

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

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George McFaddin, Jr., Circuit Court Judge

OCT 12 2018

SC Court of Appeals

Case No. 2015-CP-14-0615
Appellate Case No. 2018-000936

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,..... Respondents,

v.

M.B. Hutson a/k/a M.B. Hudson,..... Appellant.

INITIAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

I.

Whether Appellant's statements relating to the preliminary steps of initiating a judicial proceeding against Respondent were absolutely privileged under South Carolina defamation law.

II.

Whether Respondents presented sufficient evidence of lost business profits when the lost profits evidence presented at trial related solely to an entity Respondents do not own and all testimony regarding Respondents' lost profits was purely speculative.

III.

Whether the trial court erroneously instructed the jury that it could consider Appellant's truth defense as aggravation and continued express malice in estimating damages when the defense was supported by evidence and Respondents had no claim for punitive damages at trial.

STATEMENT OF CASE

This defamation action was commenced in the Clarendon County Court of Common Pleas on 7 December 2015. The case proceeded eventually to trial before a jury 22 January 2018, and the jury reached a verdict on 26 January 2018.

At the close of the plaintiffs' evidence at that trial, defendant moved for a directed verdict in his favor. That motion was denied. Defendant renewed that motion at the close of all of the evidence, and that motion was denied as well. The jury returned a verdict in Plaintiffs' favor in the amount of \$3.5 million. Defendant subsequently moved for a judgment notwithstanding the verdict and for a new trial, and those motions were also denied.

Defendant gave notice of this appeal on 18 May 2018. This Court extended the time for filing this initial brief until 9 October 2018.

STATEMENT OF FACTS

This matter arises in the context of a lengthy series of dealings between the parties in connection with an RV campground resort located adjacent to I-95 on the shores of Santee Lake; the campground was known as Big Water Resort. The campground was originally developed by the plaintiffs between the years 2003 and 2010. The plaintiffs sold lifetime memberships in the resort for approximately \$8,500 per family. [Tr. pp. 254-255.] The original plan was to sell 2,000 memberships by the year 2008. [Tr. p. 256.] The campground only had about 130 spaces for all of the memberships sold. [Tr. p. 256.] Even though the campground and memberships were marketed as private, plaintiffs never considered themselves legally obligated to remain private and prohibit non-members from using the resort facilities [Tr. p. 257-258.]

By the end of 2010, the campground was losing approximately \$100,000 per year [Tr. p. 263.] From 2003 to 2010 when the plaintiff's were in charge of the campground, it lost money every year except one. [Tr. p. 265.] By 2009, the campground had fired its sales manager to save costs, and no memberships were sold that year [Tr. p.265.] Plaintiffs had collected about \$5 million in membership fees up until that point. [Tr. p. 270.]

In January 2009 plaintiffs held a corporate board meeting to discuss the problem of serious negative cash flows. [Tr. p. 279.] They discussed a complete shutdown of operations, but they were concerned about getting sued by the campground members [Tr. pp. 281-283.] They also discussed selling the campground operating company (Big Water Resort, LLC) with whom the campers had contracted. [Tr. p. 285.] The campground operating company Big Water Resort did not own the land upon which the campground was located; that land was held by TLC, a holding company.

Around the fall of 2010, plaintiff M.B. Hutson was searching for waterfront property to develop into condominiums. [Tr. p. 412.] Mr. Hutson eventually entered into a deal to purchase the Big Water Resort, LLC, entity and lease the property still owned by TLC. He purchased Big Water Resort, LLC, for ten dollars and a promissory note to pay a total of \$500,000 for that entity, and he leased (to purchase) the assets of TLC (which included the land upon which the campground was located). [Tr. p. 628.] The payments on the lease-to-purchase were to be funded by closing funds from developed condominiums [Tr. p. 628.] Other than ten dollars, this deal required no money from Mr. Hutson. [Tr. 631.]. Mr. Hutson testified that plaintiffs told him that the campground was "not making a profit." [Tr. p. 627.]

Shortly thereafter, in 2011, Mr. Hutson moved to the campground to begin work. He soon found out that the campground was generating \$154,000 per year but required between \$400,000 and \$500,000 annually to operate. [Tr. p. 633.] He was unable to identify any lease which gave Big Water Resort, LLC (the campground), a legally enforceable right to be on the land owned by TLC. [Tr. p. 637]. As the new "owner" he was soon confronted with a group of about 200 angry campground members. [Tr. pp. 641-642.] He found problems with the septic tank system [Tr. p. 644.] Eventually Mr. Hutson was unable to meet his obligations to make the lease payments, and litigation ensued between the parties.

In December 2013, at the peak of his frustration, and having been unable to develop a single condominium in the three years since entering into this transaction, Mr. Hutson believed that he and the campground members should pursue a legal action against the plaintiffs. [Tr. pp. 659-660.] To that end, he sent out a post card to the campground members (who were still on a mailing list), which read as follows:

Dear Big Water Resort Member or Former Member:

I purchased the Big Water Resort business in 2010. I have since come to realize that members were scammed by paying thousands of dollars to Big Water Resort when formerly owned by TLC, Holdings. Those monies totaled about 5 million dollars paid by members when they signed their individual contracts to the TLC, Holdings owned Big Water Resort. There was no feasible way that Big Water Resort could furnish the contractual benefits and the spirit as outlined in the contract, nor did TLC, Holdings have any desire to fulfill their end of the contract in actuality, nor in spirit.

I, and others, will seek to demand a refund from TLC Holdings, by way of a class action lawsuit, charging TLC, Holdings with fraud and possible racketeering for the five million plus triple damages. Any existing or former member

wanting to join this lawsuit may do so by contacting me at Big Water Resort as soon as possible or dialing 423 834 4282. I, too, have been scammed by TLC, Holdings as a member and purchaser of Big Water Resort. I will be able to put any member in touch with the attorney. The suit will be filled in the next ten days. Anyone who joins stands a good chance of recovering their money. I know that hundreds of members are convinced they were scammed. It appears that hundreds will join this effort. I am told that the statute runs from time of discovery of the scam. Let's join together now and get our money back.

Thank You,
M. B. Hutson

Subsequently, Mr. Hutson contacted attorney Bill Padgett to inquire whether Mr. Padgett would speak with several members who were unhappy after reading the postcard regarding their grievances. (Tr. P. 358, 664) Mr. Padgett informed Mr. Hutson that he would be glad to speak to the members. (Tr. P. 358, 664) Subsequently, Mr. Padgett agreed to represent these members in a class action lawsuit filed by the campground members against TLC. (Tr. P. 359) In fact, Mr. Padgett considers the genesis of the class action lawsuit to be a conversation with Mr. Hutson that occurred in January of 2014. (Tr. P. 322) Mr. Hutson was not named as a defendant by the members in the lawsuit. (Tr. P. 360, 666)

In the spring of 2014, Mr. Hutson met with Mr. Padgett a number of times to discuss the class action lawsuit and assist in Mr. Padgett's investigation. (Tr. P. 359, 665) Mr. Padgett asked Mr. Hutson directly whether he would cooperate fully with the investigation. (Tr. P. 323) Mr. Hutson agreed to cooperate with Mr. Padgett's investigation. (Tr. P. 323, 360) In furtherance of such investigation, Mr. Hutson provided documents to Mr. Padgett, including a three page document authored by Mr. Hutson summarizing his complaints regarding TLC. (Tr. P. 322-23, 326-27, 359, 665)

Because of Mr. Hutson's extensive participation in Mr. Padgett's investigation, Bill Padgett dubbed Mr. Hutson a critical witness. (Tr. P. 360) Eventually, this class action lawsuit was settled by TLC for roughly \$1.85 million. (Tr. P. 364)

ARGUMENT

1. **Respondents' claims are barred in their entirety as a matter of law by the absolute privilege doctrine in South Carolina.**

In South Carolina, statements that relate to a judicial proceeding, **including preliminary steps taken prior to filing a lawsuit**, enjoy an absolute privilege. *Crowell v. Herring*, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990). Other jurisdictions are in accord.¹

Absolutely privileged statements are not actionable in defamation regardless of whether the defendant acted in good faith, acted with malice, or any other circumstance. *Hainer v. American Med. Intern, Inc.*, 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997). *See also Richardson v. McGill*, 273 S.C. 142, 145, 255 S.E.2d 341, 342, (1979); *Fulton v. Atlantic Coast Line R.R. Co.*, 220 S.C. 287, 296, 67 S.E.2d 425, 429 (1951); *Bell v. Bank of Abbeville*, 208 S.C. 490, 493, 38 S.E.2d 641, 642 (S.C. 1946); *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002); *Wright v.*

¹ *See Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C. App. 669, 355 S.E.2d 838 (1987). *See also Samson Investment Co. v. Chevaillier*, 1999 OK 19, 988 P.2d 327 (1999); *Lerette v. Dean Witter Organization, Inc.*, 60 Cal. App. 3d 573, 131 Cal.Rptr. 592 (2d Dist. 1976); *Club Valencia Homeowners Ass'n v. Valencia Assoc.*, 712 P.2d 1024 (Colo. App. 1985); *Irwin v. Cohen*, 40 Conn. Supp. 259, 490 A.2d 552 (1985); *Libco Corp. v. Adams*, 100 Ill. App. 3d 314, 55 Ill. Dec. 805, 426 N.E.2d 1130 (1981); *Sriberg v. Raymond*, 370 Mass. 105, 345 N.E.2d 882 (1976); *Johnston v. Cartwright*, 355 F.2d 32 (8th Cir. 1966) (applying Iowa law); *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980); *Penny v. Sherman*, 101 N.M. 517, 684 P.2d 1182, cert. denied, 101 N.M. 555, 685 P.2d 963 (1984); *see also Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984).

Sparrow, 298 S.C. 469, 473, 381 S.E.2d 503, 506 (Ct. App. 1989); *Johnson v. Independent Life & Acci. Ins. Co.*, 94 F. Supp. 959, 961 (D.S.C. 1951).

In *Crowell v. Herring*, cited above, a Veterans of Foreign Wars ("VFW") commander was acquitted in a court martial proceeding charging him with improperly receiving funds from video machines owned by Hoyt's Music Company ("Hoyt's") at the VFW. *Crowell*, 301 S.C. at 428-29, 392 S.E.2d at 466. Following his acquittal, the commander sued VFW investigators and several Hoyt's representatives for slander, libel, and malicious prosecution stemming from statements made at the court martial proceedings, during the official investigation, and prior to the investigation. *Id.* at 426, 392 S.E.2d at 465. The trial court granted the defendants' motion for summary judgment on all the plaintiff's claims for slander and libel. *Id.* Plaintiff appealed.

On appeal, the court first held that statements made during the court martial proceedings were absolutely privileged. *Id.* at 430, 392 S.E.2d at 467. Next, the court held that statements made by VFW investigators during their depositions were absolutely privileged. *Id.* at 431, 392 S.E.2d at 467. The court then held that statements made by VFW investigators during their investigation, prior to the court martial proceedings, were also absolutely privileged. *Id.* The court likened the investigation to a prosecutor interviewing witnesses and preparing a case. *Id.* Accordingly, these statements were absolutely privileged because they were preliminary steps that bore a reasonable relation to a contemplated proceeding. *Id.*

Finally, the court addressed an allegedly defamatory affidavit authored by a Hoyt's representative and given to a VFW trustee. *Id.* at 431, 392 S.E.2d at 467-68. The affidavit alleged that the plaintiff improperly received payments from Hoyt's. *Id.* at 429,

392 S.E.2d at 466. This affidavit was drafted long before any litigation commenced and prior to the initiation of any official investigation. *Id.* 301 at 429, 392 S.E.2d at 466. In fact, this statement led to the official VFW investigation which, in turn, led to the court martial proceeding. *See Id.* 301 at 428, 392 S.E.2d at 466. The court held that the pre-investigation statement made by an eventual witness was absolutely privileged as a preliminary statement relating to the commencement of a formal proceeding. *Id.* at 432, 392 S.E.2d at 468.

The court was persuaded by the New Jersey Supreme Court's holding in *Rainier's Dairies v. Raritan Valley Farms*, 19 N.J. 552, 117 A.2d 889 (1955). *Id.* at 431, 392 S.E.2d at 468. That case involved citizens making allegedly defamatory statements in petitions to the Office of Milk Industry encouraging them to investigate a possible price fixing scheme. *See Id.* at 432, 392 S.E.2d at 468. The *Crowell* court noted that the "New Jersey Supreme Court held the petitions to investigate were absolutely privileged even though the statements were unsolicited and given prior to the institution of a formal investigation or proceeding." *Id.*

Furthermore, the *Crowell* court found that its holding protected a vital interest, worthy of absolute privilege as a matter of policy. The court opined that "[t]he threat of a civil action in slander or libel would undoubtedly have a chilling effect on those tempted to initiate legitimate investigations or inquiries into others' supposed wrongdoings." *Id.*

The Federal District Court in South Carolina has ruled in accordance with *Crowell* and taken a similar view regarding the absolute judicial privilege. In *Woodward v. Weiss*, the court held that statements made prior to the commencement of civil litigation were absolutely protected by the judicial privilege. *Woodward v. Weiss*, 932 F. Supp.

723, 728 (D.S.C. 1996).

Woodward involved a medical doctor suing another medical doctor for libel stemming from statements made in a report. *Id.* at 725. The defendant was hired by an insurance company to evaluate the treatments and diagnoses rendered by the plaintiff to three insurance claimants. *Id.* at 724-25. In his report to the insurance company, the defendant charged that the plaintiff had excessively treated the claimants and that his opinions were not supported by the records, and plaintiff filed a claim for defamation. *Id.* at 725.

The district court recognized that South Carolina law affords statements “rendered as a preliminary step to a judicial proceeding which [bear] a reasonable relation to litigation” an absolute privilege. *Id.* at 727. The court quoted the Restatement for the proposition that “The privilege **also protects [the witness] while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal.**” *Id.* (quoting Restatement (Second) of Torts § 588, Comment (b) (1977) (emphasis added)).

The court held that the defendant’s pre-litigation statements were absolutely privileged. *Id.* at 727. The court reasoned that the defendant’s report could possibly have been used as an exhibit in theoretical future litigation. *Id.* Likewise, the defendant could possibly have been called as a witness in any such litigation. *Id.* The court even went so far as to hold that the reports were absolutely privileged irrespective of whether a judicial proceeding ever actually commenced. *Id.* at 728. The district court, like the court of appeals in *Crowell*, was influenced by the public policy consideration that people should be permitted to investigate and discuss a matter that resulted in injury

prior to the commencement of legal action without fear of a possible defamation lawsuit.
Id.

In this case, Respondents sought to prove two acts of defamation: (1) the postcard of December 2013 and (2) oral and written communications by Appellant to class action plaintiffs' lawyer Bill Padgett during the spring of 2014, following the postcard. The postcard was addressed to present and former members of the Big Water Resort campground and informed them that they (along with Appellant) had been scammed by TLC. (Defendant's Exhibit 58; Tr. P. 660-61) The postcard suggested that they all band together and initiate a class action against TLC for this scam, and indicated that Appellant had already contacted an attorney about it. (Defendant's Exhibit 58; Tr. P. 660-61)

The allegedly defamatory statements Appellant made in the postcard are strikingly similar to the statements made by the Hoyt's representative in *Crowell* in his affidavit, which were absolutely privileged. Both involve pre-litigation, pre-investigation writings. Both were offered by an eventual witness accusing another of wrongdoing. Still more, both led to an investigation and, eventually, to a judicial proceeding against the subjects of those writings. In effect, both statements are examples of a whistleblower sounding an alarm.

Respondents argue that this case is distinguishable from *Crowell* because Appellant's statements were not made by investigators as a part of an official investigation. This argument focuses on the wrong *Crowell* holding. While one holding of *Crowell* is indeed that statements made by investigators during their official investigation are privileged, *Crowell*, 301 at 431, 392 S.E.2d at 467, the *Crowell* court

also held that statements made in a pre-investigation writing authored by an eventual witness to litigation are absolutely privileged. *Id.* at 432, 392 S.E.2d at 468. The affidavit of the Hoyt representative was neither authored by investigators nor made during the course of an official investigation. Thus, *Crowell* is not distinguishable; rather, the holding addressing a pre-investigation, pre-litigation writing is directly on point.

Following the postcard, Appellant referred campground members to Mr. Padgett, who agreed to represent them. (Tr. P. 358-59, 664-65) As a part of his investigation into his clients' case, Mr. Padgett interviewed Appellant and received a three page summary from him entitled "Class Action" which outlined what Appellant believed to be the wrongful acts of TLC in furtherance of their scam. (Tr. P. 322-23, 326-27, 359, 665) Mr. Padgett testified that his communications with Appellant and the documents he received from Appellant were critical to his decision to bring the class action, which was ultimately settled by TLC for approximately \$1.8 million. (Tr. P. 322, 358-360) The Appellant here, according to Mr. Padgett's testimony, was a critical witness in that class action. (Tr. P. 360)

Appellant's statements to class action plaintiff's attorney Bill Padgett, including the documents provided, were comparable to the doctor's statements in *Woodward*, which were also absolutely privileged. Both were pre-litigation statements containing accusations and supporting facts that were likely to be used in future litigation. Appellant's communications to Mr. Padgett satisfy the key factors analyzed by the *Woodward* court. The record is uncontroverted that these allegedly defamatory statements were made by Appellant during Mr. Padgett's investigation. (Tr. P. 322-23, 326-27, 359) Mr. Padgett also testified that he viewed Appellant as a key witness to his

case. (Tr. P. 360) In fact, the judicial privilege's application is clearer here than in *Woodward* because Appellant's statements were made to an attorney in furtherance of an investigation related to a filed lawsuit.

Respondents contend that Appellant acted in bad faith by authoring the postcard and communicating with Bill Padgett and did not, in good faith, contemplate commencing a legal action. South Carolina law, however, is clear on this point: such considerations are improper and irrelevant to the issue of absolute privilege. *Hainer*, 328 S.C. at 135, 492 S.E.2d at 106 ("When a communication is absolutely privileged, no action lies for its publication, **no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice.**") (emphasis added); *see also Richardson*, 273 S.C. at 145, 255 S.E.2d at 342 ("Privileged communications in the law of libel and slander are either absolute or qualified. When the communication is absolutely privileged, no action will lie for its publication, **no matter what the circumstances under which it is published.** When qualified, however, the plaintiff may recover if he shows that it was actuated by malice.") (quoting *Bell*, 208 S.C. at 493, 38 S.E.2d at 642) (emphasis added)).²

² *Accord: Fulton*, 220 S.C. at 296, 67 S.E.2d at 429 ("Under [an absolute privilege] there is no liability, **even though the defamatory words are falsely and maliciously published.**") (emphasis added); *Pond Place*, 351 S.C. at 22, 567 S.E.2d at 892 ("When a communication is absolutely privileged, no action lies for its publication, **no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice.**") (quotation omitted) (emphasis added); *Wright*, 298 S.C. at 473, 381 S.E.2d at 506 ("If the communication is absolutely privileged no action will exist for its publication **no matter what the circumstances under which it is published.** If a privilege is qualified, a plaintiff may recover if he shows the publication was actuated by malice.") (emphasis added); *Johnson*, 94 F. Supp. at 961 ("An absolutely privileged communication is one in respect of which . . . no remedy can be had in a civil action . . . **even though it may have been made maliciously.**") (quotation omitted) (emphasis added).

Crowell and *Woodward* both hold that pre-litigation statements bearing a reasonable relation to future litigation are absolutely privileged. It is for the court to determine whether a defamatory statement is relevant to a legal proceeding, with all doubts being resolved in favor of relevancy. *McKesson & Robbins v. Newsome*, 206 S.C. 269, 275, 33 S.E.2d 585, 587 (1945); *See also Texas Co. v. C. W. Brewer & Co.*, 180 S.C. 325, 327, 185 S.E. 623, 624 (1936). The evidence here easily satisfies this low standard.

Here, the postcard resulted in the campers seeking advice and representation from Mr. Padgett, and Mr. Padgett filed a lawsuit against Respondents. (Tr. P. 319) The essence of the post card, in fact, is that it proposes a class action. (Defendant's Exhibit 58; Tr. P. 660-61) Appellant's statements made allegations and recited detailed facts central to the eventual class action. (Tr. P. 660-61)

Additionally, Appellant's statements to Bill Padgett during Mr. Padgett's investigation also plainly relate to the eventual class action lawsuit. Mr. Padgett testified that the genesis of the lawsuit that he filed was a conversation that he had with Appellant. (Tr. P. 322) Similarly, subsequent conversations between Appellant and Mr. Padgett occurred during and in furtherance of Mr. Padgett's investigation regarding this lawsuit. (Tr. P. 322-23, 326-27, 359)

Crowell is controlling here, and *Woodward* is instructive. Those cases are not materially distinguishable from this case. Both demonstrate that Appellant was entitled to judgment as a matter of law because his communications bore a reasonable relation to eventual litigation. Allowing this verdict to stand would, as South Carolina courts have suggested, chill speech from those who seek to turn to litigation to redress injury done

to them by others. Thus, the trial court erred in denying defendant's motions for a directed verdict at the close of the plaintiff's evidence, for a directed verdict at the close of all of the evidence, and for judgment notwithstanding the verdict.

2. Respondents' damages are barred by Respondents' own evidence that the damaged entity, if any, was Big Water Resort, LLC, which was not a plaintiff in this case.

Respondent Richard Clark testified that, but for the Appellant's allegedly defamatory postcard, he and Respondent Steve Lovell could have restarted the Big Water Resort Campground in 2014, generated over a million dollars a year in profit for six straight years, and then sold the campground business for a profit of \$6 million in 2019. Thus, according to Mr. Clark, Big Water Resort LLC lost \$12 million. This testimony was in stark contrast to the Respondents' own evidence that Big Water Resort, LLC, lost money every year between 2003 and 2010 (except one) when the Respondents last ran the campground prior to 2014. The problem with this testimony is that Big Water Resort, LLC was not the plaintiff and was no longer owned by Respondents Richard Clark and Steve Lovell after they sold that entity to Appellant in 2010.

Because of the Respondents own testimony, the trial court erred in refusing to direct a verdict on the issue of the alleged lost business profits incurred by the Respondents. Appellant is further entitled to a new trial on this issue of damages.

In addition, Appellant is entitled to a new trial based on the trial court's refusal to exclude the speculative testimony described herein. Over Appellant's repeated objection, the trial court allowed the above testimony. Under South Carolina law, "[p]roof of lost profits requires the plaintiff to prove (1) that it is reasonably certain that profits

would have been realized but for the tort and (2) that such lost profits can be ascertained and measured from the evidence produced with reasonable certainty.” *Collins Music Co. v. Ingram*, 292 S.C. 537, 541, 357 S.E2d 484, 486 (Ct. App. 1987). The proof “must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.” *Drews Co. v. Ledwith-Wolf Associates, Inc.*, 296 S.C. 207, 213, 371 S.E. 2d 532, 536 (1988).

Respondent Clark’s testimony regarding an alleged lost profit starting immediately upon his retaking of the campground business in 2014 is purely speculative. The facts are that the campground lost money every year except one from 2003 to 2010 when these Respondents were previously operating it. Mr. Clark’s alleged lost profits (and concomitant lost value) were completely untethered to the actual facts presented to the jury. Thus, the Court erred in allowing this speculative lost profits/lost value testimony, and defendant is entitled to a new trial on damages.

3. **Finally, Appellant is entitled to a new trial based on the court’s erroneously charging the jury in accordance with the Respondents’ requested jury charge number 8.**

Upon request of the plaintiffs the trial court included the following instruction in its charge to the jury:

“If the defendant attempted to justify the slander and proved the truth of the statements and failed because justification is unsupported by the evidence, you may consider it as a circumstance of aggravation and a continued and expressed matter, and you may consider it in estimating the plaintiff’s damages. The law states that there is peril to the defendant in the plea of justification. The defendant’s attempted justification is a repetition of the defamatory statement, and

unless the defendant is able to sustain the justification with evidence, you may consider it as malice and as aggravating damages.”

[Tr. II, pp. 16-17.]

This charge, based on the case of *Leevy v. North Carolina Mutual Life Ins. Co.*, 184 S.C. 111, 191 S.E. 811 (1937), is erroneously based on a case in which the defendant pursued the common law plea of justification. According to the *Leevy* court, “[i]f the defendant undertook to justify the slander and prove the truth of the statements, and failed because justification is unsupported by the evidence, it may be considered a circumstance of aggravation, and a continued and express malice, and may properly be considered by the jury in estimating the damages.” *Id.* at 118, 191 S.E. at 814. This instruction is plain error because (1) if “justification” is the legal equivalent of the defense of truth, there was abundant evidence of justification in the case at bar (as opposed to “unsupported by the evidence”), and (2) Respondents explicitly withdrew their claim for punitive damages at the trial. This instruction inappropriately invited the jury to assess punitive damages when Respondents had no claim for such damages. (Jury verdict)

CONCLUSION

For the reasons stated above, this Court should reverse the trial court’s denial of defendant’s motion for a directed verdict at the close of the plaintiffs’ evidence or at the close of all of the evidence, or defendant’s motion for judgment notwithstanding the verdict, and enter judgment for defendant, or order the trial court to do so. Alternatively, this Court should grant to defendant a new trial on damages.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

George McFaddin, Jr., Circuit Court Judge

Case No. 2015-CP-14-0615
Appellate Case No. 2018-000936

TLC Holdings, LLC, Richard Clark, and
Jimmy S. Lovell,..... Respondents,

v.

M.B. Hutson a/k/a M.B. Hudson,..... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on the respondents by depositing a copy of it in the United States Mail, postage paid, on October 9, 2018, addressed to their attorney of record, John S. Wilkerson, III, Turner Padgett Graham & Laney, Post Office Box 22129, Charleston, South Carolina 29413.

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October 9, 2018

Ms. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: TLC Holdings, LLC v. M.B. Hutson
Appellate Case No.: 2018-000936

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Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Brief Of Appellant and Designation Of Matter To Be In The Record On Appeal in the above-referenced case. We ask that you please return a file-stamped copy of the documents to us in the enclosed self-addressed, stamped envelope.

Thank you for your assistance and cooperation in this matter. Please do not hesitate to contact us with any questions.

Very truly yours,

Kerri M. Elliott

Kerri M. Elliott

Enclosures

cc: John S. Wilkerson, III
James B. Richardson, Jr.

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