THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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

J. Scott Kunst, ...Respondent

v.

David Loree, ...Petitioner.

PETITION FOR CERTIORARI

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Table of Contents

Table of Authorities

South Carolina Case Law

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing to the Court of Appeals in this action was made on June 25, 2018 and finally ruled upon on August 16, 2018.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by not recognizing that the defense of truth was shown by unrefuted Record evidence?
2. Did the Court of Appeals err concerning the defense of qualified privilege when it made a *factual* finding that Petitioner acted in a reckless and wanton manner with a conscious disregard of Respondent's rights?
3. Did the Court of Appeals err in holding that theft is a crime of moral turpitude?
4. Did the Court of Appeals err in using *Duncan v. Hampton County School District* to "clarify" *Sanders v. Prince* concerning whether a jury verdict was excessive?
5. Did the Court of Appeals err by ignoring law in South Carolina regarding the commingling of corporate and personal funds?
6. Did the Court of Appeals err in failing to find that the trial court should have determined as a matter of law as to whether Petitioner had proven the defense of qualified privilege?

STATEMENT OF THE CASE

Respondent J. Scott Kunst ("Kunst") filed his Complaint on December 19, 2006, naming Richard Gaby, Barbara Gaby, and David Loree as Defendants. Kunst alleged tortious interference with contractual relations, unjust enrichment, intentional infliction of emotional distress, and defamation. (Appx. p. 32, Complaint). The Gabys were dismissed from the case on

April 14, 2007, (Appx. p. 21, Order of Dismissal) because the court found that Kunst's causes of actions were compulsory counterclaims of another action involving Kunst, *Gaby v Kunst and Kunstwerke Corp.*, case number 2006-CP-23-2943 (the "Gaby Action"), as set forth in Rule 14, SCRCP, which left Petitioner David Loree ("Loree") as the sole defendant. Loree moved for summary judgment as to all causes of action and on March 3, 2009, the Honorable Edward W. Miller granted Loree summary judgment as to the tortious interference and intentional infliction of emotional distress claims, but denied summary judgment as to the defamation claim. (Appx. p. 20, Order of the Honorable Edward W. Miller dated March 3, 2009).

After Kunst lost his appeal in the Gaby Action, Loree again moved for summary judgment on Kunst's defamation claim based on collateral estoppel. The trial court granted summary judgment (Appx., p. 6, Order of the Honorable Edward W. Miller dated October 19, 2010), which Kunst then appealed to the South Carolina Court of Appeals. On August 14, 2013, the Court of Appeals reversed and remanded the case for trial.[1]

Trial of the case took place May 26-28, 2015, in the Pickens County Court of Common Pleas, the Honorable Robin Stilwell presiding. The jury returned a verdict in favor of Kunst on May 28th and awarded him $1,000,000 in actual damages. On June 8, 2015, Loree moved for JNOV, New Trial in the Alternative, New Trial *nisi remittitur* and New Trial absolute. (Appx.,p. 236, Loree JNOV motion). Loree's motion was denied on June 17, 2015.(Appx. p. 27, Order of the Honorable Robin Stilwell). Loree filed the Notice of Appeal on July 13, 2015. The Court of Appeals affirmed the trial court in its decision of May 30, 2018. (Appx., p.1464). Loree filed his Petition for Reconsideration on June 25, 2018, (Appx., p. 1482) which the Court of Appeals denied on August 16, 2018.

Underlying Facts of the Case.

[1] *See Kunst v. Loree,* Appellate Case No. 2011-199507.

This case is Kunst's attempt to re-try the Gaby Action. In the Gaby Action, the trial court found Kunst and his business, Kunstwerke Corp., to be in default after each failed to file an answer. When Kunst moved to have the default set aside on December 12, 2006, Judge Patterson denied Kunst's motion. Less than one week later, on December 16, 2006, Kunst filed his Complaint in this action, naming Richard and Barbara Gaby and David Loree as defendants. Kunst alleged claims of tortious interference with a contractual relationship, unjust enrichment, intentional infliction of emotional distress, and defamation against all defendants. Petitioner Loree is the only defendant remaining in this case and the only cause of action tried was slander *per se*.

Petitioner Loree is employed by Richard and Barbara Gaby. The Gabys hired Respondent Kunst to design and build a custom home in The Reserve on Lake Keowee. Loree, at the direction of the Gabys, investigated Kunst's work on the Gaby home when it became evident that Kunst was over budget and taking longer to complete the house than he represented. (Appx., 964-965, Tr., testimony of David Loree, pgs. 163: 3- 164: 9). In the course of his investigation, Loree contacted subcontractors and vendors to determine whether or not they had been paid by Kunst. (Appx., p. 972, Tr., testimony of David Loree, p. 171: 11-19). Loree found that Kunst was not paying the subcontractors and vendors as he was obligated to do, even after receiving funds from the Gabys to pay the invoices. (Appx. Pgs. 1034-1046, Tr., testimony of David Loree, pgs. 223-245). Loree also found in some cases that Kunst changed invoice amounts submitted to the Gabys (for amounts more than submitted by the subcontractor). (Appx., pgs. 1024-1046, Tr., testimony of David Loree, pgs. 223-245). These, and other of Loree's findings, were among the evidence presented at the damages hearing in the Gaby Action, held before the Honorable G. Edward Welmaker on March 13, 2007. (Appx., p., 29, Order of Judge Welmaker).

Judge Welmaker found all facts pertaining to the pertinent causes of action were admitted. The facts included:

1. Kunst failed to pay vendors and subcontractors as called for in the contract with the Gabys;
2. Kunst performed defective work;
3. Kunst diverted the Gabys' funds for his own personal use;
4. Kunst engaged in unfair and deceptive trade practices; and
5. Kunst breached his fiduciary duty to the Gabys.

Judge Welmaker also found the Gabys proved their damages claim and he awarded $353,993.91 in damages, with attorney's fees and costs in the amount of $35,807.41.

Kunst, although a former CPA, was unable to keep his company, Kunstwerke, financially solvent. Kunst claimed that the reason his business failed was because Loree informed other Kunstwerke clients about Kunst's nefarious acts. However, tax liens filed by both the Internal Revenue Service and the South Carolina Department of Revenue indicate that Kunst's financial woes began as far back as 2003, well before Loree started his investigation in 2006. (Appx., pgs., 414-460, Defendant's trial exhibits 19, 20, and 21, tax liens).

In sum, during the scope of the investigation Loree performed for his employer, he found Kunst had failed to pay vendors and subcontractors, overcharged on vendor invoices, and used funds paid by the Gabys for his personal use. Judge Welmaker granted damages to Loree's employer based on Loree's findings.

ARGUMENT

A. The Court of Appeals erred by not recognizing that the defense of substantial truth was shown by unrefuted Record evidence.

The Record contains overwhelming and unrefuted evidence that shows Loree proved the affirmative defense of truth. See *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 79, 221 S.E.2d 770, 772 (1976) (The truth of the matter published is ...a complete defense to an action based on defamation).

The first proof of the truth of Loree's alleged statements comes from the Welmaker Order (Appx., p. 29), admitted into evidence at Appx. p. 1256, Tr., p. 455, Defense Ex. 23. In the related Gaby action, Judge Welmaker awarded damages to the Gabys, finding by "clear and convincing" evidence that Kunst had wrongfully taken funds from his clients, Richard and Barbara Gaby. The Welmaker Order was not overturned on appeal. It is public record in South Carolina that Kunst wrongfully took money from his clients.

The second proof of substantial truth of Loree's alleged statements is another order from another judge in this state. The Parham Order (Appx., p. 405) is also public record in South Carolina (and also not overturned on appeal). The Parham action was another lawsuit in which Kunst claimed that another client abandoned him due to Loree's investigation. However, Judge Early's Order clearly shows that Kunst misused funds paid to him by the Parhams. When asked about that Parham Order at the trial of this matter, Kunst provided absolutely no evidence to refute the order and admitted under oath that Judge Early found the defamatory statements to be true. (Appx., p. 1191, Tr. Testimony of J. Scott Kunst, p. 390, lines 4-8).

Third, Loree testified at trial that Kunst misused money from the Gabys meant for the subcontractors and vendors. Loree submitted into evidence the Select Stone invoice that Kunst had marked up. (Appx., p. 1030, Tr. p. 229, lines 10-22, Defense Ex. 6) and evidence that a vendor, Paul Anderson had not been paid.(Appx., pgs. 1039-1043, Tr. pgs. 238:6-242:25, Defense Exhibits 9, 10 and 11). Kunst produced no evidence at all to refute Loree's testimony.

Yet, the Court of Appeals found that because Kunst gave testimony about his accounting practices, the testimony of Loree was rebutted. (Opinion, Appx., p. 1472). The evidence remains uncontroverted that Kunst marked up the Select Stone invoice and that Paul Anderson remains unpaid despite the fact that the Gabys provided funds to pay that vendor.

Fourth, yet another of Kunst's former clients, Eugene C. Covington, Jr.[2] testified at trial that Kunst took money paid by Covington and meant for subcontractors to purchase a ring for Kunst's girlfriend. (Appx., p., 1084, Tr. p. 283:22-25, Testimony of Eugene C. Covington, Jr.). Covington also testified that Kunst refused to provide accounting records to his attorney. (Appx., p., 1086, Tr. p., 285: 2-3, 18-23, Testimony of Eugene C. Covington, Jr.).

Kunst claimed that Loree's investigation and alleged defamatory statements caused his business to fail because Kunst's clients Gaby, Coco, Parham and Covington believed Loree when he allegedly told them Kunst was stealing from them. However, the Welmaker Order and the Parham Order establish that Kunst did indeed wrongfully use funds provided by Gaby and Parham. Covington's own unrefuted testimony established that Kunst stole from him as well. The unrefuted evidence is clear: Kunst's own malfeasance caused his business to go under, not any alleged statements from Loree.

In its opinion, the Court of Appeals is in conflict with precedence established by the South Carolina Supreme Court. In *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 79, 221 S.E.2d 770, 772 (1976), the Supreme Court held that a sufficient defense is made where evidence establishes the statement substantially true. *Id. at* 79, 772. Loree made a sufficient defense of substantial truth with two court orders, his own unrefuted testimony, and the unrefuted testimony of Covington. Loree proved a substantial defense that his alleged statements were true and not defamatory. The Court of Appeals opinion takes the position that *any* amount of testimony from

[2] In its opinion the Court of Appeals mistakenly refers to Mr. Covington as Edward Covington.

Kunst, even if it is refuted and contrary to the public records of this state, is enough to defeat Loree's defense of substantial truth. This is not the law. The law requires sufficient defense from Loree. This does not mean that clearly prejurious testimony, testimony that has no basis in fact whatsoever, and "explanations" of behavior, may be used to create issues of fact. No reasonable jury nor court could accept such specious "evidence" to refute clear testimony and public records. The Court of Appeals erred in affirming the trial court that the affirmative defense of truth was not proven and the trial court verdict should be overturned.

B. The Court of Appeals erred concerning the defense of qualified privilege when it made the *factual* finding that Petitioner acted in a reckless and wanton manner with a conscious disregard of Respondent's rights.

Qualified privilege is a communication made in good faith on any subject matter in which the person communicating has an interest or duty if made to a person with a corresponding interest or duty...one publishing under qualified privilege is liable upon proof of actual malice...recklessly or wantonly or with a conscious disregard of the plaintiff's rights. *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C. 86, 88, 447 S.E.2d 194, 196 (1994). The Court of Appeals erred when it found that Loree acted in a reckless and wanton manner and thereby narrowed the application to qualified privilege more than called for in *Constant.*

Kunst alleged that Loree defamed him to subcontractors Goad and Alfonzo by telling them that Kunst had stolen from all his clients and by stating that Kunst was going to jail. Loree maintains that because he was investigating to see if Goad and Alfonzo had been paid by Kunst for work done on the Gaby home, any alleged defamatory statements he made were protected by qualified privilege.

As set forth in *Constant*, Kunst must show that the qualified privilege defense was not applicable due to Loree's actual malice, that is recklessly or wantonly with a conscious disregard of the Kunst's rights. *Constant*, 316 S.C. at 89, 447 S.E.2d at 196. Further, this Supreme Court has held that. "Actual malice means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff's rights." *Jones v. Garner*, 250 S.C. 479, 488, 158 S.E.2d 909, 914 (1968).

Kunst alleged that because his clients (Hickey, Parham, Coco and Covington) ceased doing business with him because of what Loree allegedly told Alfonzo and Goad, his business failed. Appx., p. 1241, Tr. 440:16-17, Testimony of J. Scott Kunst, Appx. p. 1242, Tr. 441:25-442: 1, Testimony of J. Scott Kunst). According to Kunst, this proved actual malice. However, Kunst submitted no evidence to show his clients were ever told by Loree, Goad, or Alfonzo of the alleged defamatory statements. Neither Goad or Alfonzo testified that they told the clients what Loree allegedly said and they also did not testify that Loree's alleged statements caused clients to cease paying Kunst. Further, the only client Kunst called as a witness was Covington, who testified he had never met with Loree nor had any conversations with him. Covington further testified he ceased paying Kunst when he learned Kunst stole from him. Appx., p. 1087, Tr. 286:5-8, Testimony of Eugene C. Covington, Jr., Appx., p. 1084, Tr. p. 283:22-25, Testimony of Eugene C. Covington, Jr.).

In its Opinion the Court of Appeals held that while Loree and the subcontractors (Goad and Alfonzo) did have a common interest, Loree should have confined his remarks to comments concerning the Gaby project. Not only does this ignore the undisputed fact that the subcontractors were on differing Kunst projects, this is too narrow an interpretation of *Constant*

and *Jones*. The standard in South Carolina is that Loree must have been actuated by ill will in what he did, with the design to causelessly and wantonly injure Kunst, or that the statements were published with such recklessness as to show a conscious indifference toward Kunst's rights. As an initial matter, there is absolutely no evidence in the Record to show that Loree acted in any way (much less indifferently) toward Kunst's *rights*. Second, there was no evidence offered by any party for the Court of Appeals to decide that Loree was actuated by ill will. The Court of Appeals had no evidence upon which to make such a factual finding. Further, after making such a finding, the Court of Appeals attempts to redefine the Supreme Court's standards in *Constant* and *Jones*.

The Court of Appeals found that the qualified immunity applied (Appx., p. 1475, Court of Appeals opinion) and then made the factual finding that the privilege was exceeded. Respectfully, the Petitioner is entitled to a new trial on this entire matter. Given that the Court of Appeals "found" facts not presented below and then used those facts to make conclusions of law, manifest injustice to the Petitioner is blatant and highly prejudicial to Petitioner.

First, the Court of Appeals should not defer to the trial court when the evidence is, at best "speculative, theoretical, and hypothetical...." *Parrish v. Allison*, 376 S.C. 308, 319–20, 656 S.E.2d 382, 388 (Ct. App. 2007), or, as here, nonexistent. Second, an appellate court sitting in law generally should not "find" its own facts. In some circumstances, such as review of family court decisions or cases in equity, an appellate court may make its own factual findings. However, "When an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision." *Ahrens v. State*, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). The Court of Appeals did not do this. In its Opinion, the Court of Appeals makes factual findings that were not made below. In

an action at law, when a case tried by a jury is appealed, "the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

Here, the Opinion of the Court of Appeals contains numerous "findings" of fact without explanation (and inconsistent with the standard on appeal for this case at law):

1) "We find Loree's statement that Kunst took money from other clients was not a proper matter for Loree to discuss during the investigation of the Gaby project." (Appx., p. 1475)

2) "In the instant case, evidence demonstrates Loree's statements to subcontractors—that Kunst took money from other clients—went beyond the scope of the subcontractors' involvement in the Gaby project." (Appx., p. 1475)

3) "We find that Loree could have investigated the Gaby project without implicating Kunst's financial affairs with other clients." (Appx., p. 1475).

Respectfully, these "findings" are beyond the domain of the Court of Appeals. There is no evidence in the Record before this Court that Loree exceeded the scope of his qualified immunity. There are no Record facts alleged below that Loree did so. The issue before this Court regarding qualified immunity is related to the actual malice element. The issue of exceeding the scope of the immunity was not raised by the parties, as this issue was not contested at the trial below.

C. The Court of Appeals erred in holding that theft is a crime of moral turpitude.

Kunst alleged that Loree had committed slander *per se*. However, to prove slander *per se* Kunst must show he was charged with, *inter alia* (which are not alleged here), the commission of a crime of moral turpitude. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506

S.E.2d 497 (1998). The Court of Appeals cited *McBride v. School District of Greenville Co.*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) to opine that Loree accused Kunst of a crime of moral turpitude when Loree alleged that Kunst embezzled funds. The Court of Appeals interpreted *McBride* to mean that any crime is a crime of moral turpitude. The Court of Appeals also relied on *Turner v. Montgomery Ward & Co.,* 165 S.C. 253, 260-61, 163 S.E.796, 798 (1932) which stated that any words that ...or that raise strong suspicion in the minds of hearers are actionable *per se*. The Court of Appeals erred.

First, the Court of Appeals overlooks the distinction between actionable *per se* and slander *per se*. *Holtzscheiter*, 332 S.C. at 509–10, 506 S.E.2d at 501 ("[T]here is the question whether the statement is defamatory *per se* or *per quod.* A separate issue is whether the statement is 'actionable *per se*' or not"). Slander *per se* is actionable *per se* only if it charges the plaintiff with the commission of a crime of moral turpitude. *Id.* at 511, 506 S.E.2d at 502. It is insufficient to allege the defendant charged the plaintiff with committing any crime, but rather it must be a crime of moral turpitude. Simply raising a strong suspicion in the minds of hearers does not make slander actionable *per se* as the Court of Appeals mistakenly finds.

Second, in *Green v. Hewett*, 305 S.C. 238, 240, 407 S.E.2d 651, 651 (1991), this Court defined crimes of moral turpitude. *Green* defines a crime of moral turpitude as involving acts of baseness, vileness or depravity, thus showing there is a distinction between a crime and a crime of moral turpitude. *Id.* at 240, 407 S.E.2d at 652.

The Record is absent of any evidence showing Loree accused Kunst of committing a crime of moral turpitude. Kunst alleged that Loree said Kunst was going to jail, that Kunst had used client money to purchase a ring and personal vacations and that Kunst had embezzled from his clients. While some of these may be crimes, for Kunst to prevail in his slander *per se* action

he would have to show baseness, vileness or depravity that affected society as a whole. In its Opinion, the Court of Appeals cites *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) which held that an allegation charging the plaintiff with larceny or breach of trust was actionable *per se*. The matter at hand clearly is distinguishable from the *Bank of Abbeville* case. Unlike Kunst's allegations related to his few clients, the *Bank of Abbeville* matter involved plaintiffs whose actions affected society as a whole. Crimes of moral turpitude have societal impact, such as human trafficking or drug dealing as addressed in *Green*.

Here, Loree never accused Kunst of such heinous acts. Loree did not charge Kunst with committing a crime of moral turpitude. The Court of Appeals ignored this Supreme Court's distinction between crimes and crimes of moral turpitude. The Court of Appeals' holding would establish (as new law in South Carolina) that any crime was a crime of moral turpitude and would open up the elements of slander *per se* so that charging a plaintiff with any crime, whether murder or jaywalking, would allow a plaintiff to sue for damages that need not be proven. This is not what this Supreme Court intended when it made careful efforts to alleviate confusion concerning actionable *per se* as opposed to slander *per se* in the *Holtzscheiter* opinion. The Court of Appeals Opinion should be reversed and the verdict should be overturned because Kunst failed to establish Loree charged him with a crime of moral turpitude, a necessary element needed to prove his case for slander *per se*.

D. The Court of Appeals erred in using *Duncan v. Hampton County School District* #2 to "clarify" *Sanders v. Prince* concerning whether the jury verdict was excessive.

Sanders v. Prince, 304 S.C. 236, 237, 403 S.E.2d 640, 641 (1991) is a South Carolina Supreme Court case that held a jury verdict was motivated by passion when the jury asked questions of the trial court that overstepped its bounds. In *Sanders*, a slander action in which

the jury returned a verdict in excess of one million dollars, this Supreme Court found that a jury sent a question to the trial judge during deliberations asking, "Can we force [the defendant] to resign from the School Board?" *Id.* at 239, 403 S.E.2d at 642. The Supreme Court noted that the trial judge acted properly in answering the jury's question in the negative, but that the "attempt by the jurors to exceed the authority granted them by the trial judge's instructions is evidence of the fact that the jury was motivated by passion, caprice, and prejudice." *Id.* at 238-39, 403 S.E.2d at 642. This Supreme Court held that "the conduct of the jury, as well as the amount of the award, lead us to the conclusion that the jury's verdict was based on passion, caprice, and prejudice, rather than on the evidence presented at trial." *Id.* (emphasis added).

During jury deliberations at trial, the jury sent a note to the trial court judge asking if the jury could decide which of Kunst's creditors would get the money they chose to award. (Appx., p. 769, Court Exhibit 4). This is exactly what this Supreme Court in *Sanders* found to be "evidence of the fact that the jury was motivated by passion, caprice, or prejudice." *Sanders*, 304 S.C. at 238-39, 403 S.E.2d at 642. The jury in this case exceeded its authority when it took upon itself to direct who would get a portion of the damages award and how much it would be. The verdict is also disproportionate to any reasonable amount, particularly given the paucity of Kunst's evidence on damages. It is clear that the jury was not seeking to award damages to Kunst, but rather to those subcontractors whom Kunst failed to pay – many of whom are in the same community of the jurors. This is not within the province of the jury. The jury's actions in exceeding its authority, the excessive amount of the damages award, and the paucity of evidence to support the damages award to Kunst show that the jury must have been motivated by passion, caprice, and prejudice. Therefore, following the *Sanders* holding, the trial court should have overturned the verdict.

The Court of Appeals relied on its own case *Duncan v. Hampton County School District #2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) to "clarify" this Court's ruling in *Sanders*. The Court of Appeals held that *Sanders* applied only when the jury verdict was excessive. This is error for two reasons.

As a preliminary matter on this issue, the Court of Appeals either overlooked or disregarded evidence in the Record that showed Kunst's testimony was inconsistent regarding his damages. The Court of Appeals overlooked that Kunst's tax liens start before Loree made his alleged defamatory statements. If Loree's slander destroyed Kunst's business as he claims, why is it he had tax liens filed against him before Loree started his investigation? Kunst claimed his clients Hickey, Parham, Coco and Covington all ceased paying him because Loree began his investigation. However, only one client testified about this issue – Covington. Covington's unrefuted testimony was crystal clear – Covington stopped doing business with Kunst because Kunst couldn't account for the money Covington had paid Kunst to pay the subcontractors.

More importantly, this Supreme Court did not hold in the *Sanders* opinion that if the verdict was not excessive, the jury's conduct need not be taken into consideration. The Court wrote: "The conduct of the jury, as well as the amount of the award, lead us to the conclusion that the jury's verdict was based on passion, caprice, and prejudice, rather than on the evidence presented at trial." *Sanders*, 304 S.C. at 238–39, 403 S.E.2d at 642. Clearly, this Supreme Court took seriously a jury overstepping its bounds as a significant indication that the jury's verdict was based on caprice rather than the evidence. The amount of the verdict was an aggravating event, not the primary consideration. The Court of Appeals created its own interpretation of what indicates if a jury verdict is based on caprice, passion or prejudice, rather than holding to

clear precedent established by this Supreme Court in *Sanders*. By so doing, the Court of Appeals is fundamentally changing the law in South Carolina.

E. The Court of Appeals erred by ignoring law in South Carolina regarding commingling of corporate and personal funds.

The Court of Appeals found that because Kunst testified that he used Kunstwerke (i.e., corporate) funds to make certain personal expenditures, there is a conflict in evidence between Kunst and Loree. The Court of Appeals writes that conflicting evidence was presented regarding the "statements:" (1) "Loree asserted his statements that Kunst took money from clients and spent it elsewhere were true because Loree introduced letters and invoices from suppliers showing Kunst did not pay subcontractors, despite receiving the funds to make the payments," and (2) "Loree argued that Kunst's own witness, Edward Covington, testified Kunst took money from his project and spent the money on an engagement ring." (Appx., p. 1084, Tr. 283: 22-25, Testimony of Eugene C. Covington, Jr.). The Court of Appeals ignores uncontroverted, Record evidence here. Kunst does not deny that that he took money from Kunstwerke corporate accounts. In fact, Kunst admits freely that he used Kunstwerke funds for personal purchases: to purchase an engagement ring for his fiancée, to pay for his apartment, for his parents' house, and, among other things, a BMW. Appx., pgs. 1186, 1182, 1183, 1181, 2nd Supp. R. 385, 381, 382, 380, Tr., testimony of Scott Kunst, Appx., p. 1174, p. 373:15-374:7; Appx., p. 1170, 369:24-370:1; Appx., p. 1171, 370:10-12; 368:23-25.) Gene Covington's testimony is uncontroverted. (Appx., 1084, 2nd Supp. R. 294, Tr., testimony of Eugene Covington 282:20-25). The Record is bereft of evidence that contradicts these statements. The Record does, though, offer that Kunst freely testified that he used Kunstwerke funds between his various projects and that he took money for personal use. Simply because Kunstwerke may have

been a S-corporation for tax purposes does not allow the corporate funds to be raided and siphoned indiscriminately by the business owner.

While the testimony in the Record is a bit tortured, as the trial court gave Kunst – a pro se litigant - very wide latitude with his testimony and admission of evidence, the Court of Appeals simply could not credibly find evidence that controverts the statements the Court of Appeals posits as example. The Record does contain Kunst's *explanations* of why he did do these things – but he cannot and does not deny the fact that he did these things. "Explanations" – by definition - are not contrary evidence.

After overlooking the Record evidence, the Court of Appeals then writes that, "Conversely, Kunst explained how his personal draw schedule allowed him to make personal purchases—such as an engagement ring in 2005—using Kunstwerke capital collected from clients in the form of design fees." (Appx. p., 1472) (emphasis added). The Court of Appeals seems to then find that Kunst's "testimony and explanations [of taking money from Kunstwerke for personal expenditures] were sufficient to create a conflict in the veracity of Loree's alleged statements." (Appx., pgs. 1472-73).

Significantly, while Kunst explains that his paying for personal items out of the Kunstwerke accounts is simply an accounting function, such a position flies in the face of generally accepted accounting practices. In fact, what Kunst did through Kunstwerke has been the subject of many cases in South Carolina. For example, in *C.T. Lowndes & Co. v. Suburban Gas & Appliance Co.*, 307 S.C. 394, 415 S.E.2d 404 (Ct. App. 1991), the court agreed that the siphoning of funds from a corporate account for personal use is improper.

In *C.T Lowndes*, the circuit court found that an owner of a business (McLaughlin) took funds from the corporate accounts "for the use and benefit of himself, his family, friends,

associates" and that the business "failed to retain sufficient assets to pay its creditors, failed to file tax returns for 1986 and 1987, failed to keep appropriate records or observe corporate formalities, functioned only through McLaughlin without the contribution of other officers and directors except his son, who did only what McLaughlin directed." *Id.* at 307 S.C. 395, 415 S.E.2d 405. The court then pierced the corporate veil due to the business's/owner's behavior in not maintaining correct corporate protocols and for the siphoning of corporate funds for personal use.

There are many similar cases in South Carolina – cases that hold that a business owner is not allowed to disregard corporate forms (even if an S-corporation) and pay himself "dividends" or "fees" which have the effect of depriving creditors of recovery of debt. See, .e.g., *Hunting v. Elders*, 359 S.C. 217, 228, 597 S.E.2d 803, 809 (Ct. App. 2004) ("The court specifically found the money was never accounted for and must have been siphoned by Elders. This is additional evidence that the corporation was used as a mere facade for the benefit of the dominant shareholder, justifying the ultimate conclusion reached by the trial court."); *Cumberland Wood Prod., Inc. v. Bennett*, 308 S.C. 268, 272, 417 S.E.2d 617, 619 (Ct. App. 1992) ("Additionally, Tri-Wood used the money that was paid by Greif for Cumberland's products to pay other creditors and 'for other investments or things.'")(emphasis added).

In this matter, Kunst's testimony is clear:

> Q ... You used the corporate banking account for your company, Kunstwerke, to make personal purchases, correct?
>
> A That is correct. As personal draws.
>
> (Appx, p. 1169, 2nd Supp. R. 380, Tr. Testimony of Scott Kunst, 368:12-14.)

Q ... [Y]ou bought Tracy's ring out of your corporate account, yes or no?

A Yes.

(Appx., p. 1169, 2nd Supp. R. 380, Tr. Testimony of Scott Kunst, 368:23-25).

Q My question is while making purchases for the Cliff Ridge [business investment] property from your corporate account, you were deducting the mortgage interest from that house on your personal income taxes, correct?

A The Cliff Ridge property was my primary residence, so I would have deducted the mortgage interest....

(Appx., p. 1180, 2nd Supp. R. 380, Tr. Testimony of Scott Kunst, 379:12-18).

So, what the South Carolina Department of Revenue did was take all that money that came into my company from all these fees and had no expense income against that they imputed a large income number like four million dollar income on here. And as I stated earlier, I never made more than, I guess, it was 80 for that one year.

(Appx., p. 1152, 2nd Supp. R. 380, Tr. Testimony of Scott Kunst, 351:13-19).

The Court of Appeals Opinion appears to hold that because Kunst testified that he did, in fact, commingle funds, there is a conflict in the evidence that warrants affirming the trial court. Such a holding is contrary to the law of South Carolina regarding the separateness of corporate entities. As Kunst himself testified, his accounting is "unique." However, the reason the accounting is "unique" is because it is completely against generally accepted accounting practices, construction industry standard practices, established corporate procedures, and the tax laws of the United States and of South Carolina. In effect, the Court of Appeals endorses and encourages commingling of personal and corporate funds and the siphoning of funds from corporate accounts for personal use and sets a precedent that a party's evidence can be given weight even if the party testifies he has violated South Carolina law.

F. The Court of Appeals erred in failing to find that the trial court should have determined as a matter of law as to whether Petitioner had proven defense of qualified privilege.

The trial court found that the defense of qualified privilege should be allowed, but did not determine as a matter of law whether the qualified privilege should apply. (Appx., pgs. 1309-1312, R., pgs. 212-213, Tr., p. 506:15-509:1). This was an error of law. "It is the duty of the trial judge to determine if the statement is privileged." *Murray v. Holnam*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001); *accord Swinton Creek Nursery v. Edisto Farm Credit, ACA,* 334 S.C. 469, 485, 514 S.E.2d 126 (1999). The trial court should have instructed the jury that the qualified privilege did apply. Instead, the trial court allowed the jury to determine as a matter

of fact whether the qualified privilege applied. (Appx., pgs. 1347-48, R., 221-222, Tr., p. 544:16-545:12).

Loree requested a directed verdict on the grounds of qualified privilege, which the trial court denied. (Appx. pgs. 1310-12, Tr. 507:20-509:3 Defendant's motions for directed verdict). Loree also moved for the jury's verdict to be overturned on the grounds that the alleged slanderous statements were protected by qualified privilege, which was also denied. (Appx., p. 236, R., pgs. 231-241, Defendant's JNOV motion).

CONCLUSION

The Court of Appeals erred in affirming the trial court and in so doing, chose to overlook established precedent set by this Honorable Court, to overlook established law and to overlook evidence in the Record and to raise its own novel question of law. For these reasons, the Court of Appeals should be reversed.

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September 17, 2018

Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

Appellate Case No. 2015-001536

J. Scott Kunst ..... Respondent,

v.

David Loree ..... Petitioner.

PROOF OF SERVICE

I certify that I have served the **Petition for Writ of Certiorari and Appendix** on *pro se* Respondent at his last-known address of 950 Progress Street, #217, Pittsburgh, PA 15212, by depositing it into the U.S. Mail, first class postage prepaid on September 17, 2018.

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