THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

C. Victor Pyle, Jr., Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Case No.: 2005-CP-23-06048

Sherrie Mann McBride .....Appellant.

v.

School District of Greenville County.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The School District hired Appellant Sherrie Mann McBride[1] ("McBride") to work as a special education teacher at Berea High School. (R. p. 153, lines 5-23). During part of the 2001-2002 school years, McBride served as a teacher for a home-bound student named John Doe[2] ("Doe"). (Id.; R. p. 22, line 2-p.24, line 5). Doe returned to Berea High School the following school year and would stop by McBride's room because of the bond they formed when she was his home-bound teacher. (Id.) Doe was not a special education student; however, he increasingly went to McBride's classroom due to personal problems during school hours in the spring semester of 2003. (R. p. 25, line 17-p. 26, line 13).

A. Doe's Arrest and Statement

On September 24, 2003, McBride learned her car was missing when she asked two students to carry some heavy items to her car and they could not find it. (R. p. 246, line 15-p.247, line 9). She went to the parking lot and her car was not there. (R. p. 97, lines 10-13). She originally thought that her estranged husband may have taken the car. (R. p. 246, line 15-p.247, line 9).

While she was considering what may have happened to the car, Master Deputy Dan Oslager ("Oslager"), an employee of the Greenville County Sherriff's Office ("Sherriff's Office"), arrived in the parking lot. (R. p. 97, line 12-p. 98, line 21; R. p. 109, lines 2-12). Oslager had previously been assigned by Sheriff Johnny Brown as a

[1] Prior to the first trial, McBride resumed the use of her maiden name, Mann. To avoid confusion and because court documents were not amended to reflect the name change, she is referred to herein as McBride.

[2] In its prior opinion, the South Carolina Court of Appeals referred to the former student as "John Doe" to protect his identity. McBride v. School District of Greenville County, 389 S.C. 546, 553, 698 S.E. 2d 845, 848 n. 1 (Ct.App.2010).

school resource officer at Berea High School. Id. When Oslager questioned McBride about what happened to her car, she initially told him that her husband might have taken it. (R. p. 98 lines 10-25; R. p. 247, lines 10-20). However, she later doubted that her husband had taken the car. Thus, she wanted to report it stolen. Id. Several minutes later, McBride and Olsager saw Doe arrive in the parking lot driving McBride's car. (Id.; R. p. 99, lines 16-24). It is undisputed that Doe took McBride's car without her permission. (R. p. 247, lines 16-20). Oslager arrested Doe in the parking lot and placed him in his patrol car to take him to the Greenville County Detention Center. (R. p. 100, lines 1-3). The principal of Berea High School, Bill Roach ("Roach"), became aware of the incident and spoke briefly with Doe before he was taken to the detention center. (R. p. 173, lines 1-7). Doe's mother, who was on the other side of the school to pick him up, came around to the other side and saw Doe in the patrol car. (R. p. 57, lines 16-24). Doe's mother expressed anger at McBride because she believed McBride had permitted Doe to use her car and she had previously told McBride to stay away from her son. (Id.). Doe's mother spoke briefly with Doe before he was taken to the detention center. (R. p. 57 line 16-p. 58, line 11). Thereafter, Doe's mother spoke with principal Roach regarding the incident. (R. p. 173, lines 1-7).

Oslager took Doe to the detention center. (R. p. 58, line 16-p. 59, line 1). During the ride, he asked Doe why his mother was upset at McBride. (Id.). Doe told Oslager that his mother didn't like the fact that he had been in her room for significant periods of time the prior semester. (Id.). Oslager told Doe that he wanted to get a statement from him "about how [he] had come to get [McBride's] car" and Doe mentioned that he had used it before. (R. p. 58, lines 18-25). At the detention center, Doe started to tell Oslager

things. As a result, Oslager gave Doe his Miranda warnings. (R. p. 101, line 25-p. 102, line 11). He "explained to him it was in his best interest at [that] point in time not to talk to [him] 'till his parents got there." (R. Id.). When Doe's mother and father arrived, Oslager asked them to sign Miranda forms and he took a statement from Doe. (R. p. 102, lines 8-11; Defendant's Exhibits 1 & 2). Principal Roach was not present during the interview, but Oslager called him on the telephone two or three times. (R. p. 102, line12-p. 103, line 3; R. p. 170, lines 4-25, R. p. 173, lines 8-11). Doe was not a party to these telephone conversations, but Oslager and Roach both testified that Oslager called to verify information that Doe provided to him. (Id.) During the interview, Doe told Oslager that McBride had allowed him to use her car several times in the past. (R. p. 58, line 23-p. 59, line 1); (Defendant's Exhibits 2 & 3). At the time Doe took McBride's car, he thought that she had seen him take her keys and believed he had permission to use it because she had allowed him to use it in the past. (Id.; R. p. 55, lines 6-17; R. p. 66, lines 8-16). In addition, Doe informed Oslager that McBride had given him her login passwords for her School District website account, email account, and the Novel computer server. (R. p. 70, line 17-p. 72, line 8). He then told Oslager that McBride knew about and had even assisted him in running away from home the prior weekend. (R. p. 69, line 1-p. 70, line 14; Defendant's Exhibit 2). Doe said that she allowed him to store clothes in her classroom. (Id.) He also said that she drove him to the home of another student and spoke with that student's mother about helping him run away. (Id.) Finally, he detailed for Oslager how McBride wrote notes for him to miss his assigned classes. (Id.; R. p. 69, lines 11-15; R. p. 71, line 24-p. 72, line 8).

After this interview, Doe initialed and signed a typewritten statement. (Defendant's Exhibits 1 & 2). The statement indicated that Doe told McBride he was going to legal aid and took her keys off her desk. (Id.) Before leaving, he told McBride he would be back "in a little while." (Id.) However, Doe did not go to legal aid and was arrested by Oslager upon his return to Berea High School. (Id.; R. p. 55, line 9-p. 56, line 5). Doe stated that he told McBride of his plans to run away from home the prior weekend, and she knew that he was storing clothes in her filing cabinet for that purpose. (Defendant's Exhibit 2). During the afternoon of Friday, September 19, 2003, Doe stated that McBride allowed him to use her car to run some errands. (Id.) McBride then drove Doe to another student's house and went inside to discuss Doe's plans to run away: "She told [the student's] mom that I was running away and that I needed to stay there." (Id.) After spending the night at the student's home, Doe went to McBride's house the next morning, where he was picked up by Sheriff's deputies. (Id.) The statement also detailed how McBride gave Doe access to her School District computer passwords and allowed him to work on Individualized Education Plans ("IEPs") pertaining to her students. (Id.) Finally, Doe stated that McBride wrote numerous passes for him to get out of his assigned classes. (Id.)

The statement was witnessed by Doe's mother and Oslager. (Defendant's Exhibit 2; R. p. 64, line 23-p. 65, line 25). Doe admitted that he testified consistently with his statements to Oslager when he appeared before the School District's Board of Trustees at McBride's termination appeal hearing. (R. p. 72, line 10-p. 76, line 24; Defendant's Exhibits 2, 3, & 4). However, Doe testified at trial that the statements given to Oslager

were not true. (R. p. 75, lines 14-17). Further, he admitted that he provided perjured testimony:

> Q. Before we get in to the statement here before the school board, you testified at that hearing did you not?
>
> A. Yes, I did.
>
> Q. And you were placed under oath to tell the truth, were you not?
>
> A. Yes, I was.
>
> Q. Did you tell the truth at the hearing?
>
> A. No, I did not.

(R. p. 75, line 19-p.76, line 2). He later testified that there were times that he lied when he was no longer a juvenile.

> Q. So you lied at the school board when you were an adult and you lied to the police when you were a minor, correct?
>
> A. Correct.

(R. p. 81, lines 1-3). Doe never told Oslager or anyone at the Sheriff's Office that his two statements and testimony before the school board were false because he was afraid of being arrested. (R. p. 79, lines 8-25). It was not until after McBride had gotten arrested and lost her job that he "realized the implications of what I had done." (R. p. 81, line 5). Further, it was not until the first trial in this case that Doe admitted that he had lied. (R. p. 79, lines 24-25).

Oslager was employed by the Sheriff's Office as a resource officer assigned to Berea High School. (R. p. 109, lines 2-12). Resource officers are not employees of the School District but rather are part of the Sheriff's Office's selective enforcement division. (R. p. 262, line 1-p. 263 line 10). The school resource office and the school investigation

unit are only some of the units within the division. (Id.). Oslager reported to Sergeant Shea Smith, not to the principal of Berea High School. (Id.).

B. The Investigation of McBride by the Sheriff's Office

As a result of Doe's statement, Oslager contacted Sergeant Smith and informed him regarding the incident with the car and Doe's statement. (R. p. 111, lines 15-22). Sergeant Smith was the supervisor of the school investigations unit. (R. p. 262, line 1-p. 263 line 10). Oslager referred the investigation to Sergeant Smith because the Sheriff's Office has a policy that resource officers do not investigate teachers at the school to which they are assigned. (R. p. 111, lines 15-22). Sergeant Smith testified: "We do not consult with the school district when we're investigating a criminal offense." (R. p. 266, lines 11-18). Further, he testified the school district had no bearing on the decision to bring charges against McBride. The Solicitor and Sheriff's Office made the "totally independent decision" to bring charges. (R. p. 266, lines 7-22).

Sergeant Smith assigned Deputy Leslie Lambert to be the lead investigator. (R. p. 125, line 24-p. 126, line 12; R. p. 131, lines 5-11). Lambert met Oslager at Berea High School the next day to continue the investigation. (R. p. 126, line 10-p. 127, line 12). At that point, the focus of the investigation was McBride due to the statement given by Doe. (R. p. 131, lines 5-17). The investigators obtained statements from several witnesses, including Carolyn Kite, Kathleen Hills, Crystal Hunt, Linda Bimkey, Kim Fanning, and another student. (R. p. 1331, line 13-p. 133, line 1; Defendants Exhibits 5, 6, & 8). At that point in time, Lambert had already received the two statements given by Doe and she had also obtained a statement from his parents. (R. p. 133, line 3-p. 134, line 6; Defendant's Exhibits 2, 3 & 10). Sergeant Smith and Lambert also obtained a statement

from McBride. (R. p. 248, line 11-p. 250, line 4; Defendant's Exhibit 15. In her statement, McBride admitted to writing three to five notes to excuse Doe from Mrs. Kite's class and two notes to excuse him from Mrs. Hill's class during the 2003-04 school years. (Defendant's Exhibit 15). She also admitted to driving Doe to another student's house the Friday before her arrest, where she stated, "[Doe] talked about trying to go live with his aunt. [His friend's] mom and I talked about Doe. . . . I told [her] that [Doe] says stuff like that all the time." (Id.) At trial, McBride acknowledged that Doe "felt very comfortable going to [her] desk and getting [her] car keys." (R. p. 250, lines 11-22). Further he was allowed to use a filing cabinet to store clothes. (Id.). Lastly, she admitted that Doe constantly talked to her about running away. (R. p. 251, lines 4-10).

Doe's second statement was handwritten and indicated that he went to McBride's home the previous Saturday when he had attempted to run away. It also stated that she had kept him out past his mother's curfew several weeks before. (Defendant's Exhibit 3.) Doe admitted that he signed the statement. (R. p. 72, line 10-p. 74, line 18).

Carolyn Kite and Kathleen Hills were two of Doe's teachers at Berea High School. Their statements indicated that Doe had missed their classes numerous times due to notes from McBride. (Defendant's Exhibits 5 & 6). Crystal Hunt and Kathleen Hills were guidance counselors at Berea High School whose statements indicated that Doe had missed his assigned classes because he was in McBride's classroom. (Id.; Defendant's Exhibit 9).

Deputy Lambert prepared an Incident Report summarizing the information learned during the investigation. (R. p. 131, line18-p.133, line 23; Defendant's Exhibit 9). Sergeant Smith presented the information the Sherriff's Office had gathered during

its investigation to Deputy Solicitor Betty Strom and Assistant Solicitor Howard Steinberg. (R. p. 135, line2-p. 137, line 7). They both advised Sergeant Smith that the appropriate charges against McBride would be enticing an enrolled child from attendance in school and contributing to the delinquency of a minor. (Id.) Mr. Steinberg testified that he recommended the charges because he believed probable cause existed to bring them. (R. p. 276, line 13-p. 279, line 113). He testified that Magistrate Judge Dean Ford found that probable cause existed by signing the arrest warrants. (R. p. 138, line 6-p. 139, line 1; R. p. 277, lines 14-22; Defendant's Exhibits 11, 12 & 13).

As a result of the investigation, Oslager arrested McBride. (R. p. 106, line 18-p. 107, line 8). She was charged with enticing an enrolled child from school in violation of S.C.Code Ann. §16-17-510 (1976), and contributing to the delinquency of a minor in violation of S.C.Code Ann. §16-17-490 (1976). (Defendant's Exhibits 11 & 12). Former Assistant Solicitor John Rowell testified that he presented the charge against McBride for contributing to the delinquency of a minor to the Greenville County Grand Jury in November of 2003. (R. p. 283, line 16-p.286, line 20). The Grand Jury true billed the indictment. (R. p. 138, line 6-p. 139, line 1; Defendant's Exhibit 13). Later, Mr. Rowell decided to dismiss the charges against McBride. (R. p. 286, line 21-p. 289, line 1). He testified that the School District did not have any input in the decision to dismiss the charges. (Id.).

C. McBride's Termination by the School District

When Oslager arrested Doe on September 25, 2003, Principal Roach undertook his own investigation into the incident. (R. p. 192, line 13-p. 194, line 4). After performing his own investigation and receiving the information from the Sheriff's Office,

Principal Roach informed Superintendent William Harner about the investigation. (R. p. 173, line 12-p. 176, line 9; Plaintiff's Exhibit 1). Principal Roach recommended that Superintendent Harner terminate McBride, and the Superintendent suspended her with a recommendation that she be terminated. (Id.) The Board of Trustees of the School District upheld her termination at a hearing on November 7, 2005. (Defendant's Exhibit 4).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE SCHOOL DISTRICT'S MOTION TO AMEND ITS ANSWER

McBride argues that the Circuit Court erred by granting the School District's motion to amend its answer to assert two additional affirmative defenses after the remand of this case for a new trial on her claims for defamation and abuse of process. Appellant's Brief, p. 22. On March 23, 2011, the School District moved the Circuit Court for leave to file an amended answer, which included two additional affirmative defenses: (1) immunity under S.C.Code Ann. §15-78-60(3) (1976), which preserves immunity for any governmental entity's "lawful implementation of any process;" and (2) the defense of "qualified privilege" in response to McBride's claim for defamation. (Motion). The Circuit Court granted the motion on June 1, 2011. (R. hearing June 1, 2011, p. 24, line 5-p. 25, line 1). Trial took place on June 7 and 8, 2011.

McBride is correct that affirmative defenses must be pled. Rule (8)(c), SCRCP. Here, the defenses of qualified privilege and immunity under S.C.Code Ann. §15-78-60(3) (1976) were pled by the School District prior to the second trial in this matter and

thus, the School District complied with Rule 8(c), SCRCP, and did not waive these defenses.

McBride essentially argues that a litigant may never amend its answer after a case goes to trial or after an appellate court remands the case for a new trial. This position is not supported by the South Carolina Rules of Civil Procedure or relevant case law. Rule 15(a), SCRCP, specifically contemplates that a party may seek permission to amend its original pleading and that such "leave shall be freely given when justice so requires." "Courts have wide latitude in amending pleadings and, while this power should not be exercised indiscriminately or to surprise or prejudice an opposing party, the matter of allowing amendments is left to the sound discretion of the trial judge." Hale v. Finn, 388 S.C. 79, 87-88, 694 S.E.2d 51, 54 (Ct.App.2010)(citing Mylin v. Allen-White Pontiac, 281 S.C. 174, 180, 314 S.E.2d 354, 357 (Ct.App.1984)). It is well established that a party may seek leave to amend its pleadings to conform to the evidence even after a judgment. Rule 15(b), SCRCP.

In its prior opinion, the Court of Appeals noted that the affirmative defense of qualified privilege was not pled by the School District in its answer and, therefore, was not a basis for affirming the directed verdict on the plaintiff's claim for defamation. McBride v. School District of Greenville County, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct.App. 2010). Significantly, the School District did not argue or cite any authority concerning the defense of qualified privilege in its prior appellate brief. Further, the discussion of the defense of qualified privilege was effectively dicta. See Weil v. Weil, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct.App.1989)(holding the doctrine of the law of the case is not applicable to a statement by the court which is dicta and does not

constitute a binding adjudication). In short, the Court of Appeals concluded that a factual dispute existed as to the plaintiff's claim for defamation and, therefore, reversed the directed verdict on this cause of action. The Court of Appeals did not render an adjudication concerning the defense of qualified privilege because it was not argued on appeal. Nor did the Court of Appeals hold that the School District was barred from seeking leave to amend its answer after the case was remanded for a new trial on McBride's causes of action for defamation and abuse of process.

McBride has not cited any authority holding that a defendant is prohibited from amending its answer following the remand of a cause of action for a new trial. Although McBride cites Atlantic Coast Builders and Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), this case simply stands for the proposition that where the Circuit Court's decision is based on more than one ground, both of which could support its decision, an appellant must appeal both grounds. Similarly in South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk, 353 S.C. 249, 578 S.E.2d 8 (2003), the South Carolina Supreme Court held that where the Court of Appeals found concurrent insurance coverage between two carriers and, where this factual finding was not appealed by a writ of certiorari, that finding became the law of the case. In short, neither Atlantic Coast Builders nor South Carolina Farm Bureau discussed or addressed a defendant's ability to amend its answer on remand. Here, the Court of Appeals' decision did not rule that the plaintiff was actually defamed, or that the alleged defamatory statement was, or was not, qualifiedly privileged. Rather, the Court of Appeals simply stated that the defense of qualified privilege was not properly before it at that time. Accordingly, the doctrine of law of the case did not bar the School District from filing an

amended answer either as to qualified privilege or immunity under S.C.Code Ann. § 15-78-60(3) (1976).

The case of Hall v. Woodward, 30 S.C. 564, 9 S.E. 684 (1889) is directly analogous to the instant case. Hall, as the assignee of his father, sued Woodward seeking payment on a note. Id. At 684. Woodward filed an answer and defended on the ground that the note had been paid. Id. Woodward did not raise any issue concerning execution of the note. Id. At the first trial, the Circuit Court rendered a verdict for Woodward on the defense that the note was presumed paid. Id. Hall appealed and the case was remanded for a new trial. Id. On remand, Woodward moved the Circuit Court for leave to file an amended answer including defenses based on the lack of execution of the note and co-suretyship. Id. The Circuit Court granted the motion. Thereafter, the case was heard at a second bench trial and a judgment was again entered in favor of Woodward. Id.

On appeal, Hall alleged that the Circuit Court erred by allowing Woodward to file an amended answer with new defenses concerning the lack of execution of the note and co-suretyship, since these defenses were not asserted in the answer filed before the first trial. The South Carolina Supreme Court disagreed and held that the Circuit Court properly allowed the amended answer. At that time,

> Section 194 of the Code [read] as follows: 'The court may, before or after judgment, in furtherance of justice, and on such terms as maybe proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved.

Hall v. Woodward, 9 S.E. at 685. In interpreting this section, the South Carolina Supreme Court considered and rejected arguments from Hall that Woodward was prohibited from filing an amended answer on remand. The court stated:

> It is very obvious that the power of amendment conferred by this section is very broad, though not entirely unlimited; and the appellant, by this exception, contends that one of these limitations is that 'the claim or defense' shall not be substantially changed by an amendment. It seems to us, however, that this limitation applies only to cases where an amendment is applied for during or after the trial. This is shown by the language used in the latter part of the section, where the limitation is found, 'by conforming the pleading or proceeding to the facts proved,' showing clearly that it is confined to applications for amendment during or after the trial, for then only could it be ascertained what facts were proved to which the pleading can be made to conform. The reason for the distinction is manifest, for, where a party has come prepared to meet a certain claim or defense, it would be clearly unjust to permit such claim or defense to be changed substantially in the midst of the trial or after it was concluded, though there would be no injustice in permitting an amendment which made no substantial change in the claim or defense, but simply supplied some formal matter, which did not go to the merits of the issue which has been or is being tried. But this would not apply to an amendment made before trial, for there the amendment can operate no surprise, as the other party, if he moves for it, can always obtain time to answer such an amendment.

Hall v. Woodward, 9 S.E. at 685 (underline added). See also Wesley-Burke v. Wesley-Burke, 288 S.C. 28, 30, 339 S.E.2d 512, 513 (1986) (allowing husband to amend answer in divorce action on remand); Austin v. Conway Hosp., Inc., 292 S.C. 334, 338, 356 S.E.2d 153, 155 (Ct.App.1987)(favorably citing Emich Motors Corp. v. General Motors Corp., 229 F.2d 714 (7th Cir.1956) (recognizing that "waiver of statute of limitations by failure to plead it prior to first trial was not final and trial court had discretion to permit the defense on subsequent trial after remand by the reviewing court")).

Courts from other jurisdictions are also in accord with the holding in Hall. See Marks v. Macchiarola, 221 A.D.2d 217, 218 (N.Y.A.D. 1995)(reversing lower court's

denial of defendant's motion to amend answer on remand and stating: "When we spoke of waiver we meant under the particular answer at issue and did not imply, as the IAS court believed, that defendant was forever foreclosed from amending his answer"); Govant v. Houston Community College System, 2004 WL 613021 at 1-2 (Texas App. 14th Dist.)(rejecting plaintiff's argument that defendant waived all affirmative defenses not pleaded by the time of the first appeal under the doctrines of res judicata and collateral estoppel); Taylor v. Meridai Huron Hospital, 2002 WL 1453813 at 2-3 (Ohio App. 8 Dist.)(affirming lower court's decision on remand to allow amended answer asserting statute of limitations defense and subsequent grant of defendant's motion for summary judgment).

Here, McBride had ample notice that the defense of qualified privilege might be asserted at a trial following the remand of this case. First, the Court of Appeals discussed the defense of qualified privilege in its decision but noted it was not properly before it at that time. Second, the School District filed a motion to amend its answer months before trial and specifically identified the defenses of qualified privilege and immunity under S.C.Code Ann. §15-78-60(3) (1976). Attached to the motion was a copy of the School District's proposed amended answer setting forth these defenses. Accordingly, McBride cannot reasonably maintain that she was surprised by, or did not have any opportunity to respond to, these defenses prior to trial. There is no evidence that McBride sought to conduct additional discovery, requested a continuance, or otherwise indicated to the trial court that she would be prejudiced by the amended answer. (R. Hearing June 1, 2011, p. 25). In fact, McBride explicitly stated that she did not want a continuance. Id. See also, Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 716

(Ct.App.2005)(recognizing the prejudice SCRCP 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it and holding Circuit Court erred by denying defendant leave to amend its answer and assert the monetary statutory cap under the South Carolina Tort Claims Act as an affirmative defense). Accordingly, the Circuit Court did not abuse its discretion by granting the School District leave to file an amended answer.

II. THE CIRCUIT COURT CORRECTLY GRANTED A DIRECTED VERDICT FOR THE SCHOOL DISTRICT.

A. The School District is Immune from Liability under the Tort Claims Act

The Circuit Court correctly granted a directed verdict for the School District on McBride's causes of action for abuse of process and defamation. See Fairchild v. S.C. Dep't of Transp., 385 S.C. 344, 353, 683 S.E.2d 818, 823 (Ct.App.2009)("When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict").

The School District moved the Circuit Court for a directed verdict on McBride's claim for abuse of process on four primary grounds: (1) immunity under S.C.Code Ann. § 15-78-60(3) (1976); (2); immunity under S.C.Code Ann. §15-78-60(23) (1976); (3) there was no evidence the School District instituted any process; and (4) there was no evidence of an ulterior purpose or willful act in the use of the process not proper in the regular conduct of the proceeding. (R. p. 297, line 1-p.298, line 14; R. p. 301, lines 4-9). In granting the School District's motion, the Circuit Court recognized that "with respect to abuse of process . . . there's no liability where a defendant has done nothing more than

carry out the the process to its authorized conclusion, even though it's done with bad intentions." (R. p. 300, line 14-p. 301, line 9).

Pursuant to the Tort Claims Act, a governmental entity is liable for torts in the same manner and to the same extent as a private individual, subject to certain exemptions and limitations from liability and damages contained in the Act. S.C.Code Ann. §15-78-40 (1976). In relevant part, S.C.Code Ann. §15-78-60 (1976) provides that a governmental entity is not liable for a loss resulting from:

> (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;
>
> . . .
>
> (23) institution or prosecution of any judicial or administrative proceeding.

As discussed below, the School District contends that it did not institute any process or judicial proceeding against McBride; to wit, the investigation or subsequent criminal charges brought against McBride. Rather, criminal charges were brought against McBride by the Solicitor based on information obtained by the Sheriff's Office. However, to the extent that School District's employees cooperated with the investigation conducted by the Sheriff's Office, the School District is immune from liability because the process implemented against McBride was lawful.

It is undisputed that the Sherriff's Office had probable cause to arrest McBride. As the Court of Appeals recognized, "the grand jury's true bill of the indictment against her for contributing to the delinquency of a minor is prima facie evidence of probable cause as to that charge. Further, the information in several witness statements supports a finding that the sheriff's department had

probable cause to pursue both the charge for contributing to the delinquency of a minor and the charge for enticing an enrolled child from attendance in school." McBride, 698 S.E.2d at 567. McBride did not appeal this finding through a writ of certiorari and thus it is now the law of the case. Bone v. U.S. Food Service, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."). Accordingly, it cannot be disputed that the process asserted against McBride was lawful. The lawful nature of the process distinguishes this case from other cases where immunity was denied pursuant to S.C.Code Ann. §15-78-60(3) (1976). See Gist v. Berkeley County Sheriff's Dept., 336 S.C. 611, 618, 521 S.E.2d 163, 167 (Ct.App.1999) (finding Sherriff's Office not entitled to summary judgment pursuant to S.C.Code Ann. § 15-78-60(3) because arrest warrant allegedly was not supported by probable cause); Wortman v. Spartanburg, 310 S.C. 1, 3-4, 425 S.E.2d 18, 20 (1992) (reversing summary judgment in favor of City based on S.C.Code Ann. §15-78-60(3) (1976) because plaintiff was arrested prior to issuance of arrest warrant). Accordingly, even if there was an implementation of process or the institution or continuation of judicial proceedings by the School District, which it strongly denies, the implementation of such process or judicial proceedings was lawful. Therefore, the School District is immune from liability. See e.g., Patterson v. City of Columbia, 2003 WL 23901761 (D.S.C. 2003)(holding City of Columbia not liable for trespass or conversion of a weapon where plaintiff called 911, a search warrant was issued, and therefore entry into the home was authorized by law).

B. The School District Did Not Institute Process Against McBride or Commit a Willful Act Not Proper in the Regular Conduct of the Proceeding.

To establish a claim for abuse of process a plaintiff must show "'first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding.'" Huggins v. Winn-Dixie Greenville, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) (quoting Prosser, Handbook of the Law of Torts, 2d ed., § 100, p. 668). "Some definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process is required." Hainer v. American Medical Intern., Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). "There is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Id. (citing Rycroft v. Gaddy, 281 S.C. 119, 314 S.E.2d 39 (Ct.App.1984)).

In Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 73, 567 S.E.2d 251, 255 (Ct.App.2002), the court explained that to establish an abuse of process claim a plaintiff must show the primary purpose of the process was to obtain a collateral objective:

> The distinction between the two requirements is evident in the language of the Restatement of Torts: "One who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (Second) of Torts § 682 (1977) (emphasis added). As noted in the Restatement comment, "[t]he significance of ['primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended, but there is an incidental motive of spite or an ulterior purpose of benefit to the defendant." Restatement (Second) of Torts § 682 cmt. b. at 475 (1977). Accordingly, liability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting. See id. ... It therefore follows that when a claim for abuse of process is predicated on an alleged act "aimed at an object not legitimate in the use of the process,"

> the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim.

(underline added).

McBride alleges that Roach did not like her and wanted to terminate her employment. However, there is no evidence that Roach or any other employee of the School District instituted process against her or performed any act, much less a definite, willful or threatening act that was not proper or legitimate during the investigation of McBride by the Sheriff's Office. It is undisputed that McBride reported her car missing, not someone else affiliated with the School District. (R. p246, line 18-p.247, line 24). It is further undisputed that McBride informed Oslager that Doe did not have permission to use her car. Doe testified that he did not have permission to use McBride's car the day he was arrested. (R. p. 55, lines 18-20). Accordingly, Oslager could reasonably conclude that Doe had committed a crime warranting his arrest. These events were set in motion by the conduct of Doe and McBride. When Doe drove into the parking lot he was arrested by Oslager. He screamed that he "was sorry" and "just wanted to go to legal aid." (R. p. 56, lines 21-24). Doe's mother, who was waiting to pick him up on the other side of the school, came around the building and learned that he was in the back of a police car. (R. p. 57, lines 11-15). Doe's mother became upset at McBride because she had previously told McBride to stay away from her son. (R. p. 57, line 20-p.58, line 3). The undisputed testimony is that Oslager, while taking Doe to the law enforcement center, asked him why his mother was upset at McBride. (R. p. 58, lines 18-21). Doe explained that his mother did not like McBride because Doe had been allowed in her classroom during the previous semester. (R. p., 58, lines 20-22). Thereafter, Oslager

indicated that he wanted Doe to make a statement about how he "had come to get [McBride's] car." (Id.). Doe testified: I mentioned that I had used it before and then it was, you know, construed to be that [McBride] had given me the car." (R. p. 58, line 24-p. 59, line 1). Thereafter, Doe's mother went to get his father and they went back to the school to speak with principal Roach. (R. p. 59, lines 4-7).

While McBride alleges that Oslager spoke with Roach on the telephone while Doe was at the police station, there is no testimony or evidence that Roach conspired with Oslager, provided him with false or misleading information, or encouraged Oslager to charge McBride with a crime. (R. p. 102, line 12-p. 103, line 3). According to Doe, Oslager called Roach at least three times while he was at the police station giving a statement. (R. p. 60 lines 20-23). Doe told Oslager that he had McBride's school password because he "was looking for anything to get out of trouble and [McBride's] password . . . had come to mind." (R. p. 60 lines 24-p. 61, line 1). Thereafter, Oslager called Roach to verify the password. Tr. p. 61, lines 1-3. Significantly, Doe did not testify to any statements by Oslager while speaking to Roach evidencing a conspiracy to charge McBride with a crime so that her employment could be terminated. In fact, this allegation is based on nothing more than innuendo and speculation. The only testimony offered at trial of any act by Roach during the investigation by the Sheriff's Office, was the existence of three conversations whereby Roach attempted to verify facts relayed by Doe to Oslager. The existence of such conversations is not evidence of "some definite act or threat" or an attempt to obtain an improper objective outside the investigation.

Moreover, it is undisputed that Doe gave a statement to the Sherriff's Office indicating (1) that he had frequently been let out of class by McBride; (2) she knew that

he was planning to run away from home; (3) McBride was aware that he was storing clothes in her room for this purpose; (4) McBride had previously asked the mother of one of Doe's friends to take Doe in overnight because he had run away from home; and (5) had excused Doe from school so that he could run errands in her car. Defendant's Exhibits 2 & 3. The record is devoid of any evidence suggesting that this information was elicited from Doe as a result of any action by Roach. Rather, the undisputed testimony is that Doe "was looking for anything [to say] to get out of trouble."

The day that he was arrested, Doe signed a sworn statement in front of his mother and Oslager. Doe did not testify that he was coerced into giving the statement. It is undisputed that he waived his Miranda rights and signed the statement with his mother present. (R. p. 63, lines 13-25; R p. 65, lines 1-25; Defendant's Exhibit 1 & 2). In the statements, Doe alleged that he had previously spoke with McBride about emancipation, she had let him out of class numerous times in the past, and he had previously been allowed to use her car. In addition, he indicated that she had asked him to work on IEPs (individual education plans) and that he was able to "look up student grades to write down so that [he] could add them to IEPs." Id. Doe later gave an additional statement to Oslager. Defendant's Exhibit 3. Based on the information contained in the statement given by Doe, Oslager contacted Sergeant Shea Smith. Sergeant Smith assigned investigatory Leslie Lambert to investigate the matter further. Thereafter, Lambert obtained statements from other witnesses including School District employees Kathleen Hills, Carolyn Kite, Kim Fanning. (R. p. 90, lines 3-21; R. p. 112, lines 14-25; R. p. 115, line 23-p. 116, line 20; Defendants Exhibits 5, 6, 8, 15). There is no evidence that Roach elicited any information contained in the witness statements from these individuals or that

such information was not based on each witness' independent knowledge. Nor is there any evidence that the information from these witnesses was provided due to an ulterior motive by the individual or the School District for the purpose of terminating McBride's employment. A statement was also obtained from McBride. In fact, the interview of McBride was conducted by Sergeant Smith and Deputy Lambert. (R. p. 248, line 11-p.249, line 22; Defendant's Exhibits 14 & 15). No School District employee was present in this interview, other than McBride and, according to her written statement, she voluntarily participated in the interview. She specifically acknowledged that she was willing to make a statement and answer questions. . . . [and] no pressure or coercion of any kind had been used" in acquiring the statement. (Defendant's Exhibit 15). Lambert also obtained a sworn statement from Doe's parents. (Defendant's Exhibit 10). No testimony or evidence was admitted at trial indicating that the School District committed any act connected with obtaining these statements or contributed to providing any information contained in the statements that was false or misleading. It is undisputed that the decision to bring criminal charges against McBride was not made by Oslager. Rather, the solicitor made the decision to bring charges against McBride based on the statements obtained by the Sheriff's Office. (R. p. 136, lines 1-25).

In summary, no evidence was admitted at trial that the School District or its employees undertook any act that would constitute abuse of process. McBride did not present any evidence that the School District or any of its employees instituted or continued the criminal investigation against her. In this case, the School District's employees did not detain McBride to investigate the incident, did not notify the Sheriff's Office, and did not instruct the Sheriff's Office to arrest McBride. Rather, the only acts

undertaken by the School District consisted of Roach verifying information given by Doe to Oslager and allowing its employees to be interviewed by the Sherriff's Office. In other words, the School District did nothing more than cooperate with the investigation so that it could be carried out to its authorized conclusion. McBride began the investigation, Doe gave a statement concerning his relationship with McBride, and the Sheriff's Office investigated it fully and obtained additional statements from numerous witnesses. After its investigation, the Sheriff's Office provided the information it gathered to the Solicitor's Office and it recommended the charges with which McBride was charged. The only evidence that showed that any of the witness' provided false information came from the testimony of Doe, who admitted that he provided false information in the statements he gave to the Sherriff's Office and lied while testifying under oath. Accordingly, the Circuit Court properly granted the School District motion for a directed verdict on McBride's claim for abuse of process. See Guider v. Churpeyes, Inc., 370 S.C. 424, 432, 635 S.E.2d 562, 567 (Ct.App.2006) (reversing the denial of a directed verdict motion in an abuse of process case because the evidence showed the defendant engaged in a "legitimate use, not a perversion, of the legal process").

C. The Circuit Court Properly Directed a Verdict in Favor of the School District on McBride's Claim for Defamation

McBride alleges that she was defamed by a statement made by principal Roach after her employment was terminated. According to McBride, Roach observed that her classroom was empty and uttered the phrase "She really cleaned us out." The Circuit Court directed verdict in favor of the School District on the basis that there was no issue of fact concerning the defamation claim and there was no testimony or evidence that McBride sustained damages from the statement. (R. p. 297, line 1-p. 301, line 8).

To establish a claim for defamation a plaintiff must show: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." Williams v. Lancaster County Sch. Dist., 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct.App.2006).

The only testimony offered at trial concerning the alleged defamatory statement came from teacher's aide Linda Chochran, who "had a conversation with Mr. Roach about [her] classroom and after [she] had been to clean [it] out." (R. p. 207, lines 2-3). At that time the classroom was fairly empty. (R. p. 210, lines 13-15). Cochran had helped McBride clean out the room. (R. p. 210, lines 10-12). Cochran described the conversation as follows:

> [W]e were sitting in your classroom and he . . . had come in there and he said . . . 'she cleaned us out, didn't she?' And I said, 'sir?' And he said, 'she cleaned us out, didn't she? She took everything.' I said, 'well, she only took what she had put in there.'

(R. p. 207, lines 6-10). According to Cochran, she explained to Roach that McBride had used a lot of her personal money for items in the classroom. (R. p. 207, lines 11-16). Roach asked about the location of the television previously in the classroom and Cochran informed him that McBride had passed it on to her classroom along with some calculators. (R. p. 207, lines 17-23). She testified that the equipment in McBride's classroom "was redistributed. The school's property was redistributed." (R. p. 208, lines 2-4). McBride had personally given some items to Cochran and she also gave some furniture and a bookcase to another teacher. (R. p. 208, lines 5-9). According to Cochran she took Roach into her "classroom and showed him where everything was."

(R. p. 208, lines 11-13). Cochran testified that when Roach allegedly said that McBride "cleaned us out" that she did not believe McBride had stolen anything. (R. p. 210, lines 17-20). Cochran said that she didn't think any less of McBride based on Roach's alleged off-hand comment. (R. p. 210, lines 22-24). Accordingly, McBride's reputation was not damaged by the alleged comment. No other witnesses testified at trial concerning the alleged defamatory statement. (R. p. 302, line 20-p.303, line 3).

Roach denies making the alleged defamatory statement or ever accusing McBride of theft or stealing property belonging to the School District. (R. p. 256, line 18-p. 257, line 4). In any event, the alleged defamatory statement that "She cleaned us out. She took everything" is capable of a non-defamatory meaning. See White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997)("It is the trial court's function to determine initially whether a statement is susceptible of having a defamatory meaning"). For example, the comment can reasonably be interpreted as indicating that the classroom was simply empty. See Parrish v. Allison, 376 S.C. 308, 326, 656 S.E.2d 382, 392 (Ct.App.2007)(recognizing that South Carolina law allows contemplation of the context and circumstances under which words are spoken when determining if the words have a defamatory meaning and that truth is an affirmative defense to defamation); Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012)(holding bank officer's statement that bank would not make a loan to borrower if his business partner was involved in managing the operation was not defamatory to partner because it did not insinuate that he was an unfit businessman). Accordingly, to the extent that Roach's alleged statement indicated the classroom was empty, he simply stated the truth, and the Circuit Court could properly grant a directed verdict in favor of the School District.

Even assuming Roach made an alleged defamatory statement, the School District is not liable pursuant to the doctrine of qualified privilege. In the Fountain case, the court discussed the privilege as follow:

> 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. The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only. An abuse of the privilege occurs in one of two situations: (1) a statement made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement made in reckless disregard of the victim's rights. "While abuse of privilege is ordinarily an issue for the jury ... in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or not the privilege has been abused or exceeded."

Fountain v. First Reliance Bank, 398 S.C. 434, 443, 730 S.E.2d 305, 310 (2012)(internal citations omitted).

Here, there is no controversy regarding the following facts. As a school principal, Roach was responsible for everything related to the school including the facilities, the teachers, the teacher aides, and the students. (R. p. 191, line 1-p. 192, line 5). In addition, he was responsible for supervising the custodians at the school "to make sure the school was clean [and] everything was fixed as it needed to be done." (R. p. 191, lines 13-16). In other words, Roach was responsible for ensuring that school equipment was properly accounted for and maintained. Id. Roach's responsibilities included evaluating teacher fitness and reporting to the school superintendent concerning their performance. (R. p. 192, lines 6-12). After the incident with Doe, Roach was responsible for conducting an internal investigation of the incident on behalf of the School District. (R. p. 192, line 13-p. 193, line 19).

The alleged defamatory statement was made while Roach was inspecting McBride's classroom after her employment had been terminated. His alleged statement that "she cleaned us out" was made to another school district employee, special education aide Linda Cochran. The alleged statement was consistent with his duty of inspecting the school's facilities and accounting for school property. There is no evidence that the alleged statement was made more than once, or was communicated to anyone other than Cochran, who was familiar with the property personally purchased by McBride and the school property she had "redistributed" to other teachers prior to her departure. (R. p. 208, lines 2-4). Accordingly, there is no evidence Roach abused his privilege because he had an interest in accounting for school property, the alleged statement was made during a good faith inspection of McBride's classroom, the statement was made to the person who had assisted McBride in removing items from the classroom, and it was not communicated to anyone else and therefore was limited in scope.

"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 Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999) (citing Fulton v. Atlantic Coast Line R. Co., 220 S.C. 287, 67 S.E.2d 425 (1951)). "'Actual malice' means that the defendant acted with ill will toward the plaintiff or that [he] acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights." Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). To prove actual malice a plaintiff must show that "at the time of his act or omission to act, the tortfeasor be conscious, or chargeable with consciousness of his wrongdoing." Id.

McBride presented no evidence at trial that Roach knew the statement was false or that the equipment in her classroom had been "redistributed" to other teachers at the time he made the alleged statement. (R. p. 208, lines 2-4). In fact, Cochran felt it necessary to show him where McBride's equipment had gone. Accordingly, there is no evidence that Roach had serious doubts about the truth of the statement or a high degree of awareness of it's probably falsity before making the alleged statement. See Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000)(finding that editor's alleged ill will toward police chief did not demonstrate that editor deliberately published editorial column with a high degree of awareness of its probable falsity).

The case of Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 503 (Ct.App.1989) is analogous to the instant case. Wright filed a lawsuit against her supervisor after her employment was terminated. She asserted a cause of action for defamation against the supervisor on the basis that information placed in her personnel file suggested that she was unfit for employment and this information was relayed to two higher level supervisors. The trial court found that the publication of the information was qualifiedly privileged and the plaintiff failed to show evidence the statements were made with actual malice. In affirming the trial court's decision, the South Carolina Court of Appeals stated:

> The facts of this case raise the concept of qualified privilege. The underlying situation concerns an employee and her supervisor. There is a basis for applying a qualified privilege to situations in which an employee's job performance is properly evaluated. The South Carolina Supreme Court recognized a qualified privilege attached to communications between an employer and employee when the occasion was a bona fide inquiry by the employer into alleged misconduct of the employee. Bell v. Bank of Abbeville, 211 S.C. 167, 44 S.E.2d 328 (1947). We agree with the trial court that on the facts of this record Mr. Sparrow

> established a qualified privilege and Mrs. Wright failed to establish a genuine issue of material fact as to actual malice.

Sparrow. 298 S.C. at 474, 381 S.E.2d at 506-7. Like Sparrow, in the instant case there is no evidence that Roach made the alleged defamatory statement with actual malice. Rather, the alleged statement was made in reference to an empty classroom and an attempt to ascertain the location of school property. Accordingly, the trial court correctly directed a verdict for the School District on the claim for defamation.

Lastly, even if the alleged statement from Roach is slander per se and was not qualifiedly privileged, there is no evidence that McBride suffered damage to her reputation from the statement. In general, in a slander per se action general damages are presumed. McBride, 698 S.E.2d at 560 (citation omitted). However, the testimony introduced at trial rebutted any presumption of damages to McBride's reputation. See Black's Law Dictionary 1185 (6th Ed. 1991) ("A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until the presumption is rebutted"). Immediately after Roach allegedly made the defamatory statement Cochran informed Roach that "McBride only took what she had put in there." (R. p. 207, line 10). Further, she testified:

> Q. So you didn't think any less of Ms. Mann at that time, did you?
>
> A. No, sir.

(R. p. 210, lines 22-24). No testimony was offered by McBride that the statement was repeated by Roach to other individuals or that her reputation was damaged as result of the statement. While McBride attempted to argue to the Circuit Court that rumors were proceeding throughout the school about Roach's statement and that this was brought to

her attention by Cochran, the Circuit Court correctly noted that McBride did not elicit any testimony from Cochran on this subject. (R. p. 302, line 25-p. 303, line 3).

The Restatement (Second) of Torts § 621 (1977) provides that "[o]ne who is liable for a defamatory communication is liable for the proved, actual harm caused to the reputation of the person defamed." In Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the United States Supreme Court found the common law rule that allowed a jury to presume damages without proof of injury in defamation cases dealing with matters of public concern violated the First Amendment, "at least when liability [wa]s not based on a showing of knowledge of falsity or reckless disregard for the truth." In 1985 the Court declined to extend the Gertz prohibition on presumed damages to defamatory statements on matters that are not of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985). Several states have since adopted the position of the Restatement (Second) of Torts § 621 (1977) and concluded that a plaintiff must make some showing of reputational harm. See Synygy, Inc. v. Scott-Levin, Inc., 51 F.Supp.2d 570, 581-82 (E.D.Pa.1999)(discussing the Restatement (Second) of Torts § 621 and noting that it "require[es] a plaintiff in a defamation per se action to make a showing of general damage, i.e., proof of reputational harm"); Arthaud v. Mutual of Omaha Ins., 170 F.3d 860, 862 (8th Cir.1999) ("Missouri courts require a showing of actual damages in all defamation cases"); United Ins. Co. of America v. Murphy, 961 S.W.2d 752, 756 (Ark. 1998) ("From the date of this opinion forward, we hold that a plaintiff in a defamation case must prove reputational injury in order to recover damages"). Gobin v. Globe Pub. Co., 649 P.2d 1239, 1243 (Kansas 1982)(holding in Kansas "damage to one's reputation

is the essence and gravamen of an action for defamation. Unless injury to reputation is shown, plaintiff has not established a valid claim for defamation, by either libel or slander"). See also Nazeri v. Mo. Valley Coll., 860 S.W.2d 303, 313 (Mo.1993); Newberry v. Allied Stores, Inc., 773 P.2d 1231, 1236 (N.M. 1989). In light of this authority, the School District requests that this court affirm the directed verdict on McBride's claim for defamation because she has not demonstrated any damage to her reputation from the alleged defamatory statement.

III. THE CIRCUIT COURT'S RULINGS DID NOT DEPRIVE MCBRIDE OF DUE PROCESS OF LAW.

McBride alleges the Circuit Court deprived her of due process of law by improperly excluding certain testimony. However, McBride failed to preserve for review the alleged errors she attempts to raise on appeal, and they were not prejudicial to the outcome of the case. A review of the record establishes that McBride was only prohibited from introducing irrelevant or cumulative evidence.

The decision to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of discretion. Campbell v. Jordan, 382 S.C. 445, 452-53, 675 S.E.2d 801, 805 (Ct.App.2009). Evidence which is not relevant is not admissible. Rule 402, SCRE. For evidence to be relevant, it must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or the needles presentation of cumulative evidence." Rule 403, SCRE. "To warrant reversal based on the admission or exclusion of evidence, the appellant must

prove both the error of the ruling and the resulting prejudice." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

None of the alleged errors raised by McBride were preserved for review by contemporaneous objections, explanations regarding admissibility, or proffers of the testimony. "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam v. South Carolina Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 780-81 (2004). This is because "South Carolina appellate courts do not recognize the 'plain error rule,' under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party." Id.

McBride did not proffer any of the testimony that she claims was improperly excluded. The way to preserve testimony which was not admitted by the Circuit Court is though a proffer of the testimony. See Gold Kist v. Citizens and Southern Nat. Bank, 286 S.C. 272, 281, 333 S.E.2d 67, 73 (Ct.App.1985) ("Assuming arguendo the court erred in excluding the deposition, without the proffer we cannot determine the prejudicial nature of the error.").

McBride cannot point to any prejudice resulting from the evidentiary rulings because they were not prejudicial. McBride alleges that she was not allowed to develop testimony from witness Linda Cochran concerning her history with principal Roach and his response to her prior complaints." Appellant's Brief, p. 21. However, Cochran was permitted to fully testify concerning these complaints. See (R. p. 204, line 202-p. 203, line 1). Although McBride complains the Circuit Court did not allow her to develop testimony that the school investigation unit was housed on School District property, this

line of questioning was irrelevant and raised for the first time on redirect. (R. p. 124, lines 15-23). Further, when McBride was asked about the relevance of her proffered exhibit she simply replied: "This is an exhibit. This is an exhibit." (R. p. 124, lines 19-20). Although McBride claims that the Circuit Court curtailed her direct examination of Doe concerning his alleged treatment by Oslager, Doe testified that he was arrested, handcuffed, and thought he might be charged with grand theft auto. See Wright v. Craft, 372 S.C. 1, 34, 640 S.E.2d 486, 504 (Ct.App.2006)(holding Circuit Court did not abuse its discretion in refusing to admit pickup truck into evidence since admission would have wasted time and was cumulative of photographs of truck already in evidence). In short, McBride did not make a proffer of the additional testimony she intended to elicit. Accordingly, that testimony is not preserved for appeal. In addition, McBride has not demonstrated that the exclusion of such testimony was prejudicial and would have changed the Circuit Court's order granting a directed verdict.

Lastly, McBride contends the cumulative effect of alleged errors by the Circuit Court so impaired the presentation of her case that she should be entitled to a new trial. Appellant's Brief, p. 22. However, McBride presented her case over two days and called fourteen witnesses, so her ability to present testimony was not curtailed in any prejudicial manner. "[T]he appealing party must show both the error of the ruling and prejudice." Fields v. J. Haynes Waters Builders, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). McBride does not show the prejudice of any of the errors alleged in her brief. Therefore, she effectively asks the Court to depart from South Carolina's standard of review on appeal.

McBride points to State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct.App.2000), and State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995), for the proposition that the cumulative effect of errors, including non-prejudicial errors, can deny a litigant her due process right to a fair trial. However, these were both criminal cases. No civil case has ever been reversed under the cumulative error rule. As the Court stated in Wells v. Halyard:

> Wells cites State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995), for the proposition that while each error raised alone may be insufficient to warrant a new trial, the cumulative effect of those errors is enough to require a new trial. We can find no civil cases, however, where the appellate courts of our state have reversed a jury verdict and ordered a new trial based on the cumulative effect of errors. Although our state supreme court briefly addressed a similar argument in Cock-N-Bull Steak House, Inc. v. Generali Insurance Co., 321 S.C. 1, 466 S.E.2d 727 (1996), the court concluded no new trial was warranted because the trial court did not commit any of the underlying alleged errors."

341 S.C. 234, 241, 533 S.E.2d 341, 344-45 (Ct.App.2000). McBride's attempt to apply the cumulative error rule in this case would abrogate the maxim: "whatever doesn't make any difference doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct.App.1987). Accordingly, the Circuit Court did not deny McBride due process of law and the directed verdict in favor of the School District should be affirmed.

IV. THE CIRCUIT COURT PROPERLY RECONSTRUCTED THE RECORD ON APPEAL.

McBride alleges the Circuit Court erred by reconstructing the testimony of her deceased mother, Nancy Mann, by adopting her testimony from the first trial in this case. On April 5, 2012, the Court of Appeals granted McBride's motion to reconstruct the record of the second trial concerning the testimony of Nancy Mann. (Order, p. 1). A hearing to reconstruct the record took place on June 18, 2012 (Transcript). At that time,

McBride testified concerning her recollection of her mother's testimony at the second trial. In addition the School District also presented testimony and argument at the hearing.

On June 26, 2012, the Circuit Court issued an order stating in pertinent part:

> Testimony was presented by both parties as to what they recalled she said during the trial, and, as expected, there was disagreement. Over the objection of the Defendant, I admitted plaintiff's proposed reconstructed testimony of Mrs. Mann, which I decline to adopt. I did not retain my notes of the trial and I do not remember the exact testimony presented. Having reviewed my reasons for granting the directed verdict, I find that plaintiff is in error in her recollection of her mother's testimony in the 2011 trial before me. I find that the best evidence of Nancy Mann's testimony is her testimony at the first trial of the case.

(Order, p. 1).

"Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge." China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). The trial court's decision to reconstruct the record using Nancy Mann's testimony from the first trial is not an abuse of discretion. See State v. Ladson, 373 S.C. 320, 328, 644 S.E.2d 271, 275 (Ct.App.2007) (Anderson, J. concurring in result only)(noting that in reconstructing the record "[t]he ruling of the circuit court judge will only be reversed in the event of an abuse of discretion").

It does not appear that South Carolina has adopted a specific method concerning reconstruction of a trial record. In China v. Parrott, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968), the South Carolina Supreme Court held that where a portion of the court reporter's notes were lost, the trial judge properly considered affidavits from counsel and the court reporter in reconstructing the record. It appears that the record can also be

reconstructed based on the court's own recollection of the testimony of the witness. Id. at 334. In Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 383, 418 S.E.2d 319, 321 (Ct.App.1992), the trial court granted a developer's request to reconstruct a portion of the record pertaining to an evidentiary presentation before the zoning board, and requested that the developer submit affidavits from the board chairman and witnesses and allow the other party to submit counter-affidavits. In that case, the Court of Appeals found "no error in the circuit court's ruling allowing for reconstruction of the record." Id. In State v. Ladson, 373 S.C. 320, 328, 644 S.E.2d 271, 275 (Ct.App.2007), a hearing was held to reconstruct an entire trial record apparently based on sworn testimony from the parties' counsel as well as the trial judge's recollection. However, the Court of Appeals held the reconstructed record was not sufficient for meaningful appellate review despite the parties' diligent efforts. Id.

Here, the Circuit Court considered the evidence submitted by both parties and concluded, based on its own recollection, that McBride "[wa]s in error in her recollection of her mother's testimony in the 2011 trial before me." (Order, p. 1). The Circuit Court indicated that while it "did not remember the exact testimony presented . . . the best evidence of Nancy Mann's testimony [wa]s her testimony at the first trial of the case." (Id.). Despite the Circuit Court's recollection, McBride nonetheless asks that her own recollection be used to construct the record.

The Circuit Court did not err by finding that the best evidence of Nancy Mann's testimony at the second trial is her testimony at the first trial for several reasons. First, McBride was represented by an attorney at the first trial who understood the elements of the causes of action she was asserting and the need to elicit testimony establishing each

of those elements. Second, at the first trial Nancy Mann provided testimony under direct and cross examination. In contrast, the "reconstructed record" provided by McBride to the Circuit Court only included testimony from Nancy Mann on direct examination. Furthermore, McBride's reconstruction of her mother's testimony is much longer than that of Nancy Mann's testimony at the first trial.

Lastly, McBride's suggestion that she will be prejudiced by the Circuit Court's failure to adopt her recollection of Nancy Mann's testimony is specious. McBride claims that her mother would have testified to rumors circulating through the school concerning Roach's alleged defamatory statement that "she cleaned us out." Appellant's Brief, p. 26. However, it is unclear why McBride could not have testified to this herself, or presented such testimony from other witnesses affiliated with the school. McBride presented testimony from teachers Linda Cochran, Lynn Fox, Kathleen Hills, Sharon Wilson, and assistant Tina Hart, all of whom worked at Berea High School. (R. p. 199, line 1- p.200, line 22; R. p. 84, lines 20-p. 85, line 8; R. p. 149, lines 13-24; R. p. 152, line 19-p. 153 line 23). According to McBride's reconstruction of Nancy Mann's testimony, she would have testified to receiving phone calls from Linda Cochran and Lynn Fox and that they told her about Roach's alleged defamatory statement. However, both of these witnesses were present and testified at the second trial and McBride did not question either witness on this subject. In short, it simply is not credible for McBride to suggest that her mother would have testified to such statements by Linda Cochran or Lynn Fox without a contemporaneous hearsay objection by counsel for the School District.

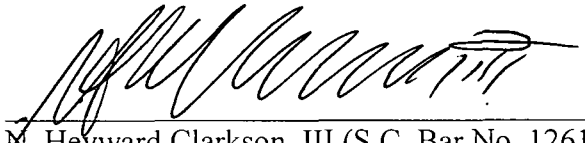
McBride's reconstruction of Nancy Mann's testimony includes numerous hearsay statements. As the court well knows, hearsay "consists of statement[s], other than one

made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. Hearsay is not admissible unless excepted by other applicable rules. Rule 802, SCRE, Rule 803, SCRE. The School District submits that McBride's reconstructed transcript contains numerous statements which are self-serving and the veracity of such testimony cannot be verified or effectively subjected to cross-examination. Here, the only admissible evidence of Nancy Mann's testimony is the transcript of her testimony at the first trial. See Rule 32(a)(3)(A), SCRCP ("The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead"). See also Rule 801(d)(1), SCRE. Accordingly, the Circuit Court did not abuse its discretion by reconstructing the record of Nancy Mann's testimony at the second trial using her testimony during the first trial in 2007.

CONCLUSION

The School District of Greenville County requests that the Court affirm the Circuit Court's Order granting a directed verdict to the School District on McBride's causes of action for abuse of process and defamation.

Respectfully submitted,



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