goes to their argument
17 that the Defendant abused the conditional or qualified
18 privilege they must be allowed to present testimony in that
19 regard, but specifically as to Subsections B, C, D,
20 anything that talks about the -- I'm sorry, K, L, M, N and
21 probably a couple of others, the methods or techniques used
22 by the investigators, whether the search warrant was
23 facially valid, things like that are not relevant to this
24 case and have been actually and necessarily determined in
25 this matter already.

1 Additionally, anything discussing the actions of
2 investigators is also not relevant because the issue here
3 is whether the statement made by Chris Cowan was true or
4 not true or made in -- with actual malice or in reckless
5 disregard of Plaintiff's rights or with knowledge,
6 conscious, you know, indifference towards the truth of the
7 statement, et cetera, but whether a search warrant was
8 facially valid or -- or things falling in that category,
9 we're not going to relitigate those issues. Those have
10 been actually and necessarily determined in this matter.

11 Additionally, the second motion in limine precluded
12 -- requested by Defendant to preclude Plaintiff from
13 introducing into evidence, commenting on or raising in any
14 manner whatsoever the method of conducting the narcotics
15 investigation, that motion is granted and Plaintiff will be
16 precluded from discussing that.

17 I'm also granting the motion as to the third request
18 precluding Plaintiff from introducing into evidence,
19 commenting on or raising in any manner whatsoever any
20 aspect of the execution of the search warrant at the
21 residence.

22 I am also granting the motion as to the fourth request
23 with the exception that the jury should be allowed to view
24 the portion of the video interview that aired on WIS in
25 which Chris Cowan makes the statement. Not the video of

1 the home, not the Plaintiff's commentary, not Jody Barr's
2 commentary, only the statement made by Chris Cowan because
3 that is what is at issue in this case.

4 I believe as to Number 5 that was conceded and agreed
5 upon yesterday by counsel and Number 6 I granted yesterday.
6 There will be no mention of drug tests taken by the
7 Plaintiffs.

8 And, finally, as to Number 7, I grant the motion as to
9 the seventh request precluding Plaintiffs and their counsel
10 from commenting on or giving any indication that Plaintiffs
11 would be treated differently if they lived in a different
12 neighborhood. That's as to Defendant's motions.

13 As to what I have received from the Plaintiff
14 yesterday, these news articles published on WIS's
15 website --

16 **MR. BUTCHER:** Yes, ma'am.

17 **THE COURT:** -- certainly the version with comments of
18 the general public is not admissible. And even the version
19 where the comments are redacted is not admissible except
20 for the single paragraph that recounts what Chris Cowan
21 said about the search or the incident.

22 **MR. BUTCHER:** Your Honor, would it be easier to just
23 have the Court stipulate that that was published on the
24 Internet or have the Court make a finding that it was
25 published on the Internet? I mean, because, otherwise, I

1 can sit there and redact for a few minutes and generate a
2 new copy.

3 **THE COURT:** Well, what I would order is that if you
4 intend to introduce this document that significant portions
5 of it be redacted, that being the title of the article
6 which appears as the heading on the article, the heading
7 on the page and in the URL that's listed at the bottom of
8 the page. There are portions of the title of the article
9 there. In addition, as it is presented to me on these
10 few pages, the entire bottom of the page that begins the
11 article will need to be redacted. In fact, it's probably
12 easier to tell you what can remain and all that can remain
13 is the single paragraph that discusses Captain Chris
14 Cowan's comments on the second page, the date and time that
15 the article was first posted, the date and time that it was
16 updated and the fact that it was written by Jody Barr, as
17 well as the WIS heading on -- you know, this block across
18 the header of the page to give context so that the jurors
19 know where this article came from.

20 **MR. BUTCHER:** That's fine. And, you know, it could
21 take about five minutes and I could e-mail it to your clerk
22 because I've got Adobe Acrobat and I can just redact it, if
23 that's okay?

24 **THE COURT:** Sure.

25 **MR. BUTCHER:** Okay. Are you ready for some questions,

1 Your Honor, please?

2 **THE COURT:** Sure.

3 **MR. BUTCHER:** Okay. One, regarding the finding of
4 qualified privilege, Your Honor, has the Court -- are there
5 any facts that the Court has to put on the record -- you
6 know, related to why there's qualified privilege for my
7 understanding?

8 **THE COURT:** Specifically, a qualified privilege may
9 be found when one has an interest in the subject matter
10 of a communication and the person to whom it is made has
11 a corresponding interest and the communication is made
12 in order to protect such common interest, that statement
13 is privileged by reason of the occasion. So specifically
14 I find that both the sheriff's department or the sheriff
15 through his agent, Chris Cowan, as the chief law
16 enforcement officer in the county has an interest in the
17 subject matter of the communication, that being the --
18 the reporting or discussion of criminal activity that
19 occurred within the county, that Jody Barr or WIS as a
20 news media entity in the area has an interest in
21 reporting such information and that the communication
22 was made in furtherance of the interest of communicating
23 that information between law enforcement and the media.

24 You seem quite confused.

25 **MR. BUTCHER:** And, Your Honor, generally the -- I am.

1 I just -- in my mind, you're ruling so I don't need to sit
2 there and argue with the ruling --

3 **THE COURT:** I agree with that.

4 **MR. BUTCHER:** -- I'll try and figure it out.

5 Okay. So we're allowed to -- so I don't go off
6 course, we're allowed to argue that even though they had
7 this privilege the statement was libelous? I mean,
8 you're making a finding that there is privilege.

9 **THE COURT:** Right, and once, as a matter of law, the
10 Court determines that such a privilege exists, you can
11 only prevail -- a party can only prevail in a defamation
12 action by determining -- by proving that there was an
13 abuse of that privilege, which is matter of fact for the
14 jury to determine; that circumstances or the behavior
15 exceeded the balance of the privilege. For example,
16 whether Defendant acted in good faith in making the
17 statement, was the statement properly limited in scope,
18 was it sent only to the necessary parties. A privilege
19 can be lost by the manner in which it is exercised. If
20 there's some ill will or actual malice in making the
21 statement.

22 Yes, ma'am.

23 **MS. BUTCHER:** Thank you, Your Honor. Your Honor, and
24 as far as this being defamation and the statement that was
25 put out was concerning a crime, the actual malice is there

1 because of a particular statement, correct?

2 **THE COURT:** That goes to whether it is defamatory
3 per se or per quod and not actual malice in making the
4 statement.

5 **MS. BUTCHER:** And my understanding is that it is
6 malice -- it is defamatory per se because actual malice
7 is a given when it's a comment about criminal activity or
8 turpitude or, I think, sexual diseases was the other.

9 **THE COURT:** Do you have some law that supports that
10 contention?

11 **MS. BUTCHER:** I believe we do, Your Honor.

12 **THE COURT:** Because the case law I'm looking at says
13 that even if a statement is defamatory per se if the
14 communication is privileged, the plaintiff must prove
15 actual malice. That is in Murray versus Holnam, Inc.

16 **MS. BUTCHER:** And, Your Honor, I guess my logic is
17 that if we can show that the privileged statement was --
18 the privilege was abused, that it wasn't made in good
19 faith, there was no interest to be upheld, the
20 communication, you know, was not between -- it exceeded
21 the scope, in other words, then that privilege is gone
22 so then we're back to the defamation with actual malice
23 because it was about a crime. Once we wash away the
24 privilege, then it's defamatory and because it was about
25 a crime the actual malice is assumed.

1 **THE COURT:** That makes it defamatory per se if you
2 are able to convince this jury that the statement exceeded
3 the scope of the privilege.

4 **MS. BUTCHER:** Exactly.

5 **THE COURT:** Absolutely.

6 **MS. BUTCHER:** And then we don't have to prove actual
7 malice if we wash away the privilege, that it was assumed
8 because it was a crime. And, Your Honor, one other issue.
9 Good faith is an element of the privilege. The search
10 warrant itself was very obviously the wrong house just by
11 the statement that was made. Additionally, in that search
12 warrant it states that -- pertaining to that house that
13 complaints were made. They've admitted the only complaints
14 were made were about two trailers, not the house. So our
15 argument is that there was no good faith in that search
16 warrant because it described the wrong house, it said
17 statements that were -- they had no basis on. So I do
18 believe that we should be able to bring in the search
19 warrant as it was written to establish the lack of good
20 faith.

21 **THE COURT:** The lack of good faith on whose part?

22 **MS. BUTCHER:** On Officer Cowan's part with that.
23 Even though it was a valid search warrant, it was based on
24 hearsay. The truth of what was in that hearsay is -- you
25 know, that's why a lot of search warrants get thrown out,

1 the fruit of the poisonous tree. The search warrant may be
2 valid in the fact that the cops went in. I believe that
3 the search warrant itself, it was valid, the cops were able
4 to go into that home. That was all valid. It's what
5 occurred afterwards when no drugs were found they could
6 look and see this search warrant wasn't even concerning the
7 correct house to then go on and make the statement to the
8 news.

9 The order that was issued for summary judgment was
10 based on hearsay and there is no case I could find on point
11 in South Carolina. And the facts that were in that order,
12 for instance, one of them, I don't have it in front of me,
13 the fact that the confidential informant said that drugs
14 were purchased off the porch, okay, that statement was
15 actually made. That's what was in the officer's mind. The
16 truth of that statement has never been litigated.

17 **MR. BUTCHER:** Isn't that what we're allowed to -- were
18 allowed to litigate?

19 **MS. BUTCHER:** And that's what I'm a little confused
20 on. Are we now allowed to now litigate the truth of that
21 statement? And also that statement is clearly that the
22 drugs were purchased off of the porch where the statement
23 to the news was they were out of the home.

24 **THE COURT:** Well, absolutely because it's -- I mean,
25 that is the essence of the defamation case and so we've got

1 to separate the -- and this is why I say their defense can
2 be truth and, of course, that has to be determined. You
3 say it's false, they say it's true. Great. That is what
4 is being litigated.

5 **MS. BUTCHER:** Okay. And this is where -- where I'm
6 just unclear, okay, because the statements in the order
7 for summary judgment, okay, that were findings of fact, it
8 was a finding of fact that that CI told the officers that
9 Peanut sold him the drugs, but there's no truth to whether
10 Peanut actually sold the drugs.

11 **THE COURT:** Right, you've got to prove that -- I mean,
12 that's your contention.

13 **MS. BUTCHER:** Okay. So -- and this is where I'm a
14 little confused about exactly how we go about -- because if
15 you're gonna say -- and I understand you're gonna make a
16 judicial finding --

17 **MR. BUTCHER:** No.

18 **MS. BUTCHER:** -- or not. You're not making a judicial
19 finding, but you're gonna tell -- okay. That's where I was
20 confused. So --

21 **MR. GARFIELD:** If I may?

22 **THE COURT:** Yes, sir.

23 **MR. GARFIELD:** Thank you. Just a couple of -- just
24 a couple of thoughts here. If I understand Your Honor's
25 ruling correctly, there is a preclusion for them -- for

1 the Plaintiffs to introduce or comment as to certain --
2 certain factual issues. These issues would include the
3 ones that were enumerated in our fourteen bases for the
4 motion in limine. These would include I, J and K. And
5 I'll wait for the Court to get situated, if that's helpful.

6 In my understanding of Your Honor's ruling in limine,
7 that the Plaintiffs are precluded from going into or
8 introducing or commenting on evidence as to whether the
9 investigators properly ascertained and established that
10 402 Gibbs Road was the incident location. Similarly, J
11 and K discusses what was contained in the affidavit to the
12 search warrant, the fact that it was truthful and correct,
13 that they would be precluded from contesting or challenging
14 those issues, those factual issues, in this matter.

15 I would -- I would represent in understanding Your
16 Honor's ruling they are precluded from going into the issue
17 as to whether or not investigators got the right house or
18 not because those go to whether they got the right house or
19 the wrong house. Understanding the good faith argument, I
20 understand where they're coming from because they're going
21 to say yes, Your Honor, I understand the qualified
22 privilege ruling by the Court, but we, however, can get
23 into and challenge the good faith. Whether or not Chris
24 Cowan operated with good faith or not in saying what he
25 said in the defamation has absolutely nothing as to whether

1 the right house or the wrong house.

2 **THE COURT:** Well, is your defense truth --

3 **MR. GARFIELD:** Yes, ma'am --

4 **THE COURT:** -- or is it privilege or both?

5 **MR. GARFIELD:** It's both. It's truth, number one.

6 Number two, that we did not exceed the privilege because
7 there was no actual malice on the part of Chris Cowan.
8 They would need to show -- to overcome the privilege or to
9 say that -- or to show the Court to the satisfaction of the
10 Court that the privilege was abused or exceeded, they would
11 need to show -- one moment, Your Honor.

12 **THE COURT:** Well, they also have to be able to show
13 that those statements are false and that's why I really
14 hesitated to do sort of a blanket ruling as to these
15 fourteen factors because what has been actually and
16 necessarily determined previously in this case is whether
17 -- let's take the search warrant, whether officers had a
18 right to rely on the confidential informant's information,
19 whether the search warrant was facially valid, et cetera,
20 that is not the same as whether what the confidential
21 informant said is true. And I am not making a finding of
22 fact, and don't believe that any other judge in this case
23 has made a finding of fact that those statements are true,
24 that Peanut did, in fact, sell drugs at this location off
25 of their porch. That is what we're litigating. That has

1 not been actually and necessarily determined because that
2 is not an element of any of these other causes of action
3 for which summary judgment was granted.

4 **MR. GARFIELD:** Let me just speak to what was said
5 before because it kind of wraps around to what you're
6 saying, Your Honor. First of all, as far as good faith is
7 concerned they could certainly -- in order to try to make
8 a showing that Chris Cowan did not operate in good faith,
9 you'd have to look at the statement itself, his statement,
10 which was, was he acting -- was it actuated by ill will,
11 was he acting in good faith to address what was in the
12 mutual interest of law enforcement and the public, for
13 instance, was he intending to harm the Plaintiffs, did he
14 know them, did he target them? All those things that can
15 be brought up in this case in order for them to attempt to
16 overcome qualified privilege. I understand it. I think
17 there's one more element as to whether he's reckless, did
18 he just mouth off without double-checking for accuracy.
19 Again, all of those are fodder for trial. So when they
20 want to try to make a showing that Chris Cowan did not act
21 in good faith, I believe all those things are relevant to
22 whether he acted with actual malice or not. I think that
23 is enough. To go back and to talk about the credibility
24 and reliability of the CI, for instance, Judge Childs in
25 her order, and this is just sort of discussing, not

1 quibbling with any kind of -- any ruling Your Honor had in
2 this, but Judge Childs in her order as a factual issue
3 recognized that this -- for instance, this confidential
4 informant was credible and trustworthy, that he was
5 reliable, that he had had previous experience in
6 approximately thirty investigations, all successfully. To
7 go back and relitigate that would be a danger. And I know
8 we're all talking about parameters. For them to go into
9 that scene really opens up what Your Honor is attempting
10 to limit, the entire investigation itself. They could
11 certainly call our investigator to the stand or if we call
12 the investigator to the stand, he can ask him what his
13 experience is with the CI, whether he found them credible
14 and reliable, why he did, but for them to go and be able
15 to relitigate as to whether this CI was an informant that
16 could produce certain information that would ultimately be
17 probable cause for the search warrant opens up, once again,
18 exactly what Your Honor is respectfully trying to preclude
19 in this case.

20 **THE COURT:** Well, and that's why I asked whether your
21 defense is truth or privilege because it makes it really
22 dicey and difficult because if your defense is truth, and
23 their claim is that it is false, then they have to be able
24 to say Peanut might have said -- or the CI might have said
25 that they bought from Peanut but that never happened, the

1 CI was lying. They'd have to be able to prove that to
2 make it a false statement. That is it their case.

3 However, if your defense is privilege, then you say
4 forget whether it's true or not, we said it in this
5 interview and they don't need to go down that road of
6 whether the CI was telling the truth or whether it actually
7 happened except to the extent that they would argue that
8 Chris Cowan had reason to believe that it was not -- that
9 he knew that it was not true, acted in reckless disregard
10 of the truth, et cetera, and so for your defense to be both
11 truth and privilege is what makes this very complicated.

12 **MR. GARFIELD:** It does and I -- and I know we're all
13 speaking on the record, but the defamation law in South
14 Carolina is really clunky in some ways. Here's -- here's
15 our position in this case. That they have the burden of
16 proving by a preponderance or a greater weight of the
17 evidence a certain criteria for defamation. One of those
18 would be a false message about the Plaintiffs. Our
19 contention is that they are unable to prove falsity, but
20 it's sort of looking at the same thing the other way. The
21 burden is on us to prove truth or substantial truth because
22 I think that's the either or that the Court has allowed.
23 So our position is -- I'm not -- although it does make it
24 tricky, I'm not sure we have to elect. I don't think
25 they're mutually exclusive legal theories and I'm not

1 saying Your Honor's suggesting, we're just trying to
2 understand how the evidence comes in. I think -- exactly,
3 and that's where I'm going with this. On the one hand,
4 we're taking the position that Chris Cowan's statement was
5 true or, substantially true and we intend to show that. I
6 think it's sort of a -- as somebody once said a kissing
7 cousin over to say that he was acting in good faith because
8 it would be a legal anomaly to say someone was acting not
9 in good faith but telling truth or lying and acting in good
10 faith. I think it all goes hand in hand. I think we will
11 be able to establish which then they could come back and
12 try to address or attack or impeach whether Chris Cowan
13 acted in good faith or whether he acted with actual malice.
14 I think the evidence as to whether he acted with actual
15 malice is what -- what did Chris Cowan know, why did he say
16 what he said and what was his reasons for saying what he
17 said and in the context that he said. That is where the
18 Plaintiffs would be able to overcome or successfully allege
19 that the qualified privilege was abused or exceeded. I
20 think we should be able to make that statement or at least
21 have that position and contain the -- contain the evidence.
22 I think that would be consistent with Your Honor's
23 preclusions and rulings in limine. They shouldn't be able
24 to go in and attack the confidential informant to
25 relitigate the issue as to whether he was trustworthy or

1 credible. I understand it puts them in a bind, but that's
2 one of those issues in this particular case, but it's just
3 unfortunately the way that the facts are presented.

4 **THE COURT:** I actually -- and I left that out of my
5 earlier ruling. I disagree that that has been actually
6 and necessarily litigated. Now I do read in Judge Childs'
7 order and I believe it's repeated in Judge Cooper's
8 order that the confidential informant was reliable and
9 trustworthy or some variation of that. I do not read that
10 to mean that -- that the informant was per se honest for
11 lack of better phrasing. That was analyzed in light of
12 the consideration as to whether the investigators had a
13 right to rely on that information in obtaining a search
14 warrant and executing the search warrant, et cetera;
15 that the consideration was not whether the confidential
16 informant was telling the truth and is an honest and
17 trustworthy reliable person per se in all things in life
18 and so because he said it then it must be true, yada,
19 yada. I mean, they have -- you know, the sheriff's
20 department perhaps -- well, definitely had a right to rely
21 on the information given by that confidential informant in
22 obtaining and executing the search warrant and doing their
23 investigation. That is what was actually and necessarily
24 litigated in those earlier proceedings, not that -- yeah,
25 not that the CI was per se reliable and trustworthy.

1 Yes, sir, Mr. Butcher.

2 **MR. BUTCHER:** Your Honor, so that means they're -- the
3 Defendants cannot bring in hearsay about what the CI told
4 them, who he bought from, that information because that's
5 the truth of the matter, Your Honor, and, frankly, that's a
6 confrontation clause issue and like -- like you just said,
7 that the courts made that finding because they had to look
8 at what the police officers knew in order for them to have
9 probable cause for the Fourth Amendment search. So, Your
10 Honor, there are huge --

11 **THE COURT:** Yeah, let me interrupt you there because
12 I've actually -- I've started to consider this because
13 we've run into a problem and I don't know that the
14 Defendant is required to elect defenses, but without
15 electing there is a real problem because what you want
16 to be able to say is Chris Cowan relied on the CI's
17 information, et cetera, and, therefore, didn't abuse the
18 privilege because the CI said this happened and that's
19 fine if you're not offering it for the truth of the matter,
20 if it's to explain why Chris Cowan did the things that he
21 did, but if your defense is also truth, then what the jury
22 hears is the CI said it and it must be true and that makes
23 it hearsay.

24 **MR. GARFIELD:** I understand. This is -- this is
25 educational for everyone. If I could, I understand --

1 could I have maybe a five-minute break just to discuss
2 with co-counsel --

3 **THE COURT:** Absolutely.

4 **MR. GARFIELD:** -- just sort of where the Court's
5 inclined to go and actually minimize, you know, what could
6 be a very long week?

7 **THE COURT:** Absolutely.

8 **MR. BUTCHER:** And go to the little boy's room?

9 **THE COURT:** Let's take five minutes.

10 (Recess taken.)

11 **BAILIFF:** All rise. Court's back in session.

12 **THE COURT:** Thank you. Please be seated.

13 All right. Mr. Garfield, you may continue.

14 **MR. GARFIELD:** Yes, ma'am. I've discussed this with
15 my client and co-counsel. We're not waving the affirmative
16 defense of truth. I mean, not to start the trial.
17 However, we are inclined based on Your Honor's rulings in
18 limine to not proceed in that direction. We still take
19 the position they're unable to satisfactorily prove to the
20 Court's satisfaction at dispositive motions made during the
21 trial such as a false message about the Plaintiff, but we
22 do -- we do not anticipate relying on truth as the defense
23 in this case, that we do accept and understand the Court's
24 ruling with respect to qualified privilege and that this
25 trial will substantively be about whether that privilege

1 was exceeded and whether they can establish an actual
2 malice standard. I understand that. But, once again, we
3 don't waive it, but we anticipate going in that direction.
4 I don't want to go on the record with absolutely
5 withdrawing an affirmative defense. I understand that
6 does throw a wrench in matters, but is it not practical
7 to proceed with the trial of the case not as an official
8 withdrawal of the affirmative defense, but to say just as
9 Your Honor is inclined in limine that this is the way you
10 would anticipate the rulings, this is our way of just
11 trying to going along or be consistent with the evidence.

12 If -- if Your Honor would like something more
13 definitive, I would need just a little more time because
14 -- and here's why. This case has been around for so long
15 and, for instance, with me is I have the sheriff's chief
16 counsel. The sheriff is the one that's actually being
17 sued and also this is not an insurance case, this is
18 self-insured through Richland County. I would need the
19 actual consent agreement from more clients to make sure I
20 actually waive an affirmative defense before trial. I
21 don't think I would need very long. I just want to make
22 sure that I'm being prudent about it. If I could ask to
23 just maybe take fifteen more minutes just to make sure
24 because that is -- that is substantial in this case, I
25 do agree, but I think it would streamline the evidence

1 considerably. I agree with the Court.

2 **THE COURT:** Okay. Yeah, because I hear what you're
3 saying and I understand strategically what you are trying
4 to do, but if you don't waive the defense of truth, then
5 you would go forward when? Because we're in the trial of
6 the case.

7 **MR. GARFIELD:** I understand. This is -- this is such
8 a novel issue, but I would just like to make sure that I've
9 got the consent agreement of my clients, but I certainly
10 understand the Court's concerns on that, too.

11 **THE COURT:** Absolutely.

12 **MR. GARFIELD:** Thank you very much.

13 **THE COURT:** Okay. But, yeah, if you -- and that may
14 change things substantially for the Plaintiffs if they
15 withdraw that defense of truth, I don't know, but we'll
16 see. We're gonna take another fifteen minutes -- fifteen,
17 twenty minutes to allow Mr. Garfield to confer with his
18 client.

19 **MR. BUTCHER:** Okay.

20 **MR. GARFIELD:** Thank you, Your Honor.

21 **THE COURT:** Yes, sir.

22 **BAILIFF:** All rise. Come to order, please. Make sure
23 everybody's cell phones are turned off.

24 **MR. GARFIELD:** Thank you for the break, Your Honor.

25 **THE COURT:** Yes, sir, Mr. Garfield.

1 **MR. GARFIELD:** I have had a chance to confer with
2 important people. We do withdraw our affirmative defense
3 for truth.

4 **THE COURT:** Okay.

5 **MR. GARFIELD:** I do -- making sure I understand for
6 housekeeping matters that Plaintiffs would now be precluded
7 from arguing that the investigators got the wrong house.
8 It's a question of whether or not the -- the privilege was
9 abused or exceeded as far as an actual malice standard.
10 Certainly they're able to give a background of the
11 investigation so the jury knows why we're all here and what
12 prompted it, but as far as from an issue preclusion
13 standpoint I just want to make sure of our understanding as
14 we go forward.

15 **THE COURT:** Mr. Butcher.

16 **MR. BUTCHER:** Your Honor, I believe you can make a
17 finding -- that the Court can make a finding that the
18 statement was false and, Your Honor -- I mean, once
19 again, the -- the basis of findings -- because what he's
20 essentially saying is we can still argue that it's false
21 and that takes away our confrontation clause, that allows
22 hearsay testimony, that it is inadmissible, Your Honor, so
23 from that perspective, Your Honor, I think they've got to
24 -- that the -- that we have to be able to show that it's --
25 that it's untrue or the Court makes a determination that it

1 was untrue, so you can't make a finding that it was bought
2 or sold from the house.

3 **THE COURT:** Whether the statement was true is no
4 longer relevant. I mean, it's sort of presumed -- I guess
5 it's presumed that it was not true, although I don't know
6 that it's appropriate for me to make a finding that it was
7 a false statement. I don't know. I'm trying to think
8 through it.

9 **MR. BUTCHER:** And, Your Honor, how do we argue
10 damages, how do we -- I mean, you know, the untruth of the
11 statement, how it was hurtful. I mean, that's -- if you do
12 what just Robbie just said, which was that the drugs were
13 sold from the house, I mean, that's what he's saying, which
14 is untrue, then, you know -- I mean, we essentially have no
15 damages because on one hand we're -- I mean, because it
16 doesn't -- it's not defamation any longer.

17 **THE COURT:** They're not arguing that it's true. He
18 withdrew the defense of truth.

19 **MS. BUTCHER:** Your Honor --

20 **THE COURT:** Yes, ma'am.

21 **MS. BUTCHER:** -- correct, but if they're withdrawing
22 the defense that it's true, I mean, first, the defamation
23 comes in whether or not it's true or if it was false. Once
24 it's determined that it was a true statement, then the
25 qualified immunity kicks in to say we're shielded from the

1 defamation. So first there has to be that determination
2 for the jury to know if it was truth or if it was false.
3 For us to sit here and the jury to think it was a true
4 statement, then --

5 **THE COURT:** The defense of privilege is it doesn't
6 matter whether it was true.

7 **MS. BUTCHER:** But there's no need for the defense of
8 privilege if it was a true statement, that that defense
9 -- that privilege is only there to protect someone who
10 makes a false statement. So when you imply the defense
11 of privilege as the defense, you're saying it was a true
12 statement so, therefore, this privilege gets me out of it
13 being defamation. Do you see what I'm saying?

14 **THE COURT:** You mean that it was a false statement?

15 **MS. BUTCHER:** Yes. Yes, Your Honor. Thank you. And
16 so, therefore, a jury instruction needs to be made that it
17 was a false statement. Now the jury needs to be instructed
18 that if you find that the privilege existed, there's no
19 defamation, but if the privilege does not exist, then a
20 false statement was made that was --

21 **THE COURT:** I have made a finding as a matter of law
22 that the privilege exists. At this point their only
23 defense is privilege, not truth. So we are not talking
24 about whether the statement is true or not. The defense
25 is regardless of whether it was true, it was a fair and

1 accurate representation of the circumstances that occurred
2 on that day and the only way for the Plaintiff to recover
3 is to prove that that privilege was abused.

4 **MS. BUTCHER:** Your Honor, the privilege doesn't exist
5 for true statements. The privilege only exists for false
6 statements. So to let this jury think and wonder if a
7 statement was true or false, I think that weighs on their
8 ability if it was made in good faith, if it was -- if it
9 went beyond what the occasion required and was
10 unnecessarily defaming, Your Honor, and that's why it's so
11 important to know if it was a true statement or a false
12 statement because if it wasn't -- if they're saying it was
13 true, and I think that's the first thing they need to
14 prove --

15 **THE COURT:** But they're not.

16 **MS. BUTCHER:** -- then did it go beyond what they're
17 saying they put out to the public? Because if it wasn't
18 true, you don't just go stating a fact to the public that
19 someone committed a crime. Then the officer's the judge
20 and the jury and --

21 **THE COURT:** Mr. Garfield.

22 **MR. GARFIELD:** Judge, if I may just kind of weigh in
23 here. In our Request to Charge Number 6, I'm not sure if
24 this helps or hurts or edifies it -- I think the Plaintiffs
25 have a copy of my request to charge.

1 **MR.. BUTCHER:** Yeah, if you'll give me a second,
2 please.

3 **MR. GARFIELD:** Sure.

4 **MR. BUTCHER:** Which one was it?

5 **MR. GARFIELD:** I may have another copy.

6 **MR. BUTCHER:** I've got it. Number 6? And this is
7 from Judge Anderson's book, correct?

8 **MR. GARFIELD:** This is from Judge Anderson's request
9 to charge, 14-16, and there's a good bit of authority
10 behind this. I think this one portion states that --
11 this is my second printed page down at the bottom, the
12 last paragraph. To prove actual -- second to the last
13 paragraph. To prove actual malice, the plaintiff must
14 show that -- the plaintiff must show that the defendant
15 was actuated by ill will in what he did with design to
16 causally and wantonly injure the plaintiff or that the
17 statements were published with such recklessness as to
18 show a conscious disregard of the plaintiff's rights..
19 You may find the existence of actual malice in the language
20 of the communication itself as well as from extrinsic
21 evidence. However, there is no actual malice if the
22 defendant had a good faith belief that the statement was
23 true.

24 So the question isn't the truth any more. It's what
25 Cowan believed based on the information provided to him or

1 the extrinsic evidence or however you want to look at it
2 that the statement was true. If the communication is a
3 privileged one made in good faith without malice with
4 probable cause to believe it is true, the falsity of the
5 communication does not destroy the privilege, and I think
6 that gives us the guidance we're looking for just from my
7 suggestion.

8 And it's not an immunity, Your Honor, just as a point
9 of clarification, it's a privilege, when she called it a
10 qualified immunity, so in that there is a distinction
11 there, there is a privilege because it could be --

12 **THE COURT:** Understood. Yeah, I think she just
13 misspoke.

14 **MR. GARFIELD:** I understand. I just wanted to make
15 sure we're talking about the same thing.

16 **THE COURT:** Okay.

17 **MS. BUTCHER:** And, Your Honor, with regard to the
18 recklessness, I believe that brings us right back to the
19 search warrant and what was in it and how messed up it was
20 when it was the wrong house and the wrong statements.

21 Additionally, Your Honor, if the slander is actionable
22 per se, which it is because it's about a crime, only if
23 they find that the communication was privileged do we need
24 to prove actual malice. If the jury finds that it was not
25 a privileged statement, then we do not need to prove the

1 actual malice.

2 **THE COURT:** The determination of whether the statement
3 is privileged is not a matter for the jury, that is a
4 matter of law for the Court that I've already determined.
5 It is, in fact, privileged. What this jury will determine
6 is whether that privilege was abused.

7 **THE COURT:** Yes, sir, Mr. Butcher.

8 **MR. BUTCHER:** So a couple of questions. The hearsay
9 -- I understand Cowan can testify about what he learned,
10 okay? Any other witnesses I do not believe can give
11 hearsay testimony about a CI.

12 **THE COURT:** I believe that would depend on the context
13 in which it's offered.

14 **MR. BUTCHER:** Well, the main context, you know, that
15 they bought drugs -- that the CI bought drugs from -- from
16 the house. Cowan obviously as the mouthpiece for the
17 sheriff's department can say, you know, I learned X, Y and
18 Z from Officer So and So who reported it to me --

19 **THE COURT:** Uh-huh.

20 **MR. BUTCHER:** -- and the question is, is whether or
21 not that information should have -- but anyone else to
22 bolster to say where it came from, whether it was
23 legitimate or anything like that, it can't come in because
24 it's hearsay.

25 **THE COURT:** Okay. Let me make this very simple. Let

1 me make this very simple for everybody.

2 **MR. BUTCHER:** Yes, ma'am.

3 **THE COURT:** The only issue that remains in this case
4 is whether the sheriff's department abused the privilege,
5 its qualified privilege in this matter; that is whether
6 the statement was made with actual malice or with ill will
7 towards the Plaintiffs or in reckless, conscious
8 indifference towards the truth, et cetera. So that all
9 goes to the reasons for making the statement. What Chris
10 Cowan knew at the time that he made the statement. All
11 other matters regarding whether the sale happened or did
12 not happen are not relevant at this point. So the
13 Plaintiff can offer evidence only -- not that the search
14 warrant was facially invalid or that the sale didn't happen
15 unless it is offered to show that Chris Cowan knew that the
16 sale didn't happen and said it did anyway. The focus is on
17 his alleged reckless disregard of the truth or malice
18 toward your clients, sir, and nothing else is relevant to
19 the jury's determination at this point.

20 **MR. BUTCHER:** Understood. Now in my case in chief
21 we have to show damages and we have to be able -- or my
22 clients have to be able to talk about why it was hurtful
23 and why they suffered harm from the --

24 **THE COURT:** They have to be able to show injury to
25 their reputation, not their state of mind, not how upset

1 they were when it happened. That is not relevant. That is
2 not an element of damages.

3 **MR. BUTCHER:** I -- okay.

4 **THE COURT:** Unless you have some case law to the
5 contrary, sir.

6 **MR. BUTCHER:** Your Honor, I -- here's the other thing.

7 **THE COURT:** Well, let's stay on that. Do you have
8 some law to the contrary?

9 **MR. BUTCHER:** Yes, ma'am. I apologize.

10 **THE COURT:** The focus of defamation is not on the hurt
11 to the defamed party's feelings, but on the injury to his
12 reputation. We're not talking about intentional infliction
13 of emotional distress. We're talking about damage to the
14 reputation of the aggrieved party.

15 **MR. BUTCHER:** Injury to reputation, standing in the
16 community, embarrassment, personal humiliation, mental
17 anguish and suffering, wounded feelings caused by injury to
18 reputation. That's -- that's 14-21 of Judge Anderson's
19 request to charge. It cites Gertz versus Robert Welsh,
20 Incorporated, and some other cases, Your Honor. It's the
21 last charge in that chapter. Do you mind if I approach and
22 hand this to you?

23 **THE COURT:** I do see it. Okay. The injury -- the
24 embarrassment and humiliation that stem from the injury to
25 the reputation.

1 **MR. BUTCHER:** Yes, Your Honor.

2 **THE COURT:** Okay. I understand.

3 **MR. BUTCHER:** And, you know --

4 **THE COURT:** Right. I understand and I agree. I was
5 focussed on -- it can't solely be their hurt feelings,
6 they're mad that the bad thing happened, but they must
7 first prove injury to their reputation and then, I guess,
8 mental anguish and embarrassment that stem from that injury
9 to their reputation, not solely their hurt feelings.

10 **MS. BUTCHER:** Your Honor, my understanding is if this
11 is about a crime or some loathsome disease it's assumed
12 that there's injury to the reputation. That's part -- that
13 assumes actual malice and it assumes the damage to the
14 reputation.

15 **THE COURT:** Right, in a case that is actionable
16 per se.

17 **MS. BUTCHER:** Correct.

18 **THE COURT:** Yes, ma'am. I agree.

19 **MS. BUTCHER:** Do you agree?

20 **THE COURT:** I agree. I'm sorry. We've talked about
21 a number of topics and I've got a million pieces of paper
22 here.

23 **MS. BUTCHER:** And I apologize. I would have case law,
24 but just without switching gears, so it's assumed that
25 there's damage to the reputation because it was about a

1 crime. And it's also assumed it was actual malice as long
2 as we can get over the hurdle of that qualified privilege
3 that he went beyond it and abused it so, therefore, it
4 doesn't protect him.

5 And, Your Honor, I hate to beat a dead horse, but,
6 you know, let's say we get over this hurdle and the jury
7 believes that he abused the qualified immunity and it
8 didn't protect --

9 **MR. BUTCHER:** Qualified privilege.

10 **MS. BUTCHER:** -- qualified privilege. I'm sorry. I
11 keep doing that -- it doesn't protect him. For the jury
12 to then make a decision on damages, does it not go back to
13 whether the statement itself was truthful or if it was
14 false? I think that makes a world of difference as far as
15 damages go. That's why I do believe it's important to give
16 a jury instruction that the statement itself was a false
17 statement, however, there's no defamation if he's protected
18 -- yeah, the privilege. If not, then I think we need to be
19 able to prove that it was a false statement. And also,
20 there again, the recklessness is part of this and the good
21 faith. I mean, I think we need -- because that search
22 warrant was so unbiased --

23 **THE COURT:** Is your contention that Chris Cowan had
24 reason to know? That he knew that there was some defect in
25 the search warrant?

1 **MS. BUTCHER:** No, Your Honor, but I think it goes to
2 good faith. Before you make a statement to the public that
3 you have a good faith belief and so the question for the
4 jury is was it reasonable for him to rely on an e-mail from
5 one of the other officers rather than look into anything on
6 his own because in that situation any officer could come up
7 and tell his chief hey, he murdered Tom and then the chief
8 could go out on the news and say hey, so and so murdered
9 Tom and quote it as fact.

10 **THE COURT:** Those are not the facts of this case.

11 **MS. BUTCHER:** Oh, I'm just using examples.

12 **THE COURT:** No, I know, but that's a whole different
13 scenario versus an investigation, a search warrant,
14 probable cause, a controlled buy, et cetera. I don't know
15 what your argument is, but maybe your argument is that he
16 should have disregarded a search warrant, he should have
17 disregarded probable cause. I mean --

18 **MS. BUTCHER:** No, no. The fact that it was a
19 controlled buy, I think it goes to -- the jury needs to
20 make the decision was his statement to the public made in
21 good faith and I think we've determined that they need to
22 determine if that officer should have gone farther into
23 his good faith -- into seeing where the truth lies before
24 -- beyond just taking one officer's word. Should he have
25 done some independent investigation himself to look at the

1 search warrant, to look at those things.

2 **THE COURT:** Put a pin in that. This is taking way too
3 long. We are not gonna start this trial today. I'm gonna
4 release the jury until tomorrow morning. If you'll have a
5 bailiff bring in the jury, please.

6 **THE CLERK:** Yes, Your Honor.

7 **MR. BUTCHER:** And, Your Honor, I do have some other
8 matters, you know.

9 **THE COURT:** I assumed you did.

10 **MR. BUTCHER:** I apologize for that.

11 (Whereupon, the jury returns to the courtroom at
12 2:20 PM.)

13 **THE COURT:** Good afternoon, ladies and gentlemen. I
14 apologize for keeping you waiting for so very, very long.
15 I dismissed you yesterday afternoon and the delay today
16 has been because a lot of times before you get a trial
17 started or even during the trial there are lots of legal
18 issues and technicalities that the attorneys have to
19 discuss with the Court and that cannot be done in your
20 presence, so that's what's been going on both when I
21 dismissed you yesterday and all the time you've been
22 waiting back there today.

23 As it turns out, I have determined -- I didn't know
24 that you'd be waiting as long as you have been. It's
25 almost 2:45 now. I wouldn't have had you come in at 1:00

1 had I realized it was gonna take so long, but also we're
2 not finished, so it's going to take even longer. So I
3 think that we have wasted enough of your time today having
4 you sit back there and wait and I truly apologize for that.
5 That is my fault. It's not the lawyers' fault, you know,
6 or any of the parties involved here. These are my
7 decisions to make and I just didn't realize things would
8 take as long as they are taking. So I am gonna dismiss you
9 for today so that I can continue to talk to these lawyers
10 about all the legal matters. I see that makes somebody --
11 at least one person really happy. I'm gonna dismiss you
12 for today and have you come back tomorrow morning at 10:00.
13 I must tell you again do not discuss the case amongst
14 yourselves, do not -- or with anyone else, do not attempt
15 to do any research about the parties or the subject matter
16 of the case or the court personnel or anything. Just
17 pretend that you're not on jury duty. Just go home and do
18 your normal thing, but don't try to do any research or have
19 any conversation about the case. But -- and, again, I
20 apologize. I just didn't realize that we were gonna really
21 get into the weeds of the legal issues that are potentially
22 involved in this case, so I hate to have you sitting back
23 there for any longer than necessary. So be back in your
24 jury room tomorrow at 10 AM, okay? Have a good night.
25 (Whereupon, the jury was dismissed for the day at

1 2:43 PM.)

2 **THE COURT:** All right. Mr. Garfield, let me hear from
3 you on this duty to investigate.

4 **MR. GARFIELD:** I'm trying to understand. I'm a little
5 -- a little in the weeds. What I think I am in agreement
6 with the Plaintiffs or I think I'm in agreement is that
7 they would need to establish actual malice to overcome the
8 qualified privilege. I do understand that they intend to
9 show damages pursuant to defamation per se. Now on the
10 one hand, one concern I had was that in the statement by
11 Mr. Cowan he never refers to the Plaintiffs, he never
12 refers to where they live, he never refers to anything
13 about them, he doesn't even refer to the neighborhood.
14 There's nothing identifying about what he said. He just
15 generically said we bought drugs from a family member out
16 of the home. If we're talking about that sound bite in
17 isolation, because in defamation that's what you're looking
18 at, I'm not quite even sure that's referring to anyone
19 sitting at that table. It could be referring to Peanut
20 if Peanut wanted to raise it. And so I'm not -- I'm not
21 raising that as an issue right now. I'm just trying to
22 understand the per se aspect of this. That's just -- I'm
23 kind of thinking that through.

24 Be that as it may, Your Honor, it's almost like -- I
25 do understand they would need to show actual malice to

1 overcome a qualified privilege and they would be entitled
2 regardless to put up evidence and testimony related to
3 damages. It's almost like you could bifurcate this and
4 have -- you know, so it's -- in a continuing effort to
5 make the testimony more efficient, particularly in light of
6 the Court's in limine ruling, it's almost like we could
7 have one -- allow them to try to make their case with
8 respect to whether Cowan acted maliciously and then if they
9 do establish that, then you could almost have a damages
10 portion of the trial because that would clean things up.
11 Because otherwise we're back to well, can they talk about
12 the investigation and the truth because as Your Honor
13 stated this is about actual malice and as so their damages.
14 I'm just kind of thinking this through logically.

15 **THE COURT:** Mr. Butcher, you had something you wanted
16 to say?

17 **MR. BUTCHER:** Yes, ma'am. A couple of things. We
18 don't believe this needs to be bifurcated. The other
19 thing regarding the fact that this was untrue is there --
20 I believe the wording of -- looking at Mr. Garfield's
21 charge in the third -- actually it's on the second page of
22 that, but the third paragraph, it talks about unnecessarily
23 defamatory and, Your Honor, I think that one of those
24 things that would be unnecessarily defamatory is when the
25 false statement is such a whopper that it is -- that in and

1 of itself they should have taken greater care not to say
2 something like that. And, once again, I think that that
3 ought to be why we ought to be able to prove the truth --
4 or, you know, my clients ought to be able to state that
5 it's false, ought to state that they -- that no one sold
6 drugs at their house, that no family member sold drugs at
7 their house. And, you know, I understand their desire,
8 but, again, you know, these other rulings were made off of
9 hearsay for a different purpose and, you know, I understand
10 his reason for wanting to hem us in, but those other
11 rulings do not relate at all to anything related to whether
12 it was true or not and we've got to be able to prove that
13 and so from that perspective that -- you know, if they in
14 any way -- I do not -- I do not think it's fair to us to
15 have to -- you know, for them to question or imply that
16 it's true without giving us the opportunity to show why
17 not, Your Honor, and so I do not think the Court can let
18 the hearsay come in except for what Cowan -- no one else
19 can give hearsay testimony unless it's within the rules.

20 And, Your Honor, just by the words "defaming
21 statement", the Court is saying it's defamatory, so I think
22 the Court has to say a false statement was uttered by
23 Chris Cowan, he said X, Y and Z. Because, otherwise, this
24 whole analysis, you don't need it, Your Honor. You don't
25 -- and I -- it's starting to click. You don't need the

1 shield if it's true.

2 **THE COURT:** No, I agree.

3 **MR. BUTCHER:** So it's false.

4 **THE COURT:** And they've withdrawn the defense of
5 truth.

6 **MR. BUTCHER:** Okay. So by implication you flip it on
7 its head, it's false, Your Honor, and if you make us have
8 to prove it's false that -- while at the same time you're
9 taking the rug out from, you know, these -- these other
10 issues, the jury is -- they're gonna have a mixed message.

11 **THE COURT:** Right. And I -- I do not say that you
12 have to prove that it's false. In fact --

13 **MR. BUTCHER:** It's unknown.

14 **THE COURT:** -- whether it is does not matter. It is
15 the state of mind and the actions of Chris Cowan in light
16 of the circumstances; whether Chris Cowan knew it to be
17 false and said it anyway.

18 **MS. BUTCHER:** Well, I don't -- one, if it was a true
19 statement --

20 **THE COURT:** Let's stop talking about it being a true
21 statement.

22 **MS. BUTCHER:** Okay. Okay. It's not what -- simply
23 whether or not he knew it was a false statement and said
24 it anyway, it's did he make this statement in good faith?
25 Did it go -- was it disseminated beyond what was necessary?

1 Was the amount of defamation unnecessary? I think strongly
2 the -- whether he said it in good faith it's a jury
3 question, again, of was it enough to impose good faith on
4 him if he only talked to one officer without looking at the
5 other things. I think that's a jury question and --

6 **THE COURT:** Your question may be did you talk to other
7 officers. The follow-up, would you -- you know, that if
8 you had talked to X, Y and Z you would have found out that
9 it was false, that's not relevant. Whether he should have
10 talked to other people, whether he ultimately -- you're not
11 going to go down the road of proving that he -- that the
12 search warrant affidavit was false, that the information
13 contained in the affidavit was false. That is not the
14 consideration here.

15 **MS. BUTCHER:** And, Your Honor, I understand that and
16 I think it would be a fair question did you look at the
17 search warrant yourself.

18 **THE COURT:** Let me hear from Mr. Garfield --

19 **MR. GARFIELD:** Your Honor --

20 **THE COURT:** -- because I feel like we're going in
21 circles now and I'm, frankly, getting tired of it.

22 **MR. GARFIELD:** Yes, ma'am. If I understand Your
23 Honor's ruling, there's a ruling, a legal ruling -- there
24 is a legal ruling that qualified privilege exists in this
25 case. I think it has already been ruled as a matter of law

1 that Chris Cowan, who is the person communicating, he had
2 an interest. In other words, we're talking about the
3 criteria for which the Court relied upon in ruling as a
4 matter of law qualified privilege. You could tell the
5 jury, you know, Chris Cowan communicating whatever had an
6 interest in the subject matter, the law enforcement agency
7 had an interest in the subject matter. The media had a
8 corresponding interest in the subject matter such as the
9 public had an interest and arguably the right to know, for
10 instance, about drug dealing going on in a residential
11 neighborhood, however, they both had an interest. If the
12 statement was limited to the scope of that purpose, the
13 occasion was proper and it was made in a proper manner.
14 So truth and falsity have nothing to do with this portion,
15 therefore, ladies and gentlemen of the jury -- and, again,
16 I'm not even suggesting Your Honor say it the way I am
17 -- very in artfully the way I'm saying it, but to say we
18 have already decided these things, therefore, you as the
19 factfinder only need to determine as to whether Chris Cowan
20 acted with actual malice in light of those things, so it's
21 not about the truth or the falsity for the factfinder and
22 that's why I suggested about the bifurcation to try to get
23 around that. I'm not -- that's almost just a -- a remedy.

24 But, Your Honor, to get back into the truth and
25 falsity, it's going to open up something completely

1 different. It was -- it is presumed or this Court will
2 instruct the jury that the occasion was proper. It's just
3 a question of whether he acted with actual malice in light
4 of those things and I think that comports with Your Honor's
5 ruling.

6 **MS. BUTCHER:** Your Honor, if I may, what he's doing
7 is taking away everything else. For us to win we have to
8 show that Officer Cowan exceeded the privilege. That's not
9 simply by actual malice. It's also because he didn't act
10 in good faith, that he did not tell the proper parties.
11 Your Honor, I don't believe the public was a proper party.
12 The proper party is when there's a common interest and
13 such that if we own a business together and one of our
14 employees is stealing, we can say to each other I think
15 she's stealing. That's the common interest. But to -- I
16 think it's a jury question was it a common interest for an
17 officer investigating the case to go and say as a fact
18 that they committed a crime and that goes beyond the
19 limits of was the statement properly limited. That's a
20 jury question. It wouldn't have been the same situation
21 if the officer had said we're conducting an investigation.
22 The problem comes in when they put it out there as a fact
23 and whether or not that was made in good faith, whether it
24 was being put out there as a fact that these people were
25 selling -- somebody in that home was selling drugs out of

1 the house, was that beyond the limit and was that statement
2 properly limited. To hold us only to actual malice cuts
3 off our other avenues of showing that the privilege was
4 exceeded. And, Your Honor, again, once the privilege --
5 if we could show it was exceeded, then actual malice is
6 assumed.

7 **THE COURT:** So what are you looking for from me?

8 **MS. BUTCHER:** Well, Your Honor --

9 **THE COURT:** Because you've just repeated yourself and
10 I've already made my ruling.

11 **MS. BUTCHER:** I know, Your Honor. Thank you, Your
12 Honor.

13 **THE COURT:** All right. Let's take a break. Let me
14 see y'all in chambers, please.

15 (Recess taken.)

16 (Whereupon, the proceedings were concluded for
17 November 29, 2016, at 3:00 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 28th - 29th days of November, 2016.

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I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

August 4, 2017

ISI Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

JOCELYN NEWMAN, CIRCUIT COURT JUDGE

CASE No. 2012-CP-40-02456
APPELLATE CASE No. 2017-001124

REGINALD ANDRE BLANDING, WANDA
BLANDING, AND BRITTANI BLANDING,
BY AND THROUGH HER GUARDIAN AD
LITEMS, REGINALD ANDRE BLANDING
AND WANDA BLANDING,

PLAINTIFFS,

OF WHOM REGINALD ANDRE
BLANDING WANDA BLANDING, AND
BRITTANI BLANDING ARE

APPELLANTS,

v.

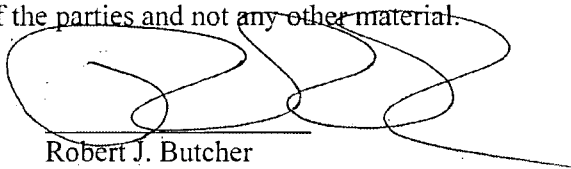
LEON LOTT, IN HIS OFFICAL
CAPACITY,

RESPONDENT.

CERTIFICATE OF APPELLANT

The undersigned certified that the Record on Appeal contains all material
proposed to be included by any of the parties and not any other material.

June 13, 2018



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