THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
C. Victor Pyle, Jr., Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Case No. 2005-CP-23-06048

Sherrie Mann McBride,

Appellant

v.

School District of Greenville County,

Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the court err in directing a verdict in favor of the School District on the plaintiff's causes of action for abuse of process and defamation of character?

2. Did the court err in excluding relevant evidence and in limiting the presentation of the evidence related to the causes of action, and did the conduct of the proceedings deny the plaintiff due process?

3. Did the court err in allowing the defendant to amend its answer to assert affirmative defenses the defendant had waived?

4. Did the court err in reconstructing the testimony of Nancy Mann not preserved by the court reporter by simply adopting her testimony from the first trial?

STATEMENT OF THE CASE

Appellant, Sherrie Mann McBride, brought this action in the Greenville County Court of Common Pleas against two defendants, the School District of Greenville County, respondent in this appeal, and William Roach. She alleged causes of action against both defendants for breach of contract, wrongful discharge, defamation of character, abuse of process, false imprisonment, malicious prosecution, intentional infliction of emotional distress and outrage, negligence, negligence per se, and gross negligence. R. pp. 43-54.

Both defendants moved for summary judgment. The court (Judge G. Thomas Cooper, Jr.) granted summary judgment to the individual defendant, William Roach, as to all the causes of action. The court granted summary judgment to the School District on the breach of contract, wrongful discharge, negligence, negligence per se, and gross negligence claims, but allowed the case to proceed against the School District on the defamation of character, abuse of process, false imprisonment, malicious prosecution, and intentional infliction of emotional distress causes of action. R. pp. 1-10.

The School District filed a second motion for summary judgment, claiming immunity from liability on the remaining five claims under provisions of the South Carolina Tort Claims Act. The court (Judge Edward W. Miller) granted summary judgment on this basis as to one cause of action – intentional infliction of emotional distress – but denied summary judgment as to the other four. R. p. 11.

The case was tried October 30 - November 1, 2007. At the close of the evidence, the court (Judge Larry R. Patterson) entered a directed verdict in favor of the School District with respect to the abuse of process, false imprisonment, malicious prosecution, and defamation causes of action. R. p. 12. McBride[1] appealed these rulings.

In a decision filed August 4, 2010, Opinion No. 4718, the Court of Appeals affirmed the lower court's grant of a directed verdict as to the causes of action for malicious prosecution and false imprisonment. The Court reversed the directed verdict with respect to defamation and abuse of process, remanding the case to the lower court for a new trial on those causes of action. R. pp. 19-35.

Following the remand, the School District again moved for summary judgment with respect to the two remaining causes of action. The School District also sought to amend its answer to assert affirmative defenses not pled in its original answer. R. pp. 55-67, 72-82. McBride submitted written memoranda opposing these motions. R. pp. 68-71, 83-92. On June 1, 2011, Judge Edward W. Miller heard the motions. R. p. 93. Judge Miller denied the motion for summary judgment but allowed the School District to

[1] During this litigation, appellant has been referred to both as Sherrie Mann and as Sherrie McBride. Prior to the first trial, she resumed the use of her maiden name, Mann. However, the court documents were not amended to reflect this name change, and she is referred to herein as McBride.

amend its answer. R. pp. 13, 116-17. McBride is appealing the court's order granting the School District's motion to amend its answer. R. p. 36.

The case was tried June 7-8, 2011, before Judge C. Victor Pyle, Jr. R. p. 121. At the conclusion of the case, the court granted the defendant's motion for a directed verdict on the defamation and abuse of process causes of action. R. pp. 14-15, 402-03. McBride is appealing these rulings. R. p. 36..

The trial transcript does not contain the testimony of one of the plaintiff's witnesses, Nancy Mann, due to the failure of the court reporter's equipment to record her testimony. This Court remanded the case to the lower court for reconstruction of the missing testimony. R. p. 16. Judge Pyle conducted a hearing for that purpose on June 18, 2012. R. p. 409. Witnesses testified concerning the substance of Ms. Mann's 2011 testimony and the differences between her testimony in the 2007 trial and her testimony in the 2011 trial, and appellant offered a written reconstruction of Ms. Mann's 2011 testimony. R. pp. 419-37, 462-66. Ultimately, however, the court adopted the transcript of Ms. Mann's testimony from the 2007 trial as the reconstruction of her testimony in the 2011 trial. R. p. 17. McBride is also appealing this order. R. p. 37.

ARGUMENT

I. THE COURT ERRED IN DIRECTING A VERDICT IN FAVOR OF THE SCHOOL DISTRICT ON THE ABUSE OF PROCESS AND DEFAMATION OF CHARACTER CAUSES OF ACTION.

Much of the evidence adduced in the second trial was the same as that presented in the first trial and addressed by the Court of Appeals in the first appeal. A detailed summary of that evidence is contained in the decision filed August 4, 2010. R. pp. 26-33. The Court of Appeals held the evidence gave rise to a jury question on both the

defamation and abuse of process causes of action. R. pp. 29-33. In the second trial, notwithstanding the presentation of substantially the same evidence, the trial court again directed a verdict on both causes of action. R. pp. 14, 406, 408.

McBride is a former teacher with the School District of Greenville County. She was employed as a special education teacher at Berea High School from August 2000 until her arrest in September 2003 and subsequent termination. R. pp. 275, 279. William Roach was an assistant principal at the school when McBride was hired, and he returned as principal in 2003. R. p. 275. Daniel Oslager was the school resource officer at Berea High School in 2003. R. p. 217.

In September 2003, Roach, acting as the agent of the District and within the scope of his employment, actively participated in a criminal investigation of McBride. While questioning a student about McBride's conduct, Officer Oslager conferred with Roach repeatedly by telephone. R. pp. 168-69, 210-11, 277-78, 298. Thereafter, Roach continued to interact with the investigating officers. He interviewed witnesses and assisted in procuring their statements. R. pp. 288, 863. The actions of Roach and Oslager led to McBride's arrest on charges of contributing to the delinquency of a minor and enticing an enrolled child from school. R. pp. 893-94. She was handcuffed, booked, fingerprinted, and incarcerated by the Greenville County Sheriff's Department. R. pp. 459. Her name and picture were splashed across Greenville area television and newspaper reports, reports which implied she had engaged in an inappropriate relationship with a student. R. p. 348. She was terminated from her employment with the Greenville County School District. R. p. 279. In addition to losing her job and her home, she suffered extreme emotional distress and public humiliation. R. pp. 348-50,

452-55. Ultimately, the charges against her were dismissed by the Greenville County Solicitor's Office. R. pp. 392-93, 907.

McBride contends that Principal Roach and Officer Oslager, both agents of the School District, acted in concert to fabricate allegations against her so that she would be arrested, with the ulterior purpose of silencing her persistent complaints about the District's handling of the special education program and having her terminated from her employment. This contention is the basis for her claim of abuse of process.

Following McBride's arrest and termination from her employment, Roach told school personnel that McBride had stolen school property. This false statement is the basis of the defamation cause of action.

A. Directed Verdict Standard.

When ruling on a motion for a directed verdict, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motion. The court must deny the motion when the evidence yields more than one inference or its inference is in doubt. *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006); *McBride v. School Dist. of Greenville Co.*, 389 S.C. 546, 558, 698 S.E.2d 845, 854 (Ct. App. 2010); *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). When considering a directed verdict motion, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663; *McBride*, 389 S.C. at 558, 698 S.E.2d at 854; *Parrish*, 376 S.C. at 319, 656 S.E.2d at 388. The appellate court must determine whether a verdict for a party opposing the directed verdict motion would be reasonably

possible under the facts, as liberally construed in favor of that party. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663. If the evidence is susceptible of more than one reasonable inference, a jury issue exists and the case must be submitted to the jury. *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663; *McBride*, 389 S.C. at 558, 698 S.E.2d at 854; *Parrish*, 376 S.C. at 319, 656 S.E.2d at 388. In this case, the evidence and the reasonable inferences therefrom created a jury question with respect to each of the four causes of action that went to trial, and the court committed reversible error in granting a directed verdict in the School District's favor.

B. Law-of-the-Case Doctrine.

An unappealed ruling, whether right or wrong, is the law of the case. *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citations omitted). When an issue has been decided by the Court of Appeals and no petition for rehearing or petition for writ of certiorari is brought to challenge the appellate ruling, the ruling is the law of the case. *See Mazloom v. Mazloom*, 392 S.C. 403, 403-04, 709 S.E.2d 661, 661 (2011); *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 353 S.C. 249, 250-51 n.1, 578 S.E.2d 8, 9 n.1 (2003). Conclusions announced in a prior appeal will not be disturbed in a subsequent appeal. *Salley v. McCoy*, 186 S.C. 1, __, 195 S.E. 132, 135 (1937).

C. Abuse of Process.

A cause of action for abuse of process has two essential elements: (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *See Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997); *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967); *McBride*, 389 S.C. at 564, 698 S.E.2d at 854; *Swicegood v. Lott*, 379 S.C. 346, 351-52, 665 S.E.2d 211, 213 (Ct. App. 2008). It is "'the employment of legal process for some purpose other than that which it was intended by the law to effect – the improper use of a regularly issued process.'" *Huggins*, 249 S.C. at 209, 153 S.E.2d at 695 (citation omitted). An ulterior purpose exists when the process is used to gain a collateral advantage or an objective not legitimate in the use of the process. *Hainer*, 328 S.C. at 136-37, 492 S.E.2d at 107; *Huggins*, 249 S.C. at 209, 153 S.E.2d at 694.

The evidence introduced at trial and the reasonable inferences drawn from that evidence revealed that Roach and Oslager both actively participated in the investigation that led to the charges against McBride and that they did so in concert with each other and with Shea Smith and Leslie Lambert, other officers from the Greenville County Sheriff's Department's school investigations unit. Although the School District claims the investigation was conducted by Smith and Lambert, not Oslager or Roach, and that the prosecution was brought by the Sheriff's Department in consultation with the Solicitor's Office, not by the District, evidence presented at trial supports a conclusion that Roach, Oslager, Shea, and Lambert were agents of the School District.

It is undisputed that Roach was an employee and agent of the School District. The evidence established that Oslager was also an agent of the District. Although he

testified he was employed by the Greenville County Sheriff's Department, he also acknowledged that the former principal of Berea High School was involved in having him assigned to the school. R. p. 217. He worked at the school, and he was paid with School District funds. R. pp. 357, 386. Moreover, the school investigations unit of the Sheriff's Department, to which Smith and Lambert were assigned, had its office on property of the School District. R. pp. 356-57. The investigators in that unit were also paid with School District funds. R. p. 357.

The charges against McBride arose from allegations concerning her dealings with one student, John Doe.[2] The evidence revealed different versions of what factual allegations led to the criminal charges brought against McBride. One allegation was that she had assisted Doe in attempting to run away. Another was that she allowed him to drive her car off school premises. Another was that she assisted him in cutting classes. Still another was that she gave him access to confidential information concerning other students contained in school computers. Significantly, there was evidence that Roach and Oslager knew these allegations to be false before the charges were brought against McBride, but they assisted in bringing the charges anyway.

The evidence of past dealings between Roach and McBride revealed a motive and incentive for Roach to fabricate charges against her. McBride had voiced concerns and sought changes in how certain aspects of the special education program of the School District were handled. She complained about certain practices engaged in by the District and about improper activities in the special education department, complaints which fell

[2] In the decision of the first appeal, the Court of Appeals referred to this student as John Doe to protect his identity. This brief adheres to that practice.

on deaf ears. Roach, in particular, was not responsive to the complaints. R. pp. 258, 263-67, 306-08, 322-23, 347.

Roach acknowledged McBride had expressed concerns about the special education system when he was assistant principal. R. pp. 301-02. He admitted he signed off on IEP (individualized education plan) documents even though he had not attended the IEP meetings. R. p. 303.

The relationship between Roach and McBride was variously characterized as "strained," "rocky, and "terrible." R. pp. 258, 307-08. Roach had told an aide that he was working on replacing McBride at the first opportunity. R. pp. 309-10. When it was announced that Roach would return to Berea as principal, McBride sought, unsuccessfully, to be transferred to another school because of their prior relationship. R. pp. 259, 268, 338-39.

In addition to working together at the school, Oslager and Roach attended the same church and were friends. R. p. 215. One observer characterized them as "good friends." R. p. 327.

In this action, McBride contended that the School District, through its employees and agents, Roach in particular, orchestrated her arrest on trumped-up charges in order to discredit her, silence her complaints about the special education department, and have her terminated. She contended that Oslager acted in concert with Roach and at his behest because of their close working relationship and friendship.

John Doe, the student to which the charges against McBride pertained, was a bright student who had a lot of emotional issues. R. pp. 131, 193. He had previously been sexually assaulted by a teacher while attending a different school. R. p. 130.

Thereafter, he had attempted suicide. R. p. 130. Because he was not mentally and physically able to attend school, McBride had been assigned to serve as his homebound teacher. R. p. 130. He resumed school attendance at Berea in 2001. R. pp. 130-31. Because he had developed a relationship of trust with McBride, he often went to her when he was troubled or under emotional duress. R. pp. 132-34.

Many of Doe's emotional issues stemmed from his being gay. Issues and disturbances arose with other students in his class because he was gay and suicidal. R. pp. 193-94. The guidance counselor, Kim Fanning, had approved allowing Doe to go to McBride's room on occasion because of his emotional issues and the disturbances that occurred in his classroom. R. pp. 138, 144, 194-95, 319. Fanning believed he had a legitimate reason to be out of class. R. p. 194. It was arranged that he would go to McBride's room, where he would complete his work from his regular classes. R. pp. 139, 144. When that work was complete, he assisted McBride with duties in her classroom. R. p. 139. He went to her class when he was under emotional duress.

Doe also had problems with his parents because he was gay. R. pp. 146-47, 149-50. Because of his issues with his parents, he was trying to find a way to leave home. R. p. 150. He frequently talked about running away or going to live with his aunt. R. pp. 149, 152. He had discussed the possibility of emancipation with both Fanning and Oslager. R. pp. 150-52.

On the weekend prior to the incident which led to McBride's arrest, Doe attempted to run away. He was to spend the night with a friend, Chris Boehmke.[3] He had brought clothes to school and stored them in McBride's room. R. pp. 153-54.

[3] The name "Boehmke" is incorrectly reflected in the trial transcript as "Bimkey."

McBride gave Doe and Chris a ride to Chris's house that Friday. R. p. 158. She cautioned Mrs. Boehmke not to allow Doe to leave unless it was with his aunt, because he had been talking about running away. R. p. 159. Doe's mother learned he had lied to her about where he would be and came to Chris's house to find him. R. p. 160. Mrs. Boehmke turned his mother away, telling her he was not there. R. p. 160. It was Mrs. Boehmke, not McBride, who knew Doe intended to run away and told Doe's mother he was not at her home. R. p. 160. After Doe's mother left, Mrs. Boehmke asked Doe to leave so that she would not be in trouble for hiding a runaway. R. p. 160. He went to McBride's house and, because she was asleep, stayed on her porch. R. p. 161.

On Saturday, when McBride found Doe on her porch, she contacted Officer Oslager. R. p. 161. Oslager told her to call the Sheriff's Department, and she did so immediately. R. p. 162. Officers picked Doe up and took him to the law enforcement center. R. p. 162. Doe's statement later given to police implicated Mrs. Boehmke in facilitating his running away, but Mrs. Boehmke was never charged with any crime. R. p. 470.

Oslager confirmed McBride had called him to report Doe was a runaway. He confirmed that he told her to call the Sheriff's Department and that she did. R. pp. 212-14. There was no testimony from any witness that McBride assisted Doe in running away.

On September 24, McBride learned that her car was not where she had left it in the school parking lot. R. p. 351. When Officer Oslager arrived in the parking lot, she reported the car was missing. R. pp. 205-06, 352. Doe had previously driven McBride's car, with his mother's permission. R. pp. 156-57, 352-53. On this occasion, however, he

had taken McBride's keys and she did not know he had taken her car. R. pp. 163-64. While Oslager and McBride were still in the parking lot, Doe returned in her car. R. p. 207. Oslager arrested and handcuffed Doe. R. pp. 164-65, 207-08. Ultimately, Oslager took Doe to the detention center for questioning. R. pp. 166, 209.

After Doe was at the law enforcement center, he was handcuffed to a chair and Oslager questioned him without his parents or a lawyer there, even though he was only 16 years of age. R. pp. 167, 177, 188. Doe's parents were at the school with Roach. R. pp. 167, 278, 399. Oslager did not read Doe his *Miranda*[4] rights or have him waive those rights until after his parents arrived. R. pp. 171-72. The waiver of rights was not signed until his mother was there, much later that afternoon. R. pp. 171-72, 399, 469.

Doe's mother was not there when Oslager took Doe's statement. R. pp. 172, 399-400. While questioning Doe, Oslager conferred with Roach by telephone. R. pp. 168-69, 210-11, 277-78, 298, 400. Oslager confirmed he talked with Roach multiple times while questioning Doe. R. p. 210. Oslager and Roach were calling back and forth, and Oslager called Roach at least three times. R. pp. 168-69. Oslager initially charged Doe with a felony. R. p. 168. Doe was a scared 16-year-old, with no parents or lawyer there. R. pp. 187-88. He was facing a felony charge and was terrified that he was going to end up in jail for 10 years. R. p. 189. However, Oslager made it clear to Doe that his target and focus had changed to having McBride arrested. R. p. 400. Oslager appeared to want Doe to sign a statement against McBride, and Doe was looking for anything that would get him out of trouble. R. pp. 168-69. Immediately after Doe gave his false statement against McBride, the felony charge was dropped. R. p. 189.

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[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Oslager claimed he gave Doe *Miranda* warnings and questioned him in the presence of his parents, but he acknowledged the parents were not there the entire time. R. p. 209. Roach confirmed Doe's mother was at the school with him. R. p. 278. Oslager had taken Doe to the law enforcement center during school hours, but the rights form was not completed until more than two hours later. The form itself shows it was completed at 1739 hours (5:39 p.m.) and it was signed by Doe's mother at 1743 (5:43 p.m.). R. 469. Once the papers were signed by his mother at 1743 (5:43 p.m.), Doe was released to his parents. R. pp. 171, 398-99.

Oslager testified that school resource officers do not handle investigations involving school personnel as a matter of policy. R. p. 219. However, Oslager was actively involved in this investigation, either taking or witnessing statements taken from various witnesses. R. pp. 219-20, 231. He went to McBride's house and Doe's house to gather additional information. R. pp. 211-12, 222. Lambert acknowledged Oslager's involvement in the investigation. R. pp. 235, 237.

Similarly, although Roach denied being involved in the investigation and arrest, Doe, Oslager, and Roach all confirmed that Oslager repeatedly consulted with Roach during Doe's interrogation. R. pp. 168-69, 210-11, 277-78, 298. Roach also actively participated in the questioning of other witnesses or witnessed their statements. R. pp. 287, 863. Although Lambert was supposedly the lead investigator in this case, she did not interview Doe. R. pp. 170, 237.

Doe's written statements were not consistent with each other. R. pp. 470-73. A handwritten statement gave one account, and Officer Oslager had personal knowledge of information not disclosed in that statement and knew the falsity of that version of the

events that occurred during the earlier weekend. R. pp. 472-73. In particular, Oslager knew that McBride reported Doe as a runaway when she discovered him at her home, because the first contact she made in an effort to do so was her call to Oslager. Oslager had told her to report the incident to the Sheriff's Department, and he knew that she had. R. pp. 212-14.

Doe's statement also referred to being given McBride's computer passwords and accessing student grades. R. pp. 470-71. Different passwords were needed to access information in different parts of the school's computer system. Doe had some passwords because he had assisted in setting up her website, with administration approval. R. pp. 140-42. He did not have the necessary password to allow him to access private information such as student's grades. R. p. 142. The passwords mentioned in his statement were not the passwords needed to access student grades and personal information. Roach knew the school's computer systems and what the various passwords could access, but he did not disclose to Oslager that the passwords mentioned by Doe would not give him access to student grades.

In argument of the motion for directed verdict, the School District contended the evidence established the charges were brought by the Sheriff's Department and the Solicitor's Office, not the School District. R. pp. 402-03. This was the same basis on which the lower court granted a directed verdict in the first trial. The Court of Appeals reviewed substantially the same evidence as that presented in this trial and held the evidence was sufficient to create a jury issue as to abuse of process. The reasoning of the Court in the decision of the first appeal is equally applicable to the evidence presented in the retrial:

> To successfully maintain an abuse of process claim, the plaintiff must show an ulterior purpose and a willful act in the use of the process that is not proper in the regular conduct of the proceeding. . . . McBride points to evidence of her bad relationship with Roach and asserts that a jury could infer from this evidence Roach's desire to silence McBride and to ultimately obtain her dismissal from Berea High School. She also points to evidence of the close relationship between Roach and Oslager, who arrested McBride; Oslager's repeated telephone calls to Roach during his interrogation of Doe; and Doe's testimony indicating that Oslager pressured him to implicate McBride in illegal activity. McBride argues that from this evidence the jury could infer that Oslager was working in concert with Roach to assist him in accomplishing the purpose of silencing McBride and that they were improperly using the legal process to do so.
>
> We believe that more than one reasonable inference can be drawn from the evidence of telephone calls from Oslager to Roach during his interrogation of Doe. Granted, it is reasonable to assume that Oslager was telling the truth when he testified that he called Roach only to verify certain information Doe provided to him. However, it is equally reasonable to infer from this evidence, combined with Doe's testimony, that Roach provided information to Oslager in an attempt to elicit this information from Doe and use it against McBride. In reviewing the propriety of a directed verdict, neither the trial court nor this court has the authority to decide credibility issues or to resolve conflicts in the evidence. . . . Therefore, the circuit court should have allowed this cause of action to go to the jury.

McBride, 389 S.C. at 564-65, 698 S.E.2d at 854-55 (citations omitted).

For the same reasons articulated in the decision of the first appeal, the circuit court committed reversible error in granting a directed verdict on the abuse of process claim. The same evidence on which the Court of Appeals relied in the first appeal was again presented in the second trial: the bad relationship between Roach and McBride; the close friendship between Roach and Oslager; the repeated calls between Oslager and Roach while Oslager interrogated Doe; and Doe's testimony that Oslager pressured him into implicating McBride. As in the first trial, the evidence was sufficient to support an inference that Roach and Oslager acted in concert to elicit information from Doe to use

against McBride and orchestrated her arrest for the improper purpose of silencing her complaints and having her terminated from her employment.

The circuit court ruled on an additional basis not argued by the District, stating that, with respect to abuse of process, there is no liability where a defendant has done nothing more than carry out the process to its authorized conclusion, even if done with bad intentions. R. p. 405. This finding is also erroneous. In *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (2008), *cert. denied*, June 24, 2009, the Court of Appeals squarely rejected the same contention asserted by the defendant in that action. The Court noted that the defendant was relying on an isolated statement from an earlier decision of the Court of Appeals, and the Court expressly disavowed the notion that no liability may ever arise where the process is carried to its authorized conclusion. The Court stated, "Indeed, the essence of the tort of abuse of process centers on events occurring *outside* of the process . . . ." *Id.*, 379 S.C. at 353, 665 S.E.2d at 214 (emphasis in original).

Even if the court had been correct in its statement concerning process taken to its authorized conclusion, however, that principle would not be applicable here. In this case, the process was not taken to its authorized conclusion. Instead, the charges were dropped by the Solicitor's Office. R. pp. 392-93, 907. The court's reliance on this principle was both legally and factually erroneous.

The School District also argued for a directed verdict on the basis of the immunity provisions of S.C. Code Ann. § 15-78-60(3), (23). R. pp. 402, 406. The trial court did not rule on this basis. If the District attempts to rely on these immunity provisions as an additional sustaining ground, the Court should reject such arguments. First, the defense of immunity under Section 15-78-60(3) – an affirmative defense – was not pled in the

School District's answer and was therefore waived. *See* Argument III, *infra*, incorporated herein by reference. Second, neither of these immunity provisions are applicable to the claim of abuse of process asserted in this case.

Section 15-78-60(3) creates immunity for a governmental entity for a loss resulting from "execution, enforcement, or lawful implementation of any process." Section 15-78-60(23) creates immunity for "institution or prosecution of any judicial or administrative proceeding." In this case, the School District's liability does not arise from the execution, enforcement, or lawful implementation of the process or from the institution or prosecution of a judicial proceeding. Rather, it arises from the *misuse* of the process and the proceedings: the employment of legal process for a purpose other than that which it was intended by the law to effect – the improper use of a regularly issued process. *Huggins*, 249 S.C. at 209, 153 S.E.2d at 695.

A similar argument was raised and rejected by the Court of Appeals in *Gist v. Berkeley Co. Sheriff's Dep't*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), a case involving a claim of false arrest against a Sheriff's Department for the manner in which it procured an arrest warrant. This Court held:

> The Sheriff's Department's liability does not arise from the "execution, enforcement, or implementation" of the magistrate's order. It arises from allegedly securing the warrant without probable cause. Therefore, the Sheriff's Department is not shielded from liability by the arrest warrant.

Gist, 336 S.C. at 617-18, 521 S.E.2d at 166-67. Similarly, the issuance of an arrest warrant against McBride cannot shield the District from liability for the acts of its employees and agents in improperly orchestrating the issuance of that warrant – for an ulterior purpose and by a willful act in the use of the process not proper in the regular conduct of the proceeding.

This Court should find that the evidence, like that presented in the first trial, was sufficient to create a jury question on the cause of action for abuse of process, find the immunity claims under Sections 15-78-60(3) and 15-78-60(23) are inapplicable, and remand for a new trial on this cause of action.

B. Defamation of Character.

A teacher's aide in the special education department, Linda Cochran, testified concerning statements made by Roach about McBride having stolen from the school. R. pp. 312-13. She testified Roach stated "she cleaned us out" and "she took everything." R. pp. 312-13. She verified the items McBride removed from her classroom were not stolen but had actually been purchased by McBride with her own money. R. p. 312. Later in the school year, Roach wrote a poem that alluded to McBride's arrest and read it to the school staff.[5] R. pp. 310-11, 363, 467.

In the first appeal, the Court of Appeals found that testimony concerning the statement "she cleaned us out" created a jury issue on the defamation cause of action. The Court's reasoning in its earlier decision applies with equal force to the identical testimony elicited in the retrial.

Defamation is established by proof that (1) a false and defamatory statement was made; (2) the unprivileged statement was made to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm. *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002); *McBride*, 389 S.C. at 559-60, 698 S.E.2d at 852; *Murray v. Holnam,*

[5] If the Court finds the lower court erred in not adopting the reconstructed testimony of Nancy Mann proffered by McBride, *see* Argument IV, *infra*, that testimony provides further evidence of Roach's defamatory statements about McBride to school personnel.

Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001). A statement is defamatory *per se* when the meaning is obvious on its face. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664; *McBride*, 389 S.C. at 560, 698 S.E.2d at 852. A statement is actionable *per se* when it charges the plaintiff with one of five acts or characteristics, including commission of a crime of moral turpitude. *McBride*, 389 S.C. at 560-61, 698 S.E.2d at 852. When the statement is actionable *per se*, the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. *McBride*, 389 S.C. at 560, 698 S.E.2d at 852.

The Court of Appeals held in the first appeal that Roach's statement – "she cleaned us out" – was an allegation that McBride stole school property. The Court found this statement was actionable per se because it accused her of committing a crime involving moral turpitude. *McBride*, 389 S.C. at 561, 698 S.E.2d at 852, *citing Bell v. Bank of Abbeville*, 208 S.C. 490, 496, 38 S.E.2d 641, 644 (1946). The Court concluded that the defamation action premised on this statement should go to the jury and reversed the grant of a directed verdict on this basis.[6]

In the hearing held six days prior to trial, the School District conceded that the Court of Appeals had held the statement "she cleaned us out" was actionable *per se*. R.

[6] The Court of Appeals also addressed the element of publication and qualified privilege. The Court held the defense of qualified privilege – an affirmative defense not included in the District's answer – could not be asserted by the District. *McBride*, 389 S.C. at 561-62, 698 S.E.2d at 853. Less than a week before the retrial, the court allowed the District to amend its answer to assert this and another affirmative defense. The ruling allowing the District to amend its answer to assert affirmative defenses not included in its original answer is challenged in this appeal, in Argument III, *infra.* The defense of qualified privilege was not argued as a basis for the directed verdict on the defamation cause of action.

p. 104, lines 19-25. However, at trial, the District took a position inconsistent with this concession, asserting the court should direct a verdict on the defamation cause of action.

In the argument of the directed verdict motion on the defamation cause of action, the School District argued the statement was without actual or implied malice. R. pp. 406-07. This argument is in direct contravention of the Court of Appeals's earlier determination that the statement was actionable *per se*, resulting in a presumption of common law malice. *McBride*, 389 S.C. at 561, 698 S.E.2d at 852-53. The District also argued that the statement was not false. R. p. 407. However, the undisputed evidence established its falsity – McBride had removed only those items she actually purchased for her classroom and stole nothing that belonged to the District. R. p. 312. Finally, the District argued there were no damages, and the court appears to have based its ruling on this argument. R. pp. 407-08. However, this argument is again contrary to the Court of Appeals's prior determination that the statement was actionable *per se*, resulting in a presumption of general damages. *McBride*, 389 S.C. at 561, 698 S.E.2d at 852-53. The court erred in not submitting the defamation cause of action to the jury where the statement at issue was actionable *per se*. This Court should reverse and remand the defamation cause of action for a new trial.

II. THE COURT ERRED IN EXCLUDING RELEVANT EVIDENCE AND IN PREVENTING THE PLAINTIFF FROM FULLY PRESENTING THE EVIDENCE IN SUPPORT OF THE CAUSES OF ACTION, AND THE COURT'S RULINGS DEPRIVED THE PLAINTIFF OF DUE PROCESS.

The court made a number of rulings that excluded relevant evidence and limited the presentation of the plaintiff's case with respect to elements of the causes of action. The manner in which the court conducted these proceedings interfered with the plaintiff's ability to fully present her case.

A key component of the plaintiff's cause of action for abuse of process was the motivation of Roach and others working with him to trump up charges against McBride in an effort to silence her. Relevant to this aspect of the case was the prior history between McBride and Roach and, in particular, his response to her prior complaints. The court did not allow the plaintiff to fully develop this evidence. R. p. 307. Another component of this cause of action was evidence that the officers of the school investigation unit were agents of the School District. When the plaintiff attempted to introduce evidence that this unit was housed on District property, the court did not allow the evidence. R. pp. 232-33. Another facet of the case was the manner in which Oslager pressured Doe and thereby coerced a false statement from him. The court curtailed Doe's testimony about how Oslager treated him, even without an objection by the School District. R. p. 167. These rulings were erroneous, because each of these pieces of evidence was relevant to the elements of the abuse of process cause of action and admissible under the rules of evidence. *See* Rules 401-403, SCRE.

In addition to these erroneous evidentiary rulings, the tone and tenor of the court's remarks and rulings throughout the trial demonstrate that the judge abandoned his role of neutrality and became active in limiting the presentation of the plaintiff's case, to her detriment. The court sustained objections where none had been made. *See, e.g.*, R. pp. 190, 191. In addition to sustaining objections and excluding relevant evidence, the court frequently curtailed the introduction of evidence, instructing the plaintiff or the witness to move on or go no further. *See, e.g.*, R. pp. 194-95, 196, 202, 209, 213, 255-56, 291, 293, 304, 308, 311. At times, the court did not allow the plaintiff to respond to the District's objections and state the basis for her attempt to introduce the evidence. *See, e.g.*, R. pp.

195, 338. The court refused the plaintiff's request to treat Officer Oslager as a hostile witness. R. pp. 212-13. The court limited the length of time the plaintiff could testify on direct. R. pp. 350-51. These rulings impaired the plaintiff's ability to give a full presentation of the evidence in support of her claims.

Under the circumstances of this case, the court so impaired the presentation of the evidence that the result was a deprivation of due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3. While a litigant is not entitled to a perfect trial, she is entitled to a fair trial. *Smoak v. Seaboard Coast Line R.R. Co.*, 259 S.C. 632, 640, 193 S.E.2d 594, 598 (1972); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 349, 450 S.E.2d 66, 76 (Ct. App. 1994). Here, cumulatively, the court's rulings undermined the fairness of the entire proceedings so as to warrant a new trial. *Cf. State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct. App. 2000), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995). This Court should reverse and grant the plaintiff a new trial.

III. THE COURT ERRED IN ALLOWING THE DEFENDANT TO AMEND ITS ANSWER TO ASSERT AFFIRMATIVE DEFENSES THE DEFENDANT HAD WAIVED.

After McBride filed this action in 2005, the School District filed a comprehensive answer, raising 20 separate defenses, including numerous claims that the causes of action were barred by various immunity provisions of the law. R. pp. 55-65. Following the first trial and appeal, the District sought to amend its answer to assert two claims of immunity not pled in its original answer – qualified privilege and immunity under S.C. Code Ann. § 15-78-60(3). McBride opposed this motion. R. pp. 68-71. Six years following the

inception of this case and just days prior to the retrial, the court, Judge Edward W. Miller, allowed the District to amend its answer. R. pp. 13, 117. This ruling was erroneous.

Affirmative defenses must be pled. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *See Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) (laches); *Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989) (accord and satisfaction); *Branche Builders, Inc., v. Coggins*, 386 S.C. 43, 48 n. 4, 686 S.E.2d 200, 202 n.4 (Ct. App. 2009) (equitable estoppel and unclean hands); *D & D Leasing Co. of South Carolina, Inc.*, v. *David Lipson, Ph.D., P.A.*, 305 S.C. 540, 542, 409 S.E.2d 794, 796 (Ct. App. 1991) (lack of enforceability of contract).

As the Court of Appeals held in the first appeal of this case, a claim of qualified privilege is an affirmative defense. *McBride*, 389 S.C. at 562, 698 S.E.2d at 853, *citing Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). The Court of Appeals has ruled that the District "did not include the defense of qualified privilege in its answer; therefore, it may not assert this privilege." *McBride*, 389 S.C. at 562, 698 S.E.2d at 853. The District did not file a petition for rehearing as to this conclusion and did not seek review of this finding in the Supreme Court. Accordingly, the Court of Appeals's determination that the District may not assert the defense of qualified privilege is the law of the case. *See Atlantic Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285; *Farm Bureau*, 353 S.C. at 250-51 n.1, 578 S.E.2d at 9 n.1; *Mazloom*, 392 S.C. at 403-04, 709 S.E.2d at 661. The lower court erred in allowing the District to amend its answer to assert this affirmative defense that the Court of Appeals, in an unappealed ruling, held had been waived.

A claim of immunity is also an affirmative defense. *See, e.g., Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) (judicial immunity); *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997) (intra-family immunity); *Washington v. Whitaker*, 317 S.C. 108, 114-15, 451 S.E.2d 894, 898 (1994) (sovereign immunity); *Crowley v. Bob Jones Univ.*, 268 S.C. 492, 497, 234 S.E.2d 879, 881 (1977) (charitable immunity). As with the affirmative defense of qualified privilege, because the District did not assert the immunity defense of Section 15-78-60(3) in its answer, it too was waived and the lower court erred in allowing the District to assert it.

The District could amend its answer only with leave of court. Leave to amend should not be granted where the amendment results in prejudice to the adverse party. *See* Rule 15(a), SCRCP. Here, after this case had been fully developed with pleadings and discovery and had already been through one trial and appellate review, the District sought to inject new issues and theories, even one that had been disallowed by the Court of Appeals, a ruling the District did not appeal. Allowing the amendment of the pleadings after six years of litigation and less than a week prior to the start of this trial was extremely prejudicial to the plaintiff, and the lower court erred in allowing the amendment. If this case is remanded for a new trial, the Court of Appeals should address this issue, reverse the order allowing amendment of the answer, and hold that all affirmative defenses not specifically pled in the original answer have been waived and may not be added by amendment of the answer.

IV. THE LOWER COURT ERRED IN RECONSTRUCTING THE TESTIMONY OF NANCY MANN BY SIMPLY ADOPTING HER TESTIMONY FROM THE FIRST TRIAL.

The transcript prepared by the court reporter does not include the direct testimony of one of McBride's witnesses, Nancy Mann. R. p. 344, lines 12-15. The Court of Appeals remanded the case to the lower court for reconstruction of the testimony of this witness. R. p. 16. At the hearing held June 18, 2012, the trial judge heard testimony from witnesses concerning the substance of the testimony of Ms. Mann in the second trial. R. pp. 419-36. McBride offered a proposed reconstruction of Ms. Mann's testimony, based on her own recollection of the testimony. R. pp. 462-66. She and other witnesses testified that Ms. Mann's testimony covered certain matters about which she did not testify in the first trial. In particular, she testified concerning calls that she and McBride received at their home from school personnel reporting the statements Roach was making about McBride at the school. R. pp. 464-65. McBride and two other witnesses testified they specifically recalled Ms. Mann testifying about the calls received from school personnel relating that Roach was telling people at the school that McBride had cleaned the school out. R. pp. 423-25, 432-33, 435-36.

The School District contended the court should adopt the testimony of Ms. Mann in the 2007 trial of this case as its reconstruction of her testimony at the 2011 trial. McBride argued that to do so would not be in keeping with the purpose of the Court of Appeals's remand to have the trial court reconstruct the *actual* testimony of the witness during the second trial.

In ruling on the directed verdict motion at the conclusion of the 2011 trial, the trial court questioned whether there was proof of the element of damages with respect to

the defamation cause of action. The court noted one witness testified concerning a statement the principal made about McBride but also testified she did not believe it and it did not make a difference to her. R. p. 407. McBride, appearing *pro se* in the 2011 trial, argued that there were rumors proceeding throughout the school concerning Roach's statements. R. p. 407. This argument was premised on the testimony of Nancy Mann, as reflected in the reconstruction of that testimony offered by McBride. R. pp. 462-66. This testimony is relevant to the trial court's grant of a directed verdict on the defamation cause of action and the issue on appeal challenging that ruling.

McBride's right to meaningful appellate review is prejudiced by the court's adoption of the 2007 trial testimony of this witness. In the first trial, McBride's former trial counsel did not elicit the testimony related to the defamation cause of action, focusing instead on the circumstances surrounding McBride's arrest and the damages resulting from the arrest. In the second trial, McBride elicited different testimony – testimony related to the defamatory statements and McBride's resulting damages. A reconstruction that omits that testimony is not a complete and accurate reconstruction. It does not afford meaningful appellate review of the defamation cause of action. Moreover, because the witness is no longer living, the incomplete and inaccurate reconstruction will not provide an accurate record of testimony that may be used in a retrial, if the case is reversed and remanded.

The purpose of the court reporter system is to preserve a record of trial testimony in order to afford appellate review. In this case, through no fault of McBride, the testimony of one of her witnesses was not preserved. The purpose of the reconstruction was to *recreate* the missing testimony as fully and accurately as possible, in order to

afford the same level of appellate review that McBride would have received had the testimony been recorded and preserved by the court reporter. The approved manner of reconstructing missing testimony is to rely on the sworn statements or testimony of persons who heard and recall the substance of that testimony. *See China v. Parrott*, 251 S.C. 329, 332 & 334, 162 S.E.2d 276, 277 & 278 (1968) (where portions of stenographic notes of the trial proceedings were lost before being transcribed by the court reporter, trial court did not err in settling the record based on affidavits of plaintiff's counsel and the court reporter); *Dolive v. J.E.E. Developers, Inc.*, 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct. App. 1992) (approving circuit court's action allowing party to reconstruct record of zoning appeal by means of an affidavit of the former zoning board chairman, which included summaries of the witnesses' testimony).

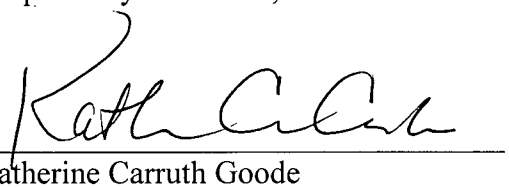
In this case, the trial judge indicated he did not recall the exact testimony of this witness and had not retained his trial notes. R. p. 17. His decision to adopt testimony from a different trial, without determining the testimony actually given by Ms. Mann based on the recollections of others who heard and recalled the testimony, fell short of the purpose of the remand and was erroneous. This Court should reverse and, based on its own review of the testimony of the witnesses at the reconstruction remand hearing, determine that the reconstructed testimony offered by McBride should be adopted as the testimony of Ms. Mann, for purposes of this appeal and for use in any retrial of the case.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's order granting a directed verdict in favor of the School District and should remand this case for a new trial on both the defamation and abuse of process causes of action. The Court

should also reverse the order allowing amendment of the District's answer. Finally, the Court should reverse the reconstruction order and adopt the reconstruction proffered by McBride as the 2011 trial testimony of Ms. Mann.

Respectfully submitted,



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