

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.

APPENDIX
VOLUME IV

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J. Scott Kunst Respondent,

v.

David Loree Appellant.

**2nd SUPPLEMENTAL RECORD ON APPEAL
VOLUME II**

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SC Court of Appeals

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1 May 28, 2015

2 **THE COURT:** Counsel, we ready for the jury?

3 **MS. WRIGHT:** Yes, we are, Your Honor.

4 **THE COURT:** If you would, sir, put Ms. Sharon
5 King, please, Sharon King, as foreperson of the jury.
6 Sharon. There are two Kings. There's a Pamela and a
7 Sharon. It's Sharon.

8 **THE BAILIFF:** Yes, sir, Your Honor.

9 (WHEREUPON, the jury came into open court at
10 approximately 9:37 a.m.)

11 **THE COURT:** Good morning, everybody. Good
12 see you here again this morning.

13 Ms. King, I am appointing you as foreperson of
14 the jury. Congratulations. That's a reward for your
15 accomplishments as a juror this week. I can tell you
16 that the duties of a jury foreperson are fairly ill
17 defined under the law. What your duties are as
18 foreperson is to make sure that when the jury is in
19 deliberations that everyone has the opportunity to be
20 heard, that everyone has a voice and no one is
21 drowned out. I know that in a group of 12 people,
22 there are going to be some people who are very loud
23 and verbose, and there may be some people a little
24 more reserved. Need to make sure that just everybody
25 has the opportunity to be heard. Otherwise, I can't

1 give you any instructions as to how to conduct jury
2 deliberations. It could be a matter of consensus
3 among you or you can try to organize it. I don't
4 know because I've never been on a jury and because
5 I'm not allow to go into the jury room while the jury
6 is deliberating or it would be an automatic mistrial.
7 So, I don't know how y'all arrive at questions -- at
8 the answers other than by mutual agreement and
9 discussing it.

10 So, when you get into your jury room, make sure
11 everybody has the opportunity to be heard. If during
12 your deliberations you have any questions, then you
13 may write those down and you can give them to the
14 bailiff to present to me. I am hopeful that you
15 won't have any questions, that my charge will answer
16 all of your questions, however, you may have some and
17 you're welcome to give them to me to answer.
18 Sometimes, I can answer questions that are posed and
19 sometimes I can't. Also, when and if the jury
20 reaches a unanimous verdict, you will sign the
21 verdict form and you will let the bailiff know that
22 you've reached a unanimous verdict.

23 Now, I'm leaning forward a little bit because I
24 anticipate we're going to argue and charge here in a
25 little bit. The only matter remaining, evidentiary

1 matter remaining, is the reading into the record a
2 deposition transcript. Now, I told you earlier in
3 the trial that a deposition is an out-of-court
4 statement made by witnesses under oath in
5 anticipation of trial. In many instances, it's made
6 as a part of discovery, that is as people are going
7 through the process of learning what the other party
8 is saying, what they're opposing.

9 Now, at certain times, it may come to pass that
10 those depositions are used at trial. You heard
11 depositions used at trial to clarify and/or impeach a
12 witness's testimony already. In this instance, we
13 have an unavailable witness, that is a witness that
14 is outside of the subpoena power of the parties in
15 this case. And that witness will not be available to
16 testify. So, the parties have determined certain
17 portions of that — of the transcript, the deposition
18 transcript which should be read to you, which can be
19 read to you, which will be read to you. Again, those
20 deposition transcripts are just like any other piece
21 of evidence that you receive in a case; just like any
22 other testimony. You decide if it's valuable or not.
23 You decide if it's credible or not. All right.
24 Having said that, we'll proceed.

25 Mr. Kunst, I believe it's your case, sir.

1 **MR. KUNST:** Thank you, Your Honor. If it
2 pleases the Court, the Plaintiff would like to read
3 from the deposition of Richard Gaby.

4 **THE COURT:** Okay. All right. Who is going to
5 read? Who is going to play the role of Mr. Gaby?

6 **MS. HILTON:** I will, Your Honor.

7 **THE COURT:** All right. Ms. Hilton, if you will
8 come forward please, ma'am, you can take a seat on
9 the witness stand.

10 Do the parties concede, stipulate, that Mr. Gaby
11 was under oath at the deposition at the taking of the
12 same?

13 **MR. SMITH:** Yes, Your Honor.

14 **MR. KUNST:** Yes, Your Honor.

15 **THE COURT:** All right. We will forgo the
16 reading of the swearing of the witness and there will
17 be a stipulation that he was under oath at the time.

18 Okay. You may begin, Mr. Kunst.

19 **MR. KUNST:** Are you ready, Ms. Hilton?

20 **MS. HILTON:** Yes.

21 **MR. KUNST:** Please begin reading the first part
22 of the line.

23 (WHEREUPON, the deposition of Richard Gaby was
24 read into the record by Ms. Hilton.)

25 **MS. HILTON:** Question by Mr. Kunst --

1 **THE COURT:** And here's what I would like you
2 do. I'd like you to read the question, then you can
3 read the answer to the question, okay?

4 **MR. KUNST:** Yes, sir, Your Honor.

5 **MS. HILTON:** We can just go back and forth?

6 **THE COURT:** Tell you what, if that's the way
7 y'all rehearsed doing it, you just do it. Just make
8 clear what the question is and what the answer is
9 okay. All right. Go ahead. You may proceed.

10 **MS. HILTON:** Question by Kunst: Who is David
11 Loree?

12 **Answer:** He works for us.

13 **Question:** Do you recognize his business card?

14 **Answer:** Yeah.

15 **Question:** Do you need time to review it for
16 accuracy?

17 **Question:** When did Loree first begin working
18 for you?

19 **Answer:** Spring of 2005.

20 **Question:** What is his official job title?

21 **Answer:** He doesn't have an official job title.
22 He does anything I ask him to do.

23 **Question:** Does he no longer serve in the
24 capacity as indicated on that business card?

25 **Answer:** He does to some degree.

1 Question: Does he serve as an executive
2 protection administrator for you?

3 Answer: Yes, on some levels, he does.

4 Question by Mr. Kunst: Based on the contract
5 that you signed, was there any stipulation for
6 withholding reimbursement based on progress?

7 The Witness: I paid every invoice that was
8 submitted to me other than the last one.

9 Question: At any time, did you order an
10 independent audit of your account with Kunstwerke?

11 The Witness: I don't recollect.

12 Question by Mr. Kunst: Did you order him to
13 contact, as his employer, any subcontractors,
14 vendors?

15 Answer: We were trying to ascertain how monies
16 were being handled.

17 Question: Did you ask him to contact other
18 clients of Kunstwerke?

19 Answer: No.

20 Question: Are you aware that he did?

21 Answer: No.

22 Question by Mr. Kunst: Do you have any
23 information regarding whether or not Scott Kunst has
24 been caught co-mingling his clients money?

25 The Witness: I don't know how I'd have a -- no,

1 I don't.

2 Question by Mr. Kunst: Has Scott Kunst
3 embezzled money from all of his clients to your
4 knowledge?

5 Answer: I have no knowledge of that.

6 Question by Mr. Kunst: Do you have any
7 information as to whether or not funds that you
8 disbursed to Kunstwerke were spent on luxury cars or
9 foreign trips?

10 Answer: No.

11 Question: Have you ever asked Mr. Loree to make
12 physical —

13 Mr. Smith: To be clear, you're saying you have
14 no knowledge of that?

15 The Witness: I have no knowledge.

16 Mr. Kunst: That was understood.

17 Mr. Smith: I want it clear for the record.

18 Question by Mr. Kunst: Have you ever asked
19 Mr. Loree to make physical threats to anyone of his
20 employees?

21 Answer: Absolutely not.

22 Question: Did Scott Kunst ever go to jail to
23 your knowledge?

24 Answer: I have no knowledge.

25 Question: Do you have any reason as you sit

1 here to believe that Scott Kunst is going to jail as it
2 relates to your project?

3 Mr. Smith: Object to the form.

4 Mr. Stern: Object to the form of the question.

5 I'm sorry.

6 MS. HILTON: Is that okay?

7 THE COURT: Is that the objection you wish to
8 lodge, Mr. Smith?

9 MR. SMITH: No, that was an objection to the
10 form, but she can finish reading the answer.

11 THE COURT: You may continue.

12 (WHEREUPON, Ms. Hilton continues reading
13 deposition of Richard Gaby into the record.)

14 MS. HILTON: The Witness: I have no basis to
15 answer that.

16 Question by Mr. Kunst: Do you have today as you
17 sit here any specific knowledge that Scott Kunst has
18 embezzled funds with you?

19 Mr. Smith: You can answer that.

20 The Witness: We have a judgment against Scott
21 Kunst.

22 Question by Mr. Kunst: Is that the default
23 judgment?

24 Answer: Is that what it was, default judgment?

25 Question by Mr. Kunst: Do you know how large

1 that judgment is?

2 Answer: I don't have a recollection.

3 Have you ever seen this affidavit before?

4 Answer: I have not.

5 Question: Do you have any information regarding
6 an insurance policy as stated in the third line from
7 the bottom that was taken out on your house?

8 Answer: I do not.

9 Have you ever referred to Scott Kunst as a
10 criminal?

11 Answer: I have no recollection.

12 As you sit here today, do you have any knowledge
13 regarding money missing from other Kunstwerke
14 projects?

15 Answer: No, I do not.

16 Mr. Smith: Meaning you don't have knowledge or
17 way or the other?

18 The Witness: I have no knowledge.

19 Question: Do you have any knowledge of dummy
20 invoices that you may or may not have received?

21 Answer: I do not have any knowledge.

22 Question by Mr. Kunst: You may have answered
23 this question, but refresh my memory, you have not
24 performed a reconciliation of your Kunstwerke
25 account?

1 Mr. Smith: Answer.

2 The Witness: I have no knowledge or
3 recollection.

4 Question: Has Mr. Loree ever said to you, his
5 employer, that he believed that 400,000 had been
6 embezzled from you?

7 Answer: I don't recollect.

8 Question: Did you ask him to do something
9 insofar as determining the payment of subcontractors,
10 suppliers, that sort of thing?

11 Answer: We were trying to ascertain the facts.

12 Question: But did you ask him to do that?

13 Answer: Yes.

14 Question: The questions you've been asked here
15 today about amounts and contracts and accounts and
16 reconciliations, are those questions more properly
17 directed to Mr. Loree?

18 Answer: Most of them, yes.

19 THE COURT: Does that conclude the deposition of
20 Mr. Gaby?

21 MR. KUNST: That concludes the deposition
22 testimony of Richard Gaby.

23 THE COURT: You have another witness whose
24 deposition you'd like to read?

25 MR. KUNST: Yes, Your Honor. The Plaintiff

1 would ask that the deposition of Barbara Van
2 Andel-Gaby be read.
3 THE COURT: Barbara Van Andel-Gaby?
4 MR. KUNST: Yes.
5 THE COURT: Okay.
6 MR. KUNST: May I approach?
7 THE COURT: Yes, sir, absolutely.
8 (WHEREUPON, the deposition of Barbara Van
9 Andel-Gaby was read into the record by
10 Ms. Hilton.)
11 MS. HILTON: Question: Do you own a home
12 designed by me at The Reserve at Lake Keowee in
13 Pickens County, South Carolina?
14 The Witness: Yes.
15 Question by Mr. Kunst: How often do you visit
16 that home?
17 Answer: It varies, but about a month out of the
18 year.
19 Question: Four weeks a year?
20 Answer: Witness nods head affirmatively.
21 Question: Do you appear here today voluntarily
22 or by subpoena?
23 Answer: By subpoena, right?
24 Mr. Smith: I'll object to the form. It's
25 basically calling for a legal conclusion that my

1 client is not competent to answer.
2 Mr. Stern: Same objection.
3 Mr. Smith: She's here by agreement and then
4 your subpoena was served after our agreement.
5 Question by Mr. Kunst: What is an executive
6 protection administrator?
7 Answer: I don't know.
8 Question: Is Mr. Loree still employed by you?
9 Answer: Yes.
10 Question: Has he been continually employed by
11 you since March 2006 until present?
12 Answer: Yes.
13 Question by Mr. Kunst: Did Mr. Loree ever speak
14 to you regarding his relationship with me
15 directly?
16 Answer: No.
17 Question: Did he ever report to you directly
18 regarding the construction of the house at Lake
19 Keowee?
20 Answer: No.
21 Question: As a signer of the contract, did you
22 make any effort to ascertain whether all weekly
23 billings were reimbursed?
24 Mr. Smith: Object to form. She can answer that
25 question if she knows.

- 1 Question by Mr. Kunst: You can answer it.
2 Answer: I don't know. I'm not involved.
3 Question: You say you're not involved? This
4 may answer that question, but just to be sure,
5 at any time, have you asked Mr. Loree or anyone
6 else to do a full audit of your Kunstwerke
7 Construction account?
8 Answer: No.
9 Question: Have you asked Mr. Loree or anyone
10 else to do a full reconciliation of your
11 Kunstwerke Construction account?
12 Mr. Smith: Object to form, but to the extent
13 you can, you may answer.
14 The witness: I have no idea.
15 MR. SMITH: I think you actually skipped a page
16 MS. HILTON: Okay. Where is that?
17 MR. SMITH: Page 12, Lines 4 through 10.
18 MS. HILTON: Page 12?
19 MR. SMITH: Yes, ma'am.
20 MS. HILTON: What lines?
21 MR. SMITH: Four through 12 — I'm sorry, 4
22 through 10.
23 MS. HILTON: I think I did read it, but I'll
24 read it again.
25 MR. SMITH: I'm sorry if you did. I must have

1 missed it.

2 (WHEREUPON, the deposition of Barbara Van
3 Andel-Gaby continued to be read into the record
4 by Ms. Hilton.)

5 MS. HILTON: Question by Mr. Kunst: Did Mr.
6 Loree ever speak to you regarding his relationship
7 with me directly?

8 Answer: No.

9 Question: Did he ever report to you directly
10 regarding the construction of the house at Lake
11 Keowee?

12 Answer: No.

13 Question: Do you have any information as you
14 sit here today whether or not Scott Kunst has
15 embezzled money from all of his clients?

16 Answer: I do not know.

17 Question: Do you have any information as you
18 sit here today whether or not any of your
19 personal funds intended to go towards your house
20 on Lake Keowee went towards luxury cars or
21 foreign trips?

22 Answer: I do not know.

23 Question: Have you ever instructed Mr. Loree to
24 make personal threats against anyone?

25 Answer: Absolutely not.

1 Question: Based on your knowledge, is Scott
2 going to jail?

3 Answer: I do not know.

4 Question by Mr. Kunst: Did you ever instruct
5 David Loree to use the word jail time in
6 reference to Scott Kunst?

7 Answer: No.

8 Have you heard David Loree ever refer to Scott
9 Kunst as a criminal?

10 No.

11 Have you instructed him to state that to anyone
12 else?

13 Mr. Smith: To state what?

14 Mr. Kunst: That Scott Kunst is a criminal.

15 The witness: No.

16 Question begins: My question to you relates to
17 that. Do you have any information or evidence
18 that 400,000 has been taken from the Gaby
19 project?

20 Answer: I have no knowledge of any of this.

21 Question: At any time since March 2006, did you
22 instruct David Loree to contact all of
23 Kunstwerke clients?

24 Answer: No.

25 Question: Did you ask David Loree to do an

1 investigation of Scott Kunst's financial
2 matters?
3 Mr. Stern: Object to the form of the question.
4 Mr. Smith: Join.
5 The witness: I have no knowledge.
6 MR. SMITH: Tracy, you forgot Page 22 as well.
7 MS. HILTON: I'm sorry?
8 MR. SMITH: And Page 24 and Page 20.
9 MS. HILTON: Oh, really. I didn't have a tab on
10 that, I'm sorry.
11 MR. SMITH: And 27.
12 MS. HILTON: Okay. If you can give me the
13 pages one at a time, I'll read it.
14 MR. SMITH: Page 22, Lines 6 through 12.
15 (WHEREUPON, the deposition of Barbara Van
16 Andel-Gaby continued to be read into the record
17 by Ms. Hilton.)
18 MS. HILTON: Question: During the time you
19 spent at your lake home at Lake Keowee in 2006, did
20 you hear any rumors regarding Scott Kunst regarding
21 financial matters?
22 Answer: In 2006?
23 Question: Yes.
24 Answer: I have no memory of that.
25 MR. SMITH: Page 24, 17 through 24.

1 MS. HILTON: Okay. I didn't have that
2 highlighted. 17 through 24?

3 MR. SMITH: Yes.

4 MS. HILTON: 24, 17 through 24?

5 MR. SMITH: Yes, ma'am.

6 (WHEREUPON, the deposition of Barbara Van
7 Andel-Gaby continued to be read into the record
8 by Ms. Hilton.)

9 MS. HILTON: Question: Exhibit 4, the following
10 is a transcript of a hearing presented by David
11 Loree. It's a default damages hearing in a case
12 involving Richard Gaby and Barbara Van Andel v.
13 Scott. Did you testify in this hearing?

14 Answer: No.

15 Question: Were you present?

16 Answer: No.

17 MR. SMITH: Page 26, 10 through 13.

18 (WHEREUPON, the deposition of Barbara Van
19 Andel-Gaby continued to be read into the record
20 by Ms. Hilton.)

21 MS. HILTON: Question by Mr. Kunst: Do you have
22 an outstanding damage award against me personally at
23 Kunstwerke?

24 Mr. Smith: You may answer if you know.

25 The Witness: Yes.

1 MR. SMITH: Page 26, Lines 23 to over the next
2 page through Line 3.
3 MS. HILTON: Twenty-two through?
4 MR. SMITH: Three on the next page.
5 (WHEREUPON, the deposition of Barbara Van
6 Andel-Gaby continued to be read into the record
7 by Ms. Hilton.)
8 MS. HILTON: Did you ever ask Mr. Loree to make
9 sure that Kunstwerke was paid everything it was due
10 as signer of the contract?
11 Mr. Smith: Object to the form. If you know,
12 you may answer.
13 The Witness: I don't know. I'm not involved in
14 the financial side of things.
15 MR. SMITH: And Page 29, 7 through 13.
16 MS. HILTON: Really? Lines again?
17 MR. SMITH: Seven through 13.
18 MR. KUNST: Your Honor, may we pause for a
19 moment?
20 THE COURT: Yes. We're getting some water for
21 you.
22 MS. HILTON: Seven through 13?
23 MR. SMITH: Yes, ma'am.
24 (WHEREUPON, the deposition of Barbara Van
25 Andel-Gaby continued to be read into the record

1 by Ms. Hilton.)

2 MS. HILTON: Question: Did you hear at that
3 same time the possibility from someone other than
4 David Lorce that there may be an account balance
5 owed?

6 Answer: I have no knowledge of anything.

7 Question: When you say you have no knowledge,
8 you do not recall or you have no knowledge?

9 Answer: I don't have any knowledge.

10 MR. SMITH: That's all.

11 THE COURT: Anything else?

12 MR. KUNST: That's all from this witness, Your
13 Honor.

14 THE COURT: Okay. You may step down. That
15 you.

16 Anything further from the Plaintiff?

17 MR. KUNST: That's it, Your Honor.

18 THE COURT: Okay.

19 MR. KUNST: The Plaintiff rests, Your Honor.

20 THE COURT: Okay. Good enough.

21 MS. WRIGHT: Defense rests, Your Honor.

22 THE COURT: Okay. Good enough. Y'all have s
23 motions, I presume?

24 MS. WRIGHT: Yes, we do.

25 THE COURT: Okay.

1 MS. WRIGHT: In the presence of the jury, Your
2 Honor?

3 THE COURT: Ma'am?

4 MS. WRIGHT: You want me to make my motion for
5 directed verdict in the presence of the jury?

6 THE COURT: No, no, no, no, ma'am. Don't. I
7 didn't know if you had anything you wanted to put
8 into the record, any evidence to put into the record?

9 MS. WRIGHT: No, Your Honor.

10 THE COURT: All right.

11 Ladies and gentlemen, at the point in time which
12 the parties rest, it is incumbent upon me to take up
13 matters of law. There may be motions that need to be
14 made and I need to resolve them before we move
15 forward. There are also matters that we need to
16 discuss before we begin our argument and charge.
17 It's not going to take us long. We got here early
18 this morning and we talked through a lot of the
19 issues that we needed to to get to argument and
20 charge, but I must necessarily from a procedural
21 perspective hear arguments now.

22 So, I ask you to retire to your jury room.
23 Don't discuss the case. When we come back, we'll go
24 into argument and charge on the law. Okay. Please
25 don't discuss the case.

1 (WHEREUPON, the jury left open court at
2 approximately 10:00 a.m.)

3 THE BAILIFF: The jury is secured, Your Honor

4 THE COURT: Okay.

5 Yes, ma'am.

6 MS. WRIGHT: Your Honor, the Defense moves for
7 directed verdict on the grounds that the Plaintiff
8 has not proven the elements of slander per se.
9 It's -- slander per se requires that the Plaintiff
10 prove that either Mr. Loree charged him with the
11 commission of a crime of moral turpitude, contraction
12 of a loathsome disease, adultery, unchastity, or
13 unfitness in business or occupation. There has been
14 no witness testimony to any of these items. In fact,
15 Plaintiff's own witnesses, Mr. Goad and Mr. Alfonzo,
16 indicated that they had been told that Mr. Loree had
17 no problems with Mr. Kunst as a builder or home
18 design. And because this is the Plaintiff's case in
19 chief on slander per se, we move that the case be
20 dismissed.

21 THE COURT: All right. Thank you. I
22 respectfully deny the same. The standard for review
23 of the directed verdict motion is to review the same
24 in the light most favorable to the nonmoving party
25 and not to weigh the sufficiency of the evidence, but

1 merely to ascertain the existence of evidence. I
2 think taking the evidence in the light most favorable
3 to the Plaintiff, there was suggestion that the
4 Defendant may have said something that impugned his
5 fitness to conduct business. Therefore, on that
6 basis, I respectfully deny the same.

7 MS. WRIGHT: Thank you, Your Honor. Just for
8 housekeeping, I had added directed verdict motions
9 concerning qualified privilege. We had addressed
10 that in chambers.

11 THE COURT: Okay. And I'll address that on the
12 record as well. Is there anything else you need to
13 put on the record?

14 MS. WRIGHT: No, Your Honor.

15 THE COURT: Okay. I know that when we began the
16 case, there was a motion in limine to amend the
17 pleadings. I told you at the time that I thought
18 that that was a fairly academic matter and that I
19 would take it up after having heard all of the
20 evidence.

21 One of the things that I was looking at
22 specifically is whether the amendment would change in
23 any way, shape or form the presentation of the case,
24 the manner and the method of presentation of evidence
25 and/or the tactical positions of either parties.

1 It's clear to me after having heard the evidence in
2 this case that no prejudice at all is upon either
3 party from amendment to the pleadings. Matter of
4 fact, from the evidence, it appears that the issue of
5 truth and qualified privilege in the underlying
6 factual allegations were present from inception of
7 this action, actually, were known to the parties
8 prior to the inception of the action. Testimony
9 clearly was that Plaintiff knew that Mr. Loree was an
10 agent of the Gaby's. He said that directly on direct
11 examination.

12 Also, the — it's clear that from all the
13 pleadings from all the submissions in this case that
14 the relationship between the Gaby's and Mr. Loree was
15 clear and fully disclosed at inception. Therefore, I
16 find with respect to qualified privilege, there is no
17 prejudice that visits upon the Plaintiff or the
18 Defendant from the amendment of the pleadings in
19 accordance with established law the amendments should
20 be liberally granted. I find again, no legal
21 prejudice and I find no actual prejudice.

22 With respect to the amendment for truth, again,
23 there is — the record is replete with discussions,
24 arguments, orders which discuss the truth as an
25 absolute defense. I will also say that in the

1 pleadings, there's an allegation of the falsity of
2 representations that were made and there was a denial
3 of the falsity of those representations, which
4 indicates to me that whether you characterize it as
5 an affirmative defense or not, it certainly was
6 affirmatively asserted in the initial pleadings in
7 this case. I also tell you it's entirely academic
8 inasmuch as it's the Plaintiff's burden of proof to
9 demonstrate the falsity of the — the falsity of the
10 statements that were made.

11 Therefore, it is this Court's opinion that
12 whether it's amended or not really has no practical
13 effect in the way this case has even been presented
14 or the charge that will be given to the jury.
15 Therefore, inasmuch as it is academic and innocuous,
16 I will allow the amendment.

17 Anything additional?

18 MR. SMITH: Yes, Your Honor.

19 THE COURT: Yes, sir.

20 MR. SMITH: Given your ruling that qualified
21 immunity is a defense in this matter, we would ask
22 the Court to recognize as a matter of law the
23 Defense's qualified immunity applies in many cases in
24 South Carolina is a matter of law not a matter of
25 fact whether qualified immunity applies. And if the

1 Court finds that qualified immunity applies, we would
2 ask the defense for the Plaintiff be dismissed.

3 THE COURT: Okay. Do you have any position
4 that, Mr. Kunst?

5 MR. KUNST: I do not, Your Honor.

6 THE COURT: Okay. I have read with some
7 interest the case law on defamation in the State of
8 South Carolina as well. It's unclear. I've read the
9 cases to which you refer, also, read cases where it's
10 a matter for the jury. I think in this case inasmuch
11 as this has been a tortured litigation that has taken
12 place over the last nine years, it has gone to the
13 appellate level and back, that we are better served
14 to not direct verdicts or summarily make any
15 decisions in this matter. If I'm wrong, the Court of
16 Appeals or Supreme Court can overturn me, but, at
17 least, they will have an evidentiary and a decision
18 from a jury that will serve the purposes of the
19 ultimate resolution of this case.

20 In this matter, I think it's appropriate to have
21 the jury make that determination. I've allowed the
22 amendment and then the jury as a matter of fact will
23 make a determination, first of all, as to whether he
24 was acting within the scope of his agency and whether
25 he enjoys the qualified privilege of acting outside

1 the scope.

2 MR. SMITH: I understand. Thank you, Your
3 Honor.

4 THE COURT: All right. Okay. All right, sir.
5 Anything before we go in front of the jury?

6 MR. KUNST: Nothing more, Your Honor.

7 MR. SMITH: Could we take about a two-minute
8 break?

9 THE COURT: I'm definitely going to take a break
10 before we get started.

11 MR. KUNST: Your Honor, I will make a motion for
12 a directed verdict.

13 THE COURT: Oh, you're going to make one?

14 MR. KUNST: Yes, sir.

15 THE COURT: Okay. Go ahead and make one.

16 MR. KUNST: Okay. Your Honor, the Plaintiff
17 moves for a motion of directed verdict because the
18 Defendant has failed to prove the defense of truth
19 and privilege over the last three days. The specific
20 statements are there. The ones that were read in the
21 beginning. They had an obligation to not just have
22 truth, but provable truth. They called one witness.
23 They had no experts. Mr. Loree specifically on many
24 instances not only didn't deny, he just simply said I
25 couldn't recall. A couple of times, he said I may

1 have said such things. When you look at every
2 slander regarding insurance policy, the dummy
3 invoices, the stealing money or money missing, the
4 400,000 from the Gaby's or from all the other
5 clients, there is not one item of truth or evidence
6 submitted by the Defense this week in any one of
7 those statements.

8 THE COURT: Okay. All right. Thank you, Mr.
9 Kunst, I appreciate it. And on the same basis upon
10 which I denied the directed verdict motion from the
11 Defendant, I respectfully deny the Plaintiff's as
12 well. Viewing the evidence in the light most
13 favorable to the nonmoving party, there is evidence
14 in the record which demands a jury decision on those
15 very same matters.

16 MR. KUNST: Thank you, Your Honor.

17 THE COURT: All right. Let's take a break.

18 (WHEREUPON, a short break was taken.)

19 THE COURT: All right. Let's bring in the jury.

20 (WHEREUPON, the jury came into open court at
21 approximately 10:20 a.m.)

22 THE COURT: All right. Ladies and gentlemen,
23 we're going to get closing arguments like I told you
24 at the beginning of the case. Closing arguments,
25 just like opening arguments, are not evidence.

1 You've already heard all of the evidence that you
2 will receive in this case. Arguments are simply
3 that. They are the particular party's attempt to
4 persuade you to their respective positions.

5 What will happen is the Plaintiff will have the
6 opportunity to begin and open, then the Defense will
7 have the opportunity to respond. The Plaintiff will
8 then have closing arguments. Now, I have spoken to
9 the parties and they've agreed — in fact, they
10 suggested that I give them a time limit, which I have
11 elected to do happily.

12 So, the Plaintiff will argue for no more than 15
13 minutes initially. The Defense will have the
14 opportunity to respond for no more than 20 minutes.
15 And then the Plaintiff will have five residual
16 minutes to reply and to close. So collectively, it's
17 no more than 40 minutes. I'll be watching the clock.
18 I know you will, too. After we have heard arguments,
19 I'll give you a charge on the law and that should be
20 about 20 minutes, I suspect. At that point, then
21 I'll allow you to go back to begin your deliberations
22 of the case.

23 Having said that, ladies and gentlemen, I defer
24 to Mr. Kunst.

25 You may begin, sir.

1 **CLOSING STATEMENT**

2 **MR. KUNST:** Thank you, Your Honor. If it plea
3 the Court?

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

5 **MR. KUNST:** Good morning, ladies and gentlem
6 it's been a long three days. We made it, thank you.
7 As I stated on Tuesday morning, someone is always
8 attempting to get a result that the truth would not
9 afford them. Sometimes the lies that they tell are
10 so bad that they can destroy good people. That is
11 why we have defamation law. And that is why this
12 case is so important. How do you stop someone from
13 going around accusing you of things you didn't do?
14 How do you stop them? If David Loree didn't say the
15 things that he said, how would our lives be
16 different?

17 According to the law, defamation occurs when
18 there's a false, defamatory statement made about
19 someone and unproven communications with a third
20 party. I remind you, the law states it doesn't have
21 to be just one person. It could be just one person.
22 If that defamation imputes unfitness in business,
23 then damages are assumed.

24 When David Loree came to town to fix things, the
25 truth didn't matter. You heard him admit that he is

1 not a detective and has no expertise in financial
2 matters. He's not accountant, auditor or CPA. You
3 heard David Loree admit that he never saw or read the
4 Gaby contract with Kunstwerke. He has shown you that
5 he understands nothing about a reimbursement
6 contract. The Gaby contract placed into evidence
7 states funds are due upon receipt at weekly billing
8 seeking reimbursement. His supposed investigation
9 did not even consider the crux of the contract,
10 reimbursement. He never looked at the last weekly
11 billing for reimbursement. You heard me ask him.

12 Do you believe the funds the Gaby's wired were
13 earmarked for specific invoices?

14 He said, Yes.

15 I asked him. I asked him is that the premise
16 you based your investigation on?

17 He said, Yes.

18 Folks, the premises was false. He didn't even
19 read the contract before going out and making false
20 statements to other clients, subcontractors,
21 suppliers, many who had nothing to do with the Gaby
22 project. He went over the line. When I asked him if
23 he had contact with Covington, Mike Parham, Ed Coco
24 and my investigator, Tom Hickey, he denied it. His
25 response was maybe, perhaps.

1 You heard me testify that the week David Loree
2 came to town every client stopped reimbursing my
3 company. You have seen evidence that the collective
4 amount owed by all these clients exceeded \$500,000.
5 In 52 other weeks of business prior to that time, no
6 client missed a weekly statement. No reimbursement.
7 I spent your valuable time this week providing facts
8 and evidence directly related to specific statements
9 that David Loree made. How did they spend your time
10 this week? Mud slinging. For two hours, you heard
11 nothing but my taxes, my tax issues. Tax issues that
12 were created by the chaos David Loree caused.

13 By the way, no clients testified that David
14 Loree said anything about my taxes. No client over
15 the last three days testified that they told David
16 Loree that there was money missing or stolen from
17 their projects. Mr. Covington, he was a little
18 belligerent at the time, but he said, I don't recall
19 ever speaking to Mr. Loree. Who was their only
20 witness? A woman from the South Carolina Department
21 of Revenue who was only on the stand for five
22 minutes. I asked her did she have any proof that I
23 stole money? She didn't.

24 Let's talk about my witnesses. You heard
25 testimony from the Gaby's just now. They are the

1 alleged victims of these problems or crimes that
2 David Loree communicated to others. They know
3 nothing about it. They had no proof. Do you
4 remember Glenn Alfonzo? You heard Glenn Alfonzo
5 testify that David Loree told him as others were
6 standing around, quote, I'm not supposed to be
7 telling you this, but to give you an idea of some of
8 the criminal things that Scott has been doing, David
9 Loree had referenced an insurance policy for the Gaby
10 project and claimed that Scott Kunst took out a
11 policy, billed the Gaby's and intentionally canceled
12 the policy the next day so that he, Scott Kunst,
13 could keep the money. There, David Loree was being
14 reckless. He had no reason to discuss the insurance
15 policy with the copper guy even if it were true,
16 which it wasn't, particularly as he stated with
17 others standing around.

18 Glenn Alfonzo also testified that David Loree
19 stated to him that quote, Scott Kunst had taken money
20 from his other clients and that money was missing
21 from these other projects. You heard Glenn Alfonzo
22 testify what David Loree said to him. As Glenn wants
23 it to read on the record, quote, I recall David Loree
24 referring to Scott Kunst as a criminal on more than
25 one occasion. You heard me ask David Loree if he

1 referred to Scott Kunst as a criminal when speaking
2 to Glenn Alfonzo.

3 What was Loree's response? Don't recall.

4 I asked David Loree, Is Glenn being untruthful?

5 His response, No, I just don't recall if I said
6 it.

7 I asked David Loree if he told Glenn I took out
8 an insurance policy and billed the Gaby's for it and
9 then canceled it.

10 You heard David Loree's response, Don't recall.
11 Can't say if I did or didn't.

12 I asked David Loree if he told Glenn that money
13 was missing from other clients.

14 David Loree's response, Don't recall.

15 Ladies and gentlemen, Glenn Alfonzo recalls it.

16 Kevin Goad, the window guy, you heard him state
17 that David Loree represented to him that he was a
18 former detective and was in the process of
19 investigating my — Scott Kunst's financial dealings
20 with his clients. You also Kevin Goad say that David
21 Loree stated to him, quote, Scott Kunst had taken
22 \$400,000 from the Gaby project and that his other
23 clients had a similar situation. You heard Kevin
24 Goad say that David Loree told him that money was
25 missing from Parham, Covington, Coco and Hickey.

1 Named clients specifically. You heard Kevin Goad say
2 that David Loree told him that, quote, Scott Kunst
3 had provided his client with dummy invoices from
4 dummy companies to take money from his clients.
5 Kevin Goad testified that David Loree's lawyer, Sandy
6 Stern, told him that Scott was going to jail.

7 You heard Kevin Goad say that David Loree
8 implied that he had reconciled the Gaby/Kunstwerke
9 account and the accounts of other clients had also
10 been reconciled. I asked David Loree on Tuesday if
11 he told Kevin that he had reconciled the Gaby account
12 and that other client accounts had been reconciled.

13 David Loree's response, Unknown, nine years ago.

14 Kevin Goad also testified that David Loree
15 stated to him that money Scott Kunst had taken from
16 his clients was spent on his personal speculative
17 project. David Loree stated that progress in the
18 speculative project had stopped because Scott's
19 clients had stopped paying Scott all together. And
20 as a result, there was no money available to be
21 illegally transferred from his clients. David Loree
22 stated that he was in contact with Hickey and that a
23 lot of money had been taken from Hickey as well.
24 David Loree appeared to know a great deal about
25 Hickey and the speculative project. I asked David

1 Loree on Tuesday did he tell Kevin that money from
2 his clients was spent on the speculative project.

3 David Loree's response, Don't recall.

4 Ladies and gentlemen, Kevin Goad recalls. You
5 know what else? Kevin Goad wasn't even involved in
6 the Hickey project. Ladies and gentlemen, David
7 Loree showed reckless disregard for my rights, made
8 these false blanket statements and needs to be held
9 liable for the damage it caused my reputation and
10 career.

11 I broached the subject with you yesterday, it's
12 a touchy subject, but there's \$400,000 to
13 subcontractors that I personally guaranteed. I also
14 incurred legal debt of \$640,000 through loans and
15 legal fees to a law firm. I'm missing self-made
16 capital that was in my business that allowed me to do
17 my work that will place me back in business, start
18 again, hopefully, is 1.6 million. The total is 2.6
19 million dollars, \$2,640,000. These are the actual
20 damages, folks. They are what they are.

21 There's such a thing as punitive damages that
22 you will hear about. And that punishes reckless
23 behavior in an effort to stop this kind of conduct in
24 the future. That's in your discretion. I just need
25 it to get going again. I'm almost finished.

1 Mr. Smith asked me yesterday why did I not just
2 declare bankruptcy? He doesn't get it. None of them
3 do. I gave good people my word that I would not give
4 up until everyone is paid, made whole. It has been
5 my responsibility to introduce the evidence in this
6 case. I now pass that responsibility on to you. It
7 is now your job to end this nine year nightmare.
8 Thank you.

9 THE COURT: Mr. Smith.

10 MR. SMITH: May it please the Court?

11 THE COURT: Yes, sir.

12 CLOSING STATEMENT

13 MR. SMITH: Good morning. We don't get to talk
14 directly very much, so when I do, I find it an honor
15 to do that. When we started this trial Tuesday, I
16 believe it was, I ask you to remember two things.
17 First, that a court of law has determined that
18 Mr. Kunst took \$400,000 from the Gaby's that should
19 have been paid to subcontractors and suppliers.
20 Second, I ask you to remember that you will see
21 absolutely no evidence whatsoever that Dave ever made
22 disparaging remarks about Mr. Kunst design or
23 construction work.

24 The Judge will tell you about the law that you
25 must follow. I just want to bring one thing to your

1 attention. Mr. Kunst brought this lawsuit.
2 Mr. Kunst decided to bring a lawsuit for something
3 called slander per se. It's a little different than
4 just slander. Because that's what Mr. Kunst chose to
5 sue Dave for, it is Mr. Kunst's burden, as the Judge
6 will tell you, to prove by a preponderance of the
7 evidence that Mr. Loree said one of the following
8 kinds of things about Mr. Kunst. That Mr. Kunst
9 either committed a crime of moral turpitude, that
10 Mr. Kunst has contracted a loathsome disease, that
11 Mr. Kunst had committed adultery, that Mr. Kunst is
12 unchaste or that Mr. Kunst is unfit in his business
13 or occupation. Mr. Kunst had to show that Dave
14 actually made these statements. But he's given no
15 evidence that he said any of those list of things,
16 which are the very things that he must have said some
17 of those things. Instead, you've heard a lot of
18 theories and a whole lot of stories.

19 But here's what the uncontroverted facts of this
20 case have shown. Dave has never said anything bad
21 about Mr. Kunst business of design and construction.
22 In fact, I think you heard that he said Mr. Kunst
23 builds beautiful houses. Dave just stated he wished
24 he kept his books a little better. If you've got
25 \$100,00 flowing through your accounts as Mr. Kunst

1 claimed, you might need a bookkeeper.

2 Dave was asked by his boss to investigate what
3 was happening at the project site. I have a boss,
4 some of you may have bosses and when they ask us to
5 do something, we generally do it because we need our
6 jobs. We want our jobs. So, Dave came up and he
7 asked Mr. Kunst a very simple question, very simple.
8 Bring me an invoice, show me the check where you paid
9 it. We've sent you -- my boss has sent you over
10 2.5 million dollars and we want to see that you've
11 been paying because we're getting notices that things
12 are not being paid. This is very simple. It does
13 not have to be as complicated as some want to make
14 it. You bring an invoice. You show where you paid
15 it. That would have been the end of this matter.

16 But instead, Mr. Kunst didn't do that.
17 Presumably, Mr. Kunst still can't do that. So, he
18 disappeared, leaving Dave with the task of unraveling
19 who had been paid and who had not been paid. Dave
20 had to call these subcontractors, Dave had to call
21 these vendors to determine whether or not he had been
22 paid by Mr. Kunst. Dave did only what he needed to
23 do and only talked to those folks who were around the
24 projects that he was involved in. And Mr. Kunst has
25 produced absolutely no evidence to contradict these

1 basic facts.

2 One thing Mr. Kunst does continue to bring up is
3 that we didn't put anybody on the stand to say that
4 Dave didn't say these things. Well, the legal answer
5 is it's not our burden to do that. It's his burden
6 to show they were said, not ours to say it wasn't
7 said. But what he's asking me to do is impossible.
8 I could call 10,000 people to come up here and say I
9 never heard Dave say that because you're trying to
10 prove something that didn't happen. It's like trying
11 to prove -- I mean, you're trying to prove something
12 that didn't happen. So, I could have brought in
13 10,000 people to sit up there and say nope, never
14 heard say those things, but we thought that would be
15 a waste of our time and your time.

16 And while we'll submit to you that Dave has not
17 slandered per se Mr. Kunst at all. He has not said
18 he's contracted a loathsome disease, is unchaste,
19 he's committed adultery. We think the evidence shows
20 that if there were statements made by Dave in the
21 course of his investigations, those statements were
22 true. For example, the \$400,000 you continue to hear
23 about, that was proven to a court. Now, I know
24 Mr. Kunst thinks that court was corrupt, but it was
25 proven to a court. The IRS and Department of

1 Revenue, he also thinks that they're wrong. But they
2 have also decided that he has been less than truthful
3 in his financial dealings.

4 Now, in South Carolina, the law protects someone
5 like Mr. Kunst — I'm sorry, the law protects
6 somebody like Dave from being sued by somebody like
7 Mr. Kunst. And that's called qualified immunity.
8 And the judge will tell you about that. But, in
9 essence, it means that if you make a good statement,
10 a good faith statement and you have an interest to be
11 upheld and the statement is limited in scope to the
12 purpose, its proper occasion, publication and proper
13 to people — it's very technical — it's not very
14 technical and legal, but it basically says if you're
15 doing your job, if your boss tells you to do
16 something and you go do that and you're investigating
17 it and you say some things one way or the other,
18 you're not liable for slander. Otherwise, none of us
19 could ever do our jobs because we'd all be afraid
20 we're going to be sued all the time. That's what's
21 happened here. And ladies and gentlemen, the law in
22 South Carolina is clear. It protects employees in
23 doing their job from being sued for slander per se.

24 Now, one of the elements of defamation is
25 damages. And Mr. Kunst's responsibility was to come

1 in here with reasonable certainty. We don't think
2 he's been damaged at all, but if he has, it is his
3 job to show you with reasonable certainty the amount
4 of damages he has suffered, he's actually suffered.
5 Well, you've heard nothing of credible evidence of
6 what he's actually suffered in damages. What you've
7 heard is him say well, I think about 2.6 million
8 dollars. Well, I wish someone would give me 2.6
9 million dollars, too. The damages portions of a
10 trial — I don't know if any of y'all have ever been
11 in a civil trial, but the damages portion of a trial
12 is often the longest and most tedious part of a trial
13 because you have to show with certainty — they have
14 to show to a jury how he's been damaged.

15 Well, what's happened here? Mr. Kunst in a
16 typical fashion has just said well, I'm missing 2.6
17 million dollars. Show me how. Well, it's in the
18 books. If you look at the big blue book, it's in
19 there. Just show me the books. Again, he's coming
20 in here and just saying y'all give me 2.6 million
21 dollars. And he said the actual damages, he just
22 told you, they are what they are. Well, okay, show
23 us. Show us what they are. That's his burden to do.
24 And if he doesn't do that, you can't award damages to
25 him because he hasn't met that burden. He's passed

1 out magazine articles. He's shown you models.
2 Beautiful houses. What has he not shown at all? How
3 he came up with 2.6 million dollars, how that was
4 calculated down to the penny. And as we have seen,
5 he has trouble doing that.

6 Finally, he talks about lost income. Lost
7 income, under South Carolina law, you have to prove
8 with more than reasonable certainty. You have to
9 show how you would have lost that income. And we
10 know he hasn't done that. In fact, he has testified
11 that he was no longer going to take clients anymore.
12 He was just going to go build spec houses. And we
13 talked about yesterday a theory called mitigation.
14 If he thought he was owed money by any of these
15 clients — and that's not a part of this lawsuit, by
16 the way, but if he thought he was, he could have
17 filed a lien at any time he wanted to and that would
18 have been resolved in about 90 days, instead of 20
19 lawsuits nine years later. That tells you a little
20 bit about what he's really after here.

21 But finally, and most importantly on the
22 damages, he said 2.6 million dollars. The one thing
23 he hasn't told you is how Dave Loree caused him 2.6
24 million dollars in damages. He has to show you that.
25 He has not done that. This lawsuit is about

1 Mr. Kunst seeking revenge for his loss in the Gaby
2 lawsuit and in the other lawsuits that he'll claim
3 victory in, but has not shown any victory.

4 The evidence will show that Mr. Kunst has spent
5 nine years writing letters to the, I believe he
6 called it the general public and writing a 300 page
7 book that he publishes on the internet about how bad
8 the judges in South Carolina are and how everybody's
9 out to get him. But one thing has been shown clearly
10 here, it's never Scott's fault. And I'm not sure
11 whether Scott actually believes this or not. And if
12 it wasn't for so many lies being caught up in the
13 middle of this, we could have an academic discussion
14 about whether if he firmly believes that ground is
15 wet and water is dry, is it true to him. But no
16 matter how much he believes it, if it's not true,
17 it's simply not true. He has brought about his own
18 issues.

19 If Mr. Kunst had simply provided documentation
20 to show he had spent the money the way it was
21 supposed to be spent and not on his houses and not on
22 his cars and not on a myriad of other things where he
23 was spending this money out of his corporate account,
24 we wouldn't be here today. Mr. Kunst's projects
25 crumbled because he finally ran out of other people's

1 money and he has only himself to blame.

2 Wrapping up, Mr. Kunst reminds me of my Aunt
3 Mary. Let me tell you about my Aunt Mary -- my great
4 aunt, actually, my grandmother's sister. My great
5 Aunt Mary had been married, I think, 10 or 11 times.
6 Nobody actually knows how many times she was actually
7 married. And I love my great Aunt Mary, don't think
8 I don't, but right before she passed away, we were
9 having a real candid conversation one day and we were
10 talking about all the number of husbands she's had.
11 A few of them passed away. It would be a fool to
12 marry her. But she actually believed that every one
13 of those husbands were wrong and every divorce was
14 their fault. Now, the evidence would tend to favor
15 that out of 10, 11, maybe 12 times, we don't know how
16 many times she was married, it wasn't the other
17 person every single time when you go through that
18 many.

19 Well, that resonates with me here. Every single
20 failure is somebody else's fault. It's Dave's fault,
21 it's the lawyer's fault, it's the judge's fault, it's
22 his client's fault. All these people, all these
23 people all over Greenville, all over Pickens have
24 decided -- got together, apparently, and decided they
25 are going to go against Mr. Kunst. But not once is

1 it Mr. Kunst's fault.

2 Folks, Dave was simply doing his job. As I told
3 you when we started, a court of law determined that
4 Mr. Kunst had taken \$400,000 that should have been
5 paid to subcontractors, that should have been paid to
6 painters, to steel companies, to cabinet makers, and
7 he took that money and he used it somewhere else.
8 And there's no evidence at all, other than some
9 convoluting, well, this was not the way this —
10 there's no evidence. It's clear, the courts have
11 found he should have paid the cabinet makers, he
12 should have paid the steel folks, he didn't do it.
13 And there's absolutely no evidence that Dave ever
14 made any disparaging remarks whatsoever about
15 Mr. Kunst's design or construction work. To the
16 contrary. And now Mr. Kunst wants to blame everybo
17 else.

18 Mr. Loree ask that you find that he did not
19 commit slander per se against Mr. Kunst and that,
20 certainly, Mr. Kunst was not damaged to 2.6 million
21 dollars by Mr. Loree simply doing his job. He was
22 simply doing what his boss asked him to do. And the
23 law in South Carolina says he's not liable for
24 slander for doing that.

25 Thank y'all for sitting so patiently for the

1 last couple of days. I know it's been an ordeal. I
2 appreciate your attention and your service.

3 THE COURT: Yes, sir, Mr. Kunst.

4 MR. KUNST: Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 CLOSING STATEMENT

7 MR. KUNST: Thank you, folks. I wasn't going to
8 bring this back out again, but since Mr. Smith
9 brought it up. In my right hand is every financial
10 record from the Kunstwerke Corporation,
11 reconciliation of bank statements, every transaction,
12 every expenditure of the Gaby project, every project
13 in spreadsheet form with codes I used to audit from
14 the firm in New York City. I know how to audit. I
15 prepared this so they could audit fairly quickly if
16 they wanted to. It's been filed in this courthouse
17 since the beginning of this case.

18 Mr. Smith made a comment about preponderance of
19 the evidence, that the burden's on me. Let me just
20 explain something, I'm sure the judge will,
21 preponderance means in civil 50 percent of that
22 scale. If you believe that I have been harmed by
23 Mr. Loree and you're 51 percent more certain, 51/49,
24 you have decided for me. That's what that means.

25 He brought up the — again, the \$400,000

1 judgment. When you go back and look at the evidence.
2 there's several documents. There are a lot of legal
3 documents, look at those. I ask you to look at my
4 letter of April 12th, 2007. It shows that there was
5 not \$400,000. If there was, they would have brought
6 in -- had an expert sit here and tell you that.
7 There was an expert in this case. He didn't show up.

8 Crimes of moral turpitude. He said that I pled
9 defamation per se. Specifically, I did. A crime of
10 moral turpitude is a legal concept about community
11 standards and general sense of justice. Obviously,
12 criminal activity was imputed by what he said. He
13 was also wrong about the damages. He said I wasn't
14 specific. I don't have to be specific, specific to
15 the point that I'm showing you actual receipts.
16 There are records that show that \$500,000 was lost to
17 the clients. It's obvious that I had capital in a
18 company that was lost, too. All these things are
19 tangible numbers. Obviously, I had \$640,000 worth of
20 legal fees. But what he failed to tell you, if a
21 defamation is actual per se, then the law presumes
22 the defamed acted with common law actual malice and
23 that the plaintiff suffered general damages and that
24 such defamation is actual without proof of special
25 damages. Actual per se carries with it the

1 presumption that actual damages to reputation and
2 character and proximately resulted therefrom. And it
3 is not necessary to allege or to prove any actual
4 special damages.

5 Lastly, he said I could have filed a lien. Read
6 the lien threat letters and you determine if I was
7 free to file liens. He's mocked my writings to the
8 public. You're truly defamed is you're not like —
9 what was the name of his aunt? You're not like his
10 aunt, but you're truly defamed and you've been harmed
11 and you want to fix it, you're going to tell people
12 about it. You're going to write about it. You're
13 going to fight it. You're going to put it out there,
14 put the truth out there in every venue possible
15 because there's no guarantee a court of law is going
16 to consider it. You have — it explodes across the
17 landscape. Everybody hears it. I don't know who's
18 all heard this.

19 This was so bad — and when you file a
20 defamation suit, the decision is do you want to file
21 a suit because that will make it even more broadcast
22 to people. You have to make a decision. This was so
23 bad, exploded so big that there was nothing that you
24 would be presented this week that could harm me
25 anymore. There are nine years of fighting and mud

1 slinging that you've seen in the last few days, it's
2 not as bad as what David Loree originally said.
3 That's why we were willing to sue. You file all
4 these lawsuits because nine years later, all the
5 other lawsuits are going to be one, dismissed for a
6 hundred different reasons. And one person's going to
7 rise to the top. There's going to be one courtroom
8 nine years later where one man is going to win.
9 There's a reason why Mr. Loree is one man alone.
10 Thank you.

11 THE COURT: All right. Ladies and gentlemen,
12 the time has come now for me to give you a charge on
13 the law. It's going to take me about 20 minutes.
14 It's not too gosh awful dry. Does anybody need to
15 take a break before we get started?

16 (There was no response.)

17 THE COURT: Okay. All right, ladies and
18 gentlemen, when we first started the case, I advised
19 you that you had a duty as jurors and I had a duty as
20 the judge. Your duty as jurors is to determine what
21 the facts are in the case. I told you that I have no
22 opinion on the facts. That you have the sole and
23 exclusive authority and jurisdiction to determine
24 what the facts are in this case based on the evidence
25 that has been presented. If it at any time during

1 this case I have given you the indication that I have
2 an opinion about what the facts are or what you
3 should do, please disabuse yourself of that notion.
4 Forget about that because I honestly have no stake in
5 this case. I have no concern for the outcome of the
6 case. Again, my only concern is that it is a fair
7 trial for both parties.

8 Now, my role, obviously, as I've told you is the
9 judge of the law. When you took your oath at the
10 beginning of this case, you swore to accept the law
11 as I give it to you. Now, if you come into this
12 courtroom with any impression or any opinion about
13 what the law is or about what the law should be, then
14 I charge you now that, again, to forget about that
15 because under your oath, you must accept the law as I
16 give it to you in this case.

17 Now, ladies and gentlemen, in this case, the
18 Defendant has — excuse me. I apologize. The
19 Plaintiff has the burden of proving his case. The
20 Plaintiff has the burden of proving his case by a
21 preponderance of the evidence. Now, you may have
22 heard on television or in other cases that you may
23 have heard of or been involved in or other jury
24 trials different burdens of proof. In a criminal
25 case, you have proof beyond a reasonable doubt, which

1 is the highest level of proof that exist under the
2 law. Then you have another proof, clear and
3 convincing evidence, which we'll talk about in a few
4 minutes. In this instance, the Plaintiff has the
5 burden of proving his case of defamation by a
6 preponderance of the evidence.

7 Now, let me give you an example of that so
8 you'll understand. Preponderance of the evidence
9 is — means that you have proved that it is more
10 likely than not, greater than 50 percent. Now,
11 ladies and gentlemen, I give you the example of the
12 scales of justice. So, when the parties to this case
13 walk into this courtroom and begin to try this case,
14 those scales of justice are absolutely even. They
15 are not one going one way or the other. If at the
16 conclusion of this trial those scales are even, if
17 they remain even or if they have tipped, even
18 slightly in favor of the Defense, then you would find
19 that the Plaintiff has not met his burden of proof.
20 However, understand that if you find at the
21 conclusion of this trial that the scales have tipped,
22 even ever so slightly in favor of the Plaintiff, then
23 he will have met his burden of proof.

24 Now, ladies and gentlemen, when we're talking
25 about weighing evidence, obviously, you can't weigh,

1 physically weigh evidence. And it doesn't matter who
2 put more into the record, who put less into the
3 record. What matters is what you take away from the
4 evidence in its aggregate. And you'll determine what
5 evidence has weight, what weight it has, whether
6 witnesses were credible or not credible.

7 Now, ladies and gentlemen, when you were looking
8 at the witnesses and you decide whether they're
9 credible, that is whether they're believable, you'll
10 use your own common sense, your common knowledge in
11 determining that. You know that in your life and in
12 your common sense, you can look at a person, you can
13 listen to what they have to say, the manner in which
14 they deliver what they have said, what they said, how
15 they said it, their physical expression, their
16 mannerisms you can look at and determine whether they
17 have something to gain or something to lose from what
18 they said. And you can determine from all of that
19 whether a witness is credible or not.

20 Again, it is entirely up to you to determine
21 whether a witness is credible or not. And you will
22 decide — you can decide that a witness was credible
23 in some regard and, perhaps, not so credible in
24 another regard. You may accept a portion of his
25 testimony as very believable and decide that another

1 portion of his or her testimony was not believable
2 and discount it entirely.

3 The same is true with the value that you place
4 on evidence that was presented into the record. You
5 may decide some is very valuable and you may decide
6 that some is not so valuable. That is entirely
7 within your discretion. And you will take all of the
8 evidence that's been presented, you will decide
9 what's credible, you will decide what is valuable and
10 how valuable it may be and take all that and apply it
11 to the law as I give it to you and then determine
12 whether the Plaintiff has met his burden of proof in
13 this case.

14 Now, ladies and gentlemen, evidence will be
15 introduced in two different forms, two different
16 possible forms of evidence. Direct and
17 circumstantial. Now, I want you to understand that
18 the law does not prefer one over the other. Again,
19 it's just like any other form of evidence, you decide
20 what weight that either direct or circumstantial
21 evidence has. Direct evidence is that evidence which
22 immediately establishes a fact to be proven.
23 Circumstantial evidence is proof of a chain of facts
24 or proof of collateral facts that when taken together
25 prove the main fact to be asserted.

1 Now, that's a pretty simply definition, but I'm
2 going to give you an example again that may help you
3 conceptualize the two a little bit better. Let's say
4 that on a January evening, you're going to bed. You
5 walk past your front window or your front door and
6 you look on your front lawn or your front yard and
7 you see that there's no precipitation on the ground.
8 You go to bed. You wake up the next morning and you
9 walk past that very same door or window and you see
10 that there's a blanket of snow on the ground. You
11 also see in that blanket of snow footsteps which lead
12 to your door and then lead away.

13 Now, you've got direct evidence that it snowed
14 last night because the snow is right there and you
15 can pick it up and feel it and touch it. It's there.
16 It's immediately established. But you have
17 circumstantial evidence as well that someone, either
18 that evening or early that morning came to your door
19 and walked away. You can't see that person. You
20 can't touch them. You can't feel them. But you know
21 as a consequence of the timing of the snowfall and
22 the existence of the footsteps in the snow that
23 someone came to your door and walked away. That's
24 circumstantial evidence.

25 Now again, ladies and gentlemen, the law does

1 not prefer circumstantial over direct evidence or
2 direct evidence over circumstantial evidence. You
3 decide what value and what weight the evidence has.

4 Now, ladies and gentlemen, I'm going to discuss
5 with you now specifically the law as its relate to
6 defamation. I'm going to read a little bit to you.
7 I don't like to read because it suggest to you that,
8 perhaps, I'm too lazy to learn the law or, perhaps,
9 I'm not smart enough to remember it, but the fact of
10 the matter is, we have very precise definitions of
11 legal terms. It's incumbent upon me to get it
12 precisely right. So if I read a little bit, I
13 apologize to you on the front end. I try not to, but
14 I may read just a little bit to you.

15 Ladies and gentlemen, as you know, it's on
16 secret, the Plaintiff has brought a case alleging
17 that he was defamed by the Defendant. Now, just
18 generally speaking, defamation -- in order to prove
19 defamation, the Plaintiff must prove the following
20 four elements: A false and defamatory statement was
21 made, the unprivileged publication was made to a
22 third party, the publisher was at fault, and the
23 Plaintiff suffered damages as a result. Those are
24 the four elements. Now, I'm going to go into those
25 in a little bit greater detail, but on the front end,

1 I just wanted to describe for you those four elements
2 so you can keep the rest of the definitions in
3 context. So, let's talk about it again. A false and
4 defamatory statement, an unprivileged publication
5 that it was published to a third person, the
6 publisher was at fault, and, four, that the Plaintiff
7 suffered damages as a result of the publication.

8 Ladies and gentlemen, the Plaintiff claims that
9 the Defendant communicated a defamatory statement
10 about the Plaintiff to another person. This action
11 is based on violation of the Plaintiff's right to
12 enjoy good reputation without false and defamatory
13 attacks. Defamatory language is language that tends
14 to injure or adversely affect the Plaintiff's
15 reputation. In order to recover in this case, the
16 Plaintiff must first prove that defamatory language
17 was communicated by the Defendant about the
18 Plaintiff. A defamatory statement is one which tends
19 to attack the honesty, integrity, virtue or
20 reputation of a person and exposes the person to
21 disgrace, public hatred, avoidance, contempt or
22 ridicule. A defamatory statement does not have to be
23 direct, open or positive attack. It may be merely a
24 suggestion or hint which is false and malicious, as
25 long as the meaning is plain.

1 A statement, ladies and gentlemen, is not
2 defamatory if it is substantially true. Even if the
3 Defendant made the statement for no good purpose, w:
4 inspired by ill will toward the Plaintiff and made
5 the statement solely for the purpose of harming the
6 Plaintiff, if the statement is true, the Plaintiff
7 cannot recover for defamation. Truth is an absolute
8 defense.

9 Next, the Plaintiff must prove that the
10 statement was communicated to someone other than th
11 Plaintiff and that the Defendant made the statement
12 knowing or reasonably expecting it to reach a third
13 person. Finally, the Plaintiff must prove that his
14 reputation was damaged by the defamatory statement.
15 The Plaintiff must prove that the damages naturally
16 and proximately resulted from the Defendant's
17 statement.

18 Actual damages are damages which compensate th
19 Plaintiff for the injury and put the Plaintiff in the
20 same position as he was prior to the defamatory
21 statement as much as is possible. General damages
22 include humiliation, hurt feelings, mental suffering,
23 injury to reputation and other types of injuries
24 which you cannot place — upon which you cannot place
25 a monetary value.

1 Now, ladies and gentlemen, damages must be
2 proven just like every other element of the cause of
3 action. They need not be proven to a mathematical
4 certainty, however, evidence must be sufficient to
5 establish what is fair, just and reasonable. The
6 Plaintiff must also prove special damages resulting
7 from the defamatory statement. Special damages are
8 monetary damages with respect to the property,
9 business, profession or occupation of the Plaintiff,
10 such as the loss of a job, the loss of customers, or
11 the loss of a business relationship as a result of
12 the injury to the Plaintiff's reputation.

13 Now, ladies and gentlemen, I'll explain to you
14 in a little bit slander per se. And I want you to
15 remember this, in a case for slander per se, the
16 requirement for the proof of special damages is not
17 necessary. And I will get to that in a second.

18 Ladies and gentlemen, I will tell you that if
19 you determine, if you determine that the Plaintiff
20 has proved his case and he should be awarded actual
21 damages, then you may consider awarding punitive
22 damages. Punitive damages are intended to punish the
23 Defendant and to attempt to ensure that neither the
24 Defendant or anyone else commit similar conduct in
25 the future.

1 In order to recover punitive damages, the
2 Plaintiff must prove by clear and convincing evidence
3 that the Defendant acted with actual malice in making
4 the defamatory statement. Clear and convincing
5 evidence is more than a preponderance or greater
6 weight of the evidence. As I've told you before,
7 with respect to the burden of proof for the cause of
8 action of defamation, the burden by a preponderance
9 of the evidence.

10 If you elect to consider punitive damages, then
11 the proof must be by clear and convincing evidence.
12 As I told you before, preponderance of the evidence
13 is 50 percent. Clear and convincing is just that,
14 clear and convincing evidence and it is greater than
15 preponderance of the evidence. But understand it is
16 less than the criminal burden of proof, which is not
17 at all at issue in this case. I only tell you this
18 by way of example, the burden of proof is beyond a
19 reasonable doubt. Punitive damages must be proven by
20 the intermediate level of clear and convincing
21 evidence.

22 Now, ladies and gentlemen, actual malice
23 involves a malicious intent or recklessness,
24 willfulness or wantonness. This means the
25 Defendant's statement was motivated by ill will, the

1 intent to injure the Plaintiff, or that the statement
2 was made with such recklessness as to show a
3 conscious indifference toward disregard of the
4 Plaintiff's right. In determining any appropriate
5 amount of punitive damages, you should consider the
6 nature of the Defendant's actions, the punishment, if
7 any, which should be given for those actions and the
8 ability of the Defendant to pay.

9 Now, ladies and gentlemen, in this instance, the
10 Plaintiff alleges that this is a case of slander per
11 se. Now, slander per se is distinguished from
12 general slander, that's general defamation. And if a
13 statement is slanderous per se, injury to the
14 Plaintiff is presumed and the Plaintiff does not have
15 to prove special damages. You will remember that I
16 told you that before that if it's slander per se, he
17 doesn't have to prove special damages.

18 Now, statements which charge the Plaintiff with
19 the commission of a crime of moral turpitude,
20 contraction of a sexually transmitted disease,
21 adultery, unchastity, or unfitness in the Plaintiff's
22 business or profession are slanderous per se. So if
23 you find that any of the statements charge a crime of
24 moral turpitude, contraction of a sexually
25 transmitted disease, adultery, unchastity, or

1 unfitness in the Plaintiff's business or profession,
2 then you may find that it is slanderous per se.

3 If you find that the statement was slanderous
4 per se, you should return a verdict for the Plaintiff
5 and must award the Plaintiff at least nominal actual
6 damages. Nominal actual damages means at least
7 something. It doesn't mean that it has to be a great
8 amount, but it can be a small amount. It just means
9 that you must award the Plaintiff something because
10 the damages are presumed under slander per se.
11 Nominal damages may only be a small or trivial sum.
12 Nominal damages are required because the law presun
13 that some actual damage to the Plaintiff's reputation
14 and character directly and proximately resulted from
15 the Defendant's defamatory statement.

16 Now, ladies and gentlemen, I also tell you that
17 the Defense alleges in this action that the Defendant
18 enjoyed a qualified privilege. That is that he was
19 the agent of a principle and acting in furtherance of
20 the principles, the main person's interest. In order
21 to prove that a qualified privilege exist, the
22 Defendant must prove by a preponderance of the
23 evidence — now, understand in this instance, the
24 Defendant must prove by a preponderance or a greater
25 weight of the evidence that the Defendant made the

1 statement in good faith. If the statement was made
2 with actual malice, that is with knowledge that the
3 statement was false, or with reckless disregard of
4 whether it was true or false, the Defendant cannot
5 claim a qualified privilege. The Defendant must also
6 prove that there was an interest to be upheld and the
7 statement was made solely to uphold the interest of
8 the Defendant or a third party. In addition, the
9 Defendant must prove that the statement was made at
10 the proper time. Finally, the Defendant must prove
11 that the statement was communicated in a proper
12 manner and only to the proper parties.

13 You also note, ladies and gentlemen, that the —
14 that the Plaintiff alleges that the — excuse me,
15 that the Defense alleges that the Plaintiff did not
16 mitigate his damages in this case. When a Plaintiff
17 is injured or damaged by the wrongful act of another
18 person, it's the duty of the Plaintiff to reasonably
19 try to avoid and lessen the damages. Those damages
20 which may be avoided by the use of reasonable
21 efforts, care and prudence by the Plaintiff cannot be
22 the proximate result of the Defendant's wrongful act.
23 Therefore, the Plaintiff cannot recover for damage
24 which reasonably might have been avoided. The
25 efforts required by the Plaintiff must be determined

1 by the rules of common sense and fair dealing, what a
2 person of ordinary reason and prudence would do und
3 the same circumstances. The Plaintiff is not
4 required to use unreasonable efforts or great expense
5 to avoid or lessen the damage. The Defendant has the
6 burden of proving a failure to lessen damages on the
7 part of the Plaintiff by the preponderance or greater
8 weight of the evidence.

9 Now, ladies and gentlemen, I have here for you
10 the verdict form. And this verdict form is what you
11 will fill out in your deliberations — or in the jury
12 room during your deliberations. You will see it's a
13 very simple form. It starts with the caption of the
14 case entitled verdict. It says, we, the jury,
15 unanimously find as follows — understand it's a
16 unanimous decision. Any decision that you reach must
17 be unanimous. It can't be 11 to one or 10 to two.
18 It must be a unanimous decision. You must all agree
19 on that decision. Then you have a series of choices.

20 Now, I want to point out before I go over these
21 choices that they're in no particular order.
22 Yesterday, as we were hearing evidence, my law clerk
23 was preparing the verdict form and I was telling him
24 what I wanted on it. I didn't tell him in what order
25 because I don't have a preference as to what order.

1 What I don't want you to do is look at this and say
2 because it appears in this order, he must want us or
3 prefer us to make a certain determination. I don't.
4 It has to be in some order and it was just put in in
5 this way. So, don't deduce any calculation from me
6 any order which I present it.

7 The first one is a blank for the Defendant. If
8 you find that the Plaintiff has failed to meet his
9 burden of proof with respect to the cause of action,
10 then you would find for the Defendant and you would
11 check that. If you find for the Defendant, then you
12 would simply sign as foreperson of the jury, date it,
13 and tell the bailiff that you have come to a
14 unanimous decision.

15 But ladies and gentlemen, if you find that the
16 Defendant has met his burden of proof with respect to
17 defamation or if you find that he has proven
18 defamation per se under the definition that I have
19 given you, then you would check for the Plaintiff in
20 actual damages in the amount of. You will determine
21 what actual damages were proven by the preponderance
22 of the evidence in this case by a unanimous agreement
23 and put that number down. Again, if you find that it
24 was slanderous per se, then you must then award at
25 least nominal damages, some sum, can be small or

1 trivial, but it must be some sum.

2 Ladies and gentlemen, if you elect, if you
3 decide that the Plaintiff has met its burden of proof
4 and you award actual damages, then you may consider
5 punitive damages. So, if you do find for the
6 Plaintiff in this column and you award actual
7 damages, then you can consider punitive damages. And
8 you consider it under the law and under the rules as
9 I have given it to you in the charge. Once you have
10 come to a unanimous decision, again, you would sign
11 as foreperson of the jury, then date it, and let the
12 bailiff know you have come to a unanimous decision.

13 Now, ladies and gentlemen, I'm about to let you
14 begin your deliberations. I don't want you to start
15 quite yet, though, because the attorneys and the
16 parties have the opportunity to take exception to the
17 law that I've given to you or correct something that
18 I may have said. So, I need to give them the
19 opportunity to tell me how I messed up. Okay. And
20 if I messed up, I'll either bring you back out here
21 and give you — and correct the charge that I have
22 made or I'll send you additional instructions,
23 whatever is appropriate under the circumstances.

24 When it's time to begin your deliberations, I'm
25 going to send back with the bailiff this verdict

1 form. And when you receive this verdict form from
2 the bailiff, you may begin your deliberations, but
3 not until. And then after you receive the verdict
4 form, very close thereafter, you will receive all of
5 the evidence. The parties are going to go through
6 and do an inventory to make sure that you're getting
7 what was introduced into evidence, no more, no less
8 and then you'll have that evidence as well. It will
9 be coming to you probably between five and 10
10 minutes.

11 So, if you will, please return to your jury
12 room. Don't begin your deliberations quite yet.

13 (WHEREUPON, the jury left open court at
14 approximately 11:15 a.m.)

15 THE BAILIFF: The jury is secured, Your Honor.

16 THE COURT: Okay.

17 Exceptions to charge?

18 MR. SMITH: No, Your Honor.

19 MR. KUNST: No, Your Honor.

20 MS. WRIGHT: No, Your Honor.

21 THE COURT: Okay. All right. Ladies and
22 gentlemen, I'm going to deliver the verdict form to
23 the jury. Each of you did an exceptional job and I
24 thank you for your conduct during the trial of this
25 case. It was different, but it was enjoyable as

1 well. It had the potential not to be. It had the
2 potential to be very contentious, had the potential
3 to be uncivil. And I appreciate the gracious manner,
4 the professional manner in which all of you conducted
5 yourself. I don't know what the verdict would be,
6 but regardless, I congratulate both of you, all of
7 y'all having tried an excellent case. And I exclude
8 Mr. Lewis from all those comments.

9 MR. SMITH: We concur in the thanking, Your
10 Honor.

11 MR. KUNST: Thank you, Your Honor.

12 THE COURT: All right. Thank you.

13 If y'all will do in inventory, I am going to
14 discharge the two alternates in chambers.

15 (WHEREUPON, deliberations began at approxim
16 11:23 a.m.)

17 (WHEREUPON, Court was in recess awaiting a
18 verdict.)

19 (WHEREUPON, Court's Exhibits Nos. 1 & 2 were
20 marked for identification and received into
21 evidence.)

22 (WHEREUPON, Court's Exhibit No. 3 was marke
23 identification and received into evidence.)

24 THE COURT: I have a note from the jury. I'm
25 going to mark it as Court's Exhibit No. 3.

1 MR. SMITH: No objection, Judge.

2 THE COURT: Let me say while y'all are reading
3 that, you will see — you see that I included not
4 just the definition of slander per se, but the
5 definition of slander as well. That's because they
6 can't be read separate from one another. You must
7 have the definition of slander in order to have that
8 definition of slander per se. One read without the
9 benefit of the other doesn't make sense and it's not
10 a holistic answer to their question. That what I
11 have put in that charge is exactly what I charged
12 them verbally on the record.

13 MR. SMITH: That's what I was going to say, your
14 Honor. It looks like exactly what you charged
15 earlier.

16 THE COURT: It was. That's why I came back to
17 get my notes to make sure that I didn't substitute a
18 word. And if not mistaken, this is verbatim what I
19 told them. So, what I'm going to do is I'm going to
20 bring them in and I'm going to tell them exactly —
21 I've given you both because they can't be read
22 separate and distinct from one another. And tell
23 them that I'm giving it to them and that the
24 distinction to be drawn between slander and slander
25 per se is that if you find that — if you find that

1 the comments were slanderous, then you would look to
2 see if it fits the definition of slander per se. And
3 if you decide that, then the imposition of damages,
4 even nominal, is automatic and as the distinction to
5 be drawn between the two.

6 MR. SMITH: Your Honor, one quick word and I
7 not sure if it matters. It could be — and I hate
8 this phrase, but a distinction without a difference.
9 But there's no — there's no cause of action for
10 slander, so I don't know if they have the option to
11 just find slander.

12 THE COURT: I got you. I got you. Okay.
13 You agree with that?

14 MR. KUNST: Not sure, Your Honor. I would leave
15 that open.

16 THE COURT: All right. Well, I'm going to
17 explain it to them. I'm not going to deviate —
18 basically, I'm not going to deviate from my charge.
19 The verdict form gives them one option, okay. One
20 option.

21 So, if you would bring them in, please, sir.

22 (WHEREUPON, the jury came into open court at
23 approximately 1:55 p.m.)

24 THE COURT: Okay. Ladies and gentlemen, I give
25 your note and I've marked it as Court's Exhibit No.

1 3.
2 Can you tell us again the definition of slander.
3 per se?

4 What I've done is I've taken the charge that I
5 delivered to you earlier and I've printed off the
6 definition of slander and slander per se. The reason I've
7 done both is they can't be read without the benefit of the
8 other because they work together. You understand that if
9 you find that the Plaintiff has met its burden of proof
10 with respect to slander, then you would make the
11 determination as to whether it fits the definition of
12 slander per se.

13 Now, the distinction to be drawn between slander
14 and slander per se is that if you determine that it's
15 slander per se under the definition that I give you, then
16 the imposition of damages, even if those are trivial or
17 nominal is automatic in that regard. And that's the only
18 distinction to be drawn from the effect of a finding of
19 slander per se as opposed to slander.

20 So, I'm going to give you the definition exactly
21 as I gave it to you on the record before for you to take
22 back with you, but I wanted to make sure you knew why I
23 was giving you both, because they must be read together.
24 Okay.

25 Ms. King, this is for you. I ask you to return

1 to your jury room and begin your deliberations.

2 (WHEREUPON, the jury left open court at
3 approximately 1:58 p.m.)

4 (WHEREUPON, deliberations continued.)

5 THE COURT: All right. We'll be in recess

6 until we hear from the jury. Thank you.

7 (WHEREUPON, Court was in recess awaiting a
8 verdict.)

9 (WHEREUPON, Court's Exhibit No. 4 was marked
10 identification and received into evidence.)

11 THE COURT: I'm informed the jury has come to
12 verdict. Are the parties ready to receive the
13 verdict?

14 MS. WRIGHT: Yes, sir, Your Honor.

15 MR. KUNST: Yes, sir, Your Honor.

16 MR. SMITH: Yes, sir, Your Honor.

17 THE COURT: All right. Bring them in, please.

18 (WHEREUPON, the jury came into open court at
19 approximately 3:10 p.m.)

20 THE COURT: All right. Madam Forelady, has the
21 jury reached a unanimous verdict, ma'am?

22 MADAM FORELADY: Yes, we have.

23 THE COURT: Okay. Would you hand the verdict
24 form to the bailiff, please?

25 Would you publish the verdict, please, ma'am?

1 VERDICT

2 THE CLERK: In the case of J. Scott Kunst vs.
3 David Loree, 2006-CP-39-1826, we, the jury,
4 unanimously find as follows: For the Plaintiff for
5 actual damages in the amount of one million dollars.
6 Foreperson, Sharon King.

7 If this is your verdict and still your verdict,
8 so say you all by raising your right hand.

9 (WHEREUPON, all members of the jury raised their
10 right hand.)

11 THE COURT: All right. Counsel, Mr. Kunst, any
12 additional matters of law or issues to take up for
13 this jury?

14 MR. KUNST: No, Your Honor.

15 MR. SMITH: None for the jury, Your Honor.

16 THE COURT: Okay. Good enough.

17 All right. Ladies and gentlemen, thank you for
18 your service. If you go back to your jury room, the
19 bailiffs will take your badges and give you your
20 phones back. I'll come back and dismiss you
21 informally. It won't take long. I'm not going to
22 take up anymore of your time. I just want to say
23 thank you in an informal setting and give you the
24 opportunity to ask me any questions if you have any.
25 Okay.

1 (WHEREUPON, the jury left open court and was
2 excused at approximately 3:11 p.m.)

3 THE COURT: Any post-trial motions?

4 MR. SMITH: Yes, Your Honor. We would move
5 a remittitur to at least zero.

6 THE COURT: Okay.

7 MR. SMITH: Because the evidence did not support
8 the verdict and, certainly, the damages evidence did
9 not support such an award.

10 THE COURT: Okay. All right.

11 MR. SMITH: I'm sorry, South Carolina, is there
12 a time that you can file?

13 THE COURT: You have 10 days under the rules.
14 if you'd like to submit it in writing, you're welcome
15 to. If you want me to withhold any ruling at this
16 time.

17 MS. WRIGHT: If you would, please, Your Honor.
18 I understand 10 days from today is the seventh, which
19 is a Sunday, so we would appreciate having until June
20 8th to get that to you.

21 THE COURT: That's fine.

22 MS. WRIGHT: Thank you, Your Honor.

23 THE COURT: All right. Okay.

24 Well, ladies and gentlemen, again, thank you for
25 having tried an excellent case. I certainly

1 appreciate it. Hope y'all have a great day. Thank
2 you.

3 MR. KUNST: Thank you, Your Honor.

4 MR. SMITH: Thank you, Your Honor.

5 (WHEREUPON, the proceedings were concluded.)
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CERTIFICATE OF REPORTER

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4 STATE OF SOUTH CAROLINA)
5 COUNTY OF GREENVILLE)
6
7

8 I, APRIL P. HERRON, Official Court Reporter for
9 the Thirteenth Judicial Circuit of the State of South
10 Carolina, do hereby certify that the foregoing is a true,
11 accurate and complete Transcript of Record of the
12 proceedings had and evidence introduced in the trial of
13 the captioned case, relative to appeal, in the Court of
14 Common Pleas for Pickens County, South Carolina, on the
15 26-28 day of May, 2015.

16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.
18

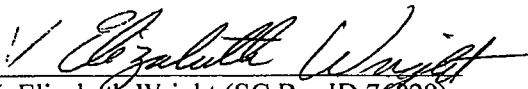
19
20 October 12, 2015
21

22
23 ~~APRIL P. HERRON, Court Reporter~~
24
25

Certificate of Counsel

The undersigned Counsel for the Appellants certifies that the 2nd Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 21, 2017


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SC Court of Appeals

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

RECEIVED
APR 27 2016
SC Court of Appeals

J. Scott Kunst Respondent,

v.

David Loree Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in not overturning the verdict when it was an error in law?
- II. Did the trial court err in not overturning the verdict when there was insufficient evidence to support the verdict?
- III. Did the trial court err in not overturning the verdict when the verdict was excessive?

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. (R. p. 27, Complaint). The Gabys were dismissed from the case on April 14, 2007, (R. p. 16, 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 Appellant 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’s summary judgment as to the tortious interference and intentional infliction of emotional distress claims, but denied summary judgment as to the defamation claim. (R. p. 14, 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 (R. p. 1, 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. (R.p. 231, Loree JNOV motion). Loree's motion was denied on June 17, 2015.(R. p. 21, Order of the Honorable Robin Stilwell). Loree filed the Notice of Appeal on July 13, 2015.

STATEMENT OF FACTS

This case is Kunst's attempt to re-try the Gaby Action. Indeed, as described in Kunst's e-book, *Cold and Greedy*² (R. 461, 497, 505-506, 733, 735-736, Defendant's trial exhibit 22, pages 4, 13, 240, and 242-243) Kunst used this action and the South Carolina courts as a tool to extract revenge for a host of perceived wrongs committed by various members of the community, bench, and bar. In the Gaby Action, the 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. As set forth in the Statement of the Case, Loree is the

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

² Kunst refers to former lead counsel T. S. Stern, Jr as "Dandy Nerts" and Loree as "Rollie".

only defendant remaining in this case and the only cause of action now remaining in this action is slander *per se*.

Loree is employed by Richard and Barbara Gaby. The Gabys hired 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. (R.p. 126, Tr., testimony of David Loree, pgs. 163: 3- 164: 9). As is customary in the construction of residences, Kunst would submit an invoice to Mr. Gaby for work thus far completed. Mr. Gaby would pay Kunst the requested amount, with the understanding that Kunst in turn would pay the subcontractors and vendors listed on the invoices. (R., p. 127, Tr., testimony of David Loree, p. 166: 4-8). In the course of his investigation, Loree contacted subcontractors and vendors to determine whether or not they had been paid by Kunst. (R., p. 128, 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. (R., pgs. 143-147, 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). (R. p. 141 - 147, 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. (R., p. 23, 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.

In paragraph 53 of his Complaint, (R. pgs. 34-35) Kunst alleged that all of the "Defendants" defamed him in the following manner:³

- Defendants stated "Plaintiff embezzled money from the Defendants";
- Defendants stated "Plaintiff embezzled money from other clients";
- Defendants reported to numerous sub laborers and suppliers that funds intended for them were taken by the Plaintiff for his own personal use;
- Defendants "stated to numerous business associates, clients, and The Reserve sales staff that the Plaintiff was in financial trouble and unable to meet his future obligations."
- Defendants stated to "associates of the Plaintiff that the Plaintiff could go to prison";
- Defendants "planted rumors that the Plaintiff's design work and construction were defective and that he lacked professional qualifications."

³ Kunst later changed the statements at pre-trial hearings. (R., p. 39-40) Plaintiff's pre-trial brief, pgs. 1-2.

Kunst did not allege that Loree specifically made any of the statements, just "Defendants." Loree denied he made the statements.

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. (R. p. 409-455, 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. If Loree did make the defamatory statements as Kunst alleges, the statements are true and were made during the performance of his duty and protected by qualified privilege. Because the jury's verdict is based on errors of law, it should be set aside and a new trial granted.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to correct errors of law. The factual findings of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

ARGUMENT

I. The trial court erred in not overturning the verdict when the verdict was an error in law.

A. Loree proved the substantial truth of Kunst's alleged slanderous statements.

Truth is an affirmative defense to allegations of defamation. *Parrish v. Allison*, 376 S.C. 308, 318, 656 S.E.2d 382, 392 (Ct. App. 2007). *See also Anderson v. Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4th Cir. 1976)(Substantial truth is a valid defense to a libel claim); *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).

During the hearing on pre-trial motions Kunst stated he was asserting the following statements from his pre-trial brief as the statements allegedly made by Loree.⁴ These statements are:

- The Plaintiff embezzled \$400,000 from the Gabys.
- The Plaintiff embezzled money from all of his clients.
- The Plaintiff had taken money from named clients Parham, Covington, Coco, and Hickey.
- The Plaintiff created dummy invoices from dummy companies so that he could steal money from these clients.

⁴ Kunst's alleged defamatory statements differ from those asserted in his Complaint. See paragraph 53, Complaint, R. p. 34-35.

- The Plaintiff took money from his clients to spend on an investment project, a car, trips, and family members.
- The Plaintiff did “criminal things” like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.
- The Plaintiff “is going to jail.”
- The Plaintiff took money from his other projects and that money was missing from these projects. *See* Kunst pre-trial brief, pages 1-2, R. p. 39-40.

Loree introduced into evidence the Gaby Action order dated March 26, 2007 in which Judge Welmaker found that the Gabys were entitled to recover on all their causes of action including breach of contract accompanied by a fraudulent act, conversion, and breach of fiduciary duty. (R. p. 23, Order of Judge Welmaker, Defense Exhibit 23).⁵ As referenced in the Order, Judge Welmaker heard testimony of how Kunst took money from the Gabys, falsified invoices, allegedly purchased and then canceled an insurance policy in order to keep the proceeds, and used the Gabys’ money for his personal purchases. Judge Welmaker ruled in favor of the Gabys. Judge Welmaker’s Order, which was not reversed by either the Court of Appeals or the Supreme Court, is a public record that affirms that the alleged defamatory statements are true.

Kunst contended that Loree said Kunst had taken money from his clients Covington, Parham, Hickey, and Coco. Of these former clients, Kunst called only Eugene C. Covington to testify. Mr. Covington testified that Kunst disappeared from his building site. Covington testified that was when he learned Kunst had not paid the

⁵ Kunst stated on cross-examination that this order had been overturned by the Court of Appeals. That is incorrect. The Court of Appeals affirmed the trial court’s order on January 14, 2009. (2009-UP-028). The South Carolina Supreme Court denied Kunst’s Petition for Writ of Certiorari on June 10, 2010.

subcontractors on his project. (R. p. 156, Tr., testimony of Eugene Covington, p. 282: 19-25). Covington further testified that Kunst used the money Covington paid for his project to purchase a wedding ring for Kunst's fiancée. (R. p. 156, Tr., testimony of Eugene Covington p. 283:25). Covington went on to testify that he tried to have an accounting done for his project, but Kunst never provided financial records to Covington's forensic accounting expert. (R., p. 157, Tr., testimony of Eugene Covington, p. 285: 1-8). Finally and tellingly, Covington testified that Loree never made any of the alleged statements to him. (R. p. 157, Tr., testimony of Eugene Covington, p. 286, lines 3-13). Nonetheless, Covington's testimony makes it clear that Kunst's alleged defamatory statements are actually true. *See Lynch v. Toys "R" Us-Delaware*, 375 S.C. 604, 611, 654 S.E.2d 541, 549 (Ct. App. 2007)(elements of defamation include unprivileged communication to a third party).

Kunst's witness Kevin Goad testified that he only remembered Loree's general statements (R. p. 116, Tr., testimony of Kevin Goad, p. 121: 2-4) and when asked if Loree's statements were true, testified, "They had as much merit as anything else I had heard." (R., p. 117, Tr., testimony of Kevin Goad, p. 127: 15-17). Goad further testified that he only talked to Loree concerning the accounting on the Gaby project. (R. p. 119, Tr., testimony of Kevin Goad, p. 135: 4-8). Finally, Goad did not recall who told him Kunst was going to jail. (R. 120, Tr., testimony of Kevin Goad, p. 137: 1-8). Goad's testimony established that he regarded Loree's statements to be true and that Loree did not tell him Kunst was going to jail.

Glenn Alfonzo, another of Kunst's witnesses, read from "his" affidavit that Loree said Kunst was a criminal, but on cross-examination, admitted that the affidavit was

incorrect and that it did not reflect what he had said. (R., p. 124, Tr., Glenn Alfonzo testimony, p. 153: 14 - p. 154: 13). Alfonzo later admitted that his affidavit, if ever corrected, should state that Loree told him Kunst did things that were criminal. However, Alfonzo also admitted Kunst prepared his affidavit, leaving it in question as to whether the affidavit really reflects what Alfonzo heard or what Kunst wanted him to say that he heard. (R., p. 124, Tr. testimony of Glenn Alfonzo, p. 156: 14-21). Interestingly, Alfonzo testified that it was true that the Kunstwerke checks to him bounced and so he made arrangements for Kunstwerke to pay him with certified checks. (R., p. 124, Tr., Glenn Alfonzo testimony, p. 155: 1-8). Alfonzo's testimony established that it is doubtful Alfonzo really heard Loree accuse Kunst of criminal acts, but it is certain the Kunstwerke checks bounced.

Loree moved for JNOV on the grounds that if he did make any of the alleged defamatory statements, he produced unrefuted evidence that the statements are substantially true. (R., p. 231, Loree Motion for JNOV). Loree introduced in his testimony invoices and a letter from Select Stone and Systems Specialties (R., p. 371, 373, 375, 377, Defense Exhibits 2, 3, 4, and 5) to show that Kunst marked up invoices to the Gabys. (R. pgs. 141 - 142, Tr., testimony of David Loree, pgs. 223: 10 – 228: 25). He introduced an email from Paul Anderson (R., p. 391, Defense Ex. 11) to show Kunst had not paid a supplier even though he had been provided with the funds to do so. *See* also R., pgs. 141-147, Tr., testimony of David Loree, pgs. 223-245, in which Loree accounts in detail the various invoices that Kunst did not pay using the funds Gaby sent him and the invoices that Kunst marked up. Kunst never introduced any evidence to refute Loree's testimony.

On cross-examination of Kunst, Loree entered into evidence the Parham Order (R., pgs. 400-408, Defense Ex. 14) and the Gaby Order (R. pgs. 738-741, Defense Ex. 23) to show that two courts had found Kunst had taken funds from his clients. While Kunst contends these orders were issued by corrupt judges (R., p. 733, Defense Exhibit 22, "Cold and Greedy", p. 240), he introduced no evidence to refute the Orders or the facts contained therein.⁶

Kunst's witness Tracey Hilton never heard any of the alleged defamatory statements. Between witnesses Alfonso, Goad, and Covington, it is clear that none of the alleged slanderous statements were ever made. Even if the jury thought Loree did make the statements, Judge Welmaker's order in the Gaby action and the evidence on the record supports the truth of the alleged slanderous statements. The overwhelming evidence shows the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law.

B. Loree proved the alleged slanderous statements were protected by qualified privilege.

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 even though it contains matter, which, without this privilege, would be actionable. *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C., 86, 88, 447 S.E.2d 194, 196 (1994). One publishing under a qualified privilege is liable upon the proof of actual malice, meaning the defendant acted recklessly or wantonly or with a conscious disregard of the plaintiff's rights. *Id.*

⁶ Kunst never appealed the Parham Order. He did appeal the Gaby Order, but the Court of Appeals affirmed that order.

One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged and (2) the privilege is not abused. *Murray v. Holnam*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001). When one has an interest in the subject matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by the occasion. The statement must be such as the occasion warrants and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed. *Murray, id.* Whether privilege exists is a question of law, whether it was abused is a question for the jury. *Murray, id.*

Kunst himself established in the direct examination of Loree that Loree was conducting an investigation that his employer, the Gabys, requested he perform. Kunst first established that Loree was working for the Gaby family and was paid by one of their family holdings. (R., p. 125, Tr., testimony of David Loree, direct examination, p. 159: 11-17). Kunst also established in the Loree direct examination that Loree was conducting an investigation concerning the Gaby home project. (R., p. 128, Tr., testimony of David Loree, p. 171: 8-19, re meeting with Kunst). Hence, the elements of the qualified privilege were established by Kunst's direct examination of Loree.

Kunst produced only two witnesses who could testify as to what Loree allegedly said. The witnesses, Goad and Alfonzo, were vendors on the Gaby home project and they both testified that Loree was checking to see that they had been paid by Kunst. Their testimony establishes that Loree was speaking to parties with a corresponding

interest. (R., p. 119, Tr., testimony of Kevin Goad, pg. 135: 4-8 and R. p., 124, Tr., testimony of Glenn Alfonzo, pg. 155: 16-17).

Kunst also failed to produce any former client to testify that Loree defamed Kunst. Kunst specifically alleged that his clients Covington, Coco, Parham, and Hickey heard Loree's defamatory remarks. Kunst called only Covington, who testified he did not recall ever having a conversation with Loree on any topic. (R., p. 157, Tr, testimony of Eugene Covington, p. 286: 9-13). In both direct examination of Loree and in his failure to rebut Loree's qualified privilege defense with any evidence, Kunst failed to show in any way whatsoever that the qualified privilege did not apply or was abused.

Kunst offered no evidence whatsoever to show Loree acted with actual malice, that is, with a reckless disregard for Kunst's rights. First, Loree's unrefuted testimony was that Kunst did not direct Loree to avoid contacting his clients; in fact, Loree testified that Kunst did not seem to care if he contacted the clients. (R., p. 141, Tr., testimony of David Loree, pg. 222: 2-10). Kunst's witness Eugene Covington testified that he had never seen or met with Loree. (R., p. 156, Tr., testimony of Eugene Covington, p. 282, l. 19-25). Kunst's witness Goad testified Loree only discussed the Gaby project with him. (R., p. 119, Tr., testimony of Kevin Goad, p. 135, 4-8). Goad further testified that because Kunst had disappeared from the project site and could not be located, Loree became the contact man for payment, (R., p. 117, Tr., testimony of Kevin Goad, p. 125: 6-14). Kunst's witness Alfonzo testified that Loree had said Kunst had done criminal things, not that Kunst was a criminal. Alfonzo also testified that Loree consulted him to make sure he had been paid so that the project could go forward. (R., p. 124, Tr., testimony of Glenn Alfonzo, p. 155: 16-19). No witness testified that Loree had behaved

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in a reckless or wanton manner. Kunst produced no evidence to show that Loree had made defamatory statements (though, even if made, the statements were true) to people not concerned with the investigation Loree was conducting on behalf of his employer.

The jury had absolutely no evidence to determine that Loree was not protected by qualified privilege. As discussed above, Kunst himself established the elements of qualified privilege.

In fact, 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. (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. (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. (R., pgs. 226-229, 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. (R., pgs. 231-241, Defendant's JNOV motion).

II. The trial court erred in failing to overturn the verdict when there was insufficient evidence to support the jury's findings.

A. Kunst did not prove the elements of slander *per se*.

Loree moved for JNOV on the grounds that Kunst did not prove the elements of slander *per se*. (R., pgs. 226-229, Defendant's motions for directed verdict). To prove slander *per se*, Kunst must show with a preponderance of evidence that Loree charged Kunst with commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in his business or occupation. *See Holtzscheiter v. Thomson Newspapers, Inc.* 332 S.C. 502, 510, 506 S.E.2d 497, 505 (1998).

There is no evidence on the record to show that Loree ever charged Kunst with the commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in his business or occupation. Kunst brought the cause of action for slander *per se* in the Complaint and he made no motion to amend his Complaint throughout the action. During the hearing on pre-trial motions Kunst stated he was asserting the following statements from his pre-trial brief as the statements allegedly made by Loree. These statements are:

- The Plaintiff embezzled \$400,000 from the Gabys.
- The Plaintiff embezzled money from all of his clients.
- The Plaintiff had taken money from named clients Parham, Covington, Coco, and Hickey.
- The Plaintiff created dummy invoices from dummy companies so that he could steal money from these clients.

- The Plaintiff took money from his clients to spend on an investment project, a car, trips, and family members.
- The Plaintiff did “criminal things” like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.
- The Plaintiff “is going to jail.”
- The Plaintiff took money from his other projects and that money was missing from these projects. (R., pgs. 39-40, Kunst pre-trial brief, pgs. 1-2).

On their face, in none of the above statements is it alleged that Kunst had a loathsome disease, committed adultery, was unchaste, or was unfit for his profession or occupation (that of a designer of residential homes). Loree testified that he had never told anyone Kunst was a bad designer and he commended Kunst at the trial on his home designs. (R., p. 149, Tr., testimony of David Loree, p. 254: 2-14).

Further, none of the statements charge Kunst with a crime of moral turpitude.

Crimes of moral turpitude involve acts of baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man. *Green v. Hewett*, 305 S.C. 238, 407 S.E.2d 651, 652 (1991) citing *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987). None of the alleged statements rise to the level of baseness, vileness, or depravity.

The case of *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010) is instructive. In *McBride*, this Court found the statement that a teacher stole school property was actionable *per se*. The Court cited the case of *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*. However, unlike Kunst's allegations related to his few clients, these cases involve plaintiffs whose actions affected "society as a whole." *Green, id.* A teacher who takes school property is in effect taking property from all the taxpayers in that school district. A bank teller who takes money from customers' deposits is in effect taking money from the bank and its investors. In Kunst's case, there is no evidence in the Record, nor any evidence presented at trial, that the alleged statements would affect more persons than just his clients, which were five in number. Because there is nothing in the alleged statements rising to the level of baseness, vileness, or depravity, nor any evidence in the Record to support such a finding, Kunst cannot, and did not, prove he was ever charged with committing a crime of moral turpitude. Therefore, Kunst did not prove his case for slander *per se* and the verdict should have been overturned.

Loree also moved for JNOV on the grounds that because Kunst did not allege a cause of action for slander and there is no evidence in the Record to show common law malice or special damages, the verdict should be overturned. (R., pgs. 231-241, Defendant's JNOV motion,). Because Kunst only alleged slander *per se* and he has not met those elements, the verdict should have been overturned.

III. The trial court erred in not overturning the verdict when the verdict was excessive.

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is merely excessive although not motivated by considerations such as passion, caprice, or prejudice. The granting or denial of this motion is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion.

Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 450 S.E.2d 66, 74 (Ct. App. 1994). If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence, the trial court must grant a new trial absolute. *Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011). When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict. See *Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011) citing *Small v. Springs Indus.*, 292 SC 481, 487, 357 S.E.2d 452, 455 (1987). Compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur* and the consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. See *Curtis v. Blake*, 392 SC 494, 709 S.E.2d 79, 82 (Ct. App. 2011) citing *Proctor v. Dep't of Health & Envtl. Control*, 368 SC 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006)

The jury awarded Kunst one million dollars in actual damages. This amount is grossly excessive and is not based on any evidence in the record. Kunst did not produce any evidence to support this claim or any documentation to support the figure of one million dollars. Of more importance, there is no evidence on the record to show that any monetary loss Kunst suffered was due to Loree.

Kunst merely stated to the jury that he needed 1.6 million dollars to pay his attorney's fees and the judgments held against him. (R., p. 175, Tr., testimony of J. Scott Kunst, p. 358: 1-18 and R., p. 215, Tr., p. 518: 11-19). Kunst was *pro se* in this action.

Therefore, he has no attorney's fees. What Kunst is trying to do is collect attorney's fees for other cases he has litigated, which have nothing to do with Loree. Kunst did testify that he was going to hire a tax attorney for \$100,000 to remove the tax liens, but he produced no documentation whatsoever to show he had consulted with a tax attorney and that he would need \$100,000 for the attorney's services. (R., p. 173, Tr. testimony of J. Scott Kunst, p. 352: 13-16). Certainly, Kunst could not explain why the tax liens against him were related to Loree's alleged defamatory statements. In any case, Kunst presented no evidence whatsoever why Loree should be liable for Kunst to hire an attorney *in the future* to remove tax liens imposed on Kunst *before Loree even began his investigation of Kunst*. This defies reason.

Even more importantly, a plaintiff is not entitled to collect attorney's fees in a defamation case because in South Carolina one is entitled to attorney's fees only if there is a provision in the contract or there is a statute providing for attorney's fees, which is not the case here. *See Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005).

Further, none of the judgments against Kunst are due to any defamation by Loree. Of the five judgments against him, four involve suppliers whom Kunst never paid.⁷ (R., p. 175, Tr., testimony of J. Scott Kunst, p. 358: 1-18). The fifth judgment is from the Gaby Action. While Kunst claimed Loree's defamation caused his business to crumble, there is no evidence in the Record to support Kunst's claim. Indeed, Kunst testified that the majority of his damages were related more to the breach of contract cases involving

⁷ General Shale & Brick, Inc., GBS Lumber, Jennings Builders Supply and Hertz Rental.

his other clients Covington, Parham and Hickey. (R., p. 202, Tr., testimony of J. Scott Kunst, p. 467: 10-21).

The evidence did show that suppliers were unpaid due to Kunst's poor accounting, and not anything Loree allegedly said. For example, Glenn Alfonzo testified that he had to make Kunst pay him with certified checks because Kunst's business checks bounced. (R., p. 124, Tr., testimony of Glenn Alfonzo, p. 154: 1-8). Kevin Goad testified that Kunst disappeared from the site and could not be found. (R., p. 118, Tr., testimony of Kevin Goad, p. 132: 12-24). Eugene Covington testified that the accounting for his project was in arrears and Kunst would not provide him the records needed to reconcile the account. (R., p. 156, Tr., testimony of Eugene Covington, , p. 282: 19-25 and R., p. 157, testimony of Eugene Covington, p. 285: 1-8). Kunst himself testified that he was having financial problems with his business in January 2006, a month before Loree began his investigation. (R., p. 162, Tr., testimony of J. Scott Kunst, p. 308: 17-18, "clients got slow", R., p. 163, testimony of J. Scott Kunst, p. 309: 16-21, "bank put 10-day hold on his deposits", and R. , p. 166, testimony of J. Scott Kunst, p. 324: 21- 325: 2, "funding deficit January February 2006 of \$539,000). Finally, Kunst's tax liens, which Kunst used to justify an award of 1.6 million dollars, date from 2003, three years before Loree began his investigation. (R. p. 447, Kunst SCDOR tax lien, Defense trial exhibit 20).

Kunst failed to prove his case for slander *per se*, therefore he is not entitled to any damages at all. The jury's verdict is grossly excessive and the amount awarded is shockingly disproportionate to Kunst's injuries. Indeed, there is no evidence to show Kunst suffered any injury due to Loree's alleged defamatory statements. Because the verdict is so disproportionate and not based on any evidence in the record, a new trial

absolute should be granted. *Curtis, id.* Certainly, the trial court was entitled in its discretion to reduce this excessive verdict, and should have done so. *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66, 74 (Ct. App. 1994).

A new trial is also justified based on the Supreme Court opinion *Sanders v. Prince*, 304 S.C. 426, 403 S.E.2d 640 (1991). In *Sanders*, a slander action in which the jury returned a verdict in excess of one million dollars, the South Carolina 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?” 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.” *Sanders*, 304 S.C. at 238-39. The 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.*

In this case, during deliberations, the jury sent a note to the court asking if they could decide who of Kunst’s creditors would get the money they chose to award. (R., p. 224, R., p. 759, Tr. 554, Court Exhibit 4) This is exactly what the 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. 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. The jury’s actions in

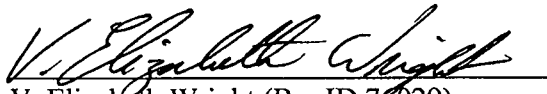
exceeding its authority, the excessive amount of the damages award, and the paucity of evidence to support the damages award show that the jury must have been motivated by passion, caprice, and prejudice and therefore, following the *Sanders* holding, the trial court should have overturned the verdict.

Conclusion

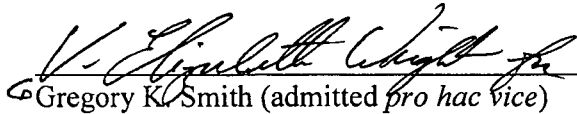
There is no evidence in the record to support Kunst's cause of action of slander *per se*. Further, there is also a preponderance of evidence to show Loree's alleged defamatory statements were either true or protected by qualified privilege and therefore not defamatory. Certainly there is no evidence whatsoever in the record to support an award of one million dollars. For these reasons, Loree respectfully requests that this Court reverse the trial court and remand this action for a new trial.

Respectfully submitted.

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April 25, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

RECEIVED

APR 27 2016

SC Court of Appeals

J. Scott Kunst Respondent,

v.

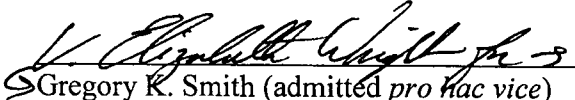
David Loree Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and the Final Reply Brief of the Appellant comply with Rule 211(b), SCACR.



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APR 29 2016

SC Court of Appeals

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J. Scott Kunst,

Respondent,

v.

David Loree,

Appellant.

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STATEMENT OF FACT

The Appellant's Statement of Facts is argumentative and attempts to surmise and impune Kunst's motives for filing this case. The most significant fact not mentioned is that a jury of twelve found David Loree to be a defamer and awarded \$1,000,000 in damages. That is now a fact. This occurred because a *pro se* litigant persevered through nine years of inexcusable delays and trial court errors (R. p. 71) to bring a case to trial in which the veracity of Loree's statements to others was finally litigated.

This was a serious matter that harmed many good people. We now have the benefit of a decade of hindsight and the resolution of twenty related cases that support the objective facts of this case. Flippant, meaningless conjecture about motives does not serve the legal issues of this appeal.

Loree introduced *Cold and Greedy* at trial and submitted a portion of an ebook preview printed from ColdandGreedy.com into evidence (R. p. 462). The full context of *Cold and Greedy* in its final form today is very clear about why it was written and who was individually responsible for the sordid events of the spring of 2006. The *objective* statement of facts relevant to *this* case are as follows:

David Loree is an executive protection administrator (bodyguard) provided by an Amway holding company, *JVA Enterprises* (R. p. 285), to protect Barbara VanAndel-Gaby, daughter of the Amway founder. Loree was initially involved with the security aspect of a new resort home the Gabys were building on Lake Keowee designed by Kunst and built by his firm Kunstwerke. Husband Richard Gaby believed that his multi-million dollar lake home was over budget and feared it would not be available for the summer of 2006. Gaby wanted to terminate Kunst and Kunst's design/build firm Kunstwerke and act

as his own builder and scale the project back.

Kunstwerke was an S Corp. created to build Kunst's unusual designs. Kunstwerke/client contracts were unique in the design/build business in that they were *reimbursement* contracts. Contractor and supplier invoiced costs were incurred by Kunstwerke and submitted without mark up in a weekly statement requesting reimbursement (R. p. 304, lines 12-15). This was a courtesy that had been offered by Kunstwerke for a decade without issue. Kunstwerke's only source of income was a fixed monthly fee.

Loree was asked by Gaby to take over the project and secure the cooperation of those contractors and suppliers in Kunst's organization that were needed to complete the project. Kunst's site manager, Bronson Shepherd, was needed most and, therefore, was targeted most. Kunstwerke and Kunst had five active projects at the time at various stages of completion. If Kunstwerke were terminated from the Gaby project in an open and legal manner, Kunst would have insisted that Shepherd and the other contractors move to other sites where they were needed.

At the time of Kunstwerke's termination on March 3, 2006, the Gabys were in arrears for three weekly statements: 2/16/06 (R. p. 349), 2/20/06 (R. p. 350), and 3/3/06 (R. p. 351). Kunstwerke's accounting system can identify the exact reimbursement amount owed on any day of construction. On any day of construction, any Kunstwerke client had sufficient records to conduct a full audit of their account if they suspected anything was awry. On February 16, 2006, the cost of construction incurred by Kunstwerke totalled \$2,656,492 and the Gabys had reimbursed \$2,554,087 (R. p. 307).

None of these totals, nor the three unpaid statements above, have *ever* been contested by the Gabys or Loree.

In February 2006, Kunstwerke was holding a window and cabinet deposit from Gaby for items not yet ordered or completed. This was known to Gaby. Gaby acknowledged by email the money he owed for the unpaid weekly statements and stated that these deposits would be a "float" to cover that "until we get our hands around where we are at (R. p. 393)."

In late February 2006, David Loree maliciously posed as a "former detective investigating Kunst's financial dealings with his clients" and announced that he had supposedly uncovered financial crimes. The specific seven slanderous quotes litigated at trial are listed in Argument A, page 15 of this brief. Only two of the seven statements have anything to do with the Gabys, and only one of them is exclusively about the Gaby's.

Loree has no financial background nor the intellectual ability to conduct any such investigation. Loree is not a former detective, nor had he uncovered any criminality. Loree acted like a reckless goon. Loree never read the Gaby contract until trial (R. p. 126, lines 12-32), nor has he demonstrated the ability to comprehend what a reimbursement contract is. Richard Gaby did not instruct Loree to "investigate Kunst's financial dealings with his clients" (R. p. 208, lines 17-19).

At the moment Loree's statements regarding financial crimes spread through the public, all five Kunstwerke clients stopped paying their current weekly statements despite the fact that these projects collectively owed \$539,027 more than had been reimbursed. Two of these clients were attorneys Eugene Covington Jr. and Michael Parham who owed

\$137,634 and \$70,906 respectively of the \$539,027 debt owed Kunstwerke (R. p. 307). Kunstwerke had processed \$20,000,000 dollars and 10,000 weekly clients statements for a decade without incident. No client had ever missed a payment prior to February 2006.

In May 2006, Gaby sued Kunst alleging that there were unpaid contractors when he took over the project and that this was due to breach of contract accompanied by fraudulent acts, conversion, and breach of fiduciary duty. Kunst's answer was deemed late and he was found in default. Kunst and Kunstwerke filed counterclaims refuting Gaby's claims and claiming money owed, and fought to have the default removed. The order of default was appealed unsuccessfully to the State Supreme Court.

Loree appeared on behalf of the Gabys in the Gaby action at a default damages hearing in March 2007 and submitted a "Default Damages Computation." Loree had just been sued by Kunst for defamation in December 2006. Loree submitted a damages computation that excluded the credit nature of the contract and the mountain of invoices Gaby never reimbursed (Richard Gaby's float) in order to make it appear that money was actually missing from the Gaby account. The window and cabinet deposits, along with a handful of other line items, appear on the computation as money supposedly used by Kunst on something other than the Gaby project (R. p. 337). The actual Kunstwerke accounting records were complete, accurate, and accounted for every dime the Gabys paid Kunstwerke. All Kunstwerke accounting records were procedurally barred and were specifically objected to by the Gaby's attorney. Kunst was not permitted to testify or call witnesses. The hearing was premised under the assumption that all causes of action were admitted. As the Appeals Court has noted, "Kunst was also not allowed to participate in any discovery on this matter (R. p. 78, lines 18-19)."

The Gabys elected to have final judgment entered in the default case under one cause of action: *breach of contract accompanied by fraudulent act*. Judge Welmaker specifically states that he did not find that Kunst violated SCUTPA. There were no monetary damages for conversion, defective work, or breach of trust. See page 9 of this brief for a detailed argument and references.

Forensic accountant Bill Larkin wrote a report during discovery for Loree's case and related cases and Loree referred to him repeatedly at trial (R. p. 133, lines 53-75) (R. p. 152, lines 30-50) (R. p. 154, lines 35-50), yet neither he nor anyone else appeared on Loree's behalf to contest Kunstwerke's actual records. The actual Kunstwerke billing statements in the possession of both Loree and the Gabys in March 2006 clearly showed the window and cabinet deposits refunded back to Gaby to pay directly (which he did), and clearly showed these items netted against the money owed, as agreed.

In 2007, Kunstwerke sued those clients, including Covington and Parham, who abruptly stopped reimbursing in February 2006 for breach of contract in order to collect the \$539,027 owed. Unlike the Gaby default action, the actual Kunstwerke accounting records were litigated in every case, and every case settled in Kunstwerke's favor (R. pp. 172-173). There was no money missing or taken from any client as alleged in Loree's slander.

On page 5 of his Statement of Facts, Loree alleges that "Kunst, although a former CPA, was unable to keep his company, Kunstwerke, financially solvent." The accounting records submitted at trial showed a company better capitalized and increasingly profitable in 2003, 2004, 2005, and 2006 (R. p. 274). No company withstands the sudden default of

\$539,027 (R. p. 273) of client debt, slander actionable *per se*, threats, and subsequent lien fraud.

On page 3 of his Statement of Facts, Loree relies on his *own* testimony at trial to support that Kunst "changed invoice amounts" from a company called System Specialties. There were 12 invoices submitted by System Specialties totaling \$9,088. If Loree is alleging that an invoice was intentionally altered (and he has been found by a jury to be a defamer about such matters), that would cause the System Specialties ledger in Kunstwerke's accounting system to be out of balance. No such thing occurred. Loree testified that people more intelligent than he looked at the accounts (R. p. 153, lines 5-20). Without a witness from System Specialties or a forensic accountant, this is hardly a statement of fact and the finders of fact agreed.

Seven of the slanderous statements that Loree made to others were litigated at trial and are listed on page 15 of this brief. Only two of these statements have anything to do with the Gabys. These are actual quotes attested to by witnesses who submitted affidavits and were deposed during discovery. These actual quotes are more concise than the allegations in the original complaint. They do not differ from the complaint and were not changed pretrial by Kunst as alleged by Loree.

ARGUMENT

I. The trial court erred in not overturning the verdict when the verdict was an error of law.

A. Loree proved the substantial truth of Kunst's alleged slanderous

statements.

Loree begins his brief by stating “This case is Kunst's attempt to retry the Gaby action.” Loree apparently forgets that the Appeals Court has already ruled on that false notion. The simple truth of the matter is that Loree's present appeal is nothing more than an attempt to re-appeal his failed collateral estoppel argument and to avoid what has now become the *actual result* of “actually litigating the veracity of Loree's statements to others” (R. p. 78).

Even after the finders of fact found that David Loree is a defamer and awarded \$1,000,000 in damages, Loree attempted yet again, through a JNOV motion, to have a trial judge summarily determine that a civil default judgment “is a public record that affirms that all of the alleged defamatory statements are true” (Page 7 of Loree's brief).

There is a blatant falsehood in *footnote 5* on page 7 of Loree's brief that needs to be addressed because it exposes the deceptive nature and the fatal flaw of Loree's substantive truth argument. Loree's footnote 5 attempts to have this court believe that Kunst stated on cross-examination that Judge Welmaker's order in the Gaby action of March 26, 2007 “had been overturned by the Court of Appeals” when the trial transcript clearly shows Kunst did not state this.

Loree's attorney Smith submitted Welmaker's order as trial Exhibit 23 (R. p. 739) as described on pages 454 and 455 (R. p. 199) of the trial transcript. At the bottom of page 455, Smith approaches the bench with Judge **Miller's** order of October 19, 2010 in the *present* case (R. p. 743) granting summary judgment based solely on the doctrine of collateral estoppel. Page 456 of the transcript could not be more clear. Smith hands **Miller's** order to Kunst who immediately identified the order as having been overturned

by the Appeals Court and objected to its use as evidence (R. pp. 199-201). The trial judge took judicial notice that it had been overturned by the court (R. p. 199) and allowed Kunst to submit the Appellate opinion reversing it (R. p. 199). These two became Exhibits 24 and 25 respectively.

Loree's footnote 5 "mistake" is relevant because it exposes how much Loree's substantive truth argument is just a rerun of his failed collateral estoppel attempt. Loree *still* depended on Judge Miller's overturned order to make his substantive truth argument appear credible at trial. So much so that attorney Smith made certain that the jury heard him imply that it wasn't overturned by stating: "if it was overturned by the Court" (R. p. 199, lines 85-100).

One of the exhibits attached to Kunst's pretrial motions is a letter by Kunstwerke attorneys objecting to Judge Miller's order when it was still just a draft. It is a thorough and well-deserved critique based on law and remains relevant to this appeal (R. p. 88). In direct contravention of Welmaker's order, this outrageous order makes factual findings from the damages hearing that Judge Welmaker did not make. It is broad, argumentative, misstates facts, finds that *criminal* findings were found in another *civil* case, references only out-of-state precedent to grant issue preclusion to a default judgment, and was written by an attorney whose law partner stood to personally gain from its "findings." The judge was made aware of all of these problems while the order was still in draft form, yet he signed it without a single correction. Furthermore, the judge did not rule to deny Kunst's motion to reconsider for an entire year, further delaying this case. This order, which was ultimately overturned by the Court of Appeals (R. p. 71), is responsible for a four year delay in this case.

On page 7 of his brief, Loree argues that Judge Welmaker "heard testimony" at the default damages hearing of various things such as "...falsefied invoices, allegedly purchased and then canceled an insurance policy in order to keep the proceeds..." and therefore, the public record of Judge Welmaker's March 26, 2007 order in the Gaby civil default case "affirms that the alleged defamatory statements are true." Loree attempts to surmise what Judge Welmaker "heard" when his actual order only states: "The Plaintiffs have provided sufficient evidence to establish their claims fully. Of course, the court starts from the premise that all facts relating to the pertinent causes of action are admitted (R. p. 740, lines 5-6)." Furthermore, in Loree's present *actual* trial, evidence was permitted to be presented to a jury refuting all of these claims.

What Loree does not reveal on page 7 of his brief is that the Gabys elected to have the court enter *final* judgment under only one cause of action, "breach of contract accompanied by fraudulent act." See Supplemental Notice of Election and *final* order dated April 23, 2007. Judge Welmaker specifically states he did not find that Kunst violated SCUTPA and there was no monetary finding of conversion or breach of fiduciary duty. The public record shows that Kunst has never been charged with or convicted of a criminal misdemeanor of any kind.

Loree argues: "Judge Welmaker's order in the Gaby action and the evidence on the record supports the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law." The present issue for the Appeals Court is not whether the "order in the Gaby action and the evidence" submitted by Loree "supports the truth." The issue is whether a review of the evidence reveals competing inferences. See *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003); *Welch v. Epstein*, 342

S.C. 279, 536 S.E.2d 408 (Ct.App.2000); see also Force v. Richland Memorial Hospital, 322 S.C. at 284, 471 S.E.2d at 715 (stating that if more than one reasonable inference exists, a jury verdict must stand). The only issue is whether the trial judge who heard all of the evidence in the context it was presented at trial erred by not overturning the jury verdict because there was only one possible inference that could have been drawn from the evidence. The trial judge clearly did not err as revealed below and the jury verdict must not be disturbed.

In his closing argument at trial, Loree's attorney summarized the whole of the Appellant's trial defense well by stating: "When we started this trial Tuesday, I believe it was, I ask you to remember two things. First, that a court of law has determined that Mr. Kunst took \$400,000 from the Gaby's that should have been paid to subcontractors and suppliers. Second, I ask you to remember that you will see absolutely no evidence whatsoever that Dave ever made disparaging remarks about Mr. Kunst design or construction work." (R. p. 215, lines 64-100) It appears the full extent of Loree's truth defense trial prep was photocopying Judge Welmaker's default judgment order in the Gaby action, Judge Miller's overturned order in this case, and a subpoena to their only called witness, a representative from the SCDOR.

The Appeals Court ruling reversing Judge Miller's application of collateral estoppel acknowledged that the Gaby action is a default judgment which by South Carolina law is not deemed to have been "actually litigated." The Appeals Court found that Kunst did not have a full and fair opportunity to defend the Gaby action on its merits:

"Although Kunst participated in the damages hearing by cross-examining witnesses called by the Gabys, it appears he was not afforded the opportunity to testify or to call witnesses

to testify on his behalf. Kunst was also not allowed to participate in any discovery on this matter. In addition, because Kunst was in default, the circuit court 'start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted.' Accordingly, we hold Kunst was not presented with a fair opportunity to 'actually litigate' the veracity of Loree's alleged statements to others." (R. p. 78, lines 15-23)

Litigating the veracity of specific slanderous words requires all evidence be heard and contested at law. Litigating words that impute serious, indictable financial crimes to another man requires more than just submitting a judgment in a civil default case.

Furthermore, the Gabys are only *one* of five clients Loree specifically named and stated Kunst took money from. Only two of the seven slanderous statements that were litigated at trial (**Statements 1 and 6** below) related to the Gabys in any way. Only one statement (**Statement 6**) involved client Gaby exclusively.

At trial, a full and fair litigation occurred based on actual accounting records and other evidence that was objected to and procedurally barred from the Gaby default damages hearing. It did not take long for the jury to figure out why Loree desperately attempted to obtain issue preclusion from a civil default case in a state that does not grant such, and why Loree fought to avoid actually litigating his statements to others for nine years.

In response to Loree's argument that "a court of law has determined that Mr. Kunst took \$400,000 from the Gabys that should have been paid to subcontractors and suppliers," the jury saw the following evidence that was not part of the default damages hearing. Loree attempted to have the actual accounting records excluded again at trial by

objecting to them claiming "its hearsay, not the best evidence" (R. p. 166, lines 51-75), but was denied.

1. The jury saw actual Kunstwerke accounting records that accounted for all 908 Gaby contractor and supplier invoices and showed that Kunstwerke had incurred \$2,656,492 in contractor and supplier cost from these 908 invoices and that Gaby had reimbursed only \$2,554,087 of it. (R. p. 273)

2. The jury heard testimony from Richard Gaby admitting that he had not paid all of his weekly reimbursement billings. (R. p. 208, lines 7-8)

3. The jury saw the email exchanges between Gaby and Kunst in which Kunst reminds Gaby that he has a reimbursement contract and must reimburse \$90,000+ owed Kunstwerke. (R. p. 393)

4. The jury saw Richard Gaby's email in which he specifically instructs Kunst that the money he had already provided for cabinet deposits, etc. was enough of a "float" to cover Gaby's unreimbursed invoices until "we get our hands around where we are at." (R. p. 393)

5. The Jury heard a witness to a meeting between Kunst and Loree on February 16, 2006 stating that Loree knew about the unpaid weekly statements and said "I think I can get these paid." (They never were.) (R. p. 109, lines 68-85)

6. The jury saw the final Gaby account billing of March 2006 that refunded such items as the Gaby deposits for windows and cabinets against the stack of invoices Gaby never reimbursed (the float) as per Mr. Gaby's instruction. (R. p. 393)

7. The jury saw how Loree submitted an intentionally deceptive damages computation at the default damages hearing on behalf of his boss Gaby that shockingly showed only one side of the ledger (Gaby's "float" conveniently disappeared). The content of those last three unreimbursed Kunstwerke weekly billings (R. pp. 349-351) was shockingly absent from Loree's default damages computation. The actual Kunstwerke accounting records would have easily shown the default damages hearing judge where every dime of Gaby money went.

8. The jury saw Kunst's reconciliation of Loree's default damages computation to the actual accounting records in a document Kunst provided to those members of the public involved with the Gaby project who had heard Loree's slander. (R. p. 336)

9. The jury heard Loree state that he *still* doesn't know where his alleged missing Gaby money went and that he had washed his hands of it years ago (R. p. 153, lines 5-20) and left it in the hands of people "much more intelligent" than he "going through accounts."

10. Kunst testified to the accounting system in place and how records were complete, objective, and existed from the moment a transaction occurred. (R. p. 165, lines 56 - 73)

11. Kunst testified to the circumstances surrounding the Gaby default case and how his response was deemed late (R. pp. 168-169).

13. The jury saw evidence that Kunst and Kunstwerke filed much more significant counterclaims against the Gabys and fought to have the default removed and have the case actually litigated on its merits. The jury saw how Kunst fought to actually litigate the Gaby case all the way to the State Supreme Court. It was the Gabys who opted not to

contest their account fully and spent far more than their “damages computation” avoiding litigation.

14. The jury saw Kunst's draw schedule from his S Corp. Kunstwerke and how it was impossible to use client money for personal things (R. p. 308).

The jury saw Loree to be a maliciously motivated man who falsely imputed serious financial crimes to another man in order to obtain a quick result in 2006 that the truth would not have otherwise afforded him. The jury also saw a motivated man who lied again in March 2007 (three months *after* being sued for defamation) when he submitted a fraudulent damages computation on his boss's behalf in a default damages hearing (R. p. 336). The jury saw a man whose motives and flippant demeanor toward his slander and the harm it caused had not changed at trial nine years later.

The full and fair actual litigation of the veracity of Loree's statements others

Three witnesses were chosen by Kunst because they represented a cross-section of those Loree spoke to and attempted to influence. These witnesses were specifically chosen from discovery because the statements were blanket statements of “fact” regarding Loree's alleged findings and were spoken after any supposed “investigation” by Loree had occurred. All of the statements imputed criminality and none of them were part of any privileged conversation or occasion. On page 6 of his brief, Loree alleges that the statements were changed pretrial from the original complaint. This is not true. These are simply the more concise statements from discovery.

Bronson Shepherd

The main witness, Bronson Shepherd, passed away in 2011 during the inexcusable delay Kunst endured bringing this case to trial. Bronson provided an affidavit in this case that was served on Loree's counsel and filed on February 3, 2009 (this can be confirmed by a Pickens County Court Record search). Unlike the other two witnesses below, Loree opted not to depose him. Loree objected to the admission of Bronson's affidavit into evidence and the court sustained (R. p. 99). For this reason, **Statement 8**: "Scott is going to jail" spoken by Loree to Bronson Shepherd is not argued below. Due to trial court errors and the inexcusable delays by Loree, Kunst was placed in the difficult position of conducting a trial in which his main witness, the man whom Loree attempted to influence the most through his slander, was not available.

The jury did, however, hear the testimony of Tracey Hilton as she described who Bronson was and why they were not going to hear from him (R. p. 111). Defendant's Exhibit 22, an ebook preview of *Cold and Greedy*, included a chapter on Bronson that Loree's own attorneys provided to the jury. The events described in this chapter placed the testimony of the other two witnesses in even better context for the jury (R. p. 725).

Kevin Goad

Kevin Goad is a window supplier who provided an affidavit in this case. The affidavit was served on Loree's counsel and filed on August 27, 2008 (this can be confirmed by a Pickens County Court Record search). Loree's attorneys deposed Goad shortly thereafter.

At trial, Kunst provided Goad a copy of his affidavit in order to refresh his memory regarding what he said Loree specifically told him in the spring of 2006. Goad

stated: "I remember some of the details of this. I would trust this paperwork more than my memory now." (R. p. 116, lines 1-25) Goad read aloud the entirety of his affidavit to the jury (R. p. 116).

Statement 1 to Goad. "He stated that Scott Kunst had taken \$400,000 from the Gaby project and had left his other clients in a similar situation." (R. p. 116)

Statement 2 to Goad. "Money was missing from many of Scott Kunst's clients. He referenced to Parham, Covington, Coco, and Hickey specifically." (R. p. 116)

Statement 3 to Goad. "Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (R. p. 116)

Statement 4 to Goad. " ...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (R. p. 116)

Glenn Alfonso

Glenn Alfonso is a copper trim contractor who provided an affidavit in this case. The affidavit was served on Loree's counsel and filed on July 24, 2008 (this can be confirmed by a Pickens County Court Record search). Loree's attorneys deposed Alfonso shortly thereafter.

At trial, Kunst provided Alfonso a copy of his affidavit in order to refresh his memory regarding what he said Loree told him in the spring of 2006. Alfonso testified as to how the affidavit came about and he read it aloud to the jury (R. p. 121, line 76 – p.

122, line 25). In recross at trial, Loree's attorney attempted to discredit Alfonso's affidavit by alleging that Kunst "wrote it." Alfonso gave his oath upon signing the affidavit and gave his oath at his deposition. Kunst is *pro se*, and must type witness statements on affidavits with a case heading in the proper format for signature.

Statement 5 to Alfonso. "I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (R. p. 122)

Statement 6 to Alfonso. "In one particular instance I recall him stating to me that 'I'm not supposed to be telling you this, but to give you an idea of some of the criminal things Scott has been doing...' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys, and intentionally cancelled the policy the next day so that he could keep the money.." (R. p. 122)

Statement 7 to Alfonso. "During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was "missing" from these other projects." (R. p. 122)

All 7 statements were litigated and proven a lie as follows

Statement 1

"He stated that Scott Kunst had taken \$400,000 from the Gaby project and had left his other clients in a similar situation." (R. p. 116)

Q. Kunst: "Did you state to Kevin Goad that Scott Kunst had taken \$400,000 from the Gaby project and left his other clients in a similar situation."

A. Loree: "Unknown, sir, nine years ago." (R. p. 136, lines 76-80)

Because Loree did not deny stating it and because he was permitted to plead a truth defense immediately prior to trial, Kunst asked him what evidence he had:

Q. Kunst: "Did you ever ask to have the Kunstwerke books audited?"

A. Loree: "No, sir."

Q. Kunst: "Are you in possession of any kind of audit of Kunstwerke records?"

A. Loree: "No, sir."

Q. Kunst: "Do you have any evidence that I embezzled money from any other client other than the Gabys?"

A. Loree: "No, sir."

Q. Kunst: "Do you have any evidence that I embezzled money from the Gabys?"

A. Loree: "We have a judgment against you of funds that were unpaid by you to vendors relative to their project" (R. p. 131, lines 28-50).

Q. Kunst: "Is it a default judgment?"

A. Loree: "Unknown sir."

Q. Kunst: "Do you know what a default judgment is?"

A. Loree: "No, sir." (R. p. 131, lines 51-55).

Q. Kunst: "I understand. Did you take the Gaby family's judgment to a prosecutor?"

- A. Loree: "No, sir."
- Q. Kunst: "Has there been any kind of criminal finding?"
- A. Loree: "Not to my knowledge, sir" (R. p. 131, lines 69-71).
- Q. Kunst: "Mr. Loree, did I take money from the Gabys and spend it on personal things?"
- A. Loree: "Unknown, sir."
- Q. Kunst: "Have you ever stated to anyone that?"
- A. Loree: "No, sir (R. p. 130, lines 70-75)."
- Q. Kunst: "As you sit here now, do you have any evidence that \$400,000 was taken from the Gabys by me?"
- A. Loree: "We actually -- I think the Gaby family has a judgment in the courts here in South Carolina in favor of the Gabys awarding them over \$400,000, so I'd say yes, we have plenty of that, sir."
- Q. Kunst: "Do you have evidence of actual theft?"
- A. Loree: "It's a civil trial, not a criminal trial. No, Sir (R. p. 135, lines 19-25)".

The accounting records that Kunst submitted into evidence clearly showed where every dime of Gaby money went (R. p. 307). Loree repeatedly referenced Mr. Larkin, the forensic accountant that supposedly looked at everything (R. p. 133, lines 53-75) (R. p. 152, lines 30-50) (R. p. 154, lines 35-50).

A Loree: "That was well beyond -- I washed my hands of that portion of it. There were people much more intelligent than I going through accounts...(R. p. 153)"

Q. Kunst: "Will you have anyone here in the next few days more intelligent than you that can speak to that?"

A. Loree: "If you turn and ask my attorneys, I don't know that (R. p. 153)." In a shocking admission, Loree testified that he *still* has never reviewed or looked at the actual Kunstwerke accounting records (R. p. 152).

In a pattern typical of defamers, Loree repeatedly attempted to add credibility to his slander by adding that it wasn't just the Gabys who were victims of a crime. **Statement 1** ends: "and left his other clients in a similar situation." The record shows that Kunst had five other clients at the time, therefore, one may reasonably infer that Loree's \$400,000 slander could exponentially be \$2,400,000. Loree provided no evidence whatsoever that these other clients were in a "similar situation." Put simply, Loree attempted a substantive truth defense for only 1/6th of the impact of **Statement 1** by submitting a copy of a default judgment order in a civil case. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 2

"Money was missing from many of Scott Kunst's clients. He referenced to Parham, Covington, Coco, and Hickey specifically." (R. p. 116)

Loree's attorney asked Goad on Cross-examination:

Q. Wright: "Do you recall Mr. Loree specifically stating to you that Mr. Kunst had taken money from Parham, Covington, Coco, and Hickey?"

A. Goad: "I do."

Q. Wright: "do you recall when that was?"

A. Goad: "When he told me that?"

Q. Wright: "Yes."

A. Goad: "I don't specifically. It was one of the initial meetings where he was introducing himself telling me he was, I guess, taking over the project in Scott's absence (R. p.119, lines 62-75)."

Loree admitted in direct examination to speaking to each and every one of the clients named above (R. p. 131, lines 71-80). Loree was asked name by name if any of them stated there was a financial problem with their project. Loree responded "Unknown, sir" all four times (R. p. 132, lines 1-25). On page 8 of his brief, Loree references Covington's testimony. Covington was subpoenaed by Kunst as a hostile witness for two reasons: 1. To testify as to the resolution of the Kunstwerke contract case against him, and 2. To admit that his own firm represented Loree for nine years up until a few weeks before trial. In page 8 of his brief, Loree references "Covington money" that was supposedly used by Kunst to make a personal purchase. The actual accounting records show that on the date that Kunst withdrew his own capital to make this purchase, Covington owed Kunstwerke \$110,080 net cash (Bates Kunst 000288) that Kunstwerke had paid out over what Covington had reimbursed to date. It was definitely not "Covington money." This was

desperate, lazy rhetoric by a belligerent attorney who finally admitted that he (Covington) wrote a settlement check mid-trial (R. p.156, lines 88-100). That is what the jury was waiting to hear. Kunst did not "disappear" from the Covington project. Covington took advantage of the Loree situation and defaulted on his debt on February 15, 2006 (R. p. 309) and threatened legal action if Kunst or anyone filed a lien.

Kunst testified that defendant Coco also settled his contract case mid-trial with a check and that attorney Parham also settled his contract case with a check (R. pp. 172-173).

Loree's own expert witness Larkin was also used by attorney Stern in these contract cases. There were years of actual litigation and discovery of the Kunstwerke records and accounts available to Loree to present to the jury to prove the truth of his statements, if they *were* true.

In his opening statement, Kunst told the jury that this had been a long and difficult event and that there were twenty related cases filed in order to provide them the evidence they needed in this case (R. p. 106). It is of significant importance to this appeal to consider that **Statement 2** had absolutely nothing to do with the Gabys or Judge Welmaker's default judgment order, the whole of Loree's apparent substantive truth defense. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 3

"Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (R. p. 116)

This statement was made as a blanket statement claiming Kunst had personally fabricated multiple false companies (plural) and intentionally caused his clients (plural) to pay fraudulent invoices from these companies. This act, if true, would result in multiple criminal charges.

Loree argues in his brief that every statement is substantially true, but when asked about this statement, Loree did not provide any examples of dummy companies or dummy invoices issued to any of Kunst's clients. Instead, Loree testified that dummy "was certainly not a term I would use (R. p.134, lines 40-50)." "That is not a statement that I made (R. p. 136, lines 80-85)."

Q. Kunst: "Is it your testimony that Kevin Goad was not being truthful?"

A. Loree: "No Sir (R. p. 136, lines 96-100)."

No one more intelligent or better prepared than Loree appeared on his behalf at trial and provided the jury with a single dummy invoice from a dummy company issued to any client. The reasonable inferences to be drawn from these words spoken to Kevin Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 4

" ...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (R. p. 116)

This is another bombshell blanket statement that imputed serious financial crimes. Goad did not even provide windows or doors for the Hickey project (see privilege

argument, page 31 below).

Q. Kunst: "Did you state to Kevin Goad to contact -- that you had made contact with Hickey and that a lot of money had been taken from Hickey as well?"

A. Loree: "I don't recall that, sir. I talked to multiple clients of yours, yes, but I don't recall that from nine years ago. Is that in deposition testimony somewhere, perhaps (R. p. 137, lines 5-11)?" Loree does not deny making the statement. Kunst asked Loree if Hickey told him there was a financial problem with his project. Loree answered: "Unknown, sir (R. p. 132, lines 9-11)."

One can reasonably infer why Loree would not even attempt to defend the truth of this statement. The reasonable inferences to be drawn from these words spoken to Goad were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 5

"I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (R. p. 122)

Stating that a man is "criminal" to that man's business associates is actionable on its face, especially if that man has never had more than a speeding ticket. The mere usage of the word "Con" has been deemed actionable *per se* and is a matter for the jury. (*Parrish v. Allison*, 656 S.E.2d 382 (S.C. Ct. App. 2007))

Glenn Alfonso stated that the only mistake in his affidavit was that he didn't remember the word "a" being in front of "criminal." He was then asked to read the affidavit again to the jury the way *he* wanted them to hear it, and this became **statement 5**

as worded above. (R. p. 124) Alfonso had first noticed his "a" mistake during his deposition in 2008 but also confirmed the corrected statement then.

The reasonable inferences to be drawn from these words spoken to Glen Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 6

"In one particular instance I recall him stating to me that 'I'm not supposed to be telling you this, but to give you an idea of some of the criminal things Scott has been doing...' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys, and intentionally cancelled the policy the next day so that he could keep the money.." (R. p. 122)

This statement is similar to the "dummy invoice" statement and is a blanket statement claiming criminal intent and theft, that if true, would result in multiple criminal charges. Indeed, Loree was "not supposed to be telling" an absolute lie. He took a simple insurance agency error and imputed criminality and intent to Kunst personally. The jury saw a man motivated to impute any kind of criminality he could fabricate. When asked about it on direct examination, Loree had no evidence whatsoever and stumbled about asking Kunst *again* for a copy of his (Loree's) testimony from the default damages hearing (R. pp. 134-135). This specific statement and affidavit had been on file in this case for seven years.

Nothing in Judge Welmaker's order specifically addresses the veracity of this statement to Alfonso which has never before been litigated in a contested environment. Witness Tracey Hilton testified as to the underwriting situation involving the policy (R. p.

112, lines 1-23) and submitted an exhibit proving that Mr. Gaby was fully aware what was going on long before Loree's "investigation" (R. p. 280). Kunst also addressed this item specifically in his letter to those involved in the Gaby project on April 7, 2007 (R. p. 347).

This was the only statement at trial other than **Statement 1** that had anything to do with the Gabys. Alfonso testified that he was not alone when Loree made this statement (R. p. 122, lines 75-100) and recalled from his deposition testimony that other construction workers were standing around (R. p. 123, lines 51-69). The reasonable inferences to be drawn from these words spoken to Glenn Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Statement 7

"During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was "missing" from these other projects." (R. p. 122)

When asked at trial if he made this statement to Alfonso, Loree answers: "I don't recall making that statement (R. p. 137, lines 69-75)."

This is another statement through which Loree attempted to add credibilty to his slander by stating the Gabys were not the only victims of the crimes he was alleging. Loree had no proof at the time he said it and offered no proof at trial. This statement is similar to **Statement 2** to Goad above. The reasonable inferences to be drawn from these words spoken to Glenn Alfonso were properly left to the jury to decide. The jury's findings must not be disturbed.

Substantive truth must be proven as to each individual statement made. (*Castine v. Castine*, Op. No. 5120 (S.C. Ct. App. filed May 1, 2013)). Loree's argument that "Judge Welmaker's order in the Gaby action and the evidence on the record supports the alleged statements, if made, were true and therefore the verdict should have been overturned as an error of law" is wholly without merit. The trial judge did not err by not concluding that there were no competing inferences for each of the above statements.

Loree did not prove at trial nor in his JNOV motion that only one possible inference could be drawn from the evidence regarding each of the seven *specific* statements referenced above. The finders of fact properly concluded that each statement as made would have a different effect on the mind of a reasonable hearer than whatever evidence Loree submitted to them.

A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict (*Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992)). When considering JNOV motions, the trial court has no authority to decide credibility issues or to resolve conflicts in the testimony or evidence (*Reiland v. Southland Equip. Serv. Inc.*, 330 S.C. 617, 500 S.E.2d 145 (Ct. App. 1998)). In ruling on a motion for JNOV, the trial judge cannot disturb the factual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Force v. Richland Mem'l Hosp.*, 322 S.C. 283, 471 S.E.2d 714 (Ct.App.1996). When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.* at 320, 585 S.E.2d at 274; *Reiland v. Southland Equip. Serv., Inc.*, 330 S.C. 617, 500 S.E.2d 145

(Ct.App.1998). The factual findings of the jury must not be disturbed.

B. Loree proved the alleged slanderous statements were protected by qualified privilege.

Loree did not prove that there were no facts in controversy as to the application and abuse of privilege. Conditional privilege usually starts from the premise that there has been some good faith pursuit of the truth and some acknowledgement as to what the specific falsehood was. From the moment Loree made his first slanderous statement in 2006, and throughout nine exhausting years of civil procedure, Loree has actively avoided the knowable facts and auditable accounting records necessary to prove the veracity of his statements to others. Privilege was plead by Loree for the first time the morning of trial in a pre-trial motion and was never part of the discovery process that had ended *eight years* earlier. Kunst objected to Loree's pretrial motion citing *Crowley v. Spivey* wherein a moving party's delay of just 16 months before amending an answer was deemed by this Court to be an inexcusable delay (R. p. 50). A nine year delay is an outrage and it was a manifest injustice to Kunst. Loree may set a new extreme judicial benchmark for an inexcusably long delay in amending an answer to plead privilege in a defamation case. The trial court should not have allowed the defense of privilege in the first place. The Appeals Court should dispose of Loree's argument "B" for that reason alone. If *Crowley* is not dispositive of Loree's argument "B," the following is.

On page 13 of his brief, Loree argues: "the jury had absolutely no evidence to determine that Loree was not protected by qualified privilege." Loree asserts that there were no disputed facts as to whether privilege should apply to each and every occasion and statement and the trial court erred as a matter of law by not doing so. The trial record

does not support Loree's argument. Not only were facts disputed and in conflict as to whether each occasion gave rise to an application of privilege, Kunst proved at trial that the specific occasions of Loree's slander as evidenced were not privileged occasions.

Conditional privileges arise from the particular occasion during which the statement is made. Loree is not granted blanket immunity by virtue of his relationship with the Gabys alone. The law looks at the particular occasion during which the statement was made. In this case, the two occasions litigated at trial had little to do with the Gabys and Loree was not "investigating anything on the Gaby's behalf" at the time.

Kunst submitted Anderson's "Additional charge where evidence regarding question of privilege is conflicting" as his preferred charge to the jury. The trial judge opted to use another, similar charge (R. pp. 221-222). Anderson notes: *"The determination of whether a publication is privileged is a question of law to be decided by the court, at least where the facts are undisputed. However, the question of privilege becomes a mixed question of law and fact, to be determined by the jury, under the court's instructions, where the evidence is conflicting, or where for any other reason different conclusions might reasonably be drawn therefrom. See Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. app. 2001); 50 Am. Jur. 2D Libel and Slander 271 (1995)."* The trial judge in this present case properly instructed the jury to consider the conflicting evidence regarding privilege (R. pp. 221-222).

In *Bell v. Bank of Abbeville*, the South Carolina Supreme Court held: "In general, the question whether an occasion gives rise to qualified or conditional privilege is one of law for the court." (50 Am.Jur.2d Libel and Slander §276 (1995) (*Bell v. Bank of Abbeville* 208 S.C 490, 38 S.E. 2D 641 (1946))). The trial judge may as a matter of law apply qualified privilege when there are no controversial facts in dispute as to whether it should

be applied. This was not the case for either occasion of Loree's slander and the trial court properly denied Loree's motion to have the trial court summarily determine application to each and every statement (R. pp. 212-213).

Occasion 1, Kevin Goad

Upon the occasion of first meeting Mr. Goad (the occasion of **statements 1-4** above), Loree lied about who he was and why he was there. Goad testified: "David Loree presented to me that he was a former detective and was in the process of investigating Scott Kunst's financial dealings with his clients (R. p. 116). The jury quickly learned that Loree was not employed by the Gabys to be a former detective investigating Kunst's financial dealings with his clients (R. p. 136, lines 86-100), and was not intelligent enough to investigate anything financial in the first place. In fact, Loree is not employed by the Gabys at all, Loree is a bodyguard (*Executive Protection Administrator*) employed by *JVA Enterprises* (R. p. 125, lines 51-75).

Loree was a stranger to Goad. Every statement Loree made invoked all of Kunst's clients in order to give his slander greater credibility. All four statements are blanket statements of "factual findings" Loree had already made from this supposed investigation. Investigating Kunst's financial dealings with his clients (which Loree never actually did) and lying to Goad about his supposed criminal findings was wholly outside his employment as *Executive Protection Administrator* for a VanAndel sibling holding company. Goad testified that Loree implied he was in contact with all of Kunst's clients (R. p. 116). Mr Gaby testified that he did not instruct Loree to contact Kunst's clients (R. p. 208, lines 17-19).

Loree was not there to exchange information on behalf of the Gabys, nor was it a fact finding mission of any kind. The Gabys are referenced only once as one of many

clients in **statement 1**. Goad testified that Loree provided no document or proof of his statements (R. p. 116, line 83- p. 117, line 5).

Statement 4 (page 23 above) involves a speculative project owned by Kunst and an investor named Hickey. Neither Goad nor his company was involved in the Hickey project in any way. On its face, this outrageous slander imputed the most criminality of the four statements to Goad. Goad testified how Loree spoke at length about what he supposedly found. Goad testified: "David Loree stated to me that the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's speculative project with an investor named Hickey. He stated that progress on the speculative project with Hickey had stopped because Scott's clients had stopped paying Scott's company altogether and as a result, there was no money to be illegally transferred from his clients to the spec project. He stated that he was in contact with Hickey and that a lot of money had been taken from Hickey as well. David Loree appeared to know a great deal about Hickey and the speculative project (R. p. 116)." The jury discovered that Loree, who "appeared to know a great deal about Hickey," did not even attempt to defend or prove the truth of **statement 4** at trial. The Jury heard testimony from Goad that he had no involvement or interest in the Hickey project.

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

A. Goad: "We did not."

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

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

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

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

Goad testified that Loree provided no document or proof of his statements (R. p. 116). There were no actual dummy invoices provided to Goad or any other specifics regarding theft from clients, it was all just thrown out there to damage Kunst's reputation as Loree intended. Loree never contacted Mr. Goad again to correct or modify any statement (R. p. 118, lines 14-17). All seven statements have been hanging out there for a decade during inexcusable delays and trial court errors which inexplicably allowed them to be argued as "true" without the evidence that such allegations would require. Kunst reminded the jury that Loree had never really stopped defaming him for that reason.

The full objective truth of these statements is readily knowable and Loree never made any good faith effort to properly investigate the truth (R. p. 153, lines 1-25). Loree has defiantly asserted for a decade that these statements which impute serious financial crimes are so indisputably true that it would be an error of law for a judge or jury to find otherwise. That is absurd. The same standard for application of privilege extends to the question of abuse of privilege: "While abuse of privilege is ordinarily an issue for the jury, in absence of any controversy to the facts, it is for the court to say in a given instance whether or not privilege has been abused or exceeded.: (Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981))

As to the question of abuse, the differentiation of fact versus law lies in the question of malice. Reckless acts include the failure to properly investigate the truth in the matter, to limit the scope of the material, or to publish the materials only to proper parties. No matter how Loree wishes to define the occasion of his conversation with Goad in this appeal, it was not the proper occasion to say **statements 1-4**. For example, there was no interest or duty to uphold in the statement about Hickey or the other named clients. Loree made no effort to limit his scope. Put simply, Loree spread malicious falsehoods in an attempt to get a result that the truth would not have afforded him.

Occasion 2, Glenn Alfonso

When a slanderer prefaces his tale with: "I am not supposed to be telling you this, but..." it is not a privileged occasion from the start. Alfonso testified: "In one particular instance, I recall him stating to me: 'I'm not supposed to be telling you this, but to give an idea of some of the criminal things Scott has been doing.' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys and intentionally cancelled the policy the next day so that he could keep the money (R. p. 122, lines 8-15)." Loree acknowledged malice with his first words.

Alfonso was asked to confirm his deposition testimony regarding whether he and Loree were alone on this occasion. "It wasn't just between me and him, there were several others standing around. I can't remember who was standing around, but there were several other workers that were on the job site (R. p. 123, lines 58-69)." It was random and reckless and Loree reasonably should have known that it would be repeated by those who heard it. As with all seven statements, Loree did not confront Kunst first (R. p. 106, lines 57-75). Defamers never do.

"During this same period of time, David Loree also stated that Scott Kunst had

taken money from his other clients and that money was 'missing' from these other projects (Statement 7) (R. p. 122, lines 16-19)." The fake former detective "in the process of investigating Scott Kunst's financial dealings with his clients" spoke freely to random men standing around a construction site similar words he spoke at Kevin Goad's business.

"I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion (Statement 5) (R. p. 122, lines 6-8)." Were *those* occasions privileged as well? Was the trial court required to summarily apply blanket privilege to all occasions when the facts were in dispute? Was the fact the judge denied Loree's request to do so a clear, unrefutable error of law? Of course not. Privilege is applied to the specific facts of each occasion a statement is made. Just as Loree did not argue the affirmative truth of *each* of the seven specific statement quotes at trial, he did not argue privilege for the occasion of each conversation and the specific words said upon each occasion. Loree did not argue what his specific duty was or what obligation he had for all seven statements. Instead, Loree asserts a vague blanket of protection over *any* lie he told while in South Carolina employed as an Executive Protection Administrator by an Amway holding company owned by Barbara VanAndel-Gaby and her siblings.

The jury determined, under the court's instruction, the reasonable inferences to be drawn from the conflicting evidence as to the question of privilege and its abuse. The jury's findings must not be disturbed.

II. The trial court erred in failing to overturn the verdict when there was insufficient evidence to support the jury's findings.

A. Kunst did not prove the elements of slander *per se*.

Loree wrongly asserts that two elements, *unfitness in one's business or profession*

and *commission of a crime of moral turpitude*, do not apply in this case.

“Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients (Statement 2) (R. p. 116)” is obviously defamatory on its face because it imputes criminality and deems Kunst unfit in his business or profession. All seven statements litigated at trial are defamatory on their face, impute criminality within the conduct of Kunst's business, and are actionable *per se*. Defamation *per se* was properly plead and charged in this case.

Unfitness in one's business or profession

All of Loree's statements slandered Kunst's conduct while acting solely within his business or profession and were specifically injurious to his ability to conduct that business or profession. This is textbook defamation *per se* in any state that recognizes defamation *per se*, as well as in US Federal Court, or in any other common law tradition.

Loree makes an absurd argument that all inferences of being “unfit in one's business or profession” must be strictly limited to a specific professional skill or product. Loree's logic would conclude that a dentist who is slandered as a molester of all his female clients while they are under anesthesia having dental work done is not slandered as “unfit in one's business” because it was not alleged that there was anything wrong with his work on the female patients' teeth. This would be laughable and absurd. The American Dental Association would agree.

Would the South Carolina LLR allow a builder's license to remain in effect for a builder who has embezzled money from all of his clients and prepared fraudulent billings? Of course not. The statements charged Kunst with unfitness in his particular and unique business and in the specific way he conducted that business: reimbursement contracts.

Imputations of conduct incompatible with one's trade is actionable without the pleading of special damages (*Nash v. Sharper*, 22- S.C. 451, 93 S.E. (2d) 457 (1956).

Witness Kevin Goad testified that Loree stated the embezzled amount from client Gaby was \$400,000 and that four other specifically named clients of Kunst were in a "similar situation (R. p. 116)." He confirmed the other four named clients again under redirect by Loree's attorney (R. p. 119, lines 62-70).

Based on Loree's words, one reasonable inference could be the embezzlement total was \$2,000,000. An allegation of \$400,000 or \$2,000,000 of embezzlement from all of one's clients would not only on its face deem someone unfit in his business, but would also immediately destroy his business. This is the type of financial crime that leads nightly news broadcasts and headlines newspapers. Every client abruptly stopped paying their weekly contractual reimbursement amounts within days of Loree's statements to Goad and others (R. p. 307).

Kunstwerke's accounting ledgers, client account records, original receipts, and invoices were professionally maintained and specifically designed to be readily audited. Kunst testified that he began his career as a CPA for Deloitte and Touche in New York City (R. p. 159, lines 31-45). For obvious reasons, Loree did not introduce an expert witness, accountant, or auditor to challenge a single Kunstwerke accounting record.

The serious criminal nature of Loree's specific allegations was no secret at trial. Kevin Goad testified that he heard Loree's attorney state that Kunst was going to jail (R. p. 120, lines 5-11). Goad also testified that he understood the seriousness of the allegation (R. p. 118, lines 3-13).

It is reasonable that, under the circumstances in which Loree made the statements, the jury could find that the defamatory statements charged Kunst with unfitness in his

business. (see *Goodwin v. Kennedy*, 347 S.C 30, 36, 552 S.E.2nd 319, 322-23 (Ct. App. 2001)). It cannot be said that when viewing the evidence the jury could not have inferred that the statements attacked Kunst's fitness to conduct his business. *"How the words were to be understood in the circumstances in which they were uttered was a question for the jury, not the court, to decide."* (*Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984))

Loree's strictly limited definition of "unfit in one's business or profession" is found nowhere in the law. The finders of fact properly inferred what it means to be "unfit." Their findings must not be disturbed.

Crimes of Moral Turpitude

Loree's argument regarding crimes of moral turpitude is equally absurd. Loree asserts that none of his statements describe acts that rise to the level of baseness, vileness, or depravity. Loree also argues that these crimes only affected five private clients and not society as a whole, and thus makes Loree's slander not actionable per se.

A crime of moral turpitude is defined by the Supreme Court of South Carolina as: *"...an act of baseness, vileness, or depravity in the private and social duties that a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man"* (*State v. Ball*, (292 S.C. 71, 73, 354 S.E. 2D 908 (1987)). Perhaps it is no surprise that an Executive Protection Administrator (bodyguard) who is employed by a holding company of a pyramid scheme that was exposed on Dateline NBC as a scam that preys on good people and destroys them would opine that embezzling hundreds of thousands of dollars from all of one's clients and forging "dummy invoices from dummy companies" to steal is not a base, vile, or depraved act. Thankfully, twelve citizens from Pickens County, South Carolina

unanimously disagreed and inferred otherwise.

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

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

There is no priority given to harm to "society as a whole" over harm to a single man. A man's personal duty to his fellow man is equally important. If there is any threshold to be found in the law, it pertains to crimes that involve self-destructive behavior versus those that harm others (five clients). In *State v. Ball*, (292 S.C. 71, 73, 354 S.E. 2D 908 (1987)) the Court ruled that *"In determining whether a crime involves moral turpitude, one looks not to instances involving self-destructive behavior but, rather, instances where the duty to society and fellow man ... is breached by the commission of the crime ..."* Society and fellow man is intended to represent all others, other than oneself. A crime of moral turpitude was specifically defined in *State v. Ball* as acts of baseness, vileness, or depravity **in private** and social duties which man owes **to his**

fellow man or to society in general.

In South Carolina, larceny of private funds is deemed a crime of moral turpitude. In *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946), the Supreme Court of South Carolina held that an allegation charging larceny or breach of trust, both specifically identified by the Court as crimes involving moral turpitude, was actionable *per se* and did not require special damages: “*Any oral statement which falsely or maliciously charges another with the commission of a crime is actionable per se if proof of the commission of the act of which the party is accused would subject him to an indictment for a crime of moral turpitude. The alleged slanderous communications set forth in the complaint clearly charged the plaintiff with larceny or breach of trust, and it was not necessary to allege special damages.*” “*The words spoken are actionable if they convey to the minds of the listeners, and would naturally be understood to mean, the plaintiff has committed a crime.*” *Id.* at 377, 6 S.E.2d at 752. Any words actually or impliedly stating the plaintiff’s guilt, or raising a strong suspicion of it in the minds of the hearers, are sufficient. *Porter v. News & Courier Co.*, 237 S.C. 102, 108, 115 S.E.2d 656, 658 (1960). *See Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 235, 72 S.E.2d 453, 455 (1952)

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

S.E.2d 470, 471 (Ga. Ct. App. 1992))

Moreover, South Carolina law allows contemplation of the context and circumstances under which words are spoken when determining if the words have a defamatory meaning or are actionable *per se*. The resolution of conflicting meanings is reserved for the jury. In *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584, 589 (1940), South Carolina supreme court instructed:

“If words are susceptible of two meanings, one imputing a crime, and the other innocence, the latter is not to be adopted, and the other rejected, as a matter of course. In such a case, it must be left to the jury to decide in what sense defendant used them. Their conclusion must be formed from the whole of the circumstances attending the publication, including the sense in which the witnesses understood the words.”

Loree has failed to establish under any law or authority that there was insufficient evidence to support the jury's findings. The jury's findings must not be disturbed.

III. The trial court erred in not overturning the verdict when the verdict was excessive

Loree's argument that the trial judge abused his discretion by not overturning this verdict is unfounded. Loree's argument appears to be conditioned on a false premise that Loree's statements were not actionable *per se*. Loree argues that Kunst was only entitled to special damages and failed to prove any proximate monetary damage. Even though the record does show that Kunst did in fact prove specific, tangible economic or material losses, this was not necessary.

The very essence of an action for defamation is that the plaintiff has suffered damage as a result of the injurious effect of the defamation upon his reputation (*See, Prosser, supra*, p. 737, fn. 5; and 50 Am. Jur. (2d), Libel and Slander, 1 (1970)). Actual proof of damages is not required if the defamation is actionable *per se*. (*See, Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 484, 514 S.E.2d, 133 (1999)*) Money damages rewarded for defamation are those that necessarily result from publication of a defamatory statement. General damages are those which arise by interference of law and need not be proved. (*Holtzscheiter, 338 S.C. 308 (Ct. App. 2007)*) (see *Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319*). They include injury to reputation, mental suffering, hurt feelings, and other similar types of injuries which are incapable of definite money valuation. If a defamation is actionable *per se*, then the law presumes the defendant acted with common law actual malice and that the plaintiff suffered general damages. Words actionable *per se* carry with them the presumption that actual damage to reputation and character directly and proximately resulted therefrom, and it is not necessary to allege or prove any actual or special damages.

South Carolina allows the context of the words themselves and the circumstances under which words are spoken to be considered in determining whether there is a defamatory meaning and whether it is actionable *per se* (*Herring v. Lawrence Warehouse Co., 222 S.C. 226, 235, 72 S.E.2d 453-455 (1952)*). In *Herring*, the Court found that the mere statement that an employee was “short” (funds) was clearly defamatory and actionable *per se* because it alleged the commission of a crime, namely theft.

The trial judge properly instructed the jury that damages are presumed under slander *per se* (R. p. 221).

Kunst suggested over \$2,000,000 as guidance to the jury for actual damages and made no recommendation for a punitive amount. Kunst testified about the destruction of his business and livelihood in order to give the jury guidance as to what the presumed damages could be in order to place him in the same position he was before Loree's slander. Kunst provided examples of his reputation and standing in the community prior to Loree's slander. Kunst described the special trust he had with his clients (R. p. 164, lines 97-100) (R. p. 165, lines 1-9). Kunst submitted evidence of magazines he was featured in (R. p. 159, lines 85-95). Kunst described his reputation in The Reserve at Lake Keowee (R. p. 161). Kunst described how much of his business was dependent on a trusting handshake (R. p. 162, lines 8-19).

The jury was provided a schedule showing what Kunst's annual income was from his company prior to the week that Loree came to town (R. p. 308). Kunst also submitted into evidence a summary of how much debt every client owed the week that Loree came to town (R. p. 307). Kunst explained how he personally guaranteed much of the \$500,000 listed there (R. p. 170, lines 56-62) (R. p. 175, lines 28-35). The jury also heard testimony that Kunst had endured the cost of nine years of litigation and incurred additional legal costs (and yes, pro se litigants have legal costs) from Loree's inexcusable delays and his failed attempt to keep this case from a jury. The jury also heard testimony that damages accrue and should be greater the longer a case is kept from a jury because Loree was free to continue to defame Kunst during litigation (R. p. 175, lines 17-22).

The jury found that Loree's slander was actionable *per se* and awarded damages accordingly. A one million dollar verdict for a defamation *per se* case in which the defamer was found to have wrongly imputed financial crimes that immediately destroyed

a business and livelihood once spoken is not at all excessive.

Loree's argument is filled with lazy rhetoric such as “The evidence did show that suppliers were unpaid due to Kunst's poor accounting, and not anything Loree allegedly said.” The only reason any contractor or supplier was unpaid on any project in February 2006 was because Kunstwerke was left holding the bag for \$539,027 in contractor and supplier invoices that it had not been reimbursed for. No client was going to pay Kunstwerke another dime, regardless how much was owed, when rumors of embezzlement and arrest became rampant.

Did Loree's alleged “poor accounting” suddenly start in February 2006? There was nothing different about Kunstwerke's accounting or financial health in February 2006 than any other February during the past ten years. The jury saw evidence that Kunstwerke was better capitalized in January 2006 than ever before (R. p. 162, lines 76-100). The science of accounting is about objectively accounting for things as they occur. Accounts must be complete, finite, balanced, and reported. The jury was given ample evidence at trial of the great detail in which Kunstwerke records were kept and reported (R. pp. 315-332). Kunst had processed \$20,000,000 worth of transactions for sixteen multi-million dollar projects for a decade without issue. Loree provided no evidence of this “poor accounting” and admitted his own lack of intelligence in the matter (R. p. 153, lines 5-20).

Loree wanted the jury to believe that it was just a coincidence that every client abruptly stopped reimbursing Kunstwerke for monies they already owed during the weeks that his embezzlement slander spread from contractors to clients. Loree ignores the fact that five contract cases were *actually litigated* and resolved in Kunst's favor that proved why contractors and suppliers were unpaid.

The jury heard a detailed explanation as to why there were tax liens (R. p. 173-174). There were no tax liens in 2003 as alleged by Loree nor at anytime prior to Loree's slander. Kunst explained to the jury the amended returns he filed in 2011 and the loss carryback from the destruction of Kunstwerke in 2006 he was *later* denied for 2003, and the reporting change that created this lien. A representative from the SCDR was the only witness Loree called at trial. There was no tax evasion (R. p. 205, lines 37-41).

The jury heard Kunst testify that he refused to declare bankruptcy because he has given his word to the unpaid contractors and vendors who remain unpaid to this day (R. p. 203, lines 51-75). Loree's attorney argued at trial that Kunst should have filed bankruptcy to mitigate his damages.

Loree wrongly states on page 20 of his brief that the jury exceeded its authority. This is not so. It is a reasonable question for a jury not familiar with the law to ask if they have the ability to direct where general damages go if their award is an attempt to make Kunst whole again. Their note said nothing about Kunst's creditors as Loree alleges (R. p. 759). The trial judge instructed the jury that they could not direct funds and that was the end of it. The jury did not exceed its authority nor was the jury's verdict "based on passion, caprice, and prejudice, rather than on the evidence presented at trial." Kunst presented ample evidence of his damages (as described in page 42 of this brief) even though by law, general damages are assumed and need not be proven. (see *Goodwin v. Kennedy*, 347 S.C 30, 36, 552 S.E.2nd 319, 322-23 (Ct. App. 2001)). There was no paucity of evidence. The harm to Kunst was immediate and consuming as would reasonably be expected from this type of slander.

The jury had the benefit of a decade of hindsight and saw all of Loree's tawdry acts in context. The jury also asked during deliberation for a written definition of defamation

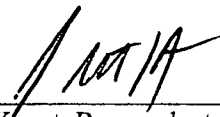
per se. They were thorough. The trial judge properly denied Loree's motion to overturn the verdict of \$1,000,000 in damages and certainly did not abuse his discretion.

Conclusion

The finders of fact found that David Loree slandered Scott Kunst. The finders of fact found that David Loree's slander was actionable *per se* and awarded Kunst appropriate general damages. The record clearly shows that Loree's seven slanderous statements were not privileged statements. The record also shows that Loree did not plead privilege until the morning of trial after a nine year inexcusable delay. This has been a tortured case, harmed by trial court errors and inexcusable delays. The harm done by Loree's slander had been allowed to fester and grow for a decade until these finders of fact finally stopped it. Even without the benefit of Kunst's main witness, Bronson Shepherd, the jury got it right.

The record clearly shows that there has been no error of law, lack of evidence, or abuse of judicial discretion to cause this Court to disturb the jury's findings.

Respectfully Submitted.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2006-CP-39-1826

J. Scott Kunst, Respondent,

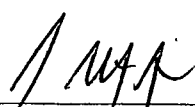
v.

David Loree, Appellant.

RESPONDENT'S CERTIFICATION OF RULE 211(b) COMPLIANCE

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

April 27, 2016,



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SC Court of Appeals

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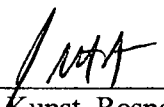
v.

David Loree,

Appellant.

PROOF OF SERVICE

I, J. Scott Kunst, Respondent *pro se*, hereby certify that I have served the Final Brief of Respondent and the Certificate of Compliance with Rule 211(b) on the Appellant by depositing a copy in the United States Mail, postage prepaid, on April 27, 2016, addressed to the Appellant's counsel of record as follows: V. Elizabeth Wright, V. Elizabeth Wright, P.A., 217 E. Park Avenue, Greenville, SC 29601, and Gregory K. Smith, King & Spaulding, LLP, 1180 Peachtree Street, Atlanta, GA 30309.



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J. Scott Kunst Respondent,

v.

David Loree Appellant.

FINAL REPLY BRIEF OF APPELLANT

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Respondent

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Introduction

Respondent J. Scott Kunst ("Kunst"), though a *pro se* litigant, has had considerable trial and appellate experience in the courts of South Carolina. For example, he filed thirteen separate defamation cases connected with the dissatisfied clients of his concern Kunstwerke. Mr. Kunst also appealed the trial court's finding he was in default in the action *Gaby v. Kunst and Kunstwerke*, civil action number 2006-CP-23-2943. In this case, Kunst appealed the trial court's summary judgment order of 2010 and the order was reversed and remanded. Therefore, Kunst is familiar with the South Carolina Appellate Court Rules and Rule 208(b)(4), SCACR, which requires citations in the brief from the trial transcript and other materials to support the facts. Though allowed great latitude by the trial court, (R., p. 104, Tr. p. 76: 4-5), Kunst is still held to the same standard in regard to legal proceedings as an attorney. See *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 808 (Ct. App. 2001) citing *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Kunst's Initial Brief cited as evidence items which are not part of the record, cited documents that were never admitted into evidence and blatantly misstated evidence. Kunst's brief is filled with hyperbole and *ad hominem* attacks, but wholly fails to rebut the fact that there was insufficient evidence in the admitted evidence in the record to sustain the jury's verdict.

Argument

I. Kunst's initial brief contains numerous instances of lack of support from the record and instances when citations to the trial transcript are misquoted.

Loree naturally expects Kunst to have a different view of the trial and its outcome, but Kunst's utter disregard for Rule 208(b)(4), SCACR creates a distorted and misleading

brief which causes confusion. In an effort to reduce confusion created by Kunst's ignoring the rules of appellate procedure, Loree first addresses issues that may cause confusion for the Court if left unsubstantiated by correct references to the trial transcript and other authorities.

A. Kunst's examples of what the jury heard are not cited.

In his Respondent's initial brief, Kunst listed several examples of evidence the jury heard that he argued established Loree's liability. (*See* Resp. Br. At 11-14). However, Kunst's items 1, 3, 4, 6, 7, 8, 13 and 14 are not supported by any cite to the record evidence. Kunst cited no record evidence that the Kunstwerke accounting records for the alleged 908 invoices nor email exchanges between Kunst and Richard Gaby concerning how much Gaby owed were ever admitted into evidence at trial. *See* Resp. Br. At 11-12. There is no citation to record evidence to show that the jury saw the "float" email from Gaby or that Kunst refunded any money to Gaby. *See* Resp. Br. At 12.

To further confound the issues created by Kunst's brief, item 7 concerns the damages hearing in the *Gaby v. Kunst and Kunstwerke* action and has no bearing on this case. (*See* Resp. Br. At 12-13). Additionally, there is no record evidence to establish that the "reconciliation" referenced by Kunst in his item 8 was admitted into evidence at trial.

The title page of the trial transcript (R., p. 91, cover page trial transcript) lists Plaintiff's (Kunst) exhibits admitted into evidence at trial. Even a cursory review of the trial transcript shows that the following documents were never admitted into evidence:

- All accounting records (Plaintiff's Ex. 13) is described as an accounting spreadsheet and on pg. 323, lines 6-8, Kunst informs the trial court that they are four pages from accounting records);

- no emails between Kunst and Gaby concerning a reimbursement contract
- no emails concerning a “float”
- no final Gaby account billing;
- no unreimbursed Kunstwerke weekly billings; and
- no draw schedule.

As these documents, cited by Kunst, were never introduced into evidence, the jury could not have considered these documents. Hence, it is illogical and not proper for Kunst to attempt to use these documents to uphold the jury’s verdict.

Given that Kunst has misled this Court about which documents were admitted into evidence and hence which documents the jury saw, Appellant had to confirm the accuracy of Kunst’s descriptions of the documents which were admitted into evidence. In item 2, Kunst stated the jury heard Richard Gaby admit he had not paid all of his weekly reimbursement billings. *See* Resp. Br. at 12. Mr. Gaby was not present at trial and Kunst published portions of Gaby’s deposition. The portion of Mr. Gaby’s deposition read into the record at trial actually reads, “I paid every invoice that was submitted to me other than the last one”. (R., 208, Tr. Testimony of Richard Gaby, p. 489: 7-8).

In item 8 Kunst stated that the jury heard a witness to a meeting between Kunst and Loree in which Loree stated he thought he could get the weekly statements paid. (*See* Resp. Br. at 12). That was Tracey Hilton’s testimony. However, Ms. Hilton did not state in the cited example that the statements were never paid as the parenthetical in Kunst’s brief indicates.

In item 9 Kunst quoted from Loree's testimony and spun Loree's testimony to make it sound as if Loree was not intelligent enough to conduct an investigation. What Loree actually testified in that section was that the Stern Law Firm¹ took over the investigation from Loree and used a forensic accountant to go over the records. (R., p. 153, Tr. Testimony of David Loree, p. 269: 12-20).

Of the fourteen examples cited by Kunst regarding evidence in the record that supported the jury's verdict, only three of the fourteen examples are substantiated by the trial transcript: item 10 in which Kunst testified that his accounting records were complete, objective and existed from the time the transaction occurred; item 11 concerning Kunst's default in the *Gaby v. Kunst and Kunstwerke* action, and item 13 concerning Kunst's efforts in the *Gaby v. Kunst and Kunstwerke* in litigating it all the way to the Supreme Court. None of the examples cited by Kunst which are actually in the record of evidence before this Court have anything to do with the slanderous statements allegedly made by Loree nor upholding the jury's verdict.

B. The Welmaker and Miller Orders.

Kunst referenced footnote 5 in the Appellant's Initial Brief and claimed "blatant falsehood" (Resp. Br., at. 7) and "rerun of failed collateral estoppel attempt" (Resp. Br. at 8). A simple review of the trial transcript shows that, as Kunst was testifying, he was handed two orders at the same time - the Welmaker Order of 2007 in the *Gaby v. Kunst and Kunstwerke* case and the Miller Order of 2010 in this case. (R., p. 199, Tr. Testimony of J. Scott Kunst, p. 455-456, R., p. 742 and 756, Defense exhibits 24 and 25).

¹ What Mr. Loree calls the Stern Law Firm was actually Covington, Patrick, Hagins, Stern & Lewis, P.A. The former lead counsel T. S. Stern, Jr. was a partner at Covington Patrick until he suffered a stroke in January of 2015. The author of this brief was Mr. Stern's associate.

This led to some confusion when reading the trial transcript as to which order Kunst claimed had been reversed and remanded.

To be clear, the Miller order was reversed by this Court. However, this Court's opinion shows that the Court opined only regarding collateral estoppel, holding that the doctrine of collateral estoppel was not applicable in instances of default. (R., p. 756, Defense Ex. 25). As Loree questioned Kunst about the accusations Kunst had made against Judge Miller and other South Carolina judges, the trial court admitted Judge Miller's order into evidence. (R., pgs. 200-201, Tr. Testimony of J. Scott Kunst, pgs. 460-62). As Kunst has done for the past decade, in the Respondent's brief, Kunst attempted to impugn the bench and bar for perceived slights.

C. Kunst's portrayal of Appellant David Loree

While it is understandable that Kunst would have an uncharitable opinion regarding David Loree, he is under a duty to this Court to cite only record evidence. As further examples of Kunst's lack of candor with this Court, Kunst cited the trial transcript to show that Loree was a "bodyguard." (Resp. Br. at 30). If the Court examines the trial transcript, it is clear that Loree testified that he is an "executive protection coordinator/property manager" (R., p. 125, Tr. Testimony of David Loree, p. 157: 16-17). Kunst also referred to Loree as "maliciously posing as a former detective". (Resp. Br. at 3). The record evidence does not support Kunst's assertion. In fact, the record evidence shows that Loree testified that he did not represent himself as a detective. (R., p. 125, Tr. Testimony of David Loree, p. 160: 3-4).

While some of the mis-citations and unsupported "facts" may seem small, taken in totality, Respondent's Brief paints a picture of the record evidence in this matter that

simply does not exist. The unsupported and mis-supported “facts” in Kunst’s brief are legion, creating confusion and distorting the true record before this Court.

II. Kunst offered no support from the trial record to show he proved the elements of slander *per se*.

To prove slander *per se*, Kunst must show with a preponderance of evidence that Loree charged Kunst with commission of a crime of moral turpitude, contraction of a loathsome disease, adultery, unchastity, or unfitness in his business or occupation. *See Holtzscheiter v. Thomson Newspapers, Inc.* 332 S.C. 502, 510, 506 S.E.2d 497, 505 (1998).

A. Crimes of moral turpitude

Two of the alleged statements indicate that Loree accused Kunst of the crime of embezzlement. (R., p. 39, Plaintiff’s pre-trial brief “The Plaintiff embezzled \$400,000 from the Gabys” and “The Plaintiff embezzled money from all his clients.”). Embezzlement, due to the breach of trust element, is a crime of moral turpitude. *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) (an allegation charging the plaintiff with larceny or breach of trust was actionable *per se*). Kunst quoted statements from the affidavits of Charles Goad and Glenn Alfonzo (Resp. Br. at 15-17) yet none of the statements referenced “embezzlement.” Kunst limited himself to the alleged defamatory statements in his pre-trial brief. There is no record evidence that Loree accused Kunst of embezzlement. In fact, the record evidence shows the opposite. Kunst himself questioned Loree, under oath at trial, and asked:

Q Do you have any evidence that I embezzled money from any other client other than the Gaby's?

A No, sir.

Q Do you have any evidence that I embezzled money from the Gaby's?

A We have a judgment against you of funds that were unpaid by you to vendors relative to their project.

(R., p. 131, Tr. Testimony of David Loree, p. 182:17-23).

The other evidence in the record regarding whether Loree accused Kunst of embezzlement comes from Kunst's fiancé and witness, Tracey Hilton:

Q Okay. Now, did Mr. Loree ever tell you that Mr. Kunst embezzled \$400,000 from the Gaby's?

A No. He never spoke to me except for at that meeting, probably.

(R., p. 114, Tr. Testimony of Tracey Hilton, p. 116:15-18).

Loree's un rebutted testimony was:

Q Did you tell anyone on that list that Mr. Kunst had embezzled money from his clients?

A No, sir.

(R., p. 148, Tr., Testimony of David Loree, p. 251:2-4).

Kunst himself testified under oath that he knew there is no evidence admitted at trial that showed Loree ever accused Kunst of "embezzlement": "I don't think there's the word embezzle in any of the affidavits that are admitted into evidence here." (R., p. 196, Tr., Testimony of J. Scott Kunst, p. 441:9-11). In fact, when asked if Loree had ever

called Kunst a “crook,” Kunst testified that “There’s no evidence here today stating that.” (R., p. 197, Tr., Testimony of J. Scott Kunst, p. 445:23-446:1).

The record is clear: Kunst produced no evidence that Loree stated to a third party that Kunst had committed a crime of moral turpitude. Because Kunst failed to prove his cause for slander *per se*, the jury verdict should have been overturned as a matter of law.

B. Unfit for business or profession

Kunst also discussed the slander *per se* element of unfitness in one’s business or profession. (Resp. Br. at 35-37).² It is undisputed that none of the alleged slanderous statements impugn Kunst’s fitness to design or build homes.

Kunst stated in his opening statement that he was an “architectural design artist” and “craftsman.” (R., p. 105, Tr. 78: 4-8).³ Loree’s unrefuted testimony established that Loree never told anyone that Kunst was a bad designer, and, in fact, he commended Kunst during trial on his home designs. (R., p. 149, Tr., Testimony of David Loree, p. 254:2-14).

While Kunst advocated for the expansion of South Carolina law on defamation, he cited no cases that evinces any court or legislature agreeing with Kunst’s overly broad interpretation. In fact, Kunst is unable to provide any authority that Appellant’s interpretation of being unfit in business or occupation is too narrow. Kunst cited *Nash v.*

² In that discussion, Kunst continues to cite to items that are not in the record before this Court. For example, no documents from the American Dental Association or the South Carolina LLR were admitted as evidence during the trial.

³ It was established in trial that Loree complained about how Kunst accounted for money the Gabys sent to Kunst to pay subcontractors and suppliers. (R., p. 140, Tr. Testimony of David Loree, p. 220:16-21 and R., p. 141, Tr. Testimony of David Loree, p. 221: 5-13). It is undisputed that Kunst is not a Certified Public Accountant. Defense exhibit 13 (the revocation of Kunst’s CPA license) establishes that Kunst was not a CPA during the time in question. (R., p. 396, Defense exhibit 13).

Sharper, 22 S.C. 451, 93 S.E.2d 457 (1956) to show that imputations of conduct incompatible with one's trade is actionable without pleading special damages. However, *Nash* supports Loree because there is no evidence in the record Loree made any imputations incompatible with Kunst's occupation as a designer of homes. Kunst also cited *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001) as support, but *Goodwin*, too, supports Loree's position. In *Goodwin*, the Court of Appeals held that the defendant's remarks were defamatory because they related to how Goodwin reacted with students at the school where he served as assistant principal, which was his business or occupation.

Kunst cited *Wardlaw v. Peck*, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984) to argue that the jury could have inferred Loree's alleged statements concerning the arrears in the accounting for the Gaby home project concerned Kunst's unfitness for his occupation, but Kunst misses the point. Because Kunst failed to prove the elements of slander *per se*, the jury's verdict is not based on the law and should be overturned.

With regard to "unfitness" in his occupation, the record is clear: Kunst produced no evidence that Loree ever impugned Kunst as a designer or builder. Because Kunst failed to prove his cause for slander *per se*, the jury verdict should have been overturned as a matter of law.

III. Kunst never proved Loree abused the defense of qualified privilege

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 even though it contains matter, which, without this privilege, would be actionable. *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C.,

86, 88, 447 S.E.2d 194, 196 (1994). One publishing under a qualified privilege is liable upon the proof of actual malice, meaning the defendant acted recklessly or wantonly or with a conscious disregard of the plaintiff's rights. *Id.*

One who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged and (2) the privilege is not abused. *Murray v. Holnam*, 344 S.C. 129, 140, 542 S.E.2d 743 (Ct. App. 2001). When one has an interest in the subject matter of a communication, and the person to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by the occasion. The statement must be such as the occasion warrants and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed. *Murray, id.*

It is undisputed that Loree established that he was acting on behalf of his employer in investigating the Gaby construction project managed by Kunst. (*See App. Initial Br.* at 10-13). While Respondent argues otherwise, he cites no legally sufficient record evidence in his brief in support. Kunst shows a fundamental misunderstanding of the law of agency. For example, Kunst argues that Loree could not be an agent for the Gabys because Loree's paycheck came from a corporate entity owned by the Gabys, instead of Mr. or Mrs. Gaby themselves. (*See Resp. Br.* at 30). Further, Goad was not a "stranger" to the Gaby project, as Kunst alleges. *id.* Kunst himself established that Goad was a supplier on the Gaby project. (R., p. 115, Tr., Testimony of Charles Goad, p. 120:18-20).

In order to meet his burden of proof that Loree abused the scope of the qualified privilege, Kunst has to prove actual malice by Loree. *See Constant* at 196. There is absolutely no evidence in the record to show that Kunst even attempted to prove actual malice by Loree.

Even assuming *arguendo* that every alleged defamatory statement was made (which they were not), Kunst's witnesses Goad, Alfonzo and Covington show in their testimony that Loree only spoke to vendors working on the Gaby project or others with whom Kunst was working to investigate why so much money was missing from the Gaby project. Loree did not speak to the public in general nor with anyone not associated with Kunst's projects - and then Loree addressed only the accounting issues and whether the vendors had been paid.

Loree established that he was acting under the qualified privilege associated with the investigation of his employers' construction project. There is no evidence in the record to refute that. Further, there is no evidence in the record to show that Kunst proved that Loree acted with actual malice toward Kunst. Hence, the jury's verdict must be set aside a matter of law.

IV. Loree established that the alleged defamatory statements were true.

Loree proved the truth of the alleged defamatory statements in the following instances:

- The 2007 Order of Judge Welmaker in which he found that the Gabys established Kunst had taken money from the Gaby project. (R., p. 737, Defense Ex. 23).

- Defense exhibits 2-9 which showed Kunst had taken money from the project. (R., p. 371-391, Defense Exhibits 2-9).
- Loree's testimony on his findings in his investigation. (R., pgs. 141-147, Tr. Testimony of David Loree, pgs. 223-245).
- Covington's testimony in regards as to Kunst taking money from his project. (R., p. 156, Tr. Testimony of Eugene C. Covington, p. 282: 19-25 and R., p. 157, Tr. Testimony of Eugene C. Covington, p. 283: 25).

Because Loree proved the defense of truth, the jury verdict should be set aside as a matter of law.

V. The damages awarded by the jury were not appropriate

As an initial matter, Kunst never pleaded for special damages in his complaint. (R., p. 27, Complaint). Second, Kunst overlooked the point that because he never proved the elements of slander *per se*, he must prove special damages. *See Parrish v. Allison*, 376 S.C. 308. 656 S.E.2d 382 (Ct. App. 2007).

Further, Kunst claimed he was entitled to damages to cover the costs of removing his tax liens. (R., p. 175, Tr. Testimony of J. Scott Kunst, p. 358: 1-18 and R., p. 215, Tr. Testimony of J. Scott Kunst, p. 518: 11-19). The tax liens date back to 2003, three years before Kunst even met Loree, so Loree cannot be liable for those damages. Kunst claimed he was entitled to damages for the judgments he has against him, but those judgments come from suppliers who were never paid and from the Gabys and are not linked in any way to Loree's alleged slander. Because there is no evidence on the record to show how these damages are linked in any way to Loree's alleged slander, the damages award should be set aside as a matter of law.

What Kunst referred to as “lazy rhetoric” by Loree are statements that establish that Kunst failed to meet the legal requirements to be awarded damages. (*See* Resp. Br. at 42.) This especially true for damages so grossly out of proportion to any evidence of damages *caused by Loree*. While Kunst prattled on for hours about how much money he owed various parties, (*see, generally*, R., pgs. 159-175, Tr., Testimony of J. Scott Kunst, p. 293-359), he failed to establish how Loree’s alleged defamation proximately caused these debts to be unpaid.

Finally, and assuming that the jury could properly find for such a large amount of damages caused by Loree’s alleged statement (which they could not), Kunst admitted again that he refused to mitigate his damages. (*See* Resp. Br. at 44, *see also* R., p. 203, Tr., Testimony of J. Scott Kunst, p. 470:20-471:11) . Mr. Kunst apparently believes that filing bankruptcy necessarily means that he will not pay the suppliers he left unpaid. This is another example of a fundamental misunderstanding of legal proceedings and issues by Mr. Kunst. Which would be excusable, except for the fact that he seeks, without any precedential support, to hold Loree liable for years of interest and invoices and for which Kunst admitted he could have mitigated, *but refused to do so. Id.*

The jury’s award of such excessive damages cannot remain. It was against the proof offered at trial and against the law of South Carolina.

Conclusion

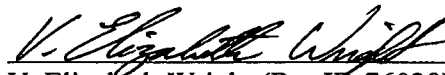
Kunst failed in his brief to cite any record evidence or legal precedent to show that Loree did not prove the affirmative defenses of truth and qualified privilege. He also failed to cite any record evidence or legal precedent to show he had proved his case of

slander *per se*. Kunst further failed to plead and prove special damages and limited his causes of action to slander *per se*.

Kunst attempted to prove the jury heard evidence of Loree's slander, but the "evidence" he cited in his brief is not record evidence. Kunst attempted to rely on hyperbole and *ad hominem* attacks in an attempt to use emotion to prove his case instead of record evidence and legal precedent. Kunst has taken part in prior proceedings before this Court and is in a position to know what is expected. Because Kunst has failed to prove his case, the jury's verdict should be set aside as a matter of law and the case should be reversed and remanded for another trial.

Respectfully submitted.

V. ELIZABETH WRIGHT LAW FIRM, LLC



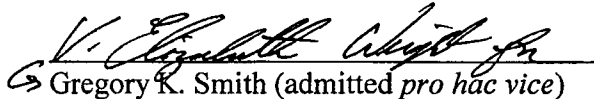
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April 25, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
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Robin B. Stilwell, Circuit Court Judge

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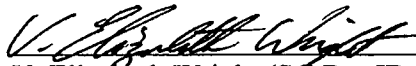
J. Scott Kunst Respondent,

v.

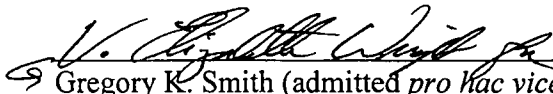
David Loree Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and the Final Reply Brief of the Appellant comply with Rule 211(b), SCACR.



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Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

J. Scott Kunst, Respondent,

v.

David Loree, Appellant.

Appellate Case No. 2015-001536

Appeal From Pickens County
Robin B. Stilwell, Circuit Court Judge

Opinion No. 5564
Heard January 17, 2018 – Filed May 30, 2018

AFFIRMED

Violet Elizabeth Wright, of V. Elizabeth Wright Law Firm LLC, of Greenville, and Gregory K. Smith, of King & Spaulding, LLP, of Atlanta, Georgia, for Appellant.

J. Scott Kunst, pro se, for Respondent.

WILLIAMS, J.: In this civil matter, David Loree appeals the award of actual damages to Scott Kunst on his defamation cause of action. Loree argues the circuit court erred in sustaining the jury's verdict because (1) Loree proved the substantial truth of the allegedly defamatory statements and proved a qualified privilege existed, (2) sufficient evidence did not support the verdict, and (3) the verdict was excessive. We affirm.

FACTS/PROCEDURAL HISTORY

This case arose out of David Loree's investigation into the construction of Richard and Barbara Gaby's (the Gabys') home on Lake Keowee, outside of Greenville, South Carolina. In 2004, the Gabys contracted with Kunstwerke Corporation (Kunstwerke) to design and build their residence at The Reserve on Lake Keowee (The Reserve).

Scott Kunst, a former certified public accountant, founded Kunstwerke after he started designing and building custom homes.¹ At trial, Kunst explained how his business differed from other firms and contractors, specifically detailing how his unique accounting methods and billing system allowed him to build the custom homes. Instead of utilizing the typical fiduciary construction-account system, Kunstwerke implemented a reimbursement system that allowed the company to advance credit to a client for building materials, which the client later reimbursed.² To ease the burden on its clients, Kunstwerke compiled daily invoices from vendors and subcontractors into a weekly summary, called a progress billing. It then forwarded the progress billing and copies of the invoices to each respective client every week for reimbursement. Because large amounts of money flowed through Kunstwerke each week, Kunst relied on his clients to trust his ability to manage financial matters involved in constructing their homes.

Because the company advanced credit to its clients, Kunstwerke required its clients to pay their weekly progress billing immediately upon receipt to continue the construction of their homes. Kunst explained any stoppage in payment required Kunstwerke to stop construction to reconcile the client's account. Kunst testified he relied upon Kunstwerke as his only source of income, which he derived from monthly fees³ charged to clients for designing and building their homes. Kunst explained that the amount of collected fees remaining after he deducted corporate

¹ In the early 2000s, two periodicals wrote articles featuring Kunst and his uniquely designed homes.

² Conversely, Loree testified he believed Kunstwerke's billing operated as a pass-through account, wherein funds forwarded to Kunstwerke by the client for tallied invoices were passed directly to the subcontractor or vendor for the invoiced amount.

³ Kunst claimed his fees helped his business stand out because his fees were typically less than the fees of other builders or designers that performed similar work. As an example, Kunst stated he only charged the Gabys \$96,000, when the project should have cost \$600,000.

expenses were available to him as a personal draw from Kunstwerke's capital. Consequently, because he did not have a personal checking account, Kunst stated he made personal purchases using personal draws from the Kunstwerke corporate account.

In January 2006, Kunst experienced a "cash crisis." Kunstwerke had numerous projects nearing completion, and while the company was more profitable than it had ever been, Kunstwerke had also extended the most credit in its history. Compounding matters, Kunst claimed that some clients were not making timely payments, and that his bank implemented a new policy that placed ten-day holds on deposits, which prevented deposits from becoming immediately available to Kunstwerke. In February 2006, the Gabys—concerned that Kunst was over budget and not paying subcontractors or vendors—instructed Loree, their employee,⁴ to investigate the matter. Loree sought to meet with Kunst at The Reserve, and requested that he bring copies of paid invoices and canceled checks—showing the disbursement of funds transferred by the Gabys—to explain what happened to their funds and to reconcile their account. As part of his investigation, Loree contacted numerous vendors, subcontractors, and other Kunstwerke clients to determine the balances of each account and to facilitate timely completion of the Gabys' home.

At trial, Tracy Hilton, Kunst's fiancée, testified she and Kunst received several inquiries from clients and subcontractors asking who Loree was, why he was contacting them, and what was happening with Kunstwerke. Kevin Goad, a vendor, and Glenn Alfonzo, a subcontractor, testified to meeting with Loree in 2006. Both men acknowledged discussing their respective accounting matters related to the Gaby project with Loree, who told them Kunst had taken money from the Gabys and other clients. Goad noted Loree mentioned that Kunst used false invoices to take money from clients and spent client money on other projects. Similarly, Alfonzo recalled that Loree claimed Kunst took out an insurance policy on the Gaby project and later canceled the policy to keep the money. Although Loree admitted to contacting numerous vendors, subcontractors, and clients, he denied, or asserted he did not recall, making the statements to Goad or Alfonzo or discussing Kunst's financial matters with anyone.

Upon concluding his investigation, Loree found Kunst had not paid several vendors and subcontractors for some time, despite receiving wire transfers from

⁴ Loree's stated employment with the Gabys was as an "executive protection coordinator/property manager."

the Gabys for invoiced amounts.⁵ To resume construction of their home following Loree's investigation, the Gabys "double paid" and wrote checks directly to certain vendors and subcontractors, even though they allegedly paid Kunst for the same work. In March 2006, the Gabys terminated their contract with Kunst and Kunstwerke. Kunst stated the Gabys stopped paying him during Loree's investigation, and subsequently, other clients stopped making payments as well. As a result, Kunst dissolved Kunstwerke.

In May 2006, the Gabys brought an action (the Gaby Action) against Kunst and Kunstwerke, alleging breach of contract, breach of contract accompanied by fraudulent acts, conversion, and violation of the South Carolina Unfair Trade Practices Act. Kunst and Kunstwerke failed to timely answer the Gabys' complaint, and the circuit court entered default on June 20, 2006. Kunst and Kunstwerke moved for relief from default, but the circuit court denied the motion in December 2006. Following a March 2007 damages hearing, the circuit court issued an order awarding the Gabys actual and punitive damages, and attorney's fees and costs.

After the circuit court denied his motion for relief from default, Kunst brought the current action against the Gabys and Loree on December 19, 2006, alleging defamation, tortious interference with contractual relations, unjust enrichment, and intentional infliction of emotional distress. On April 14, 2007, the circuit court issued an order dismissing Kunst's causes of action against the Gabys. The court found Kunst's causes of action were compulsory counterclaims under Rule 13(a), SCRCF, that should have been brought in the Gaby Action, and further, were barred under the doctrine of collateral estoppel. Accordingly, only the causes of action against Loree remained.

In March 2009, the circuit court granted summary judgment on Kunst's claims for tortious interference and intentional infliction of emotional distress, leaving only the defamation claim. On September 20, 2010, Loree moved for summary judgment based on collateral estoppel on Kunst's defamation cause of action. The circuit court granted Loree's motion and dismissed Kunst's defamation claim,

⁵ In response to Loree's testimony regarding unpaid subcontractors, Kunst testified he withheld payments of certain subcontractors—despite collecting money for their payment—because the Gabys were behind in their reimbursements to Kunstwerke and Kunst needed to reconcile or settle the Gabys' account before proceeding further.

finding the final adjudication of the Gabby action established Loree's affirmative defense of truth as a matter of law. Kunst appealed the circuit court's order, and on August 14, 2013, this court reversed and remanded the case to trial.⁶

On May 26-28, 2015, the circuit court held a jury trial on Kunst's defamation claim against Loree. In his pretrial brief,⁷ Kunst claimed Loree made the following statements alleging criminal activity:

Slander 1: [Kunst] embezzled \$400,000 from the Gabys.

Slander 2: [Kunst] embezzled money from all of his clients.

Slander 3: [Kunst] had taken money from named clients Parham, Covington, Coco, and Hickey.

Slander 4: [Kunst] created dummy invoices from dummy companies so that he could steal money from these clients.

Slander 5: [Kunst] took money from his clients to spend on an investment project, a car, trips, and family members.

Slander 6: [Kunst] did "criminal things" like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.

Slander 7: [Kunst] "is going to jail."

⁶ See *Kunst v. Loree*, 404 S.C. 649, 746 S.E.2d 360 (Ct. App. 2013).

⁷ Kunst's pretrial statements differ slightly from those alleged in his complaint. At the pretrial hearing, however, Kunst stated his pretrial brief statements were more specific than the statements in the complaint, and he consented to being limited to the pretrial brief statements.

Slander 8: [Kunst] took money from his other projects and that money was missing from these projects.

Following trial, the jury returned a verdict in favor of Kunst and awarded him \$1 million in actual damages. Loree moved for judgment notwithstanding the verdict (JNOV), a new trial absolute, or in the alternative, a new trial *nisi remittitur*. On June 17, 2015, the circuit court denied Loree's motions. This appeal followed.

ISSUES ON APPEAL

- I. Did evidence support the jury's verdict that Kunst proved the elements of slander per se?
- II. Did the circuit court err in failing to set aside the verdict despite the jury's findings that (A) Loree did not prove the truth of the alleged slanderous statements and (B) Loree was not protected by a qualified privilege?
- III. Was the jury's verdict excessive, warranting a new trial?

STANDARD OF REVIEW

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).

When making a motion for directed verdict, a party must state the specific grounds relied upon therefor, and the circuit court may grant the motion when the case presents only issues of law. Rule 50(a), SCRPC. If the court denies the motion, the party may then move for a JNOV to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion. Rule 50(b), SCRPC. A motion for a new trial may be joined with the JNOV motion or prayed for in the alternative. Rule 50(b), SCRPC. When a circuit court's ruling on a motion for a directed verdict or a JNOV is appealed, an appellate court must apply the same standard as the circuit court. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). In determining these motions, the circuit court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the

nonmoving party. *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 558, 698 S.E.2d 845, 851 (Ct. App. 2010). If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the circuit court must deny the motion for directed verdict or JNOV. *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171. "When considering [such] motions, neither the [circuit] court nor the appellate court has [the] authority to decide credibility issues or to resolve conflicts in the testimony or [the] evidence." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). The appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 477, 514 S.E.2d 126, 130 (1999).

"On appeal, the appellate court reviews a denial of a new trial motion for an abuse of discretion." *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). In determining whether the circuit court erred in denying a motion for a new trial, the appellate court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Id.*

LAW/ANALYSIS

I. Slander Per Se

Loree argues the circuit court erred in sustaining the jury's verdict because evidence does not support the jury's finding that Kunst proved the elements of slander per se. We disagree.

"Defamatory communications take two forms: libel and slander. Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 133–34. "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Accordingly, the tort of defamation allows a plaintiff to recover when a defendant communicates a false message about the plaintiff to others, injuring the plaintiff's reputation. *McBride*, 389 S.C. at 559, 698

S.E.2d at 852. To state a claim for defamation, the plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged publication of the statement was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement regardless of special harm or the publication of the statement caused special harm. *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012).

Defamation may be either actionable per se or not actionable per se. *Id.* at 442, 730 S.E.2d at 309. "Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct. App. 2001). When a defamatory statement is actionable per se, the plaintiff need not prove general damages—as these damages are presumed—and the defendant is presumed to have acted with common law malice. *See Fountain*, 398 S.C. at 442, 730 S.E.2d at 309. "Whether the statement is actionable per se is a matter of law for the court to resolve." *Id.*

While Loree asserts no evidence exists in the record to show that his alleged slanderous statements met the elements of slander per se, we note that statements alleging the commission of a crime, such as theft, are actionable per se. *See McBride*, 389 S.C. at 561, 698 S.E.2d at 852 (determining a statement that accused a teacher of stealing property was actionable per se because it accused the teacher of committing a crime involving moral turpitude); *see also Turner v. Montgomery Ward & Co.*, 165 S.C. 253, 260–61, 163 S.E. 796, 798 (1932) (finding any words that clearly assume or imply that one committed a crime or that raise strong suspicion in the minds of the hearers that one committed a crime are actionable per se). Moreover, upon our review of the record, we find evidence supports Kunst's allegations that Loree made several slanderous statements accusing Kunst of, among other things, embezzling money from all his clients and taking money from clients to spend elsewhere. *See Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130 (finding the appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling).

At trial, Goad testified Loree told him that Kunst took money from clients and used clients' money for an investment project. Additionally, Alfonzo testified Loree mentioned that Kunst took out an insurance policy on the Gaby project, billed the Gabys, and intentionally canceled the policy to keep the money. Viewing the evidence in a light most favorable to Kunst, the nonmoving party, we find Loree's

statements were actionable per se because the statements accused Kunst of committing a crime of moral turpitude—theft. *See McBride*, 389 S.C. at 561, 698 S.E.2d at 852. Accordingly, we affirm the circuit court's denial of Loree's motion for JNOV because evidence supports the jury's findings.

II. Defenses to Defamation

A. Truth

Loree asserts the circuit court erred in sustaining the verdict because Loree proved the alleged slanderous statements were substantially true. We disagree.

"The truth of the matter is a complete defense to an action based on defamation." *WeSav Fin. Corp. v. Lingefelt*, 316 S.C. 442, 445, 450 S.E.2d 580, 582 (1994) (per curiam). "Under common law, a defamatory communication was presumed to be false, but truth could be asserted as an affirmative defense." *Parrish*, 376 S.C. at 326, 656 S.E.2d at 391. When the alleged defamatory statements are published by a private figure and involve a matter of private concern, the plaintiff is not required to prove falsity of the statements; instead, the defendant has the burden of pleading and proving the substantial truth of each of the alleged defamatory statements. *See Castine v. Castine*, 403 S.C. 259, 266, 743 S.E.2d 93, 96–97 (Ct. App. 2013) ("Substantial truth must be proven as to each individual statement [appellant] made, not as to the contents of the letters he sent as a whole."); *Parrish*, 376 S.C. at 326, 656 S.E.2d at 392 ("If the statements are a matter of private concern, the plaintiff is not required to prove falsity. Thus, truth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue." (citation omitted)). "When the truth of the defamatory communication is in dispute, the issue is a jury question." *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 515, 435 S.E.2d 864, 867 (1993).

We find the circuit court correctly denied Loree's motion for JNOV because the parties presented conflicting evidence regarding the truth of the statements, which created a question for the jury. For instance, 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. Moreover, Loree argued that Kunst's own witness, Edward Covington, testified Kunst took money from his project and spent the money on an engagement ring. 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. Further, Kunst detailed why production must stop if a client fell behind in his or her progress billing payments. Kunst later explained that, because the Gabys were behind in their payments, he withheld paying subcontractors—despite receiving money from the Gabys for specific invoices—so he could reconcile the Gabys' account.

Mindful of our standard of review and without elaborating on the credibility of any evidence, we find Kunst's testimony and explanations were sufficient to create a conflict in the veracity of Loree's alleged statements. *See Parrish*, 376 S.C. at 319, 656 S.E.2d at 388 (stating that, when deciding motions for directed verdict or JNOV, neither the circuit court nor the appellate court has authority to determine credibility issues or resolve conflicts in the evidence or testimony). Moreover, evidence in the record supports the jury's findings. *See Swinton Creek Nursery*, 334 S.C. at 477, 514 S.E.2d at 130 (finding the appellate court can only reverse the circuit court when no evidence exists to support the circuit court's ruling). Thus, we affirm and find the circuit court did not err in either refusing to overturn the verdict or denying Loree's motion for JNOV because determining the veracity of the statements was a question for the jury.

B. Qualified Privilege

Loree also argues the verdict was an error of law and the circuit court erred in not overturning it because Loree proved the statements were protected by a qualified privilege. We disagree.

A defendant may assert a conditional or qualified privilege as an affirmative defense in a defamation action when the defamation is made in good faith and with proper motives. *See id.* at 484, 514 S.E.2d at 134 ("In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege."); *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 125, 341 S.E.2d 622, 624 (1986) ("Whe[n] the defamation is made in good faith and with proper motives, a defendant may claim a qualified or conditional privilege."). "Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. However, the privilege does not protect against unnecessary defamation, and the person making the statement must be careful not to go beyond what his interests or duties require. *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001).

In *Bell v. Bank of Abbeville*, our supreme court held:

In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

208 S.C. 490, 493–94, 38 S.E.2d 641, 643 (1946). Generally, whether an occasion gives rise to a qualified privilege is a question of law for the court. *Castine*, 403 S.C. at 267, 743 S.E.2d at 97. "A qualified privilege may exist whe[n] the parties have a common business interest. However, the qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only." *Abofreka*, 288 S.C. at 125–26, 341 S.E.2d at 624–25 (citation omitted).

When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice *or* that the scope of the privilege has been exceeded. *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134. The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: "(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless disregard of the victim's rights." *Fountain*, 398 S.C. at 444, 730 S.E.2d at 310. "[T]he fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." *Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 (quoting *Fulton v. Atl. Coast Line R. Co.*, 220 S.C. 287, 297, 67 S.E.2d 425, 429 (1951)). Ordinarily, the jury determines if a qualified privilege has been abused or exceeded. *See id.* ("Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.").

At trial, Loree moved for a directed verdict and JNOV on the basis that his statements were protected by a qualified privilege. Loree argues a qualified privilege protected his alleged defamatory statements because Kunst did not show that Loree made the statements to anyone other than subcontractors and vendors. 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. *See Abofreka*, 288 S.C. at 125–26, 341 S.E.2d at 624–25 ("[T]he qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only."). Here, an occasion gave rise to the existence of a qualified privilege because Loree, the Gabys' employee, investigated whether Kunst paid the subcontractors and vendors on the Gaby project. Inherently, the scope of Loree's duties and interests extended to any discussion of financial matters involved with the Gaby project. However, Loree's qualified privilege only extended as far as Loree's duties and interests required, which meant that the privilege did not protect matters outside the Gaby project. *See Swinton Creek Nursery*, 334 S.C. at 485, 514 S.E.2d at 134 ("[T]he person making [the defamatory statement] must be careful to go no further than his interests or his duties require. . . . And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." (quoting *Fulton*, 220 S.C. at 297, 67 S.E.2d at 429)).

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. At trial, Goad and Alfonzo testified Loree informed them that Kunst took money from other clients. Further, Goad testified Loree mentioned that Kunst spent client money on other projects. In our view, any discussion of Kunst's dealings outside of the Gaby project, even if with another person with a common interest in the matter, would amount to an abuse of privilege and would render the protection lost. We find that Loree could have investigated the Gaby project without implicating Kunst's financial affairs with other clients. Thus, the circuit court properly denied Loree's motions for directed verdict and JNOV because evidence existed that allowed the jury to find Loree's statements regarding Kunst and other clients exceeded the scope of the qualified privilege.

Additionally, Loree argues Kunst failed to meet his burden of showing an abuse of privilege because he failed to prove actual malice by Loree. However, we find that Loree misconstrues the law because a plaintiff may also show an abuse of a qualified privilege by demonstrating the speaker exceeded the scope of the qualified privilege. *See id.* at 484, 514 S.E.2d at 134 ("Whe[n] the occasion gives

rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice *or* that the scope of the privilege has been exceeded." (emphasis added)). Accordingly, the circuit court did not err in submitting the issue to the jury because evidence at trial allowed for factual inquiries as to whether the privilege was abused or exceeded. *See id.* at 485, 514 S.E.2d at 134 ("Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.").

Because evidence existed for the jury to determine that Loree abused or exceeded his privilege, we find the circuit court did not err in sustaining the verdict and properly denied Loree's motions for directed verdict and JNOV.

III. Damages

Last, Loree contends the circuit court erred in sustaining the verdict because the verdict was excessive. We disagree.

In a successful defamation claim, the plaintiff recovers for injuries to his or her reputation, which result from the defendant's communications to others of a false message concerning the plaintiff. *Murray*, 344 S.C. at 138, 542 S.E.2d at 748. Consequently, "[d]efamation does not focus on the hurt to the defamed parties' feelings, but on the injury to their reputations." *Castine*, 403 S.C. at 265, 743 S.E.2d at 96. If the alleged defamatory statement is actionable per se, the law presumes that the defendant acted with common law malice and the plaintiff suffered general damages;⁸ however, if the alleged defamatory statement is not actionable per se, the plaintiff must then plead and prove both common law malice and special damages. *See Fountain*, 398 S.C. at 442, 730 S.E.2d at 309.

⁸ General damages include injuries such as: injury to one's reputation, mental suffering, hurt feelings, and any other similar injury that is incapable of being given a definitive monetary valuation. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510 n.4, 506 S.E.2d 497, 502 n.4 (1998). Conversely, "special damages are tangible losses or injury to the plaintiff's property, business, occupation[,] or profession, capable of being assessed monetarily, which result from injury to the plaintiff's reputation." *Id.*

The jury maintains discretion, as reviewed by the circuit court, in awarding actual and punitive damages. *See Miller v. City of West Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000). While a circuit court may grant certain new trial motions on the ground that the verdict is inadequate or excessive, a jury's determination of damages is given substantial deference. *Id.* at 446–47, 520 S.E.2d at 629.

When considering whether the verdict is excessive, a court will not disturb the jury's verdict if substantial evidence exists to sustain the verdict. *Miller*, 322 S.C. at 231, 471 S.E.2d at 687. An appellate court will only intervene when the verdict is "so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence." *Id.*; *see also Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985) (stating that, while an appellate court will overturn a verdict actuated by passion, caprice, or prejudice, it "will not set aside a verdict for its possibly undue liberality"). "A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive." *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969).

The circuit court may grant a new trial *nisi* when it finds the amount to be merely inadequate or excessive. *Vinson*, 324 S.C. at 405, 477 S.E.2d at 723. However, a party must provide compelling reasons to justify invading the province of the jury. *Id.* "The [circuit court that] heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Id.* at 405–06, 477 S.E.2d at 723 (citation omitted). The denial of a motion for a new trial *nisi* will not be reversed on appeal unless there was an abuse of discretion. *Id.* at 406, 477 S.E.2d at 723. An appellate court is obligated to review the record and determine whether an abuse of discretion amounting to an error of law exists. *Id.* at 406, 477 S.E.2d at 723–24.

At the conclusion of the trial, Loree moved for JNOV, a new trial absolute, or in the alternative, a new trial *nisi remittitur*, all of which the circuit court summarily denied. On appeal, Loree appears to rely on the premise that Kunst failed to prove

slander per se and did not provide evidence of special damages to support the jury's award. However, as previously discussed, we find Loree's alleged defamatory statements were actionable per se and not protected by a qualified privilege. Accordingly, South Carolina law presumes Loree acted with common law malice and Kunst suffered general damages. See *Fountain*, 398 S.C. at 442, 730 S.E.2d at 309; *contra Murray*, 344 S.C. at 142, 542 S.E.2d at 750 (finding that, although slander is actionable per se, the plaintiff must prove actual malice if the communication is privileged because a privileged communication is the exception to the rule that malice is presumed from statements that are actionable per se). Therefore, because Kunst's general damages were presumed and he was not required to prove actual malice or special damages, the circuit court did not err in denying Loree's motions.

Loree also argues the circuit court erred because the jury's award of \$1 million was grossly excessive and not based on any evidence in the record,⁹ and because Loree's statements did not cause Kunst's damages. Moreover, Loree contends that *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), warrants the grant of a new trial because the jury's award was "shockingly disproportionate to Kunst's injuries." Last, Loree asserts the circuit court erred in sustaining the verdict because the verdict was excessive given the lack of evidence at trial. We disagree.

In the instant case, Loree asserts the jury exceeded its authority when it sent a note to the circuit court asking whether it could stipulate how Kunst should distribute any award to his creditors, if it found against Loree. Loree contends the jury's note was the exact type of evidence our supreme court in *Sanders* found to indicate that a jury was motivated by passion, caprice, or prejudice. See *Sanders*, 604 S.C. at 238–39, 403 S.E.2d at 642. We find *Duncan v. Hampton County School District Number 2* is more akin to the instant case than *Sanders*. See 335 S.C. at 535, 517 S.E.2d at 449. Indeed, in *Duncan*, this court clarified the holding from *Sanders*, stating that while the jury's question in *Sanders* may have been evidence of the jury's improper motive, the lack of evidence supporting the size of the award played a major role in our supreme court's decision to grant a new trial in *Sanders*. See *Duncan*, 335 S.C. at 548, 517 S.E.2d at 455–56. Importantly, the court of appeals distinguished *Duncan* from *Sanders*, and found that the evidence in *Duncan* supported the large verdict and that the jury's recommendations to the circuit court were not evidence of an improper motive, when the recommendations were consistent with a reasonable view of the evidence. *Id.* at 548–49, 517 S.E.2d at 456.

⁹ At oral argument, Loree conceded that Kunst testified to damages.

Like *Duncan*, we find evidence in this case supports the jury's award of damages. Moreover, we find the jury's question was consistent with a rational view of the evidence because it directly related to the testimony introduced at trial. *See id.* ("Significantly, these recommendations are consistent with a reasonable view of the evidence and do not indicate that the jury's verdict was based on an improper motive."); *see also King v. Daniel Int'l Corp.*, 278 S.C. 350, 355, 296 S.E.2d 335, 338 (1982) ("[The appellate court] will not usually interfere in the amounts of verdicts, the matter being ordinarily within the sound discretion of the [circuit court], unless the verdict is so grossly excessive as to be deemed the result of a disregard of the facts and of the court's instructions, and to be due to passion and prejudice rather than reason."). Here, Kunst testified he owed roughly \$400,000 to subcontractors and vendors and estimated he would need approximately \$1.6 million to design homes again. Kunst claimed he borrowed nearly \$650,000 from others for his legal debts and "to survive." Kunst also estimated his total economic loss was nearly \$2.6 million. Last, Kunst specifically mentioned he would not have incurred a loss in his greatest investment project "but for Loree coming to town."

Of note, the jury heard evidence of Kunst's success and reputation prior to the alleged defamation, including:

- (1) Kunst's testimony discussing the great trust he developed with his clients, vendors, and subcontractors;
- (2) Kunst's testimony discussing how he personally guaranteed his accounts with his suppliers;
- (3) Kunst's testimony discussing how his designs were well-known and unique;
- (4) Kunst's testimony discussing how articles from two periodicals featured him, his company, and his designs;
- (5) Kunst's testimony discussing how he earned nearly \$200,000 a year in fees;
- (6) Kunst's testimony discussing how, prior to 2006, he had the most clients and projects in his company's history;
- (7) Kunst's testimony that he had approximately eight simultaneous projects; and
- (8) The introduction of Kunst's letter to clients, which detailed how his homes in The Reserve ranged in price from \$200 per square foot to \$350 per square foot, which he indicated was much less than the average cost of other builders.

The jury heard evidence of the damage to Kunst after Loree's investigation, including:

- (1) Testimony that Kunstwerke's clients abruptly stopped paying their progress billings, when no client previously missed a payment;
- (2) Testimony that Kunst lost his investments in other projects;
- (3) Testimony that Kunst moved to Pittsburgh to try and start over;
- (4) Testimony that Kunst worked as a security guard; and
- (5) Testimony that Kunst's reputation around The Reserve diminished.

While Kunst admitted Goad and Alfonzo were willing to work with him again, Kunst implied his reputation with other suppliers and vendors was damaged because many would be unwilling to work with him as they believed he was "the reason they're owed money." Thus, evidence exists to support the jury's verdict.

We do not find the award to be unreasonable in relation to the character and extent of the injury. *See Young*, 252 S.C. at 187, 165 S.E.2d at 801 ("A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive."). Considering a person's reputation is invaluable, we find Loree failed to establish that the verdict was excessive. *See Miller*, 322 S.C. at 231, 471 S.E.2d at 687 (finding that, "[w]hen considering that a person's reputation is invaluable," the defendant failed to establish the verdict was grossly excessive because evidence of the plaintiff's status and time at the police department, history of winning the highest awards, and inability to obtain employment demonstrated the defendant effectively destroyed the plaintiff's reputation). Given the evidence at trial, the amount of the award does not indicate that the jury's verdict resulted from prejudice, passion, partiality, bias, or caprice. Furthermore, we find a rational view of the evidence supports the award. Accordingly, the circuit court did not err in denying Loree's motion for a new trial.

CONCLUSION

Based on the foregoing analysis, the circuit court's denials of Loree's motions for a directed verdict, for JNOV, for a new trial, and, in the alternative, for a new trial *nisi remittitur* are:

AFFIRMED.

THOMAS and MCDONALD, JJ., concur.

84988

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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

RECEIVED
JUN 13 2018
SC Court of Appeals

J. Scott Kunst Respondent,

v.

David Loree Appellant.

APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR and Rule 240(i), SCACR, Appellant David Loree (“Loree”) respectfully petitions this Court for a rehearing of Opinion No. 5564, dated May 30, 2018. Rehearing is warranted when the Court has overlooked or misapprehended points (as further described below). *Kennedy v. S.C. Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001).

SUMMARY OF ARGUMENT

In its Opinion, the Court either overlooked or misapprehended the Record from the trial court and the evidence admitted at trial. The Court’s misapprehension or confusion regarding the evidentiary Record from the trial court led the Court to misapply well-settled principles of South Carolina law, and, in at least one instance, cited evidence (which was in the Record) of illicit accounting activity to affirm the trial court.

QUESTIONS PRESENTED

1. Did the Court overlook or misapprehend the law and evidence related to the elements of slander per se?
2. Did the Court overlook or misapprehend items in the trial record concerning truth as a defense?
3. Did the Court overlook or misapprehend items in the trial record concerning the affirmative defense of qualified privilege?
4. Did the Court overlook or misapprehend the law in South Carolina regarding commingling of corporate and personal funds?

STATEMENT OF FACTS

Loree is employed by Richard and Barbara Gaby (“Gabys”). The Gabys hired Respondent J. Scott Kunst (“Kunst”) to design and build a custom home in The Reserve on Lake

Keowee. Kunst owned a design and contracting firm, Kunstwerke. Loree, at the direction of the Gabys, investigated Kunst's work on the Gaby home when it became evident that Kunstwerke was over budget and taking longer to complete the house than Kunst represented. (R. 26, Tr., testimony of David Loree, pgs. 163: 3- 164: 9). As is customary in the construction of residences, Kunstwerke would submit an invoice to Mr. Gaby for work thus far completed. Mr. Gaby would pay Kunstwerke the requested amount, with the understanding that Kunstwerke in turn would pay the subcontractors and vendors listed on the invoices. (R. 127, Tr., testimony of David Loree, p. 166: 4-8). In the course of his investigation, Loree contacted subcontractors and vendors to determine whether or not they had been paid by Kunstwerke. (R. 128, Tr., testimony of David Loree, p. 171: 11-19). Loree found that Kunstwerke was not paying the subcontractors and vendors as he was obligated to do, even after Kunstwerke received funds from the Gabys to pay the invoices. (R. 143-147, 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). (R. 141 - 147, 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 against Kunst, held before the Honorable G. Edward Welmaker on March 13, 2007. ("Gaby Action") (R. 23, 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.

In paragraph 53 of his Complaint (R. 34-35), Kunst alleged that all of the "Defendants" defamed him in the following manner:¹

- Defendants stated "Plaintiff embezzled money from the Defendants";
- Defendants stated "Plaintiff embezzled money from other clients";
- Defendants reported to numerous sub laborers and suppliers that funds intended for them were taken by the Plaintiff for his own personal use;
- Defendants "stated to numerous business associates, clients, and The Reserve sales staff that the Plaintiff was in financial trouble and unable to meet his future obligations."
- Defendants stated to "associates of the Plaintiff that the Plaintiff could go to prison";
- Defendants "planted rumors that the Plaintiff's design work and construction were defective and that he lacked professional qualifications."

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. (R. 409-455, Defendant's trial exhibits 19, 20, and 21, tax liens).

¹ Kunst later changed the statements at pre-trial hearings. (R. 39-40) Plaintiff's pre-trial brief, pgs. 1-2.

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 to Kunstwerke (to be used for payment to subcontractors and suppliers) for his personal use. Judge Welmaker granted damages to Loree's employer based on Loree's findings. If Loree did make the defamatory statements as Kunst alleges, the Record evidence and the public records of South Carolina clearly and uncontrovertibly establish that the statements are true and were made during the performance of his duty and protected by qualified privilege, which was never claimed to be exceeded.

ARGUMENT

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

The Court wrote in its Opinion that, "we note that statements alleging the commission of a crime, such as theft, are actionable per se." Respectfully, the Court misapprehends the standard for defamation per se. South Carolina law holds that only crimes involving *moral turpitude* are actionable per se.

Defamation "is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct.App. 2001).

However, not all crimes are "crimes of moral turpitude." The Supreme Court addresses this issue: "The question is whether the commission of such a crime is egregious enough such

that it may be viewed as a breach of respondent's duty to his fellow man and society as a whole." *Green v. Hewett*, 305 S.C. 238, 241, 407 S.E.2d 651, 652 (1991).

The Court then cites two examples for which it holds that Loree did, in fact, accuse Kunst of crimes of moral turpitude: (1) "Goad testified Loree told him that Kunst took money from clients and used clients' money for an investment project", and (2) "Alfonzo testified Loree mentioned that Kunst took out an insurance policy on the Gaby project, billed the Gabys, and intentionally canceled the policy to keep the money."

The Court then finds that, "Viewing the evidence in a light most favorable to Kunst, the nonmoving party, we find Loree's statements were actionable *per se* because the statements accused Kunst of committing a crime of moral turpitude—theft."

The Court overlooks two critical factors with such a holding: (1) neither statement involves an accusation that would be "egregious enough such that it may be viewed as a breach of [Kunst's] duty to his fellow man and society as a whole", and (2) these statements are supported by the Record evidence as being true.

This Court cites *McBride v. School District of Greenville County*, 389 S.C. 546, 698 S.E.2d 845, 852 (Ct. App. 2010) for its holding related to crimes of moral turpitude. Indeed, in *McBride*, this Court found the statement that a teacher stole school property was actionable *per se*. In *McBride*, the Court cited the case of *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*. However, unlike Kunst's allegations related to his few clients, these cases involve plaintiffs whose actions affected "society as a whole." *Green*, 305 S.C. at 241. A teacher who takes school property is in effect taking property from all the

taxpayers in that school district. A bank teller who takes money from customers' deposits is in effect taking money from the bank and its investors.

In this matter, the Court overlooks the fact that there is no evidence in the Record, nor any evidence presented at trial, that the alleged statements would affect more persons than just Kunst's clients, **which were five in number**. Certainly, even if made, these statements certainly don't affect society. Further, because there is nothing in the alleged statements rising to the level of baseness, vileness, or depravity, nor any evidence in the Record to support such a finding, this Court misinterprets that the statements above equate with "crimes of moral turpitude."

Next, the Court overlooks the Record evidence on the statements. Regarding the "investment property" or spec house, Kunst himself testified that, "I had already made arrangements to go back to building speculative houses only. And I already had one house under way that was spec only with an investor from Florida. His name was Thomas Hickey." (2nd Supp. R. 324, Tr., testimony of Scott Kunst, p. 312:6-10). Then, when asked about where Kunst kept his funds for the investment or "spec" project, Kunst admits readily that,

Q When you were doing the spec houses, you testified that you only had one checking account; is that correct?

A I've always had only one checking account.

(2nd Supp. R. 324, Tr., testimony of Scott Kunst, p. 367:25-368:1).

As discussed in Section IV, Kunst simply admitting that he took Kunstwerke corporate funds for his personal use does not excuse such behavior, nor does it legitimate the illicit siphoning of corporate funds for improper uses.

Regarding the insurance policy, the Record is clear that the statement is not refuted. Kunst and his fiancée attempt to explain *why* the insurance policy was cancelled, but nowhere in

the Record will the Court find that Kunst did, in fact, refund the money paid by the Gabys for the policy. This distinction is, of course, a critical one. Further, Loree's unrefuted testimony establishes the matter further:

Q Do you have any evidence as you sit here today that I took out an insurance policy for the Gaby's [sic] and intentionally canceled it the next day and billed the Gaby's [sic] for it and pocketed the money?

A Could I see my testimony from the damages hearing?

Q I'm asking you do you have evidence as you sit here today?

A I believe I do. If you'd show me that document, I can read that verbatim for you. I think that's what occurred.

(2nd Supp. R. 324, Tr., testimony of David Loree, p. 95:22-196:9).

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

A. Kunst's Allegations in General

In its Opinion, this Court explicitly accepted the following statements presented by Kunst as the alleged defamatory statements made by Loree. These statements have either been proven to be true or proven that Loree never made them:

- **The Plaintiff embezzled \$400,000 from the Gabys.**

Judge Welmaker awarded the Gabys a judgment of \$353,993.91 in damages, with attorney's fees and costs in the amount of \$35,807.41. (*See* R. 23, Order of Judge Welmaker, Defense Exhibit 23). Were this not true, Judge Welmaker would not have awarded the judgment. Therefore, there is irrefutable evidence in the form of a court

judgment that this statement is true and that Loree did not defame Kunst if he actually made this statement.

- **The Plaintiff embezzled money from all of his clients.**

This statement was proven to be true in the testimony of Eugene C. Covington, Jr., who testified that Kunst took money from his project and that subcontractors involved in his project were not paid. Therefore, if Loree actually made this statement, it is true and not defamatory. (*See, e.g.*, R. 156, Tr., testimony of Eugene Covington, p. 282: 19-25).

- **The Plaintiff had taken money from named clients Parham, Covington, Coco, and Hickey.**

Kunst called as a witness Eugene Covington, Jr. who testified that Kunst had taken money from him. (*See, e.g.*, R. 156, Tr., testimony of Eugene Covington, p. 282: 19-25). Kunst did not call Parham, Coco or Hickey as witnesses. The Court states that the testimony of Goad and Alfonso supports Kunst's allegation. However, Goad testified that he only talked to Loree concerning the accounting on the Gaby project. (R. 119, Tr., testimony of Kevin Goad, p. 135: 4-8).

- **The Plaintiff created dummy invoices from dummy companies so that he could steal money from these clients.**

Loree introduced in his testimony invoices and a letter from Select Stone and Systems Specialties (R. 371, 373, 375, 377, Defense Exhibits 2, 3, 4, and 5) to show that Kunst marked up invoices to the Gabys. (R. 141 - 142, Tr., testimony of David Loree, pgs. 223: 10 – 228: 25). Kunst never introduced any evidence to refute Loree's testimony.

- **The Plaintiff took money from his clients to spend on an investment project, a car, trips, and family members.**

This statement was proven to be true in the testimony of Eugene C. Covington, Jr., who testified that Kunst took money from his project and that subcontractors involved in his project were not paid. Therefore, if Loree actually made this statement, it is true and not defamatory. (2nd Supp. R. 385, 381, 382, 380, Tr., testimony of Scott Kunst, pgs. 373:15-374:7; 369:24-370:1; 370:10-12; 368:23-25.)

- **The Plaintiff did “criminal things” like take out an insurance policy, bill the Gabys, and then cancel it the next day so that he could keep the money.**

Glenn Alfonzo, another of Kunst’s witnesses, read from “his” affidavit that Loree said Kunst was a criminal, but on cross-examination, admitted that the affidavit was incorrect and that it did not reflect what he had said. (R. 124, Tr., Glenn Alfonzo testimony, p. 153: 14 - p. 154: 13). Alfonzo later admitted that his affidavit, if ever corrected, should state that Loree told him Kunst did things that were criminal. However, Alfonzo also admitted Kunst prepared his affidavit, leaving it in question as to whether the affidavit really reflects what Alfonzo heard or what Kunst wanted him to say that he heard. (R. 124, Tr. testimony of Glenn Alfonzo, p. 156: 14-21). Interestingly, Alfonzo testified that it was true that the Kunstwerke checks to him bounced and so he made arrangements for Kunstwerke to pay him with certified checks. (R. 124, Tr., Glenn Alfonzo testimony, p. 155: 1-8). Alfonzo’s testimony established that it is doubtful Alfonzo really heard Loree accuse Kunst of criminal acts, but it is certain the Kunstwerke checks bounced.

- **The Plaintiff “is going to jail.”**

Goad did not recall who told him Kunst was going to jail. (R. 120, Tr., testimony of Kevin Goad, p. 137: 1-8).

- **The Plaintiff took money from his other projects and that money was missing from these projects.**

Covington testified that Kunst had not paid the subcontractors on his project. (R. 156, Tr., testimony of Eugene Covington, p. 282: 19-25). Covington further testified that Kunst used the money Covington paid for his project to purchase a wedding ring for Kunst’s fiancée. (R. 156, Tr., testimony of Eugene Covington p. 283:25). Covington went on to testify that he tried to have an accounting done for his project, but Kunst never provided financial records to Covington’s forensic accounting expert. (R. 157, Tr., testimony of Eugene Covington, p. 285: 1-8).

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

In its Opinion, the Court affirmed the trial court on the defense of truth. The Court 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.”

The Court overlooks uncontroverted, Record evidence here. Kunst does not deny that that he took money from Kunstwerke personal 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. (2nd Supp. R. 385, 381, 382, 380, Tr., testimony of Scott Kunst, pgs. 373:15-374:7; 369:24-370:1; 370:10-12; 368:23-25.) Gene Covington's testimony is uncontroverted. (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.

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, this Court cannot find evidence that controverts the statements it posits as example. The Record does contain Kunst's *explanations* of why he did do these things – but he cannot deny the fact that he did these things.

After overlooking the Record evidence, the Court 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.” The Court 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.” This will be discussed in Section IV.

Loree is not asking this Court to weigh evidence. There is simply no evidence in the Record to weigh on these issues. The statements were, at a minimum, substantially true. Simply because explanations were offered, that does not create a credible refutation. In fact, an explanation is antithetical to evidence of a denial. This Court 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).

III. Did the Court overlook or misapprehend items in the trial record concerning the affirmative defense of qualified privilege?

A. No Actual Malice

Kunst offered no evidence whatsoever to show Loree acted with actual malice, that is, with a reckless disregard for Kunst's rights. First, Loree's unrefuted testimony was that Kunst did not direct Loree to avoid contacting his clients; in fact, Loree testified that Kunst did not seem to care if he contacted the clients. (R. 141, Tr., testimony of David Loree, pg. 222: 2-10). Kunst's witness Eugene Covington testified that he had never seen or met with Loree. (R. 156, Tr., testimony of Eugene Covington, p. 282, l. 19-25). Kunst's witness Goad testified Loree only discussed the Gaby project with him. (R. 119, Tr., testimony of Kevin Goad, p. 135, 4-8). Goad further testified that because Kunst had disappeared from the project site and could not be located, Loree became the contact man for payment. (R. 117, Tr., testimony of Kevin Goad, p. 125: 6-14). Kunst's witness Alfonzo testified that Loree had said Kunst had done criminal things, not that Kunst was a criminal. Alfonzo also testified that Loree consulted him to make sure he had been paid so that the project could go forward. (R. 124, Tr., testimony of Glenn Alfonzo, p. 155: 16-19). No witness testified that Loree had behaved in a reckless or wanton manner. Kunst produced no evidence to show that Loree had made defamatory statements (though, even if made, the statements were true) to people not concerned with the investigation Loree was conducting on behalf of his employer.

B. Scope Was Not Exceeded

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).

In its Opinion, this Court 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 contains numerous “findings” 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.”

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.”

3) “We find that Loree could have investigated the Gaby project without implicating Kunst’s financial affairs with other clients.”

Respectfully, these “findings” are beyond the province of this Court. 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 related to the actual malice element. The issue of exceeding the scope of the immunity was not raised by appellant, as this issue was not contested at the trial below.

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

As discussed above, this Court seems to imply that because Kunst testified that he used Kunstwerke funds to make certain personal expenditures, there is a conflict in evidence between Kunst and Loree.

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 to 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), this 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. This 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 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.

(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.

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

Q My question is while making purchases for the Cliff Ridge 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....

(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.

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

The Opinion seems to state 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. Surely, this Court does not intend to endorse and encourage commingling of personal and corporate funds and the siphoning of funds from corporate accounts for personal use.

Kunst's confession of improper accounting should not create a conflict in the evidence. And, even if this Court does so hold, Kunst again simply offers explanations of the siphoning of funds, he does not dispute that he did, in fact, take funds from Kunstwerke for personal use.

CONCLUSION

For the foregoing reasons, Loree respectfully requests rehearing of Opinion No. 5564, dated May 30, 2018.

Respectfully submitted.

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June 12, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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

RECEIVED

JUN 13 2018

SC Court of Appeals

J. Scott Kunst Respondent,

v.

David Loree Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief and the Final Reply Brief of the Appellant comply with Rule 211(b), SCACR.



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Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
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Robin B. Stilwell, Circuit Court Judge

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David Loree Appellant.

PROOF OF SERVICE

I certify that I have served the **Appellant's Petition for Rehearing** on *pro se* Respondent at his last-known address of 130 Arabian Way, Simpsonville, SC 29681, by depositing it into the U.S. Mail, first class postage prepaid on June 12, 2018.



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J. Scott Kunst, Respondent,

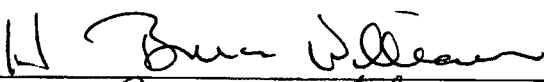
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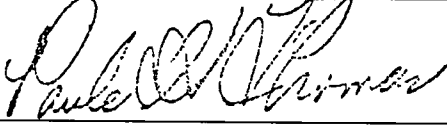
David Loree, Appellant.

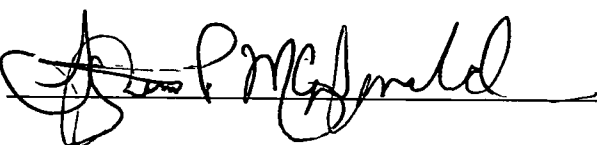
Appellate Case No. 2015-001536

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

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J. Scott Kunst

FILED

Aug. 16, 2018