

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-001700

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S.C. SUPREME COURT

J. Scott Kunst,Respondent

v.

David Loree,Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Facts/Procedural History section of Appeals Court Opinion 5564 is a better and more objective statement of case than Loree's statement which is not typical and is argumentatively biased. Loree's Statement of the Case requires some response here.

Kunst is a hard working artist and successful business person who had earned an impeccable reputation of being honest and trustworthy throughout his career. It is important to note that David Loree was a bodyguard for one of the most notorious product-based pyramid schemers in American history – Jay Van Andel, co-founder of Amway. Upon his death in 2004, Loree became a bodyguard for his daughter Barb Van Andel-Gaby and her husband Richard Gaby.

The Gabys and Kunst signed a reimbursement contract in 2004 that required weekly reimbursement for expenditures that Kunstwerke had already made on the Gaby's behalf. In February 2006, Richard Gaby and Loree conspired to default on three such weekly payments creating a large >\$200,000 balance of debt owed Kunstwerke which Gaby refused to pay. Kunst's only option was to reconcile the account and refund any items that Gaby had paid Kunstwerke for, but had not yet been disbursed. An example would be the Paul Anderson cabinet deposit Loree references in his petition. Loree does not mention that it shows up in the Gaby's final reconciliation billing as a credit to Gaby netted against cash Gaby owed. Gaby later paid Paul Anderson directly as agreed. Today, Loree's attorneys allege that the Anderson deposit was stolen by Kunst. That is beyond deceptive slight of hand, it is an outright lie.

If the Gaby account had been actually audited or litigated and was not a default case (a material fact which Loree fails to reference in his Statement of the Case), Gaby would have owed money and would have been sued for breach of contract.

This present defamation case was no small matter. There were eighteen related cases litigated to support it. Today, Loree is an adjudicated defamer 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.

At the end of his Statement of the Case, Loree attempts to blame all of the post-slander devastation on tax liens or Kunst's own inability to keep his business afloat. But a slanderous accusation of grand larceny would immediately and overwhelmingly destroy any business, livelihood, and reputation.

Nonetheless, its worth clarifying that the tax liens were a result and not cause of the financial devastation. The tax liens Loree references were put in place in 2009 (public record), three years after the slander. Half of the IRS tax liens have already been removed and the remainder will be removed shortly. All of the South Carolina Department of Revenue tax liens have been removed. The only instance of an uncontested genuine tax liability arose from unpaid South Carolina employment taxes due from Eugene Covington's project that Covington never reimbursed to Kunstwerke. This is fully supported by Covington billings, time sheets, and worker testimony.

At the core of this case is a simple reimbursement contract with 908 finite, knowable, and auditable transactions. Loree's attorneys hired a forensic auditor during discovery. If Loree's slander were true, it would have been easy to prove. For obvious reasons, Loree's expert witness auditor was not called by Loree at trial.

This petition is yet another inexcusable delay in a twelve-year tortured case for which a speedy resolution should have been a priority. Loree has been free to continue the harm caused

by his slander in petitions such as this for over a decade without fear of consequence.

The following arguments are just a regurgitation of the same old innuendos and smears that have been defeated at trial and in appeal after appeal. All six arguments are based on intentionally misconstrued laws and contrived false premises alleging that the record contains no evidence about a material matter, when in fact the record contains overwhelming evidence in all of these matters.

ARGUMENT

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

For this argument to have any merit, the substantive veracity of all seven slanderous statements would need to have been proven with no competing inferences. This argument is absurd on its face. No reasonable attorney would make such an argument in a case like this.

The seven statements litigated at trial were taken directly from affidavits provided by the witnesses in discovery and confirmed in deposition testimony and upon examination at trial. Remarkably, the most damning statements featured in the original complaint, but not listed below, were witnessed by Kunst's main witness, Bronson Shepherd, who passed away in 2011. His affidavit was not permitted in evidence at trial.

Statement 1 to witness Goad. "He stated that Scott Kunst had taken \$400,000 from the Gaby project and had left his other clients in a similar situation." (Appx. p. 121, Tr. p. 122)

Statement 2 to Goad. "Money was missing from many of Scott Kunst's clients. He referenced to Parham, Covington, Coco, and Hickey specifically." (Appx. p. 121, Tr. p. 122)

Statement 3 to Goad. "Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (Appx. p. 121, Tr. p. 122)

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." (Appx. p. 121, Tr. p. 122-123)

Statement 5 to witness Alfonso. "I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (Appx. p. 127, Tr. p. 145)

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.." (Appx. p. 127, Tr. p. 145)

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." (Appx. p. 127, Tr. p. 145)

The common thread among these seven statements is that they accuse Kunst of what would be serious indictable financial crimes if they were true. It would have taken Loree's expert witness Bill Larkin a week or two to audit all 908 Gaby transactions totaling \$2,656,492 and opine. For obvious reasons, Loree did not call his own forensic auditor to testify at trial. Such audits or good faith efforts to discover objective truth is what society demands in the law before someone like Loree recklessly spouts off such malicious accusations.

Instead, Loree's proffers this "unrefuted evidence" in his petition: (1) A "Public record" of an unlitigated civil default judgment, (2) a Judge's order dismissing a related Parham defamation

case, (3) Loree's own trial testimony, and (4) the testimony of Kunst witness Covington.

(1) A **“Public record” of an unlitigated civil default judgment.** Loree fails to mention in his petition that *Gaby v. Kunstwerke* was a default judgment and that final judgment was only entered on the breach of contract claim. The Gabys fought Kunst's efforts to have their account actually litigated all the way to this present Court.

The Court of Appeals opined in the first of two published opinions in this case:

"Although Kunst participated in the damages hearing by cross-examining witnesses called by the Gabys, it appears he was not afforded the opportunity to testify or to call witnesses to testify on his behalf. Kunst was also not allowed to participate in any discovery on this matter. In addition, because Kunst was in default, the circuit court 'start[ed] with the premise that all facts relating to the pertinent causes of action [were] admitted.' Accordingly, we hold Kunst was not presented with a fair opportunity to 'actually litigate" the veracity of Loree's alleged statements to others."

(Appx. p. 83, lines 15-23) Loree was denied his petition for certiorari in this matter.

Loree's (1st) alleged "Unrefuted Evidence" Refuted by Kunst at trial: The jury saw the following evidence that was not part of the default damages hearing:

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. (Appx. p. 278)

2. The jury heard testimony from Richard Gaby admitting that he had not paid all of his

weekly reimbursement billings. (Appx. p. 213, Tr. p. 489, 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. (Appx. p. 398-400)

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." (Appx. p. 398-400)

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.) (Appx. p. 114, Tr. p. 95, lines 24-25)

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. (Appx. p. 398)

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 (Appx. pp. 354-358) 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. (Appx. pp. 341-353)

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 (Appx. p. 158, Tr. p. 269, 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. (Appx. p. 170, lines 56 - 73)

11. Kunst testified to the circumstances surrounding the Gaby default case and how his response was deemed late (Appx. pp. 173-174).

12. 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.

(2) A Judge's order dismissing a related Parham defamation case.

Loree's (2nd) alleged "Unrefuted Evidence" Refuted by Kunst at trial: Kunst testified that all of the clients who stopped paying their account the month Loree came to town had to eventually be sued for breach of contract and, unlike the Gaby account, every balance was fully litigated based on the actual accounting records and *all* settled in Kunst's favor. Parham settled his contract case with a check (Appx. p. 177). There is no evidence in the actual accounting records that anything was ever 'taken' from Parham.

(3) Loree's own trial testimony.

Loree's (3rd) alleged "Unrefuted Evidence" Refuted by Kunst at trial:

To put it mildly, the jury simply did not believe Loree's testimony. In fact they found him to be a liar and a defamer. He admitted his own ignorance about such financial matters at trial.

The accounting records that Kunst submitted into evidence clearly showed where every dime of Gaby money went (Appx. p. 312). Loree repeatedly referenced Mr. Larkin, the forensic accountant that supposedly looked at everything (Appx. p. 138, Tr. pp. 191-192) (Appx. p. 157, Tr. p.266) (Appx. p. 159, Tr. p. 274).

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...(Appx. p. 158)"

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 (Appx. p. 158, Tr. p. 269)."
In a shocking admission, Loree testified that he *still* has never reviewed or looked at the actual Kunstwerke accounting records (Appx. p. 157, Tr. p. 267).

(4) The testimony of Kunst witness Covington.

Loree's (4th) alleged "Unrefuted Evidence" Refuted by Kunst at trial:

Covington was subpoenaed by Kunst to testify as to the resolution of the Kunstwerke contract case against him. Loree references in his petition 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 from the retained earnings of design fee revenue 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. Covington wrote a settlement check mid-trial in his own contract case. (Appx. p.161, Tr. p. 284).

Loree concludes his argument A with an outrageous smear alleging that Kunst's testimony was "clearly perjurious." Kunst's testimony included the submission of volumes of evidential matter including the actual accounting records that Loree never once attempted to refute at trial. Are the accounting records and the unpaid Gaby billings Kunst submitted into evidence during this alleged "perjurious testimony" perjurious too? Why was this alleged perjury not properly pursued during or after trial if it were a material cause of Loree's loss at trial? It's because *that* effort would have only again found Kunst to be honest and Loree to be a liar, just as this jury did.

Loree argues for qualified privilege in Arguments B and F below just in case this Court doesn't believe his testimony either.

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

This argument is a misleading, twisted mess and should be rejected on its face. Loree falsely alleges that the Court of Appeals made a "*factual* finding" of actual malice (a reckless and wanton manner with a conscious disregard for the rights of another) but its opinion only states that there was evidence at trial that Loree *exceeded the scope* of the occasion. The only real issue here is whether evidence existed at trial for the finders of fact to determine whether Loree abused conditional privilege.

As in argument A above, this argument is based solely on a false premise that the trial record has no evidence of something. Loree concludes in his last paragraph: "there is no evidence in the record before this Court that Loree exceeded scope" and this issue was not "contested at trial." From this nonsensical premise, Loree argues that actual malice was the only standard at trial and should be the only standard here and impunes the Court of Appeals for simply acknowledging the obvious fact that there was evidence that Loree exceeded the scope of the occasions of his slander.

The Appeals Court was too polite to Loree's attorneys when it noted that "Loree misconstrues the law": **"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."** (Opinion 5564, p. 12)

The Appeals Court properly emphasizes the conjunction *or*:

"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.' " (Opinion 5564, p. 12)

Kunst provided convincing evidence to the jury that the scope of privilege (if there were

any privilege) was exceeded. For example, in the examination of witness Kevin Goad at trial, Kunst presented evidence of scope as it related to **slander 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." (Appx. p. 121, Tr. p. 122-123)

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 (Appx. p. 122, line 76 – p.123, line 2)."

In another example, **slander 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.." (Appx. p. 127, Tr. p. 145)

This was not a good faith inquiry, but rather a general statement blurted out in a random crowd, and it was made to a crowd of workers standing around - none of whom had any interest in this insurance policy. Witness Alfonso testified regarding scope under examination by Kunst stating that he was not alone when Loree made this statement (Appx. p. 127, lines 75-100) and he recalled from his deposition testimony that other random construction workers were standing around (Appx. p. 128, lines 51-69).

Even though the Court of Appeals identified some of the evidence of Loree exceeding scope and saw no need to opine further, a reasonable jury might also conclude that Loree was also acting with ill will and actual malice when he started **slander #6** above by saying *"I am not supposed to be telling you this."* Kunst argued that Loree did not come to town to investigate anything. Loree repeatedly admitted at trial that he was unqualified to fully ascertain where his boss's money went and he had never even read the contract until trial (See quoted testimony on page 8 above). The jury was aware of the resolution of the related cases and the greater context of the financial scam that Loree's slander was a part of as described in the statement of the case above. Loree's real purpose for coming to town was not an innocent good faith affair as laid out very clearly in the book *Cold and Greedy* (ColdandGreedy.com) written by Kunst that Loree's own attorneys submitted into evidence.

As to the other clients referenced in Loree's slander, these weren't third party facts he acquired through careful good faith investigation of those accounts. These were innuendos

fabricated to make Loree's own slander regarding the Gabys appear more credible to the listener. Where did Loree get any information about these other clients in slander statements 1, 2, 3, 4, and 7? We *still* don't know. And why could he not defend at trial his purpose for naming each and every name and disclose where he got his alleged information? A reasonable jury might conclude that Loree spouted off these other names to bolster his fabricated Gaby allegation. That is what defamers do - especially if what the defamer is saying contradicts the well-earned good reputation of the one being slandered.

Midway through this argument, Loree references plaintiff witness Covington. Covington is an officer of the court, and if Covington actually said that Kunst "stole" from him as Loree alleges, then Covington lied under oath as a witness in a court of law. And if he said such a thing outside a courtroom it would be actionable per se and Covington would find himself in the same situation as Loree.

Lastly, it should be noted that privilege was pled by Loree for the first time in eight years the morning of trial. 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 to be an inexcusable delay (Appx. pp. 55-56).

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

All crimes do not involve moral turpitude as the Supreme Court of South Carolina has clearly ruled time and again.

In *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990), this Court states: "In *State v. Ball*,

292 S.C. 71, 354 S.E. (2d) 906 (1987), we held that the crime of possession of cocaine was not a crime of moral turpitude since it involved "primarily self-destructive behavior." 292 S.C. at 74, 354 S.E. (2d) at 908. We noted in *Ball* that, "[i]n determining whether a crime is one involving moral turpitude, the Court focuses primarily on the duty to society and fellow men which is breached by the commission of the crime." See, e.g., *State v. Morris*, 289 S.C. 294, 345 S.E. (2d) 477 (1986) [bookmaking]; *State v. Harvey*, supra [simple possession of marijuana]; *State v. LaBarge*, supra [public drunkenness, disorderly conduct]; *State v. Carriker*, 269 S.C. 553, 238 S.E. (2d) 678 (1977) [illegal possession of prescription drugs]; *Taylor v. State*, 258 S.C. 369, 188 S.E. (2d) 850 (1972) [possession of an unlawful weapon].

In *Green v. Hewett*, 305 S.C. 238, 407 S.E.2d 651 (1991) this court states: "In determining whether a crime is one of moral turpitude, The Court's focus is primarily on the duty to society *and one's fellow man* [emphasis added] which is breached by the commission of the crime." Society and fellow man is intended to represent all others, other than oneself. Such crimes were described by this Court in *Green* as "contrary to the customary and accepted rule of right and duty between man and man." In *Green*, marijuana trafficking was deemed egregious enough to breach his duty to his fellow man and society.

Under Federal immigration law and the laws of those states that have passed legislation specifically listing crimes of moral turpitude, property crimes (larceny, etc.) are usually listed at the top.

The purpose, as in immigration law, is obvious. Not all crimes are crimes of moral turpitude affecting society and fellow man, but a thief entering your country is a threat to your fellow man and society in general.

Grand larceny > \$300,000 and the other fraudulent acts alleged in the seven slanderous statements are actionable per se in South Carolina. In its published opinion in this present case, the Court of Appeals properly cites *McBride* which states: “Further, the statement was actionable per se because it accused McBride of committing a crime involving moral turpitude. See *Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946) (holding that an allegation charging the plaintiff with larceny or breach of trust, crimes involving moral turpitude, was actionable per se and did not require an allegation of special damages).”

The Supreme Court explicitly states in *Bell* that larceny and breach of trust are crimes of moral turpitude. Loree apparently agrees on page 12 of his Petition of Certiorari that theft by a teller from four bank customers and a stamp box in Abbeville totalling \$50 (*Bell*) and theft of school supplies from the Greenville County School District (*McBride*) are crimes of moral turpitude. Yet he argues that grand larceny of >\$300,000 from five clients and the other alleged financial crimes that were successfully litigated as slander in this present case are not crimes of moral turpitude because they somehow affected society as a whole differently and ignores the fellow man duty. Loree even goes so far as to state the absurd on page 12: “Loree never accused Kunst of such heinous acts” as presumably *Bell's* \$50 and *McBride's* school supplies.

If that argument isn't absurd enough, Loree fabricates a false premise to create another absurd argument on page 11 stating “The Court of Appeals interpreted McBride to mean that *any* [Emphasis added] crime is a crime of moral turpitude.” The Court of Appeals clearly identifies *theft* as *the* crime of moral turpitude in this present case as in McBride: “While Loree asserts no evidence exists in the record to show that his alleged slanderous statements met the standards of slander per se, we note that statements alleging the commission of a crime, such as theft, are

actionable per se” (Opinion 5564, p.8). And again: “...we find Loree's statements were actionable per se because the statements accused Kunst of committing a crime of moral turpitude-theft” (Opinion 5564, p.9). The Court goes on to name witnesses and specific trial testimony.

This is not “new law in South Carolina” as argued by Loree. Larceny has been a crime of moral turpitude in South Carolina for at least seventy years (*Bell*). *Bell* and *McBride* would be reversed and South Carolina would regress out of the mainstream of defamation law if larceny were to now suddenly and illogically be ruled to somehow not breach one's duty to society and one's fellow man. This is an absurd argument no reasonable attorney would make, nonetheless it appears here in Loree's Petition for Certiorari.

Note: Although the Appeals Court sufficiently found that the theft allegation was a crime of moral turpitude, it could have identified the other obvious actionable per se qualifier that was met at trial – incompatibility with trade or business. All seven slanderous statements charged Kunst with conduct incompatible with his particular and unique business and the specific way he conducted that business: reimbursement contracts.

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

This is yet another argument based solely on a false premise that there was no evidence regarding a material matter at trial. In this argument Loree alleges a paucity of evidence of any damages to Kunst. The Court of Appeals presents a brilliant legal analysis on damages (Opinion 5564, p. 13) that cannot be improved upon by this pro se litigant. There is a key footnote relevant to this argument on page 15 (footnote 9) noting that Loree conceded during oral arguments that Kunst testified to his own damages. This testimony included Kunst entering numerous exhibits

into evidence as he testified. A detailed summary of Kunst's damage evidence starts on page 17 of the Court of Appeals published opinion 5564. Loree's argument "D" is fatally flawed, nonetheless the following corrections need to be made to Loree's petition.

The Jury's Note: There was no attempt by this jury to exceed authority. The jury had apparently already determined that Loree was a liar and a defamer that had done great harm when it sent the note during deliberations. Asking a procedural question as to whether they had the authority to direct general damages in a case this large with so many other related businesses financially harmed is not unusual for a jury not schooled in the law. If their only intent at awarding a large verdict was a capricious effort to pay off subcontractors in their community who were also harmed as Kunst was, then they would have returned a verdict of \$1 for Kunst once they were instructed that they could not direct.

Unlike the *Sanders* jury referenced in Loree's petition, this jury did not send a note demanding Loree be fired as bodyguard for the Gabys for harming so many good people in South Carolina - their neighbors.

There are numerous factual errors and deceptions in the second paragraph of page 14 of Loree's Petition that alone should disqualify this argument.

First, Loree falsely alleges that "tax liens" were the cause and not the result of the sudden financial devastation that occurred in March 2006. The tax liens referenced were not placed until September 2009, three years later. This is public record.

Second, Loree falsely alleges that there was no evidence at trial that any of Kunst's clients stopped paying as Loree's slander spread other than the testimony of Plaintiff witness Covington. Plaintiff Exhibit 13 (Bates stamped KUNST 000093) (Appx. pp. 312-314) is an accounting

summary submitted by Kunst to the jury that shows the specific date that each client stopped paying (all at the same time Loree came to town) and the large amounts of debt owed by each client at that time. Kunst testified that no client had missed a payment in a decade of business until then. Loree did not refute this document at trial.

Third, Covington did not "stop... doing business with Kunst because Kunst couldn't account for the money that Covington had paid Kunst to pay contractors" as alleged by Loree. Covington's multi-million dollar project was months from completion and he was overextended financially when Loree came to town. Covington was under pressure from his mortgage lender and he took advantage of the explosion caused by Loree and abruptly stopped paying his debt of \$137,634 (Appx. pp. 312-314) on February 16, 2006 and breached his contract. Every dime was accounted for as Exhibit 13 attested. Covington never fired Kunst's firm Kunstwerke nor terminated the contract. Kunstwerke was on the building permit through completion. Equipment and sub-contractors were on site through completion. Kunst never stopped communicating with Covington as Kunst's collection efforts will attest. Covington fraudulently avoided the lien process as did Loree's boss Gaby and would later be sued by Kunstwerke for collection. Covington settled by check mid-trial in 2012. *That* is what the jury was waiting to hear.

The evidence of real financial damage as well as the evidence of all of the other general damages provided for in defamation law that are difficult to place a monetary value on are overwhelming in this case. Kunst recommended general damages of \$2,000,000 to the jury. If anything, a \$1,000,000 verdict was much too low.

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

Every distribution to S. Corp. Kunstwerke's lone shareholder was properly recorded throughout each year and deducted from shareholder equity. Kunstwerke's profits were taxed on Kunst's personal tax return. All distributions to Kunst were only a small fraction of the balance available to him at the time. Shareholder distributions are not "commingling" of corporate and personal funds.

Kunst's capital basis in the company increased dramatically during 2004 and 2005 (Appx. p. 313) and he took only a fraction of the distributions available to him because he had to personally fund an increasing debt balance from clients. The funds that financed the daily expenses of client projects Gaby, Covington, and Parham were retained earnings that had already been taxed to Kunst personally. Those that stiffed Kunstwerke and had to be sued to collect from were not just stiffing a corporation, they were taking Kunst's personal funds.

There is nothing improper about the bookkeeping. The accounting system was indeed "unique" from other design/build firms in the way it processed invoices and maintained a *debt* balance from each client. The corporate structure, bookkeeping methods, and shareholder equity of *C.T Lowndes & Company* in the case referenced by Loree have no relevance here.

The absurdity of this argument is demonstrated above in Argument A where Loree accuses Kunst of using "Covington money" to make a personal purchase. In the week that the referenced shareholder draw occurred, hundreds of thousands of dollars flowed in and out of the Kunstwerke bank account from seven different clients. On the day of the \$9,000 draw, Covington owed Kunstwerke greater than \$100,000 net cash and the accumulated retained earnings available to Kunst to draw from that day were also greater than \$100,000. Yet Loree alleges money was improperly taken from a specific client whose own cash was somehow just sitting there in Kunst's

trust earmarked for some other use.

Clients like Gaby paid their design/build fee in the same billing statement from which they paid their construction debt. From a practical standpoint it was not possible to have two corporate accounts. Net fee income needed to be retained to provide capital for future client debt. There is nothing wrong with this as long as everything is properly accounted for. Kunst's cash salary draws and other larger shareholder draws *had* to come out of this account.

When then, according to Loree, would it have ever been proper for Kunst to take a shareholder draw from Kunstwerke? If Kunst had retained another \$100,000 more net fee income in the S. Corp and spent it all on the Gaby project's contractors and vendors, Gaby would have stiffed him for that amount, too.

Loree improperly references *Elders v. Harding*, a case in which funds were siphoned and never accounted for. But then how would Loree's attorneys know it doesn't apply? They have never looked at the actual Kunstwerke accounting records. In fact, throughout Loree's petition and dating back twelve years to the Gaby default judgment, they've pretended these records don't exist. This argument has no merit and is just another opportunity to smear. Loree's attorneys are even willing to use their false premise to impune the Court of Appeals opinion which clearly does not “endorse and encourage commingling” and “siphoning” of corporate funds.

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

On page 13 of his initial brief to the Court of Appeals, Loree argues: “the jury had

absolutely no evidence to determine that Loree was not protected by qualified privilege.” The trial record does not support Loree's argument. Facts were disputed and in conflict as to whether each occasion gave rise to an application of privilege.

Conditional privileges arise from the particular occasion during which the statement is made. 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 (Appx. pp. 226-227). 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 (Appx. pp. 226-227).

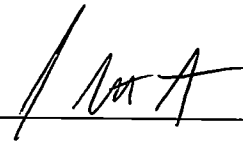
In *Bell v. Bank of Abbeville*, the South Carolina Supreme Court held: “In general, the question whether an occasion gives rise to qualified or conditional privilege is one of law for the court.” (50 Am.Jur.2d Libel and Slander §276 (1995) (*Bell v. Bank of Abbeville* 208 S.C 490, 38 S.E. 2D 641 (1946)). Generally, 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 litigated occasion of Loree's slander and the trial court properly denied Loree's motion (Appx. pp. 217-218).

For example, facts were in dispute as to whether the occasion described in the testimony

of Glen Alfonso (Detailed in argument B above) were a privileged occasion, and if so, whether it was abused. A general statement blurted out to a random group of men standing around a construction site who have no good faith interest in the specific subject matter is not a privileged occasion.

CONCLUSION

For the reasons stated above, the Court of Appeals properly affirmed the Trial Court and the jury's verdict must not be disturbed.



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October 16, 2018

Pittsburgh, Pennsylvania

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 18 2018
S.C. SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-001700


J. Scott Kunst,Respondent

v.

David Loree,Petitioner.

PROOF OF SERVICE

I Hereby certify that I have served a copy of the Respondent's Return to Petition for Writ of Certiorari upon the Petitioner by mailing a copy to both counsels of record for the Appellant: V. Elizabeth Wright, 217 E. Park Avenue, Greenville, SC 29601, and Gregory K. Smith, SMITH, GAMBRELL & RUSSELL, 1230 Peachtree Street N.E. Atlanta, GA 30309, by depositing it in the US Mail on October 16, 2018.



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