**THE STATE OF SOUTH CAROLINA**

**IN THE SUPREME COURT**

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S.C. SUPREME COURT

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APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Case No. 2006-CP-39-1826
Appellate Case No. 2018-001700

J. Scott Kunst, .....Respondent

v.

David Loree.....Petitioner

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# REPLY OF PETITIONER

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## Introduction

"When drafting the briefs, all factual statements should be rooted firmly in the record. Lawyers should cite the record following each sentence or factual assertion and lawyers should reference every relevant page of the record. Attorneys should verify the accuracy of their citations before filing final briefs." Jean H. Toal, et al, Appellate Practice in South Carolina, 422 (3rd ed. 2016).

"Lack of familiarity with legal proceeding is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney". *Hill v. Dotts*, 346 S.C. 304, 310, 547 S.E.2d 894 (Ct. App. 2001), citing *Goodson v. Am. Bankers Ins. Co.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988).

A Return Brief should set forth for the Supreme Court the Respondent's arguments to assertions made in the Petition and the Return Brief should make accurate and truthful cites to the Appendix in support. Upon review of the Return Brief, numerous "citations" were discovered that were not accurate. There were also numerous instances when Respondent chose to rely on snide comments or emotional tirades rather than cite the Appendix or case law to support his argument. Mindful of the fifteen page limit for the Reply, Petitioner Loree responded to the most egregious examples and he respectfully urges this honorable Court to carefully check Respondent's citations for accuracy. The Court should also be mindful that while Respondent is a *pro se* litigant, this is his second appearance at the Supreme Court and his third appearance at the Court of Appeals. As a seasoned *pro se* litigant, Mr. Kunst is familiar with the rules, yet often uses his *pro se* status as a shield and a sword. His Return is the latest example of Kunst's use of hyperbole, non-sequiturs, strawmen, and confusion to create havoc

within the Record and courts – all with the hope that the bench will simply defer to his *pro se* status and excuse the lack of merit, facts, and law in his positions.

## Argument

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

Kunst attempts to persuade this honorable Court that the standard for showing substantial truth means there are "no competing inferences." (Return at 3). Obviously, this is not the standard in South Carolina. This Court has unambiguously held that, "a sufficient defense is made out where the evidence establishes that the statement was substantially true." *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976). There is no Record evidence to refute that the substantial truth of the allegedly defaming statements are substantially true.

The Record is clear that the Court of Appeals erred when it failed to consider that the trial court disregarded the Order of Judge Welmaker in the Gaby action (Appx. p. 29) and the Order of Judge Early in the Parham action (Appx. p. 405), both which establish (as public records in this State) that Kunst's financial woes were from his own misconduct and not due to any statements made by Loree. Further, the Court of Appeals overlooked testimony from Loree and Eugene C. Covington, Jr., Esq. in which established without refutation that Kunst misappropriated money received from Kunstwerke clients. Instead of confronting Loree's Record evidence, Kunst makes new attempts to refute trial testimony by introducing "facts" and "evidence" to this Supreme Court that are not part of the Record. Kunst wholly fails to address the Record evidence overlooked by the Court of Appeals in any coherent manner. In particular, Kunst's repetition of statements in pleadings does not create Record evidence.

*The Gaby and Parham Orders*

Kunst appears to assume that the Welmaker Order was overturned by the Court of Appeals in the opinion *Kunst v. Loree*, Opinion No. 5163. This is not the case. The Court of Appeals affirmed the Welmaker Order in its unpublished opinion *Gaby v. Kunst and Kunstwerke Corp.*, Opinion No. 2009-UP-028. This Supreme Court denied hearing the *Gaby v. Kunst and Kunstwerke* case on June 10, 2010. The Welmaker Order is still in effect and is still unrefuted Record evidence that Kunst misappropriated funds paid to Kunstwereke by Loree's employers, Richard and Barbara Gaby.

Kunst admitted at trial that Judge Early found the defamatory statements tried in the Parham case to be true. (Appx. p. 1191, Tr., p. 390:4-8). The Parham Order was never appealed and therefore is still a matter of public record that Kunst misappropriated funds paid to Kunstwerke by his clients. Kunst fails in his Return to refute that the Parham Order is proof that Loree proved the defense of truth at trial.

*Kunst Listing of "Evidence"*

In his Return, Kunst attempts to persuade this Supreme Court that the jury saw and considered evidence that was neither part of the Record nor admitted into evidence at the trial. (Return at 5-12).

Regarding the alleged 908 Gaby invoices, Kunst cites Appendix page 278. Page 278 of the Appendix is part of Kunst's Reply to Loree's Motion for JNOV. This is not Record evidence and this was not introduced at trial. Further, Page 278 of the Appendix is clearly not 908 Gaby invoices. Kunst did have admitted Plaintiff's Exhibit 14 into evidence at trial, which was an "example" of invoices as Kunst himself testified at trial. (Appx. p. 1127, Tr. p. 326: 17-22). However, even Plaintiff's Exhibit 14 did not contain anything close to 908 invoices, and was

simply a sample of some invoice – not an entire "accounting record" as Kunst urges this Supreme Court to accept. (Return at 5). Finally, even a cursory review of the trial exhibits admitted into evidence show no mention of 908 invoices. (Appx. p. 96).

Kunst then cites to deposition testimony read into evidence at the trial, but exaggerates the actual testimony. (Return at 5-6). The actual testimony read states clearly that all but the last invoice from Kunstwereke was paid. (Appx. p. 1292, Tr. p, 489, lines 7-8).

Kunst cites an email exchange between Mr. Gaby and himself. (Return at 6). Kunst then selectively and randomly selects lines out of context to make his point. The email, read in its entirety and in context does not support Kunst's proffer. (Appx. pp. 398-400).

Next, Kunst writes that the jury heard a witness testify about a meeting between Kunst and Loree, in which Loree said that he thought he could get Kunstwerke invoices paid. Kunst fabricates this testimony. The cited testimony does not so state. (Appx. p. 114, Tr. p. 95, lines 24-25).

Kunst cites Appendix page 398 for his statement that the jury saw the final Gaby accounting, and evidence of certain issues related to the Gaby accounting. Appendix page 398 does not support Kunst's statement. Appendix 398 is an email exchange, not accounting records.

Kunst attempts to use an "open letter" to the "general public" which he authored to refute clear Record evidence. (Appx. pp. 341-353). Kunst also mischaracterizes his letter as "accounting records." (Return at 6-7). Due to page limitations and to not belabor an obvious point, other Record cites by Kunst suffer from similar defects.

Should Kunst wish to refute the substantial truth of the allegedly defaming statements, he needed only cite Record evidence that the statements were false. Glaringly missing is any

Record evidence submitted at trial that shows that Kunst did not misappropriate funds paid to Kunstwerke by his clients. Nowhere in evidence is found proof that Kunst paid subcontractors and suppliers the amounts he billed Mr. Gaby. However, Loree provided proof in his testimony that suppliers and subcontractors were paid less than what Kunst billed Mr. Gaby. For example, Loree had admitted into evidence, with no objection from Kunst, Defense Exhibit 5 (Appx. 1027-28, Tr. pgs. 226:20-227:6) and Defense Exhibit 7 (Appx. 1031-32, Tr. pgs. 230:23-231: 7) which proved that suppliers had not been paid in full with the funds provided by the Gabys to do so.

The Court of Appeals mischaracterization (and apparent misunderstanding) of Kunst's accounting records and the accounting records that were actually admitted into evidence must not be allowed to refute a clear Record.

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

Kunst misunderstands Loree's argument related to the Court of Appeals making a factual finding regarding Loree's perceived motivations. Loree's argument is this: The Court of Appeals found that the qualified immunity applied (Appx., p. 1475, Court of Appeals opinion) and then made the factual finding that the privilege was exceeded. Given that the Court of Appeals "found" facts not presented below and then used those facts to make conclusions of law, manifest injustice to Loree is blatant and highly prejudicial to Loree.

In his Return, Kunst makes several citations to the trial testimony (with Appendix cites that are clearly erroneous) and then cites to his own tome, in which he spins a tale of intrigue and

conspiracy by the bench and bar of South Carolina. (Record at 11-12). However, Kunst fails to refute Loree's fundamental allegation of error by the Court of Appeals.

The "findings" made by the Court of Appeals are beyond the domain of the Court of Appeals. There is no evidence in the Record that Loree exceeded the scope of his qualified immunity. There are no Record facts alleged below that Loree did so. The issue of exceeding the scope of the immunity was not raised by the parties, as this issue was not contested at the trial below. Hence, the issue was not properly before the Court of Appeals.

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

Kunst concedes that this Supreme Court has held that not all crimes are "crimes of moral turpitude." (Return at 13-14). Kunst then appears to think that the Court of Appeals merely added theft to the list of crimes of moral turpitude when the court said, "we note that statements alleging the commission of a crime, such as theft, are actionable *per se*" (emphasis added). As did the Court of Appeals, Kunst confuses the elements of slander *per se* and whether a claim is actionable *per se*. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 509–10, 506 S.E.2d 497, 501 ("[T]here is the question whether the statement is defamatory *per se* or *per quod.* A separate issue is whether the statement is 'actionable *per se*' or not"). Slander *per se* is actionable *per se* only if it charges the plaintiff with the commission of a crime of moral turpitude. *Id.* at 511, 506 S.E.2d at 502.

Kunst then describes allegations of grand larceny, which are nowhere to be found in the Record of this matter.

If left undisturbed, the Court of Appeals opinion *does* change the law of defamation in South Carolina. As described in Loree's Petition, the Court of Appeals ignored this Supreme Court's distinction between crimes and crimes of moral turpitude. Not every crime is a crime of

moral turpitude. So holding, the Court of Appeals creates more confusion and contravenes this Supreme Court's holding in the *Holtzscheiter* opinion.

**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.**

In his Return, Kunst states that Loree conceded at oral argument in the Court of Appeals that Kunst testified to his damages. (Return at 16). While that is true, Loree did not concede that Kunst's testimony was reliable, reasonable, nor proved Kunst's damages. Significantly, Loree did not concede that Kunst proved that his damages were causes by alleged defamation by Loree. Loree simply admits that Kunst did offer testimony regarding damages. However, this is not relevant to the error by the trial court and the Court of Appeals.

The tax liens against Kunst individually and his corporation, Kunstwerke, clearly show that Kunst either could not or would not pay his taxes long before Loree began his investigation in February 2006. The SCDOR tax liens found at Appendix pages 440, 441, 442, 443, 444, 445, 452, 453 and 454 show that the SCDOR had not received tax payments from either Kunst or his corporation as far back as December 2003. That is approximately two-and-a-half years before Loree conducted his investigation. Appendix pages 461, 462, 463, and 464 show a similar story with the IRS, with tax liens on Kunst or Kunstwerke dating back to the period of 2002-2004. It is irrelevant whether the liens are currently removed. These liens show that Kunst's financial woes were not because Loree allegedly defamed him and ruined his business, but for other reasons having nothing to do with Loree.

With many other areas, Kunst makes factual allegations without citation to the Record in this matter. (Record at 17-18). However, regardless of the factual allegations made in the

Return, the primary issue is the expansion of this Supreme Court's holding in *Sanders v. Prince*, 304 S.C. 236, 237, 403 S.E.2d 640, 641 (1991), by the Court of Appeals. Kunst divines that the jury "had apparently already determined that Loree was a liar" and was asking a procedural question. (Return at 17). Obviously, Kunst can provide no support whatsoever for this statement.

The issue for this Supreme Court is whether the Court of Appeals properly changed the *Sanders* holding, relying on its own case *Duncan v. Hampton County School District #2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999). Kunst fails to address this issue.

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

As with other sections in his Return, Kunst cites a litany of "facts" that are not supported by Record citations. (Return at 19-20). Kunst then offers yet another *excuse* for his admission of commingling funds: "From a practical standpoint it was not possible to have two corporate accounts." (Return at 20). Obviously, this is complete nonsense. Tellingly, Kunst still offers no Record evidence that he did not, in fact, commingle corporate funds with his personal funds.

Kunst does not (and cannot) deny that that he took money from Kunstwerke corporate accounts and admits freely that he used Kunstwerke funds for personal purchases: to purchase an engagement ring for his fiancée, to pay for his apartment, for his parents' house, and, among other things, a BMW. (Appx., pgs. 1186, 1182, 1183, 1181, Tr. pgs. 381, 382 and 385, testimony of J. Scott Kunst) (Appx., p. 1174, Tr. Testimony of J. Scott Kunst, p. 373:15-374:7; Appx., p. 1170, Tr. Testimony of J. Scott Kunst, 369:24-370:1; Appx., p. 1171, Tr. testimony of J. Scott Kunst, 370:10-12; 368:23-25.)

Kunst then sets up a strawman argument that, according to Loree, Kunst could never take personal draws. (Record at 20). Of course, this is not the case. Kunst was free to take personal draws, but he must account for those draws and he may not drain corporate funds for personal use – which is exactly what he did here.

The Court of Appeals Opinion finding is that because Kunst testified that he did commingle funds, there is a conflict in the evidence that warrants affirming the trial court. Kunst ignores Loree's argument that the Court of Appeals opinion sets a precedent that a party's evidence can be given weight even if the party testifies he has violated South Carolina law.

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

There is no dispute that Loree was an employee of the Gabys. Kunst has never alleged otherwise. There is no dispute that Loree was working on behalf of the Gabys during his interaction with Kunst. Kunst has never alleged otherwise. There is no Record evidence that would suggest that the qualified immunity would apply to Loree as a matter 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 – and allowed the jury to determine whether the scope of the qualified immunity was exceeded. Instead, without any facts disputing whether the qualified privilege applied, the trial court allowed the jury to determine as a matter of fact whether the qualified privilege applied. (Appx., pgs. 1347-48, R., 221-222, Tr., p. 544:16-545:12).

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

Allowing the jury to determine whether the qualified privilege applied at all – without any factual dispute as to the elements of whether the privilege should apply (as distinct from whether the privilege was exceeded) – was error and must be reversed.

**Conclusion**

Having reviewed Kunst's Return and respectfully set forth his objections, Loree respectfully asks this Court to grant his Petition for Writ of Certiorari.

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**PROOF OF SERVICE**

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I certify that I have served the **Reply of Petitioner** on *pro se* Respondent at his last-known address of 950 Progress Street, #217, Pittsburgh, PA 15212, by depositing it into the U.S. Mail, first class postage prepaid on October 26, 2018.

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