THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-00013

Maureen T. Coffey, ... Respondent,

v.

Community Services Associates, Inc. and George F. Breed, Jr., ... Appellants.

MAUREEN T. COFFEY'S FINAL RESPONDENT'S BRIEF IN RESPONSE TO GEORGE F. BREED, JR.'S FINAL APPELLANT'S BRIEF

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Counter-Statements of Issues on Appeal

I. **Did Breed waive all arguments requesting judgment in his favor due to his failure to renew his directed verdict motion at the close of all evidence?**

II. **Are issues Breed attempts to raise on appeal unpreserved due to his failure to properly raise the issues to the trial court and/or obtain a ruling from the trial court on the issues?**

III. **Was there any evidence of a clear and convincing quality that the statements in Breed's letter, published to the assistant town manger for the Town of Hilton Head and CSA's Board, were false; that Breed acted with actual malice in publishing his letter beyond the Commission on Judicial Conduct; and that Respondent proved damage by a preponderance of the evidence as a resulted of the defamatory publication?**

IV. **Did the trial court correctly reject Appellants' arguments that, as a matter of law, the publication of Breed's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by either an absolute or a qualified privilege?**

V. **Did the trial court correctly admit evidence related to Breed's character?**

VI. **Did the trial court properly allow witnesses to testify at trial in this matter who were identified to Appellants in the course of discovery prior to trial?**

VII. **Did the trial court properly admit a portion of CSA's public financial statement into evidence based on the stipulation of the parties?**

VIII. **Did the trial court properly admit evidence that Breed's complaint against Respondent had been dismissed by the Commission on Judicial Conduct prior to Respondent filing this action?**

IX. **Did the trial court correctly determine that evidence concerning Breed's publication of his letter to others was not based upon hearsay?**

X. **Did the trial court properly refuse to admit evidence of a complaint against Respondent filed with the Commission on Judicial Conduct when the complaint was filed after Respondent initiated this action and was not relevant to the claims in this action?**

XI. **Did the trial court correctly charge the jury on spoliation due to Breed and CSA's failure to maintain records for email, recordings of telephone calls, and recordings from security cameras?**

Counter-Statement of the Case

Pursuant to Rule 208(b)(1)(C), SCACR, Respondent Maureen T. Coffey ("Respondent" or "Judge Coffey") includes her own Statement of the Case. This appeal arises out of a $6,006,050.00 general verdict in favor of Respondent against George F. Breed, Jr. ("Breed") and Community Services Associates, Inc. ("CSA") in a defamation action. (Judgment and Verdict Form; R. 1 & 1881.) The trial court entered judgment for Respondent on June 18, 2012. (*Id.*)

Respondent is a municipal court judge for the Town of Hilton Head. (Am. Compl.; R. 41.) Breed was the director of Security and Community Affairs at Sea Pines and CSA is the entity that owns and manages Sea Pines and employed Breed. (Am. Compl.; R. 41.) Breed, in his capacity as the director of security, was engaged in his own investigation of a rash of break-ins in the Sea Pines community during 2004 and 2008. (Tr. 235-248; 470-495; 842-846; 1118-1129; R. 324-337; 467-492; 975-986.) Of course, the Beaufort County Sheriff's Department would be the entity conducting any official criminal investigation. Breed and CSA's security agents suspected that Respondent's adopted brother, Mr. Otis Coffey, was responsible for the break-ins. (*Id.*) Otis Coffey was never charged for the break-ins. (Tr. 467-470; 1133-1135; 1118-1120; R. 464-467; 990-992; 975-977.) Respondent presided over various cases in the Town of Hilton Head, including cases involving CSA security and Breed but recused herself from such matters after Breed lodged his complaint with the Commission on Judicial Conduct. (Tr. 210-211; 232-234; 261-267; R. 299-300; 321-323; 350-356.)

While investigating the break-ins in Sea Pines, Breed wrote a letter to the South Carolina Commission on Judicial Conduct and stated that "[s]he [Respondent] has given

the distinct and transparent appearance of bias and partiality, and is not able to be a neutral and detached arbiter of the many cases that have been and will be pending before her." (Tr. 1121-1179; Plaintiff's Exs. 4 & 18; R. 978-1036; 1721 & 1886.) Among other statements, Breed also stated in the letter that "Judge Coffey has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (*Id.*) Breed further stated that "[t]his conduct was/is pervasive and invasive in nature, and directly results in Judge Coffey's inability to maintain the impartiality so necessary to the successful balance of our legal system." (*Id.*) Breed sent the letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1886.)

Prior to sending the letter, Breed contacted Mr. Greg DeLoach, the then Assistant Town Manager for the Town of Hilton Head, to express his concerns about Respondent. (Tr. 1121-1179; R. 978-1036.) Mr. DeLoach informed Breed that Respondent did not report to Mr. DeLoach but instead she reported to the Town Council for the Town of Hilton Head. (Tr. 1123-1128; 1141-1147; R. 980-985; 998-1004.) Because Mr. DeLoach was not Respondent's supervisor, Mr. DeLoach informed Breed that Breed should send any concerns about Respondent to the South Carolina Commission on Judicial Conduct (sometimes "the Commission"). (*Id.*; Tr. 745-750; R. 660-665.) Breed then sent the aforementioned letter to the Commission. (Tr. 1121-1179; R. 978-1036.) After sending his letter to the Commission, Breed provided a copy of the letter to Mr. DeLoach. (Tr. 1121-1179; R. 978-1036.) Mr. DeLoach and Breed work for separate employers and do not work together. (*Id.*) The town of Hilton Head employs Mr. DeLoach and CSA employed Breed. Despite the absence of common employers and Mr.

DeLoach having informed Breed where to file a complaint about Respondent, Breed sent Mr. DeLoach a copy of the letter anyway. (*Id*; *see also* Tr. 746-748; R. 661-663.)

Further, prior to sending the letter to the Commission, Breed provided a copy of the letter to Mr. Cary Kelley, the Executive Vice President and Chief Operating Officer at CSA. (Tr. 1121-1179; R. 978-1036.) After Breed sent the letter to the Commission, Mr. Kelley provided copies of the letter to the full Board of Directors for CSA on June 24, 2008. (Tr. 1121-1179; 976-995; 1222-1226; 1289-1292; R. 978-136; 839-858; 1079-1083; 1144-1147.) Breed did so, in part, in an attempt to explain why a number of incidents at Sea Pines had gone unresolved and cited his letter to the Commission as one of the "hurdles" to resolving those incidents. (Tr. 1222-1226; 1164-1171: R. 1079-1083; 1021-1028.)

In the course of discovery and at trial, Breed admitted that he could not identify any cases in which Respondent acted with bias or partiality. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005 & R. 1723.) Further, at trial it was admitted that on October 1, 2008, the Commission dismissed Breed's complaint against Respondent. (Pl. Ex. 7; Tr. 1179-1182; R. 1724; 1036-1039.) Breed did not inform DeLoach that the complaint against Respondent had been dismissed or report that information to the Board himself. (*Id.*; 999-1000; R. 862-863.)

Also during the course of the above events, CSA employees alleged that Respondent was engaged in an extra-marital affair with a CSA Officer named John Jolin. (Tr. 812-814; 847-850; 857; 516-522; R. 711-713; 731-734;740;513-519.) This statement was spread by CSA employees Ms. Bobbie Martin and Mr. Randy Woods. (Tr. 516-522; 813-814; 818-819; 857; 847-850; R. 513-519; 712-713; 715-716; 740; 731-

734.) Mr. William Waxel testified as to these false statements being spread, (Tr. 848-850; R. 732-734) as did Ms. Sherry Hamilton, Judge Coffey's court assistant. (Tr. 1048-1050; R. 909-911.) Mr. Woods testified that others in the employ of CSA had asked him about the allegations of an affair, naming CSA employees Mr. Waxel, Mr. Ryan, and Mr. Hahn, specifically at trial. (Tr. 856-860; R. 739-743.) Respondent testified about what she heard being spread about her as well. (Tr. 260-263; R. 349-352.) Respondent testified that such statements were especially troubling because another associate municipal judge had previously been relieved of her duties for having an affair. (*Id*; *see also* Tr. 777-779; R. 692-694.)

Arising out of: 1)Breed's dissemination and publication of his letter to Mr. DeLoach and the CSA Board; and 2) the statements of CSA employees concerning her alleged infidelity to her husband, Respondent filed this action. On November 20, 2008, Respondent originally filed suit against Breed and Community Services Associates, Inc. (collectively sometimes "Appellants" [1]). (Compl.; R. 12.) Initially, the suit also named Sea Pines Committee. (Compl.; R. 12.) On January 12, 2010, Respondent removed the case from the active docket pursuant to Rule 40(j), SCRCP. (Rule 40(j) filing; R. 39.) On January 4, 2011, Respondent restored the action to the active docket. On February 8, 2011, Respondent filed an Amended Complaint naming Breed, CSA, and adding the Association of Sea Pines Plantation Property Owners. (Am. Compl.; R. 41.) The trial court later dismissed the Association of Sea Pines Plantation Property Owners. (Tr. 1713-1714; R. 1461-1462.)

[1] Breed and CSA were represented jointly at trial by the same counsel.

Respondent's Amended Complaint asserted causes of action for common law libel and slander, constitutional libel and slander, civil conspiracy, and negligence. (Am. Compl.; R. 41.) The trial court dismissed Respondent's claims for civil conspiracy and negligence. (Tr. 1714; R. 1462.) At the start of trial, the trial court ruled that Respondent was a public figure, thereby removing her common law causes of action for libel and slander. (Tr. 135; R. 245.) Further, prior to trial, the trial court directed a verdict in favor of Breed, but not in favor of CSA, on the constitutional slander claim. (Tr. 1715; R. 1463.) Thus, at trial the remaining claims were for constitutional libel and slander against CSA and constitutional libel against Breed.

The action was tried before a jury in Beaufort County from May 29, 2012 through June 6, 2012. (Judgment and Verdict Form; R. 1 & 1881.) Breed and CSA made joint directed verdict motions at the close of Plaintiff's case, which the trial court denied (Tr. 1385-1443; R. 1240-1298.) Breed and CSA again made joint directed verdict motions which the trial court again denied. (Tr. 1710-1724; R. 1458-1472.) The Appellants did not make their renewed directed verdict motions, however, at the close of all evidence. (Tr. 1728; R. 1476.) Instead, following the second set of directed verdict motions, Ms. Sherry Hamilton testified and Breed and CSA failed to renew their directed verdict motions thereafter. (Tr. 1725-1728; R. 1473-1476.) On June 6, 2012, the jury returned the general verdict against Breed and CSA. (Judgment and Verdict Form; R. 1 & 1881.)

On June 15, 2012, Breed and CSA filed post-trial motions. (Appellants' Post-Trial Mot. & Memo.; R. 166 & 167.) The trial court denied the post-trial motions, and filed an Order on October 15, 2012 regarding them. (October 10, 2012 Order; R. 3.) CSA and Breed appealed.

Standard of Review

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); *see Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995). A directed verdict motion on liability for defamation is properly denied where evidence exists justifying submitting the issue to the jury. *See Anderson v. Augusta Chronicle*, 355 S.C. 461, 471, 585 S.E.2d 506, 51 (Ct. App. 2003) (internal citations omitted).

Whether a public figure-plaintiff has presented evidence sufficient to constitute actual malice is, in the first instance, a question of law for the trial court. *See Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986) ("When determining if . . . actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under *New York Times*."). Similarly, the appellate court is obligated to independently examine the entire record on appeal and decide, *de novo*, whether the evidence presented below is of sufficient quantity and quality to sustain a finding of actual malice. *See Elder*, 341 S.C. at 113-114, 533 S.E.2d at 902; *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996). In all cases the court must ask "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255-56.

The Facts Viewed Most Favorably to Respondent

Respondent is a municipal judge for the Town of Hilton Head. (Tr. 203; R. 292.) She has been employed either part-time or full-time by the Town since 2000. (Tr. 200-207; R. 290-296.) Respondent's family lives in Hilton Head in the Sea Pines Community. (Tr. 360; R. 406.) Her adopted brother, Otis Coffey, lived with her parents in Sea Pines. (Tr. 230-237; 253-256; R. 319-326; 342-345.) Her father died in 2005. (*Id.*)

The community of Sea Pines experienced a rash of break-ins during 2004 and more in 2008. Breed and his officers in the security patrol, employed by CSA, were on guard and attempting to stop the break-ins and identify suspects though the Beaufort Sheriff's Department would ultimately be responsible for any official criminal investigation and prosecution of an offender. (Tr. 235-248; 470-495; 843; 845; 1118-1129; R. 324-337; 467-492; 729-730; 975-986.) At some point in the course of events, Breed and his team focused on Otis Coffey as a possible suspect regarding the break-ins. (*Id.*) This resulted in several interactions with Otis Coffey, his parents, and the CSA security personnel. (Tr. 230-257; 1121-1179; R. 319-346; 978-1036.) Mr. Otis Coffey was never charged in these incidents. (Tr. 467-470; 1133-1135; 1118-1120; R. 464-467; 990-992; 975-977.) Breed never interacted with or even met Respondent prior to her deposition. (Tr. 1121-1179; R. 978-1036.)

Breed, in his capacity as director of security for CSA, claimed to conclude that Respondent was interfering with the break-ins investigation as a result of those interactions. (Tr. 1121-1179; R. 978-1036.) Prior to her deposition in this suit, Breed had not met Respondent. (Tr. 1121-1179; R. 978-1036.) Further, with respect to other

municipal judges, Breed would often call them to express his concern about an issue. (*Id.*) Breed did not talk to Respondent or her mother about his alleged problems with their family. (*Id.*) At trial, Breed claimed Respondent was interfering with the sheriff's department's investigation though he could not cite one instance of such interference or name one person who said Respondent interfered. (Tr. 1121-1179; R. 978-1036.) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.)

Breed called Mr. DeLoach, the assistant manager for the Town of Hilton Head to complain about Respondent. (Tr. 1123-1128; 1141-1147; R. 980-985; 998-1004.) Mr. DeLoach informed Breed that Respondent did not report to Mr. DeLoach but that Respondent reported to town council and that Breed should lodge any complaint about Respondent with the Commission on Judicial Conduct. (*Id.*; Tr. 745-750; R. 660-665.) Breed did so in the form of the aforementioned letter. Breed sent the letter on CSA stationary and the letter listed him as the director of security on the signature block. (Pl.'s Exs. 4 & 18; R. 1721 & 1886.) Thereafter, despite Mr. DeLoach's statements that Respondent reported to town council, Breed sent a copy of the letter to Mr. DeLoach. (Tr. 1121-1179, R. 978-1036.) Mr. DeLoach was employed by the town of Hilton Head and Breed by CSA. Thus, despite the lack of a common employer or interest, Breed published his letter to Mr. DeLoach. (*Id.*)

The complaint was later dismissed by the Commission. (Tr. 1179-1182; Pl. Ex. 7; R. 1036-1039; 1724.) Breed, however, never informed Mr. DeLoach of that fact. (*Id.*)

Before sending the letter to the Commission, Breed provided a copy of a draft to Mr. Kelley, the chief executive of Sea Pines. (Tr. 1121-1179; R. 978-1036.) Mr. Kelley and Breed then shared the letter with the full Board of CSA. (*Id.*) At other points, according to the testimony of Respondent, Breed caused the letter to be shared with Mr. Coltrane, another assistant manger with the Town of Hilton Head at the time and others then working at the town of Hilton Head including Steve Riley (town manager) and Brian Hulbert (attorney with the Town of Hilton Head). (Tr. 213-218; 231-232; R. 302-307; 320-321.) Breed's stated reason for sharing the letter with the Board was that he needed to account to the Board as to why the rash of incidents in Sea Pines had gone unsolved and his department was experiencing "hurdles" in solving the crimes. (Tr. 1224-1226; 1164-1171; 1278-1295; 982-985; R. 1081-1083; 1021-1028; 1133-1150; 845-848.) In other words, Breed was using his letter and the false statements therein to blame Respondent for the failures to solve the break-ins at Sea Pines. (*Id.*) Breed testified that the letter was published to the Board. (Tr. 1121-1179; R. 978-1036.) Breed never informed the Board that his complaint against Respondent had been dismissed by the Commission. (*Id.*; Tr. 1179-1182; 999-1000; R. 1036-1039; 862-863.)

At trial, Breed's testimony, read in via deposition, established that he had no foundation for making the statements about Respondent's alleged inability to be impartial and unbiased. (Pl. Ex. 6; Tr. 230-234; 1125-1148; R. 1723; 319-323; 982-1005 .) He could not cite to a single case where Respondent had acted improperly or unfair in a case. (*Id.*) Respondent testified that she always acted with impartiality and fairness in every case before her. (Tr. 210-212; 230-234; 256-260; R. 299-301; 319-323; 345-349.) Similarly, other witnesses at trial said Respondent was fair in cases before her, and no

instance of her acting otherwise was revealed. (Tr. 461-463; 789; 1598-1599; R. 458-460; 1374-1375.)

Moreover, Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would prosecute anyone arrest for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.) Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations. (Tr. 1143; R. 1000.)

Thus, Breed's disseminated statements about Respondent's alleged inability to be impartial were admittedly false. Breed made other false statements in the letter, including the allegation of Respondent's interference with investigations of her adopted brother. (Pl.'s Exs. 4 & 18; R. 1721 & 1886) Breed's false statements caused Respondent damage. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Respondent testified that as a result of the statements by Breed, the town of Hilton Head only renewed her contract for two years instead of the normal three year period she had previously had. (Pls. Exs. 1-3; Tr. 202-210; 274-281; R. 1712-1720; 291-299; 363-370.) Respondent also experienced more parties asking for her to recuse herself because of the allegations that she could not be fair, damaging her reputation. (Tr. 280-282; R. 369-371.) Breed's statements thus made it difficult for her to function in her job as a judge.

Further, Breed's statements caused Respondent to seek medical care and she incurred costs arising from that care. (Tr. 208-218; 228-287; 935-942; 972-974; R. 297-307; 317-376;799-806; 836-838.) Respondent also suffered debilitating migraine headaches where she was incapacitated and could not always care for her young children and was required to hire babysitters as a result. (Tr. 270-287; R. 359-376.)

Trial testimony also revealed that Mr. Otis Coffey was not charged for the incidents at Sea Pines, but a Mr. Levy was. (Tr. 1118-1120; 1133-1135; R. 975-977; 990-992.) Levy was charged in 2004. (*Id.*) Breed was aware of this fact but continued to operate as if Mr. Otis Coffey was responsible for the prior incidents as revealed in this letter. (*Id.*; Tr. 1583-1586; Pl. Ex. 18; R. 1359-1362; 1886.) Thus, there was never any basis for any of Breed's actions respecting the Coffey family.

Argument

Breed does not challenge the amount of the verdict in this case as unconstitutional, unduly liberal, or ask for it to be reduced. All of Breed's arguments on appeal request either judgment as a matter of law in his favor or a new trial. All of Breed's arguments requesting judgment as a matter of law are unpreserved because of his failure to renew his directed verdict motion at the close of all evidence. With respect to various issues, including those upon which Breed seeks a new trial, many are not preserved due to Breed's failure to properly raise the issues to the trial court and/or obtain a ruling on those issues from the trial court. The issues that *are* arguably preserved are without merit, and do not warrant a new trial because the trial court properly exercised its discretion respecting those issues, and because Breed has shown no legal prejudice resulting from the alleged errors.

Moreover, Breed attacks the judgment on the basis that a judge should not generally be able to maintain a defamation suit. (Breed Initial Br. at 30-33.) Breed warns that if this judgment is not reversed, it will mark the end of a citizen's ability to criticize a judge. (*Id.*) Breed's contentions are unsupported by the law and wrong. Judges can and do file successful defamation suits.[2] Further, this suit does not challenge the ability of a person to complain about a judge to the Commission on Judicial Conduct. Instead, this suit challenges the ability of a person to make false statements about a judicial officer beyond the venue of the Commission on Judicial Conduct. (Am. Compl.; R. 41.) Had Breed only filed his grievance with the Commission on Judicial Conduct, no suit would lie. Breed went beyond that protected venue, however, and used his communication to the Commission as an opportunity to publish the statements therein to others and to falsely attack Respondent with knowledge that his statements about her were untrue. This Court should reject Breed's plea for the Court to ignore his dissemination of admittedly false statements.

I. Breed is not entitled to a directed verdict because he failed to make a directed verdict motion at the close of all evidence, thereby waiving all arguments seeking judgment in his favor.

[2] *See Bunton v. Bentley*, 176 S.W.3d 1 (Tex. App. 1999) (affirming an award of damages in favor of a judge who brought a defamation action against host of local television show who called the judge corrupt); *Gaylord Broad. Co., L.P. v. Francis*, 7 S.W.3d 279 (Tex. App. 1999) (holding that a question of fact existed as to whether statements made by a news reporter against a judge were made with actual malice); *DiSalle v. P.G. Pub. Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (Pa. Super. 1988) (affirming an award in favor of a judge who sued newspaper for publishing a libelous statement from a private citizen); *Thibadeau v. Crane*, 131 Ga. App. 591, 592, 206 S.E.2d 609, 610 (Ga. App. 1974) (reversing a grant of summary judgment against a judge because issues of material fact as to truth and actual malice remained).

All of Breed's arguments which are grounded upon the failure to grant judgment notwithstanding the verdict are not preserved. Thus, the Court should decline to entertain Breed's arguments that he is entitled to judgment as a matter of law in this case.

"When a defendant moves for a directed verdict under Rule 50, SCRCP at the close of the plaintiff's case, he must renew that motion at the close of ***all evidence***." *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 at 496 (Ct. App. 2007) (emphasis added). The rule that a judgment notwithstanding the verdict may not be granted unless the moving party moved for a directed verdict at the close of all the evidence is a ***strict*** one. *Hendrix v. Eastern Distribution, Inc.*, 316 S.C. 34, 446 S.E.2d 440 (Ct. App. 1994) (emphasis added). Further, "[w]hen a party fails to renew a motion for a directed verdict at the close of all evidence, he waives his right to move for JNOV." *Id.*

Legal arguments for judgment are preserved only via proper directed verdict and JNOV motions for matters arising during the trial. *See Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) (denial of summary judgment does not establish the law of the case . . . issues raised in the motion may be raised again later . . . by a motion for a directed verdict). *Collins Cadillac, Inc. v. Bigelow-Sanford, Inc.*, 276 S.C. 465, 279 S.E.2d 611 (1981) (failure to raise legal issue on motion for directed verdict precluded review on appeal). *Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436, 437 (Ct. App. 1995) ("a party cannot for the first time raise an issue by a Rule 59(e) motion which could have been raised at trial").

Appellants did jointly renew directed motions, but did not do so at the close of all evidence. Rather, ***after*** the renewed motions were made, Respondent put up a rebuttal witness, Ms. Sherry Hamilton, who was questioned by both Respondent's counsel and

Appellants' counsel. The trial court did not instruct the Appellants as to when the directed verdict motions had to be made. However, and most importantly, even assuming *arguendo* that the trial court "instructed" the Appellants to make their directed verdict motions before the rebuttal witness testified, the trial court certainly ***did not*** preclude the Appellants from renewing their motions for directed verdict after the rebuttal witness testimony concluded. Instead, after the trial judge made the point of asking Respondent's counsel "at this time, do you rest?," to which Respondent's counsel replied "I do, your honor," (Tr. 1728; R. 1476.) Appellants' trial counsel then said nothing and made no effort to renew anything. The trial judge said nothing at all about renewal of the directed verdict motion at that point in the proceedings. Thus, Appellants may not blame their failure to renew their Rule 50 motion after the testimony of witness Ms. Sherry Hamilton on the trial court.

The requirement under Rule 50 that directed verdict motions must be made at the close of all evidence cannot be disregarded. Breed will argue that this Court can ignore Rule 50's requirements if the evidence that comes in after the directed verdict motion is "brief or inconsequential"—a test adopted by the Fourth Circuit in *Singer v. Dungan*, 45 F.3d 823 (4th Cir. 1995). Respondent submits the *Singer* analysis is flawed and should not be followed for several reasons.

First, just because evidence is "brief" says nothing about its probative power. To determine, therefore, whether certain testimony was "brief" versus "lengthy" is simply illogical and should not be adopted as a test of any sort by any court.

Second, the *Singer* rule was expressly connected by the Fourth Circuit to the existence of the "plain error" doctrine in federal court—a doctrine which does not exist in

South Carolina state courts. *See Singer*, 45 F.3d at 847. Application of the *Singer* rule here would require the appellate court in the ***first instance*** to consider evidence under a Rule 50 standard at the close of the evidence. The trial court was never asked to, and did not, consider the Sherry Hamilton testimony in the context of a Rule 50 motion. Appellants nevertheless want this Court to do that as an initial matter, and then go further and reverse the trial court regarding a ruling she never made. This request by Breed should be rejected.

Third, the language the *Singer* Court quotes from *Moore's Federal Practice* no longer appears in the current version of *Moore's*. This is because FRCP Rule 50 was amended in 2006 and no longer requires a motion for directed verdict to be renewed "at the close of all evidence." The amendment to the rule was in response to federal courts, like *Singer*, contriving exceptions to the requirement. *See generally Moore's Federal Practice: Civil* § 50.40. Rule 50 of the South Carolina Rules of Civil Procedure has not been so amended, and our courts have not expressly adopted any exceptions to the requirement that a directed verdict motion must be made at the close of all the evidence.

Fourth, the *Singer* analysis of determining whether evidence is "inconsequential" conflicts with the historic role that our appellate courts have stated they play in a directed verdict context. The following was stated by the South Carolina Supreme Court regarding that role in *Laney v. Bi-Lo, Inc.*, 309 S.C. 37, 419 S.E.2d 809 (1992):

> Since this is a law case, we must view the evidence and all its reasonable inferences in the light most favorable to Mrs. Laney, the party who resisted the motion for directed verdict, and most strongly against Bi-Lo, the party making the motion. Because we are not a jury, ***we do not weigh the evidence and we do not decide matters of credibility.*** We also eliminate from our consideration all evidence contrary to or in conflict with the evidence favorable to Mrs. Laney

> and give to her the benefit of every favorable inference that the facts reasonably suggest.

309 S.C. at 38, 419 S.E.2d at 810 (emphasis added). Here, contrary to the above stated rule from the *Laney* Court, Breed desires that this Court weigh the Hamilton evidence and determine that it is "inconsequential," as compared with other evidence. The South Carolina Supreme Court has stated that our appellate courts do not play that role. Hence, this Court should not follow *Singer* or the federal cases like *Singer* but must adhere to the holding in *Laney*.

Fifth, before the change to federal rule 50, the federal courts were split on whether Rule 50 should be strictly applied and the liberal exceptions rules followed by some federal courts had been expressly considered and rejected by some state appellate courts. *See, e.g., GMC v. Seay*, 879 A.2d 1049 (Md. Ct. App. 2005) (discussing split among the federal courts on the issue and declining to adopt any liberal exception to the requirement that a directed verdict motion be made at the close of all evidence, including after rebuttal testimony). In *Coker v. Amoco Oil Co.,* 709 F.2d 1433 (11th Cir. 1983) (superseded by statute on other grounds), Amoco moved for a directed verdict at the conclusion of the plaintiff's case but did not renew the motion at the conclusion of its own case. On appeal, Amoco argued that although it had not presented its motion at the close of all the evidence, it should not be prevented from arguing for jnov because it had presented only a single witness, whose testimony comprised only nine pages of transcript. The court refused to overlook the failure, stating that Rule 50(b) "clearly requires a movant to file a directed verdict motion at the end of all the evidence in order to challenge the sufficiency of the evidence on appeal." 709 F.2d at 1438. The court also explained that "[t]he length

of a movant's evidentiary presentation or demonstration, after the fact, that compliance would probably have been futile does not satisfy the rule's requirement." *Id.*

Assuming *arguendo* that a *Singer* test is followed, the testimony of Sherry Hamilton was of important consequence and thus Appellants' argument should be rejected in any event. Part of the support for the Appellants' defenses and the charges regarding Respondent was the testimony of Captain Toby McSwain. McSwain testified that Respondent met him in her office and sought to influence an investigation of her adopted brother. (*See* Tr. 1579-80; R. 1355-1356.) This claim by McSwain was alleged foundational support for the Breed written defamation of the Respondent. McSwain further testified that this meeting was in late 2004. (*Id.* at 1578, 1613; R. 1354, 1389.) Further, McSwain described the Respondent's office in appearance in which the meeting supposedly occurred. (*Id.* at 1611-14; R. 1387-1390.) Conversely, the Respondent denied ever having a meeting with Captain McSwain, period. (*Id.* at 239; R. 328.) Sherry Hamilton testified that Respondent's office was actually in a different location in late 2004 and early 2005 than her current office. (*Id.* at 1726-27; R. 1474-1475.)[3] She further testified that at such different location, the office was configured in a manner so that anyone had to walk past her and another clerk to get to the Respondent's office. (*Id.* at 1726-27; R. 1474-1475.) Lastly, she testified she never saw Captain McSwain ever come to that office. (*Id.* at 1727; R. 1475.)

[3] Captain McSwain's description of Respondent's office was of her current office. (*Id.* at 1612-13; R. 1388-1389.) Hence, the implication of Ms. Hamilton's testimony was that McSwain was fabricating the existence of the meeting, as Respondent testified he was, since his description of the office was faulty, and since, at Respondents' office during the relevant time frame, Ms. Hamilton never saw McSwain visit.

As stated, Captain McSwain was a key witness in the trial.[4] His credibility and the evidence concerning his actions and testimony were important to both sides. Respondent's credibility and testimony were also obviously key. Ms. Hamilton's testimony (both her original testimony and her rebuttal testimony) related to and was probative with respect to both key witnesses' credibility and to evidence submitted by both sides as to the respective claims and defenses in the case. Thus, even if a *Singer* rule were followed, it cannot be said that the Hamilton testimony was "inconsequential."

Finally, Breed did not substantially comply with Rule 50 by moving for directed verdict before Ms. Hamilton testified or because the law does not require a motion to be made "repeatedly." Appellants here ***never*** requested that the trial court consider the ***totality*** of the evidence and make a ruling on a directed verdict motion after doing so. Hence, there is ***no ruling, at all,*** by the trial judge on a request for a directed verdict based on all of the evidence before the court. Thus, an appellate court cannot "reverse" the trial court on a ruling she was never asked to make and never made. Further, *State v. Bryant,* 316 S.C. 216, 447 S.E.2d 852 (1994) does not save Breed's failure to make a proper Rule 50 motion on the basis that the trial court noted her ruling and it would have been fruitless to renew the motion again. Adopting such an argument would mean that no Rule 50 motion is required to be renewed (after the court has denied a directed verdict at the close of the plaintiff's case, for instance). *Bryant* does not stand for the proposition that Rule 50 motion requirements, which our courts have stated are "strict" requirements, can be disregarded based on trial court commentary during trial about submitting this or

[4] Captain McSwain has, since the trial, been hired to replace George Breed.

that claim to the jury. The requirements on filing directed verdict motions are well known, strict requirements which cannot be ignored.

As the Record reveals, no directed verdict motion was renewed after Ms. Hamilton testified. Therefore, South Carolina appellate courts will not review the defective directed verdict motion as to either Appellant. Nor can the Court review the appeal of any JNOV denial order. This is because, as set forth above, the JNOV motion is considered waived by virtue of the defectiveness of the renewed directed motions.

As a result, the following arguments of Breed are not preserved for appellate review:

Argument I, pages 12-26
Argument II, pages 30-39

Accordingly, this Court should hold that the arguments in which Breed requests judgment as a matter of law are unpreserved due to his failure to renew a directed verdict motion after the close of all evidence.

II. Breed failed to raise several arguments to the trial court and/or failed to obtain a ruling from the trial court on those arguments.

In order for an issue to be preserved for appellate review, the issue must have been raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, if an issue is raised to a trial court but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the order to provide a chance for the trial court to rule upon any issues not previously addressed. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (stating an issue must be raised to and ruled upon by the trial court in order to be preserved for

appellate review, and that a party must file a Rule 59(e), SCRCP, motion to preserve an issue on which the trial court fails to rule).

A. The following issues are not preserved for review because Breed failed to raise them and/or have the trial court rule upon them.

In his post-trial motion, Breed did not argue that the statements in Breed's letter to the Commission on Judicial Conduct were "substantially true." Therefore, this issue was neither raised to or ruled upon by the trial court. Thus, the arguments at pp. 20-22 are not preserved.

In his post-trial motion, Breed did not argue that the statements in Breed's letter were opinion based on enumerated facts and/or rhetorical hyperbole. As a result, the issue was neither raised to or ruled upon by the trial court. Thus, the arguments at pp. 22-25 are not preserved.

Breed made no argument at the post-trial stage that Respondent failed to present competent evidence that her reputation was damaged. Thus, Breed failed to raise this issue to the trial court and the trial court did not rule upon this issue. Thus, the arguments at pp. 28-29 are not preserved.

In his post-trial motion, Breed did not contend that his letter was absolutely privileged and that public policy favors a finding of absolute privilege for communications to the Commission on Judicial Conduct, even if the letter is published to others. Because he failed to raise this issue, the trial court did not rule upon it. The arguments at pp. 30-33 are thus not preserved for appellate review.

At trial, upon the reading of Breed's deposition, Breed did not raise a contemporaneous object to the admission of the fact that Breed filed a defamation suit against a neighbor. (Tr. 1186; R. 1043.) Because Breed did not raise the issue, the trial

court did not rule upon it and the issue is waived. *See Washington v. Whitaker*, 317 S.C. 108, 114, 451 S.E.2d 894, 898 (1994) (to preserve an issue regarding the admissibility of evidence for appellate review, a contemporaneous objection must be made); *McCreight v. MacDougall*, 248 S.C. 222, 226, 149 S.E.2d 621, 622 (1966) (failure to object when evidence is offered constitutes a waiver of the right to have the issue considered on appeal). Thus, the argument on this point at p. 47 is not preserved.[5]

At trial, upon the reading of Breed's deposition, Breed did not contemporaneously object to the admission of evidence regarding the 2004 arrest of Mr. Levy. (Tr. 1221-1223; R. 1078-1080.) Therefore, the Breed has waived the issue. *See Washington v. Whitaker*, 317 S.C. at 114, 451 S.E.2d at 898 (to preserve an issue regarding the admissibility of evidence for appellate review, a contemporaneous objection must be made). Hence, the argument at p. 48 is not preserved.[6]

At trial, Breed did not object to Respondent's testimony that Breed had Respondent's mother's gate pass cancelled. (Tr. 252-253; R. 341-342.) The argument on this point at p. 48 of the brief is not preserved because of Breed's failure to contemporaneously object—he has waived the issue. *See Washington v. Whitaker*, 317 S.C. at 114, 451 S.E.2d at 898 (to preserve an issue regarding the admissibility of

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[5] While Breed moved *in limine* to exclude evidence regarding his having filed a defamation suit previously, his failure to renew that objection at the time of his testimony waives the issue. *See State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) (holding that because a ruling in an *in limine* motion is not final, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) (same).

[6] While Breed moved *in limine* to exclude evidence regarding Levy's arrest, his failure to renew that objection at the time of Breed's testimony waives the issue. *See State v. Schumpert, supra.*

evidence for appellate review, a contemporaneous objection must be made). Thus, the argument at p. 48 is not preserved. [7]

Breed's contention that Mr. William Waxel should not have been permitted to testify is not preserved. The argument at pp. 50-51 regarding this witness should not be considered. Breed did not object to Waxel taking the stand contemporaneous with Waxel being called a witness. (Tr. 847; R. 731.) Therefore, the objection has been waived. *See Washington v. Whitaker*, 317 S.C. at 114, 451 S.E.2d at 898 (to preserve an issue regarding the admissibility of evidence for appellate review, a contemporaneous objection must be made).[8]

At trial, Breed did not contend that the trial court failed to apply Rule 801(d)(1)(A)-(D). Thus, the trial court did not rule on this issue. Thus, the argument on this point at p. 52 of the brief is not preserved. None of the above issues should thus be considered by this Court.

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[7] While Breed moved *in limine* to exclude evidence regarding the gate pass, his failure to renew that objection at the time of Respondent's testimony waives the issue. *See State v. Schumpert*, *supra*.

[8] While Breed moved *in limine* to exclude Waxel, his failure to renew that objection prior to his testimony waived the objection. *See State v. Schumpert*, *supra*.

B. The following issue is not preserved for appellate review because the trial court did not rule upon it at the post-trial stage.

Breed did raise the argument that his publication of the letter to the assistant town manager was conditionally or qualifiedly privileged as a matter of law. The trial court, however, failed to rule upon this issue in denying Breed's post-trial motion. Breed failed to file a Rule 59(e) motion to point out the trial court's failure to rule upon this issue. Due to this failure, the trial court has not ruled upon the issue of whether Breed's publication of the letter to the assistant town manager was protected by a conditional or qualified privilege and, therefore, the issue is not preserved.

III. Breed's arguments fail on the merits because Respondent proved that Breed published false statements about Respondent with constitutional actual malice, which caused damage to Respondent.

If the Court reaches the merits of the arguments contained in Breed's brief despite the preservation issues detailed in Sections I and II herein, the Court should hold that Respondent met her burden on her constitutional libel claim against Breed.

To prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff. *Erickson v. Jones Street Publishers*, LLC, 368 S.C. 444, 467, 629 S.E.2d 653, 665 (2006) (citing *New York Times v. Sullivan*, 376 U.S. 254, 279-80) (additional internal citations omitted). When determining if clear and convincing evidence exists upon which to submit a public figure defamation case to the jury, the trial court must look to the quantum and quality of the evidence. *See Anderson v. Augusta Chronicle*, 355 S.C. 461, 471, 585 S.E.2d 506, 51 (Ct. App. 2003) (reversing the trial court's decision to grant directed verdict, finding that the quality of the evidence was of a convincing clarity sufficient to submit the issue to the

jury when viewed in the light most favorable to the plaintiff). A plaintiff must prove the false statements caused damage by a preponderance of the evidence. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 475, 629 S.E.2d 653, 670 (2006) ("Appellant is required to . . . show actual injury in the form of general or special damages . . . by a preponderance of the evidence."). Respondent met her burden in this case with respect to Breed's publication of the letter to the assistant town manager for the town of Hilton Head, others in at the town, the CSA chief executive, and the CSA board in this case.

A. Breed published false statements about Respondent's ability to be impartial, fair, and unbiased in matters that had been pending before her Court and her alleged interference with an investigation.

A defamed public official or public figure must prove the falsity of the allegedly libelous publication. *Beckham v. Sun News*, 289 S.C. 28, 31, 344 S.E.2d 603, 604 (1986) (citing *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975)). This requirement follows necessarily from the actual malice standard. *Id.* Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish the statement was, in fact, false. *Id.* (internal citations omitted).

In the letter Breed published to the assistant town manager and CSA Board, letter, Breed stated:

> In summary, as a result of Judge Coffey's actions, ***she*** has given the distinct and transparent appearance of bias and partiality, and ***is not able to be a neutral and detached arbiter of the many cases that have been*** and will be ***pending before her.***

(Plaintiff's Exs. 4 & 18; R. 1721 & 1886.) (emphasis added).

Breed's published statements[9] about Respondent's alleged inability to be fair in past cases pending before her was proven false, both in discovery and at trial. Breed admitted that he was not aware of any cases where Respondent acted with bias or partiality. (Plaintiff's Ex. 6; R. 1723.) Further, no witness at trial was able to identify a single case where Respondent acted with partiality. (Tr. pp. 463, 1362-1363, 1598; R. 460; 1217-1218; 1374.) Moreover, Respondent testified that she always acted with fairness and impartiality in all cases pending before her. (Tr. 210-212; 230-234; R. 299-301; 319-323.) Thus, the ***only*** evidence presented at trial was that Breed's published statements about Respondent's alleged inability to be fair, impartial, and unbiased were false at the time of publication.

Despite the evidence and his admission regarding his lack of support for his statements, Breed attempted to defend his statements at trial by arguing that the letter as a whole was substantially true. (Tr. 1121-1179; R. 978-1036.) Breed failed to prove this, however. As noted above, he admitted that he had no basis for his published statements. (Tr. 230-234; 1125-1148; Plaintiff's Ex. 6; R. 299-301; 982-1005; 1723.) Further, South Carolina law requires that a defendant demonstrate that each individual statement within the overall publication is substantially true, not that the content of a publication as a whole is substantially true. *Castine v. Castine*, 403 S.C. 259, 266, 743 S.E.2d 93, 96-97 (Ct. App. 2013) (finding a letter to be defamatory based upon examination of each statement in the letter). At trial, Breed attempted to clarify his statements in the letter by claiming that he was not speaking about actions Respondent took judging cases or on the bench. (Tr. 1128; R. 985.) On appeal, Breed now contends that the whole letter shows

[9] These are statements of alleged fact, and are not merely opinions.

that Breed was expressing his opinion in the context of the investigation of Mr. Otis Coffey in connection with the break-ins at Sea Pines. (Breed Initial Br. at 20-25.) These post-revisionist efforts must be rejected. Respondent proved that particular statements of fact in the letter were false, and Breed did not establish any grain of truth for the statements about Respondent's alleged inability to fairly judge past cases by his own admission.

Accordingly, Respondent proved by clear and convincing evidence that Breed's published statements regarding her alleged inability to be fair and impartial in cases were false. Other statements in the letter were also testified to as false by Respondent. The letter by Breed sets forth a detailed meeting that allegedly occurred between the Respondent and Captain Toby McSwain. (Plaintiff's Exs. 4 & 18; R. 1721 & 1886). Breed writes that during this meeting the Respondent and McSwain discussed the investigation of her adopted brother, Otis Coffey. *Id.* Respondent denied that such a meeting ever occurred, and thereby testified the allegation in the letter was false. (Tr. 239; R. 328.) The letter also falsely accused Respondent of engaging in "conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure" (Plaintiff's Exs. 4 & 18; R. 1721 & 1886) in connection with the investigation of her adopted brother, an accusation vehemently denied by Respondent. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would officially investigate and prosecute anyone arrested for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.)

Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations. (Tr. 1143; R. 1000.) Hence, the record reveals no evidence of Respondent interfering with an investigation.

B. Breed published false statements about Respondent with actual malice and a reckless disregard for the truth of his statements.

In order to establish actual malice, a public figure plaintiff must demonstrate that the defendant knew the statement was false or had serious reservations about its truthfulness when the statement was made. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 515, 506 S.E.2d 497, 504 (1998).

As the South Carolina Supreme Court explained in *Elder*:

> ***Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements***. The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. ***There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. There must be evidence the defendant had a high degree of awareness of . . . probable falsity***.
>
> Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. Actual malice may be present, however, where one fails to investigate and

> there are obvious reasons to doubt the veracity of the informant.

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (citations, quotes, and emphasis added).

In this case, evidence was adduced at trial that Breed knew that the statements contained in his letter published to the assistant town manager for the town of Hilton Head and the Board of CSA were false. In his letter, Breed wrote:

> In summary, as a result of Judge Coffey's actions, ***she*** has given the distinct and transparent appearance of bias and partiality, and ***is not able to be a neutral and detached arbiter of the many cases that have been*** and will be ***pending before her***.

(Plaintiff's Exs. 4 & 18; R. 1721 & 1886) (emphasis added). Breed also stated that "Judge Coffey ***has engaged*** in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (*Id.*) (emphasis added). Breed stated that "***[t]his conduct was/is pervasive and invasive in nature, and directly results*** in Judge Coffey's ***inability to maintain the impartiality*** so necessary to the successful balance of our legal system." (*Id.*) (emphasis added). In his publication, on CSA letterhead, to the assistant town manager for Hilton Head and the CSA Board, Breed went on to cite Cannons 1, 2, and 3 of the Code of Judicial Conduct. Breed noted that his statements were the "result of much serious, sober and deliberate examination and contemplation." (*Id.*)

In discovery, Breed admitted that he could not name a single case in which "Plaintiff has acted with bias, partiality or prejudice." (Plaintiff's Ex. 6; R. 1723). Breed's admission proves that he knew his publication to be false at the time he wrote it. The letter plainly states that Breed knew Respondent had ***not*** been a neutral and detached arbiter of the many cases "that have been . . . .pending before her." (Plaintiff's Exs. 4 &

18; R. 1721 & 1886.) Hence, Breed's published statements about Respondent's ability to be fair in cases pending before her was proven to be made with knowledge of its falsity or with a reckless disregard for its truth. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005; 1723.) Breed further published these statements to the assistant town manager for the town of Hilton Head after Mr. DeLoach told him not to do so but to lodge any complaint against with Respondent with the Commission on Judicial Conduct. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) Mr. DeLoach and Breed shared no common interest or employer and Breed has no appropriate justification for sending the letter to the town of Hilton Head after the instruction to complain elsewhere about Judge Coffey. This further shows the malice with which Breed acted.

The evidence also showed that Breed did not attempt to retract his statements and that Breed did not inform DeLoach or the town of Hilton Head or the Board that his complaint with the Commission had been dismissed. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039; 862-863.) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creating "hurdles" with CSA's investigation of Mr. Otis Coffey as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150; 845-848.) This evidence alone is of sufficient quality to establish that Breed acted with reckless disregard for the truth of his statements in an effort to shield his own investigation work from criticism. The letter also falsely accused Respondent of engaging in "conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure" (Plaintiff's Exs.

4 & 18; R. 1721 & 1886) in connection with the investigation of her adopted brother, an accusation vehemently denied by Respondent. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Breed admitted that it was not really his investigation into the incidents in truth as the Beaufort County Sheriff's Office would prosecute anyone arrested for such an incident. (Tr. 1121-1179; R. 978-1036.) At trial Breed claimed his letter was detailing Respondent's hindering the sheriff's office's investigation. (Tr. 1142; R. 999.) Breed could not identify anyone from the Beaufort County Sheriff's Office that said Respondent interfered with an investigation. (*Id.*) Appellants attempted to use alleged Sheriff department interactions with Respondent to imply interference by Respondent, but even Captain McSwain from the Sheriff's department said Respondent did not interfere with any investigation. (Tr. 1610; R. 1386.) Breed admitted that regulations do not permit CSA to conduct criminal investigations. (Tr. 1143; R. 1000.) Hence, the record reveals no evidence of Respondent interfering with an investigation and that Breed acted without basis for his statements on this point as well.

Further, Respondent offered testimony that Breed had previously been a plaintiff in a defamation action.[10] (Tr. 1186-1188; R. 1043-1045.) Breed thus had personal experience with the harmful consequences that making false statements can have on an individual. Despite that knowledge, Breed published his statements to the assistant town manager and the full Board of CSA with no regard to the truth of his statements. Breed

[10] In conclusory fashion, Breed argues that the admission of Breed's filing of a defamation action was prejudicial. (Breed Initial Br. at 47.) Breed does not specifically identify this point in his Statement of Issues as required by Rule 208(b)(1)(B), SCACR. Thus, the issue is not preserved for review. Further, CSA does not challenge the admission of this evidence.

also deeded his interest in his home to his wife shortly after his publication of the false statements concerning Respondent.[11] (Tr. 1149-1155; R. 1006-1012.)

Breed's own admission in discovery and at trial that his statements were not based upon actual cases Respondent had adjudicated, alone, is sufficient evidence for the trial court to submit this case to the jury. *See Erickson*, 368 S.C. at 463, 629 S.E.2d at 663 (citing *Quesinberry v. Rouppasong*, 331 S.C. 589, 594, 503 S.E.2d 717, 720 (1998) (noting that if the evidence is susceptible to more than reasonable inference, the case should be submitted to the jury). Accordingly, Respondent proved by clear and convincing evidence that Breed knew his statements to be false and/or acted with a reckless disregard for the truth.

C. Respondent proved damage arising from Breed's false statements by a preponderance of the evidence.

In order to recover in a defamation action, a public figure plaintiff must demonstrate, by a preponderance of the evidence, that the false statements caused harm. *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. at 475, 629 S.E.2d at 670. Two categories of damages are recoverable—general damages and special damages. As the Supreme Court has stated:

> General damages include injury to reputation, mental suffering, hurt feelings, emotional distress, and similar types of injuries which are not capable of definite money valuation. Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages.

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[11] In conclusory fashion, Breed argues that the admission of Breed's act of deeding his interest in his home to his wife was prejudicial. (Breed Initial Br. at 47.) Breed has failed to specifically identify this point in his Statement of Issues as required by Rule 208(b)(1)(B), SCACR. Thus, the issue is not preserved for review. Further, CSA does not challenge the admission of this evidence.

Id., 368 S.C. at 465, 629 S.E.2d at 664, fn. 6. Thus, South Carolina permits a public figure-plaintiff to recover for actual injury which means not only out-of-pocket losses, but includes injury to reputation, mental suffering and anguish, and personal humiliation.

Moreover, when South Carolina law does not provide a specific answer, our appellate courts often look to North Carolina law if an issue is considered to be novel. *See State v. Dowd*, 306 S.C. 268, 269, 411 S.E.2d 428, 429 (1991) (stating that the Court will rely on North Carolina law in a novel case that "has been directly addressed by our sister state, North Carolina"). North Carolina law recognizes that that "medical care and expense" are recoverable as special damages. *Araya v. Deep Dive Media, LLC, et. al.*, Case No. 5:12-cv-163, 2013 U.S. Dist. LEXIS 117841 * 45-46 (citing *Tallent v. Blake*, 57 N.C. App. 249, 291 S.E.2d 336, 340--41 (N.C. Ct. App. 1982). Other states similarly recognize recovery for medical treatment arising due to defamatory statements. *Kaiser v. Hardin*, 953 So.2d 802, 810 (La. 2007) ("Special damages are those which have a ready market value, . . . [that] may be determined with relative certainty, including medical expenses and lost wages."); *Posey County v. Chamness*, 438 N.E.2d 1041, 1049 (Ind. Ct. App. 1982) (noting that Indiana courts refer "to the cost of sessions with a clinical psychologist as "special damages.'"); *Picone, et. al. v. Talbott*, 349 A.2d 615, 620 (Md. Ct. Sp. App. 1975) (noting that special damages included medical treatment for a condition partially caused by a slander).

Respondent testified concerning the amount of special damages she incurred in connection with her having to obtain babysitters on the weekends, due to her incapacitation due to debilitating migraine headaches caused by the false statements Breed published about her. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-

412.) Further, Respondent sought treatment from a psychologist because of the defamatory remarks, and those costs were testified to at trial by Respondent and her physician. (Tr. 208-218; 228-287; 360-366; 458-460; 935-942; 972-974; R. 297-307; 317-376; 406-412; 455-457; 799-806; 836-838.) Thus, Respondent proved by competent evidence that she suffered identifiable special damages. The jury properly awarded those amounts.

As to general damages, Respondent similarly proved that she had suffered injury though no specific amount was identified—nor was one required. Respondent testified that her contract with the Town of Hilton Head was not renewed for another three year period, only two. (Tr. 208-218; 228-287; R. 297-307; 317-376.) Respondent further testified that other lawyers/litigants now moved for recusal in cases pending before her due to the allegations Breed levied against her and published to many in the community. (Tr. 280-282; R. 369-371.) Respondent also testified as to her emotional distress, humiliation, and hurt feelings because of the attacks Breed made about her ability to be fair and impartial, because those false statements damaged her reputation and standing in the community. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Others similarly testified. (Tr. 707-714; 760-761; 827; R. 633-640; 675-676; 724.) Respondent experienced a tough time with her co-workers from the town and she was unable to accomplish all that she set out to do in her job. (Tr. 208-218; 218-287; R. 297-307; 317-376.) Respondent further testified that the statements harmed her ability to seek higher office on the bench. (Tr. 228-287; R. 317-376.) The jury considered all of the

testimony and awarded $2,000,000 in general damages.[12] This amount is supported by the record and the law.

The jury also awarded Respondent punitive damages. The trial court properly evaluated the award and refused to set it aside. On appeal, Breed does not challenge the punitive damages award as unduly liberal or challenge the trial court's evaluation of the award. Breed only contends that the award is not supported because she did not prove special and general damages and the award is therefore excessive. (Breed Initial Br. at 29.) The evidence showed that Breed knowingly published false statements about Respondent's ability to be fair as a judge. (Tr. 230-234; Tr. 1125-1148; Breed Resp. to Resp.'s Ints., Pl. Ex. 6; R. 319-323; 982-1005; 1723; 1721 & 1726.) The evidence showed that Breed did not attempt to retract his statements and that Breed did not inform those to whom he published the defamatory communication that his complaint with the Commission had been dismissed. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039.) The evidence further showed, through Breed's testimony, that he was using Respondent's alleged "interference" and creation of "hurdles" with CSA's investigation of Mr. Otis Coffey, as an excuse for his department's failure to solve a rash of incidents at Sea Pines. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1031; 1133-1150; 845-848.)

Hence, the evidence was sufficient for the trial court to submit the issue of punitive damages to the jury. The award does not shock the conscience. *See Knoke v. South Carolina Dep't of Parks, Rec. & Tourism*, 324 S.C. 136, 142, 478 S.E.2d 256, 259

[12] Further, Respondent suffered damage to her reputation due to the slanderous comments published about her alleged infidelity to her husband. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) Though that cause of action was only had against CSA, the verdict in this case is a general verdict.

(1996) (refusing to set aside a verdict based on the claim that the verdict shocked the conscience and was the result of passion or prejudice); *Duncan v. Hampton County Sch. Dist. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) (rejecting the appellant's contention that *Sanders v. Prince* required a new trial). Further, results in other libel and slander actions demonstrate the award here should be affirmed when the appellate court considers the evidence adduced at trial. *See Weir v. Citicorp Nat'l Servs.*, 312 S.C. 511, 435 S.E.2d 864 (1993) (affirming an actual and punitive damages award in a defamation action); *Deloach v. Beaufort Gazette*, 281 S.C. 474, 316 S.E.2d 139 (1984) (affirming an actual and punitive damages award in a libel action); *Stevens v. Sun Pub. Co.*, 270 S.C. 65, 240 S.E.2d 812 (1978) (affirming libel award in favor of a public official); *Davis v. Niederhof*, 246 S.C. 192, 143 S.E.2d 367 (1965) (affirming slander verdict); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 106 S.E.2d 258 (1958) (affirming an actual and punitive damages award on a slander verdict); *Goodwin v. Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001) (affirming an actual and punitive damages award on a slander verdict); *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (affirming an actual and punitive damages award on a slander verdict); *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984) (affirming slander verdict). For all of these reasons, Respondent's claims were properly submitted to the jury.

IV. The trial court properly rejected Appellants' arguments that, as a matter of law, the publication of Breed's letter to the assistant town manager for the Town of Hilton Head and the Board of Directors of CSA was protected by either an absolute or a qualified privilege because the publication exceeded permissible bounds.

Breed admitted that he published the letter he sent to the Commission on Judicial Conduct to Mr. DeLoach, the assistant Town Manager for the Town of Hilton Head; a chief executive at CSA; and to the full Board of Directors for CSA. (Tr. 1121-1179; R. 978-1036.) These publications went beyond any protected privilege or occasion.

A. Breed's publication of the letter to the assistant town manager, among others, removed any protection the letter might have had as absolutely or judicially privileged.

While a defamatory pleading or complaint is absolutely (or judicially) privileged, that pleading cannot be a basis for dissemination of defamatory statements to the public or third parties not connected with the judicial proceeding. South Carolina adheres to this well-reasoned rule. *See, e.g., Eubanks v. Smith*, 292 S.C. 57, 63 354 S.E.2d 898, 901-902 (1987) (demonstrating that the republication of false statements which exceeds the necessary occasion are not protected by an absolute privilege even when the original forum in which the statements were made may have shielded the speaker from liability).

Otherwise, "to cause great harm and mischief a person need only file false and defamatory statements in a judicial pleading and then proceed to republish the defamation at will under the cloak of immunity." *Spencer v. Spencer*, 479 N.W.2d 293, 295-296 (Iowa 1991) (quoting *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 698 (8th Cir. 1979). Thus, the absolute privilege cannot be exploited as an opportunity to defame with impunity, because it is available only when the challenged remarks are relevant or pertinent to the judicial proceedings. *Sullivan v. Birmingham, et. al.*, 416 N.E.2d 528, 530 (Mass. 1981). Further, the privilege may be lost by unnecessary or unreasonable publication to one for whom the occasion is not privileged. *Brown v. Collins*, 402 F.2d 209, 213-214 (D.C. Cir. 1968); *Sriberg v. Raymond*, 544 F.2d 15 (1st Cir. 1976); *see*

also Restatement (Second) of Torts §§ 604, 605 (1977; *see also Vahlsing Christina Corp., et. al. v. Stanley*, 487 A.2d 264, 267 (Maine 1985) (holding that "[t]he privilege may well have been lost by unnecessary or unreasonable publication beyond the scope of the privileged circumstances.") (internal citations omitted).

Breed does not contend that his ***republication*** of his letter to ODC to others is absolutely privileged. (Breed Initial Br. 30-32.) Nor can he. Breed recites general propositions concerning the absolute privilege as the privilege relates to disciplinary or judicial proceedings. (*Id.*) The stated authorities relied upon by Breed do not address the factual circumstances of this case, however. Had Breed sent his letter only to the Commission on Judicial Conduct, no cause of action would lie. Breed's actions extended beyond the singular act of writing the Commission. (Tr. 1121-1179; R. 978-1036.) Before sending the letter to the Commission, Breed provided a copy to Mr. Kelley, a chief executive at CSA. (Tr. 1121-1179; R. 978-1036.) After sending the letter to the Commission, Breed then republished it to a number of people. Breed republished the letter to the assistant managers of the Town of Hilton Head, the Board of Directors for CSA, and the chief executive at CSA (Tr. 208-218; 228-287; 1121-1179; R. 297-307; 317-376; 978-1036.) Hence, any protection the letter might have had as absolutely privileged was destroyed.

As the Record reveals, Breed called Mr. DeLoach at the town of Hilton Head to complain about Respondent and the assistant town manager specifically directed Breed to make any complaint Breed might have about Respondent to the Commission and ***not*** to the Town of Hilton Head because Mr. DeLoach was not Respondent's supervisor. (Tr. 745-750; 1123-1128; 1141-1147; R. 660-665; 980-985; 998-1004.) While Breed did

send the letter to the Commission following the call, Breed went beyond the protected occasion and sent his letter to the assistant town manager as well, despite the assistant town manager's instruction not to do so. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) Breed and Mr. DeLoach do not share common employers or interests and Mr. DeLoach was in no way involved with the complaint to the Commission or that proceeding. Thus, Breed had no privilege in sending the letter to DeLoach at the town of Hilton Head. As the law makes clear, such unwarranted and unnecessary publication takes away any absolute privilege that might have attached to the communication in the original forum. Hence Breed's communication is not absolutely privileged.

B. Breed's republication of the letter was not protected by any qualified privilege.

Breed asserts that the statements in his letter about Respondent concerned shared interests between Breed and CSA and the Town of Hilton Head, and thus a qualified privilege should apply as a matter of law. This argument should be rejected.

In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege. Under this defense, one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 484-485, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts, § 593 (1977) and *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946)).

In *Bell*, the South Carolina Supreme Court held:

> In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an

> interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

Bell, 208 S.C. at 493-94, 38 S.E.2d at 643. Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded. *Swinton*, 334 S.C. at 484-485, 514 S.E.2d at 134 (citing *Fulton v. Atlantic Coast Line R. Co.*, 220 S.C. 287, 67 S.E.2d 425 (1951)) and 53 C.J.S. Libel and Slander § 79 (1987).

In *Swinton*, the South Carolina Supreme Court reversed the trial court's decision to grant a directed verdict where a bank, through its agent, made statements about the plaintiff-borrower to another potential borrower. *Swinton*, 334 S.C. at 486, 514 S.E.2d at 134-135. The potential borrower was considering buying property and equipment from the plaintiff-borrower. *Id.* In the course of dealings with the potential borrower, a loan officer of the bank, acting in the course of his employment with the bank, wrote a letter to the potential borrower informing the potential borrower that the plaintiff-borrower's business operation was under "financial duress." *Id.* The Supreme Court held that even if the bank made the communication in good faith, the jury might conclude that the statement was defamatory under the circumstances. Thus, the trial court erred in directing a verdict for the bank because the qualified privilege, as a matter of law, did not bar the action based on its agent's conduct.

The same analysis applies here. Here, in viewing the evidence in the light most favorable to Respondent, sufficient and quality evidence was admitted showing that Breed published his statements to the assistant town manager of Hilton Head, a chief executive for CSA, and then the Board of CSA. Breed had no shared interests with Mr. DeLoach, the assistant town manager. They worked for different employers. DeLoach informed Breed that Respondent did not report to Mr. DeLoach in his capacity as assistant manager for the town. (Tr. 745-750; 1121-1179; R. 660-665; 978-1036.) In fact, Mr. DeLoach told Breed to lodge any complaint Breed had against Respondent with the Commission, not to him. (Tr. 745-750; 1123-1128; 1141-1147; R. 660-665; 980-985; 998-1004.) Breed nevertheless sent the letter at issue, on CSA letterhead, to Mr. DeLoach at the town of Hilton Head after sending it to the Commission. (Tr. 1121-1179, R. 978-1036.) This alone made it any conditional or qualified privilege issue a jury question. Further, while possibly having a shared interest with CSA and Mr. Kelley, Breed did not merely inform them he had filed a complaint with the Commission on Judicial Conduct against Respondent. Rather, he went further and provided a draft copy of the letter, with its included false statements, to Mr. Kelley and the Board. Further, Breed presented the copy of his letter to the Board via Mr. Kelley to purportedly show why he was having difficulty solving a rash of incidents at Sea Pines, and to deflect any potential criticism of his investigative work. (Tr. 1222-1226; 1164-1171; 1278-1295; 982-985; R. 1079-1083; 1021-1028; 1133-1150.) He thus utilized the letter and its misrepresentations about the Respondent as an excuse for his failings as director of security, knowing the letter contained false information. *Id.* This also destroyed any possible privilege that might have existed with respect to Breed and CSA and the Board.

See Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. at 484-485, 514 S.E.2d at 134 (qualified privilege exceeded where publication went beyond the occasion when a bank officer made statements for the purpose of trying to dissuade a purchase by a potential borrower when the comments went beyond the scope of the potential purchase).

V. The trial court properly admitted evidence of Breed's character.

At trial the trial court permitted the introduction of evidence concerning Breed's character and his motives underlying his decision to publish the false statements about Respondent. There was no error. CSA does not challenge the admission of such evidence in its appeal further confirming the proper admission of the evidence.

First, Breed has not listed the questions about Breed's actions and character in his "Statement of Issues." Pursuant to Rule 208(b)(1)(B), SCACR, these points should not be considered. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642-43 (2011) (holding that issues were not preserved because, among other reasons, the issues were not set out specifically in the statement of issues in the appellate brief). The Court noted that "[e]very ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Id.* (citing *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Breed's hodgepodge of arguments does not comply with the appellate court rules and should not be considered.

Second, although evidence concerning motive or character may bear some relation to the actual malice inquiry; however, "courts must be careful not to place too much reliance on such factors." *Harte-Hanks*, 491 U.S. at 668. That being the case, under Rule 404(a), evidence of a person's character is not admissible for the purpose of

proving action in conformity therewith unless it is evidence of a pertinent trait offered by the defendant. S.C.R. Evid. 404; *See State v. Weaverling*, 337 S.C. 460, 472, 523 S.E.2d 787, 793 (Ct. App. 1999) ("truthfulness must be a trait pertinent to the offense charged."). Unlike under the federal rules, in South Carolina, specific acts can only be used under Rule 404(b) to prove certain exceptions enumerated in *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). *See also Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 24 S.E.2d 369 (1943) (holding *Lyle* is applicable in civil cases). These exceptions are motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. S.C. R. Evid. 404.

Although Respondent has located no South Carolina authority deciding whether truthfulness is pertinent to the character of a defendant in a defamation action, other courts have held that truthfulness of a defendant is at issue when the defendant raises the defense of truth. *See Blyth v. McCrary*, 184 N.C. App. 654, 661, 646 S.E.2d 813, 818 (2007) [13] ("[A] defendant's character for truthfulness is always at issue in a defamation suit."); *Rety v. Green*, 546 So. 2d 410, 422 (Fla. Dist. Ct. App. 1989) ("Character witness testimony of this sort is clearly admissible in a defamation action when, as here, the defendant raises truth as a defense in the cause."). In this case, Breed defended his statements regarding Respondent's ability to fairly judge cases before her as true. (Tr. 1121-1179; R. 978-1036.) His character was thus placed into issue. Further, under Rule 608(b), evidence of specific acts to attack the credibility of a witness is admissible if it goes to truthfulness or untruthfulness, subject to the limitations of Rule 403. S.C.R. Evid.

[13] Our courts will look to North Carolina law on novel issues. *See State v. Dowd*, 306 S.C. at 269, 411 S.E.2d at 429 (stating that the Court will rely on North Carolina law in a novel case that "has been directly addressed by our sister state, North Carolina").

608; *See State v. Grace*, 350 S.C. 19, 26, 564 S.E.2d 331, 334 (Ct. App. 2002) (stating that the credibility of a witness can only be impeached for "truthfulness or untruthfulness" under Rule 608).[14] Without question, Breed's character for truthfulness was thus squarely at issue. The below outlined evidence was therefore properly admitted by the trial court.

The issues that Breed attempts to raise on appeal concerning his character can be summarized as follows:

- Breed's and his department's decisions to *nol pross* tickets for individual's willing to support the Sea Pines Museum and Forest Preserve Foundation that results in monies going directly to Sea Pines. (Tr. 714-721; R. 640-647);
- Breed's taping of a phone conversation with a judge and initially lying about it in his deposition. (Tr. 1204-1222; R. 1061-1079);
- Breed and CSA's prosecution of a defendant after having reached a plea bargain with the defendant. (Tr. 1250-1251; R. 1107-1108);
- Breed's act of quit-claiming his half interest in his home to his wife shortly after he published the defamatory statements about Respondent. (Tr. 1149-1155; R. 1006-1012);
- Details about the 2004 arrest of Mr. Levy and his actions relating thereto disproving that Mr. Otis Coffey was a suspect. (Tr. 1222-1226; 1233-1236; R. 1079-1083; 1090-1093);

[14] Additionally, since the defendant testified on his own behalf as to the truthfulness of his statement, he put his character for truthfulness into issue under Rule 404. Specific acts can always be used to attack the defendant's credibility as a witness under Rule 608, SCRE, subject to Rule 403.

- Breed's act of entering into an indemnification agreement with CSA for his actions in publishing statements about Respondent. (Tr. 1246-1250; R. 1103-1107); and
- Respondent's testimony that Breed pulled Respondent's mother's guest pass privileges at Sea Pines. (Tr. 252; R. 341.)

Every one of the above-categories of evidence bears upon Breed's character and his truthfulness. Breed, in defending his statements as truthful, placed his character at issue. Breed has shown no abuse of discretion or undue prejudice as a result of the trial court's evidentiary rulings in this regard. Hence, the judgment should be affirmed.

VI. The trial court properly allowed witnesses to testify at trial in this matter who were identified to Appellants in the course of discovery prior to trial.

Breed next contends the trial court committed reversible error in permitting Mr. Richard Sonberg,[15] Mr. William Waxel, and Dr. Lynn E. Geiger to testify at trial. (Breed Initial Br. at 50-51.) Breed bases his argument on the claim that he was taken by surprise and ambushed by Respondent's calling of these witnesses at trial. Breed's arguments are without merit.

Breed posits that Respondent did not comply with Rule 33(b), SCRCP by failing to specifically identify, by name, witnesses expected to testify at trial via supplemental discovery response. First and most importantly, CSA and Breed's discovery requests did not request that Respondent identify which fact witnesses would be expected to testify at trial. (Court Ex. 2: R. 1797.) Instead, the discovery request only sought the names of those that might have information as to the facts of the case. (*Id.*) The issue is thusly

[15] CSA does not challenge the trial court's decision to permit Mr. Sonberg to testify.

waived. With respect to expert witnesses, Respondent identified treating physicians as possible witnesses at trial, and listed Dr. Geiger specifically by name and address. (*Id.*)

In addition, each of other the witnesses were identified in the course of discovery sufficient to put Breed on notice the witness may testify at the trial of this matter. Mr. Sonberg was identified in the course of a discovery deposition of Respondent well before trial as a person having heard statements from Mr. Kelley, CSA's chief executive, regarding the alleged interference by Respondent into the purported investigation of Mr. Otis Coffey and that Mr. Otis Coffey was the prime suspect for the break-ins in 2004. (Tr. 138-142; 149-151; 734-742; R. 248-252; 259-261; 650-657.) Thus, Breed was aware that Mr. Sonberg was a witness as to the republication of the defamatory remarks as it concerned CSA.

Mr. Waxel was an employee of CSA and was identified by a catchall response identifying "other employees" of CSA that might have relevant information concerning the case. (Tr. 151-154; R. 261-264.) While not identified by name in the discovery response, Mr. Waxel testified concerning the slanderous statements repeated by CSA employees concerning the alleged affair between Respondent and Mr. Jolin. (*Id.*; Tr. 847-850; R. 731-734.) Counsel for CSA (who was also Breed's counsel) could speak to Mr. Waxel at any time of their choosing in their own investigation of the case.

Generally, "[t]he admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." *Kenneth B. Jenkins, Respondent, v. Benjamin Scott Few and Few Farms, Inc.*, 391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010) (citing and quoting *Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996)). The same is true for an

expert witness: "[w]here a party fails timely to disclose the identity of an expert witness, the question of whether the witness'[s] testimony may be received in evidence is left largely to the discretion of the trial judge." *Id.* (citing *Tribble v. Hentz*, 285 S.C. 616, 618, 330 S.E.2d 560, 562 (Ct. App. 1985)).

When considering the issue, the South Carolina Supreme Court has held:

> We hold that the exclusion of a witness whose name is not given in answer to an interrogatory calling for it is but one of the discretionary powers committed to a trial judge for the proper conduct of litigation. . . . We further hold that there is no mandatory rule requiring the trial court to exclude a witness whose name is not given, but that the trial court is under a duty, when the situation arises, to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness' name, and the degree of surprise to the other party, including prior knowledge of the name by said party.

Laney v. Hefley, 262 S.C. 54, 59-61 202 S.E.2d 12, 14-15 (1974) (citing and quoting *Wright v. Royse*, 43 Ill. App. 2d 267 (Ill. App. 1963)). Further, the Supreme Court has emphasized that "the fact that the opposing party has independent knowledge of the existence of such witness prior to the trial is a ***major consideration*** . . . ." *Id.* (emphasis added).

In *Laney*, the Court found that "[i]n the present case the defendant had knowledge through the deposition of the mother of the child, taken more than a month before the trial, of the presence of [the challenged witness] in the residence at the time of the accident." *Laney*, 262 S.C. at 60-61, 202 S.E.2d at 15. The Court further found that "[w]hile the defendant was given no information as to what, if anything, she knew about the accident, we do not think the defendant was warranted in assuming that she knew none of the details surrounding the accident, or that she was not possessed of any

information of probative value as to how the accident occurred, even though she did not see it." *Id.*

Continuing from this precedent, the South Carolina Supreme Court adopted the "*Bensch*" test for analyzing whether the witness should be permitted to testify. *Bensch* provides that before excluding a witness as a sanction for violating the continuing duty to disclose information, the trial court should ascertain: (1) the type of witness involved, (2) the content of the evidence, (3) the explanation for the failure to name the witness in answer to the interrogatory, (4) the importance of the witness's testimony, and (5) the degree of surprise to the other party. *Bensch v. Davidson*, 354 S.C. 173, 182, 580 S.E.2d 128, 133 (2003).

In this case the trial court appropriately considered the relevant factors. The trial court considered the type of witnesses involved—Mr. Sonberg and Mr. Waxel as fact witnesses, and Dr. Geiger as an expert. (Tr. 138-171; R. 248-281.). The trial court next considered the expected content of the testimony of each. (*Id.*) The trial court heard the explanation from Respondent's counsel as to why the interrogatory responses were not supplemented with particularity prior to trial even though each witness had been revealed in the course of discovery. (*Id.*) Next, the trial court examined the importance of the testimony with respect to each. (*Id.*) Finally, the trial court found that the fact that the witnesses would be called at trial was not an unfair surprise to Appellants. (*Id.*)

This final factor—unfair surprise—is the focal point of Breed's misgivings about the trial court's ruling. When considering the circumstances regarding these witnesses, Appellants cannot plausibly claim surprise. Mr. Waxel is a CSA employee and Respondent listed "other employees of CSA" in his response to Breed's inquiry about

potential witnesses. (Tr. 152-157; Court Ex. 2; R. 262-267; 1797.) It should be no surprise that an employee of CSA and Breed's co-worker with knowledge of the facts relevant to this case and security at Sea Pines would be a potential witness at trial. Further, Breed's and CSA's counsel at trial were the same, and Breed's counsel had ready access to Mr. Waxel to interview him and talk with him at any time.

Dr. Geiger's treatment of Respondent was testified to at Respondent's deposition which took place well in advance of trial. (Tr. 138-171; R. 248-281.) Dr. Geiger was listed by name and address in Respondent's discovery responses as a treating physician and the responses further noted that treating physicians may testify as expert witnesses at trial. (Court Ex. 2; R. 1797.) Dr. Geiger's records and billing invoices were produced in discovery, which contained all relevant contact information for her office. (*Id.*) Her testimony detailed the treatment of Respondent as reflected by the billing records. (Tr. 935-942; 972-974; R. 799-806; 836-838.)

Mr. Sonberg was identified by name in Respondent's deposition as a person having relevant information about the republication of the defamatory comments. (Tr. 139-152; R. 249-262.) Further, the trial court provided Appellants' counsel an opportunity to talk to him before he testified. (*Id.*) As the Supreme Court noted in *Laney*, "[i]f there was prejudice or surprise it was, at least in part, due to failure of the defendant to inquire more fully into the nature and significance of" the witness. *Laney*, 262 S.C. at 60, 202 S.E.2d at 15 (internal citations omitted). Appellants here failed to investigate further as to each and cannot now claim surprise.[16] Hence, the trial court did

[16] Further, while the documentation appears not to have been admitted at trial, the trial transcript reveals that the Appellants were definitively provided advance notice of who Respondent was calling as a witness at trial via a witness list produced one week prior to

not abuse its discretion in permitting the witnesses to testify at trial, and the judgment should thus be affirmed.

VII. The trial court properly admitted a portion of CSA's public financial statement into evidence based on the stipulation of the parties.

Breed complains about the introduction into evidence of a portion of a financial statement of CSA. (Breed's Initial Br. at p. 39-41.) Breed argues that while there was a stipulation respecting the authenticity of the financial statement, there was no stipulation regarding the admissibility of it. The trial court ruled otherwise. At the post-trial motions hearing, the trial court heard argument by Appellants' counsel respecting the admission of the financial statement.[17] In disposing of the argument, the trial court ruled that "I had it down in my notes that it had been stipulated, and it was coming in. And I believe I would have reserved it if it had—the question is whether or not punitive damages were appropriate in this case." (Post-Trial Hearing Tr. 37; R. 1702.) Appellants did not and have not challenged the trial court's ruling that the Appellants consented by stipulation to the admission of the financial statements.[18]

It is well settled that when a party fails to challenge a ruling, that ruling becomes the law of the case between the parties. Because Appellants failed to challenge the ruling of the trial court, Breed has abandoned the issue concerning whether CSA's financial statement was stipulated for admission into evidence. *See Lindsay v. Lindsay*, 328 S.C.

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trial. (Tr. 138-139; R. 248-249.) Further, Appellants moved to limit the admission of these witnesses, showing that Appellants knew who the witnesses were. (Tr. 138-139; R. 248-249.) Thus, Appellants had notice. Rather than attempt to depose or talk to the identified witnesses, the Appellants chose to attempt to have the court exclude them.

[17] The trial court did not address this issue again in her separate, written post-trial motions order. Her express ruling on the issue was at the hearing. (Post Trial Hearing Tr. 37; R. 1702.)

[18] Neither Appellant designated the post-trial motions transcript containing this ruling for inclusion in the Record.

329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) (appellate court will affirm ruling if offended party does not challenge that ruling; failure to challenge ruling is abandonment of the issue and precludes consideration on appeal because an unchallenged ruling is law of the case). Therefore, the argument contained at pp. 39-41 is defeated by the law of the case doctrine and is not preserved for appellate review. *See S.C. Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 353 S.C. 249, 251 n.1, 578 S.E.2d 8, 9 n.1 (2003) (where a party fails to challenge ruling, it becomes the law of the case).

Moreover, CSA does not even challenge the issue of whether the trial court properly admitted ***its*** financial statement to the jury. (*See* CSA's Initial Br.) CSA's decision not to challenge the admission of ***its*** financial statement evinces counsel for CSA's understanding that the financial statement was stipulated for admission. Appellants stipulated to the admission of the financial statement and Appellants are bound by their stipulation. *See Corley v. Rowe*, 280 S.C. 338, 340, 312 S.E.2d 720, 722 (1984) (noting that stipulations on the admission of evidence are binding and a party making such a stipulation cannot later complain about it). Especially since the Appellants had the same counsel at trial, this Court should not reward Breed by considering his complaint about the CSA financial statement when CSA has abandoned the issue. *See, e.g., Wal-Mart, Inc. v. Stewart*, 990 P.2d 626, 640 (Alaska 1999) (preventing a party from taking opposing positions on the stipulation of evidence in light of a stipulation).

Counsel for Respondent also referred to the financial statement as being "in the record" in his closing argument. (Tr. 1782-1783; R. 1530-1531.) Appellants' counsel

did not object. Breed has thus waived any objection regarding the admission of the CSA financial statement in light of Respondent's counsel informing the jury the evidence was admitted without objection. *See Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (2000) (holding that the failure to object to a statement in closing waives that party's ability to then complain about the issue on appeal).

Finally, with respect to the financial statement, Breed does not challenge the award of punitive damages as unduly liberal, unconstitutional, or contend that the trial court failed to consider the relevant factors in evaluating the punitive damages award. The financial statement was directly relevant to the ability of CSA to pay. *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 586-587, 686 S.E.2d 176, 184-185 (2009) (noting that a court should consider the defendant's ability to pay). The one page of the financial statement admitted into evidence demonstrated a reserve of $6.7 million dollars on CSA's balance sheet and evidenced its ability to pay a judgment, including any award of punitive damages. Thus, the portion of the CSA financial statement was relevant and in no way prejudicial to Breed. Hence, Breed has no ground upon which to challenge the admission of the financial statement and his arguments on the issue should be rejected.

VIII. The trial court properly admitted evidence that Breed's complaint against Respondent had been dismissed by the Commission on Judicial Conduct prior to her filing this action.

In three sentences, Breed contends that the trial court erred in allowing into evidence the fact that his complaint against Respondent was dismissed by the Commission because the letter was highly prejudicial and improperly suggested the statements in Breed's letter were false. (Breed Initial Br. at 48-49.) CSA does not challenge this issue on appeal. There was no error in the admission of the evidence.

First, such conclusory and unsupported arguments are deemed abandoned by our appellate courts. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). Second, this point is not set forth in Breed's Statement of Issues on appeal. Pursuant to Rule 208(b)(1)(B), SCACR, this point should thus not be considered. *See Herron*, 395 S.C. at 466, 719 S.E.2d at 642-43.

Third, the fact that the complaint was dismissed was relevant to the issues of actual malice and punitive damages. The testimony concerning the dismissal of the complaint to the Commission was elicited from Breed. (Pl. Ex. 7; Tr. 1179-1182; R. 1724; 1036-1039.) The fact that Breed's complaint was dismissed was not offered to prove the statements in Breed's letter to the Commission were false. (Pl. Ex. 7; Tr. 1179-1182; R. 1724; 1036-1039.) Breed was examined about whether he ever informed the individuals to whom he published the letter that the Commission dismissed the complaint. (Pl. Ex. 7; Tr. 1179-1182; 999-1000; R. 1724; 1036-1039; 862-863.) Breed testified that he did not inform Mr. DeLoach or Mr. Kelley that the complaint had been dismissed. (*Id.*) Such evidence was relevant to demonstrate Breed's continued reckless disregard for the truth and consequences of his statements.

Moreover, the evidence was directly probative regarding the issue of punitive damages. While Breed does not challenge the verdict as unduly liberal, unconstitutional, or contend that the trial court failed to properly review the appropriate factors in evaluating the punitive damages award, the court must look at the actions by the defendant aimed at concealing his wrongdoing and the reprehensibility of his conduct.

Mitchell v. Fortis Ins. Co., 385 S.C. at 586-587, 686 S.E.2d at 184-185 (detailing the relevant factors for a court's review of an award of punitive damages including concealment of the conduct). Breed's decision not to inform those to whom he published the defamatory statements in the letter about the Commission's dismissal of his complaint is probative of concealment. Breed's decision to withhold such critical information from those to whom he published the harmful statements is highly reprehensible and warrants punishment.[19] Accordingly, the trial court did not err in admitting the evidence concerning the dismissal of Breed's complaint. The evidence was relevant for the reasons detailed above.

IX. The trial court correctly determined that evidence concerning Breed's publication of his letter to others was not based upon hearsay.

Breed argues, again in conclusory[20] fashion, that testimony concerning the republication of Breed's letter by Mr. DeLoach to Mr. Coltrane and by Breed to others

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[19] Breed also entered into an indemnification agreement with CSA to indemnify him for any liability stemming from his publication of matters concerning Respondent. Evidence of this agreement was also relevant to the degree of the reprehensibility of Breed's actions. See *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 140-141, 584 S.E.2d 120, 128-129 (Ct. App. 2003) (recognizing that the attempt by a party to shield liability by execution of an indemnification agreement is relevant to the reprehensibility of the conduct of the bad actor when assessing punitive damages). Breed argues error in the introduction of the indemnification agreement on the basis that it was used to prove liability. This argument should be rejected. The indemnification agreement was introduced as character evidence (detailed in Section V herein) and with respect to reprehensibility. Further, CSA does not challenge the admission of the indemnification agreement on appeal.

[20] The arguments on this point in Breed's brief are not preserved as detailed in Section II herein. Further, the argument is conclusory and offers no support for Breed's contention. It is well-established that such conclusory and unsupported arguments are deemed abandoned by our appellate courts. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory). For these reasons, this Court should not consider the issue. CSA does not raise this issue.

was based upon inadmissible hearsay. (Breed Initial Br. at 52 n. 56.) This argument should be rejected.

First, Respondent testified about the republication of the letter. (Tr. 208-218; 228-287; 360-366; R. 297-307; 317-376; 406-412.) That is not hearsay. She had first hand knowledge of the republication to her and the testimony was offered to demonstrate the continued publication of Breed's false statements—not whether the statements were false.

The important distinction is whether the statements are offered for the truth of the matter asserted or for another purpose. *See Goodwin v. Kennedy*, 347 S.C. 30, 47-48, 552 S.E.2d 319, 328 (Ct. App. 2001) (holding testimony of witness who did not hear defamatory statement was not hearsay because it did not go to the truth of the matter asserted); *Momah v. Bharti*, 144 Wash. App. 731, 749-50, 182 P.3d 455, 466 (Wash. Ct. App. 2008) ("Since the articles were offered for the purpose of showing republication and not to prove the truth of the contents, the print-outs of the *Journal* articles are not excludable as hearsay."). The trial court correctly allowed the testimony concerning republication regarding the letter by Mr. DeLoach and to Mr. Coltrane—among others—to show the widespread dissemination of the false statements and resultant reputational damage.

X. The trial court properly refused to admit evidence of a complaint filed against Respondent after the commencement of this action.

After Respondent filed this suit and after the Commission dismissed Breed's complaint against her, another citizen, not connected to the evidence in this matter, filed a complaint against the Respondent with the Commission. (Tr. 110-117; 120-137; 447-451; R. 220-227; 230-247; 445-449.) The trial court ruled that the complaint, post-dating

the instant action, was not relevant and if it were, the prejudice to Respondent outweighed any probative value. (Tr. 110-117; 120-137; 447-451; R. 220-227; 230-247; 445-449.) In fact, the trial court's inquiry into the contents of the post-suit citizen complaint revealed that the individual was actually complaining that Respondent had filed a lawsuit based on Breed and CSA's defamatory acts. (*Id.*) Further, CSA does not challenge this issue on appeal. There was no error in the exclusion of the evidence.

Relevant evidence is evidence that tends to make a material fact more or less probable and is generally admissible. Rule 401, SCRE. However, "[t]he dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." *Watson ex rel. Watson v. Chapman,* 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). Evidence that is relevant may still be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . ." SCRE 403. This Court reviews a trial court's decision regarding Rule 403 "pursuant to the abuse of discretion standard" and is "obligated to give great deference to the trial court's judgment." *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Therefore, "[a] trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 269, 644 S.E.2d 755, 766 (Ct. App. 2007).

The trial court determined that the subsequent complaint about Respondent's filing of this action was not relevant and, even if so, was unduly prejudicial. There was no proof that the contents of the subsequent complaint to the Commission had been

published to third parties. The complaint could have confused the jury and led them to think Respondent's lawsuit was somehow improper. Thus, the trial court correctly excluded this evidence.

XI. The trial court properly instructed the jury on spoliation in light of the evidence adduced at trial that Breed and CSA possessed technology to preserve communications and records, but were unable to produce those communications and records in this action.

At trial it was established that CSA and Breed had technology that archived emails, recorded phone conversations, and that they also maintained cameras in security patrol cars and at security gates on the Sea Pines property. (Tr. 1093-1112; 1229-1233; 1237-1243; 1204-1222; 1189-1204; 1585-1586 R. 950-969; 1086-1090; 1094-1100; 1061-1079; 1046-1222; 1361-1362.) Breed also admitted that he had previously tape recorded a conversation with at least one judicial officer in the past. (Tr. 1204-1222; R. 1061-1079.) Respondent requested such materials in discovery but no recordings of phone conversations were produced and no videos from security cameras were produced. (Tr. 1093-1112; 1189-1204; 1229-1233; 1237-1243; 1204-1222; R. 950-969; 1046-1061; 1086-1090; 1094-1100; 1061-1079.) Further, it was established that Breed had not produced email records though some of his email communications were produced by other persons or entities and these emails were admitted into evidence at trial. (Tr. 1189-1204; 1229-1233; 1237-1243; R. 1046-1061; 1086-1090; 1094-1100.) Jolin also testified that when he left employment with CSA, he destroyed all his tapes. (Tr. 574; R. 536.) Due to Breed and CSA's failure to produce these materials or provide an explanation as to what happened to them, Respondent requested that the trial court charge the jury on spoliation of evidence and the inference the jury may draw from the non-production of such items.

A trial court is required to charge the current and correct law. *Burroughs v. Worsham*, 352 S.C. 382, 392, 574 S.E.2d 215, 220 (Ct. App. 2002). It is error for the trial court to fail to give a spoliation charge when missing evidence would assist a plaintiff in proving his claim. *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006) (reversing the decision of the trial court to refuse to give a spoliation charge). "[W]hen evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." *Kershaw County Board of Education v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990).

First, it should be noted that CSA does not challenge the trial court's spoliation charge on appeal. This is no doubt because the issue is without merit.

Second, this Court's recent decision in *Stokes* demonstrates that the trial court correctly provided this instruction to the jury. In *Stokes*, the plaintiff contended that two pieces of medical evidence were missing from the plaintiff's medical record: results from a blood test and the floor nurse's chart detailing plaintiff's vital signs on the evening of his death. Rebutting that evidence, the defendant-hospital suggested the blood drawn from the plaintiff on the night of his death ***may never*** have been sent to the laboratory for testing. *Id.* at 521, 629 S.E.2d at 679-80 (emphasis added). As for the missing chart, the defendant-hospital speculated it may have been lost during the code. *Id.* at 521, 629 S.E.2d at 680 (emphasis added). In reversing the trial court's refusal to charge spoliation, this Court held that "[w]hile the jury may well have accepted the [defendant's] explanations, it was also in its province to draw a negative inference from the [defendant's] failure to produce" the evidence. *Id.*

In this case, Respondent established that Breed recorded at least one conversation with another judge and that CSA did record calls at various points in time. (Tr. 1204-1222; R. 1061-1079.) Those admissions, coupled with the absence of production of any recordings in this case or a definitive explanation as to what might have happened to any such recordings, provided sufficient grounds for the trial court to charge the jury on spoliation.

Contrary to Breed's argument, Respondent did not have to prove that the missing evidence existed. The jury may well have accepted Breed and CSA's explanation about the missing tape[s] and emails, however, the jury was properly charged that it could draw a negative inference from the failure to produce the tape[s] and emails. The trial court's charge thus does not give rise to a reversible error.

Conclusion

For the above reasons, the judgment and the rulings of the trial court should be affirmed.

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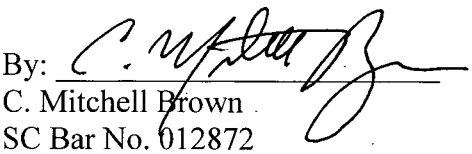
By: 
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February 11th, 2014
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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Maureen T. Coffey, ... Respondent,

v.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Maureen T. Coffey's Final Respondent's Brief in Response to George F. Breed Jr.'s Final Appellant's Brief

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