THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2015-000613

Jeffrey Kennedy .... Respondent,

v.

Richland County School District Two, Eric Barnes, and Chuck Earles .... Appellants.

FINAL BRIEF OF APPELLANTS

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I. STATEMENT OF ISSUES ON APPEAL

(1) Did the Trial Court Err In Denying Appellants' Motion For Directed Verdict/JNOV On Respondent's Defamation Claim?

(2) Did The Trial Court Err In Denying Appellants' Motion For JNOV On The Issue Of Individual Liability Under The South Carolina Tort Claims Act?

(3) Did The Trial Court Err In Denying Appellants' Motion For JNOV On The Issue Of Punitive Damages Under The South Carolina Tort Claims Act?

(4) Did The Trial Court Err In Excluding Evidence Of Respondent's Alleged Theft And His Corresponding Loss Of Employment With A Subsequent Employer During The Pendency Of This Case?

(5) Did The Trial Court Err In Failing To Instruct The Jury That No Defamatory Communication Was Made As A Result Of Respondent's Termination And That Respondent's Employment Termination Was Not Part Of His Defamation Claim?

(6) Did The Trial Court Err In Denying Appellants' Motion For A New Trial Absolute On The Grounds That The Amount Of The Verdict, Given The Evidence Presented At Trial, Demonstrated That It Was Motivated By Caprice, Passion, Or Prejudice?

(7) Did The Trial Court Err in Denying Appellants' Motion For New Trial Nisi Remittitur?

(8) Did The Trial Court Err In Affirming the Constitutionality Of The Jury's Award Of Punitive Damages?

II. STATEMENT OF THE CASE

Respondent, Jeffrey Kennedy, is a former employee of Appellant Richland School District Two ("Richland Two"). He filed this action on March 11, 2013, in the Richland County Court of Common Pleas alleging multiple causes of action against the following defendants: Richland School District Two ("Richland Two"), Dr. Katie Brochu,

Roosevelt Garrick, Traci Batchelder, Kim Jones, Eric Bonds [sic], and Chuck Earles. (R. pp. 13-18.) Prior to trial, the parties stipulated to the dismissal of Dr. Brochu, Mr. Garrick, and Ms. Batchelder. (R. p. 26.) The case was called for trial during the September 29, 2014 Common Pleas term of court. A jury was empaneled and Mr. Kennedy's case proceeded against Richland Two, Chuck Earles, Eric Barnes, and Kim Jones.

Upon the close of Mr. Kennedy's case, the Court granted a directed verdict for all defendants on Mr. Kennedy's intentional infliction of emotional distress claim and his defamation claim against Ms. Jones. (R. p. 598 l. 22 - p. 601 l. 15.) After Appellants rested their case, the Trial Court directed a verdict on Mr. Kennedy's claim of Negligent Supervision and Retention against Richland Two. (R. p. 937 l. 8 - p. 942 l. 2.) The Trial Court denied the directed verdict motion only as to Mr. Kennedy's defamation claim against Mr. Earles and Mr. Barnes with regard to alleged communications in June 2011, regarding Mr. Kennedy's reassignment to a desk-based position inside the School District's security office, following a theft investigation at Spring Valley High School ("SVHS"). The Trial Court granted the motion for directed verdict to the extent Mr. Kennedy contended that any communications surrounding or related to the termination of his employment with Richland Two in October 2012 were defamatory. (R. p. 908 l. 20 – p. 910 l. 2; p. 922 ll. 18-23.)

On October 3, 2014, the jury returned a verdict against Mr. Barnes for $100,000 in actual damages and $150,000 in punitive damages, and a verdict against Mr. Earles for $100,000 in actual damages and $200,000 in punitive damages. The Court allowed the parties ten days for post-trial motions and Appellants timely submitted their post-trial motions on October 13, 2014. (R. pp. 46-75.) The Court denied Appellants' post-trial

motions on February 24, 2015, and Appellants timely filed their Notice of Appeal on March 13, 2015. (R. pp. 100-108.)

III. STATEMENT OF FACTS

Mr. Kennedy began working third shift as a security guard in Richland Two's security department in May 2008. (R. pp. 140-142.) His starting rate of pay was $11.77 per hour. (R. p. 141.) In his position, he was essentially the night watchman. (R. p. 144.) Spring Valley High School ("SVHS") was his base school. He was also responsible for security at seven other schools on nightly rounds. (R. p. 145.)

At relevant times, Mr. Earles was Richland Two's Emergency Services Manager. (R. p. 409 l. 22 – p. 410 l. 1.) Mr. Barnes was Richland Two's Assistant Security Manager. (R. p. 287 ll. 13-20; p. 410 ll. 2-5.)

In February 2011, Mr. Kennedy applied for a lieutenant position in the security department, which was essentially a patrol supervisor, shift leader job. (R. p. 152.) He was to move to the second shift and would have received an unspecified pay raise. (R. pp. 412-413, 1009.) Mr. Kennedy offered no evidence of the difference in pay he would have received as lieutenant. *Id.* Mr. Earles recommended Mr. Kennedy to Richland Two's Human Resources department for the position on or around February 28, 2011. (*Id.*) The position was scheduled to start March 7, 2011. (R. pp. 416, 1009.)

On the morning of March 4, 2011, SVHS Athletic Director Tim Hunter reported that $1000 in cash was missing from his office in the athletic department at SVHS. (R. pp. 607, 1025.) Mr. Hunter left the money under his desk in a cash box after collecting it from a sporting event the previous night. (R. pp. 611, 1025.)

Mr. Kennedy became the focus of the investigation of the missing funds. Specifically, the money went missing during his shift and on his watch, there were some other thefts at SVHS on his watch in other parts of campus that were under investigation

at that time, he had a key that would open any door on campus, and videotape surveillance showed him engaging in what school district administrators, including Mr. Barnes and Mr. Earles, considered unusual behavior in lingering off camera for five minutes in the SVHS athletic department. (R. p. 510 l. 14 – p. 516 l. 20.) According to defense witnesses, this would have provided Mr. Kennedy an opportunity to rifle through Mr. Hunter's office, which was not covered by a security camera. (R. pp. 491, 510-515, 619-621.)

Mr. Kennedy was placed on paid administrative leave during the investigation and the matter was referred to the Richland County Sheriff's Office. (R. p. 210 ll. 11-14.) Mr. Kennedy was not criminally charged for the theft. (R. p. 167 ll. 9-11; p. 210.) He was returned to full duty security work with Richland Two on or around June 16, 2011. (R. p. 766 l. 16 – p. 767 l. 9; pp. 1010-1012.) Roosevelt Garrick, who was then Richland Two's Chief Human Resource Officer, informed Mr. Kennedy that he would be permitted to return to work, but due to concerns with Mr. Kennedy's lack of candor during the investigation and suspicious behavior, he would not be promoted to lieutenant at that time. (R. pp. 826-842, 1011-1012.)

Prior to Mr. Kennedy's return to work in June 2011, Mr. Earles sent an email with the reference line "**CONFIDENTIAL**" in bold, capital letters to security department supervisors that read as follows:

> THE INFORMATION CONTAINED IN THIS EMAIL IS CONFIDENTIAL AND WILL ONLY BE SHARED WITH OTHER DISTRICT SECURITY SUPERVISORS, AS NEEDED, WHEN THEY WILL BE SUPERVISING MR. KENNEDY.
>
> Mr. Kennedy will be reporting to work tomorrow night (Thursday, June 16) to work on third shift, weekdays. This will be his permanent assignment.

> I have told him that he will be assigned to work in the watch room answering phones and performing whatever other duties are necessary in the watch room.
>
> He is NOT to be given any assignment that involves having keys to any District facility.
>
> Thank you.

(R. pp. 424-428; p. 518 l. 15 – p. 520 l. 25; p. 1010.) Two of Mr. Kennedy's former coworkers testified that they saw Mr. Earles' confidential email printed out at the security office. (R p. 229 l. 21 – p. 231 l. 1; p. 274 l. 16 – p. 275, l. 17.) However, both of those co-workers testified that they first heard Mr. Kennedy was under investigation for the SVHS theft from Mr. Kennedy himself. (R. p. 235 ll. 6-23; p. 276 l. 23 – p. 277 l. 1.) Mr. Kennedy testified that he also saw the email "lying out" in security vehicles and in offices. (R. p. 168.) No evidence was presented at trial that Mr. Earles or Mr. Barnes had printed out the email or were aware that it had been printed out prior to the litigation. Both Mr. Earles and Mr. Barnes testified that they were not aware of any rumors or allegations that the email had been printed out until Mr. Kennedy alleged it by way of this action. (R. p. 308 l. 11 – p. 312 l. 4; p. 429 ll. 2-7; p. 519.)

After returning to work in June 2011, Mr. Kennedy did not look for another job for the next fourteen months. (R. p. 213.) He testified that he continued to enjoy his job. (R. pp. 213-214.) Mr. Kennedy did not receive any reprimands or warnings after reinstatement to his position in June 2011. (R. p. 214.) His at-will employment with Richland Two was ultimately terminated in October 2012. (R. p. 213.)

Mr. Kennedy contended that he was further defamed by way of his termination and by Kim Jones, a bus driver for Richland Two who had reported Mr. Kennedy for intimidating behavior toward her during an investigation of whether Ms. Jones may have improperly reviewed a school video with Mr. Kennedy's assistance. (Compl. ¶¶ 13-17;

R. p. 15.) However, the Trial Court's rulings granting Ms. Jones a directed verdict on that claim and holding that Mr. Kennedy did not prove any defamatory communication in connection with his termination have rendered the circumstances of his 2012 employment termination largely irrelevant to this appeal.

Mr. Kennedy offered evidence that after his termination in October 2012, he was evicted from his house, his car was repossessed, and ultimately he was divorced from his wife. (R. pp. 180-183, 1013-1014.) At the time of trial, he was working for GEO Care as a security officer, where he was eligible for stock and participation in its 401(k) program. (R. p. 183.) Between his employment at Richland Two and GEO Care, he worked for Allied Barton as a security guard at an hourly rate of $13.26. (R. p. 205 ll. 10-11.) His final hourly rate at Richland Two was $12.77 per hour. (R. p. 219.) Mr. Kennedy testified that he resigned from Allied Barton in February 2014. (R. pp. 204-205) The Trial Judge limited defense counsel's ability to cross examine Mr. Kennedy under Rule 405 of the South Carolina Rules of Evidence regarding the circumstances of his resignation from Allied Barton. (R. p. 193 l. 11 – p. 201 l. 25.) At the time of trial, Mr. Kennedy had pending charges of petty larceny for thefts at the SCANA campus where he was assigned to work through Allied Barton. Appellants challenge this ruling below. (R. pp. 27-32, 116-122.) Mr. Kennedy testified that he had no evidence that anyone at Richland Two had provided a negative reference or had attempted to keep him from securing subsequent employment. (R. p. 221.)

IV. ARGUMENTS

A. The Trial Court Erred In Denying Appellants' Motion For A Directed Verdict/JNOV On Mr. Kennedy's Defamation Claim.

1. JNOV Was Warranted Because Mr. Kennedy Did Not Carry His Burden Of Proving Each Element of His Defamation Claim.

A Motion for JNOV is a renewal of the directed verdict motion. *See Roland v.*

Palmetto Hills, 308 S.C. 283, 417 S.E.2d 626 (Ct. App. 1992); *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993). Directed verdict is a test of the sufficiency of the evidence. *Carolina Home Builders, Inc. v. Armstrong Furnace Co.*, 259 S.C. 346, 191 S.E.2d 774 (1972) (when evidence presented at trial raises no issue for the jury as defendant's liability, a motion for a directed verdict based on the sufficiency of the evidence-should be granted); *see also, e.g., Tucker v. Pure Oil Co. of Carolinas*, 191 S.C. 60, 3 S.E.2d 547 (1939) (remarking that review of a trial court's failure to grant directed verdict is a test of the sufficiency of the evidence). A court should grant a JNOV when the evidence presented at trial is insufficient to support the jury's verdict. *See Rogers v. Norfolk S. Corp.*, 343 S.C. 52, 59, 538 S.E.2d 664, 668 (Ct. App. 2001), *aff'd as modified*, 356 S.C. 65, 71, 588 S.E.2d 87 (2003).

To prove a defamation claim, a plaintiff carries the burden of proving: "(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 Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

Mr. Kennedy did not meet his burden of proving an unprivileged publication by either Mr. Earles or Mr. Barnes. First, the only possible defamatory communication Mr. Kennedy identified at trial was Plaintiff's Exhibit 4 - the June 15, 2011 email from Defendant Earles addressed to the following individuals: Angelia Permenter, Eric Barnes, Gerome Young, Lelith Zerzycki, and Rick Groves, with a copy to Traci

Batchelder. The Trial Judge identified this as the only potentially defamatory comment in her charge to the jury. (R. p. 981.) It was undisputed that each of the recipients of the email was a supervisory-level employee in the security department, with the exception of Ms. Batchelder, who was a Director of Human Resources.

Mr. Kennedy and witnesses testified that they saw printed copies of the email in a security department truck as well as in an office in the Security Services building. (R. p. 168, p. 229 l. 21 – p. 231 l. 2; pp. 274-275.) No witness testified: (1) that Mr. Earles or Mr. Barnes[1] was responsible for distributing the email or placing it in the locations it was found; (2) that the witness had discussed the confidential email with either Mr. Earles or Mr. Barnes[2]; (3) that Mr. Earles or Mr. Barnes discussed the subject matter of the investigation with any third party not addressed in the email itself; or (4) that they had reason to believe Mr. Earles or Mr. Barnes knew the email had been seen by others prior to the litigation.

As the Trial Court recognized during directed verdict arguments at the conclusion of the evidence, the mere fact that non-supervisor witnesses may have seen the confidential email is not sufficient evidence for the jury to conclude *ipso facto* that Mr. Barnes or Mr. Earles was responsible for its printing or circulation beyond the email's listed recipients. (R. pp. 926-927.) Proof of a defamatory publication requires publication by the defendant, not speculation that an addressee of the email may have ignored the directive of Mr. Earles' email to maintain confidentiality. Further, it was not a permissible inference for the jury to speculate that either Mr. Barnes or Mr. Earles was responsible for issuing the communication to a third party (*i.e.*, outside the group of

[1] Mr. Kennedy introduced no evidence at trial that Mr. Barnes contributed to preparation of the email, sent the email, printed the email, or copied the email.

[2] In fact, Mr. Kennedy's witnesses specifically denied discussing the memorandum with Mr. Earles or Mr. Barnes. (R. pp. 235, 258, 277-279.)

supervisory addressees) just because it had been printed out and seen by Mr. Kennedy and two of his witnesses.

The proof of publication offered by Mr. Kennedy in this case was similar to the proof the Court of Appeals flatly rejected in *Williams*, 369 S.C. at 304, 631 S.E.2d at 286. In that case, the plaintiff argued that because a rumor existed that the plaintiff coach was having an affair with a school secretary, the school principal, who confronted the plaintiff coach about being in a bathroom alone with the secretary, must have been responsible for publishing the rumor. However, the Court of Appeals found:

> Based on the evidence of record, there were numerous individuals who were aware of the . . . incident besides [the Principal]. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were [the principal and the assistant principal]. Thus, the rumors cannot be said to have only been possibly attributable to [the principal] and the Williamses' argument concerning indirect evidence fails.

Williams, 369 S.C. at 304, 631 S.E.2d at 292.

Because Mr. Kennedy offered no direct or circumstantial evidence that either Mr. Barnes or Mr. Earles was responsible for printing out the email or any further distribution of the email beyond the addressees, he failed to prove by a preponderance of the evidence any defamatory publication by Mr. Earles or Mr. Barnes, and JNOV was warranted for that reason.

Likewise, the evidence introduced at trial did not establish the "fault" element on the part of either Mr. Barnes or Mr. Earles without proof that they published the email beyond the list of addressees. As a matter of law, the language of the email itself demonstrates that Mr. Earles took reasonable precautions to assure its confidentiality.

The Trial Court so held in granting Richland Two JNOV on Mr. Kennedy's negligent supervision claim:

> And the testimony was, "When I send out something confidential, I would expect that those in a supervisory role would understand that importance and to show and demonstrate and respect the fact it's confidential and should not be shared with others." I think that's a reasonable expectation. I also believe that based upon the evidence and the case law that there is not a --- that there has been no reason to believe that those individuals would therefore go out and do something contrary to what the expectation was in light of the fact that the memo clearly says its confidential.

(R. pp. 939-940.) The suggestion that Mr. Earles could have gone to each supervisor individually, or not sent the email at all, does not negate the reasonableness of the precautions demonstrated by Mr. Earles' testimony and the text of the email itself. (R. pp. 425-428, 518-519.) Mr. Kennedy offered no evidence to suggest that any of the addressees were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential. An employer is not obligated to maintain a "rumor free" workplace, particularly in the absence of any evidence that any of the email recipients could not be trusted with, or were likely to disclose confidential information. Accordingly, there was insufficient evidence of a false and defamatory publication by Mr. Earles or Mr. Barnes, or fault on behalf of Mr. Earles or Mr. Barnes in any disclosure made by another employee, to warrant submitting the defamation claim to the jury. Appellants were entitled to JNOV on that basis as well.

2. **Any Allegedly False And Defamatory Statement Published By Any Defendant Regarding Mr. Kennedy Was Subject To A Qualified Privilege And Mr. Kennedy Produced No Evidence To Support A Jury Verdict That Any Publication Was Made With Actual Malice.**

The Court properly determined that a qualified privilege applied to Mr. Earles' email to the security supervisors as a matter of law. (R. p. 981.) A statement made in connection with an employer's *bona fide* inquiry into possible employee misconduct is qualifiedly privileged. *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 507 (Ct. App. 1989). "Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141 542 S.E.2d 743, 749 (Ct. App. 2001).

Where a defendant is entitled to a qualified privilege, a plaintiff can recover for defamation only if he or she can show that the defendant exceeded the scope of the privilege or was motivated by actual malice in the publication of the allegedly defamatory statements. *Richardson v. McGill*, 273 S.C. 142, 145, 255 S.E.2d 341, 342 (1979). In the defamation context in South Carolina, "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). South Carolina law also requires, in order to prove actual malice, that "at the time of his act or omission to act, the tortfeasor be conscious, or chargeable with consciousness of his wrongdoing." *Id.* Both ill will and consciousness of wrongdoing must be shown by more than a scintilla of evidence. *See Austin v. Torrington Co.,* 810 F.2d 416, 425 (4th Cir. 1987) (applying South Carolina law). Relevant factors may include whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited, and whether the statement was sent only to the proper parties. *See Swinton Creek Nursery v. Edisto Farm*

Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). The issue of malice is for the jury only when a reasonable juror could draw more than one inference from the evidence. Otherwise, the issue becomes a question of law for the court. *Bell v. Bank of Abbeville*, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947) ("*Bell II*").

It is clear that the plaintiff must show that *the publication* was made with actual malice. *See Murray*, 344 S.C. at 143-44, 542 S.E.2d at 750-51. The South Carolina Supreme Court in *Bell II* framed the issue as follows:

> Assuming the statements in question to be slanderous in character, were they uttered in good faith in the pursuit of the business of the bank by and to persons who had a right to hear and consider such statements, at a time and place and in a manner and under circumstances which effectually negative the existence of a purpose to injure and defame the respondent; or were the statements made maliciously, or without any proper occasion for the making of the same, and in such manner or under such circumstances that it may be reasonably inferred that the object of the parties was not to bona fide act in the pursuit of the business of the appellant, but to use the excuse of a meeting of the officers and directors to injure and defame the respondent?

Bell II, 211 S.C. at 173, 44 S.E.2d at 330.

Bell II is apposite to this case. In *Bell II*, numerous customers of the bank complained about the actions of the plaintiff in the handling of their accounts, some of which amounted to accusations of criminal conduct by the plaintiff. Based on his duties as an employee, the cashier to whom the complaints were made repeated these complaints to two members of the bank's board of directors. Based on these reports, the board decided to terminate the plaintiff, and the plaintiff sued for defamation. The court determined that a qualified privilege existed because the cashier had an interest in advising the plaintiff's employer of the complaints he had heard about the plaintiff.

Because of the qualified privilege, the plaintiff had the burden of establishing malice, even though he was alleging defamation *per se*. *Bell II*, 211 S.C. at 171-72, 44 S.E.2d. at 329-30. After the case proceeded to a jury trial, the court then overturned the verdict and held that a directed verdict should have been granted because there was not sufficient evidence to create a question of fact on the issue of malice, even though the plaintiff alleged that the cashier disliked him and there were strained relations between the two of them. *Id.* at 333.

Likewise, Mr. Kennedy offered no evidence from which the jury could conclude that the confidential email was sent to supervisors with the design to injure him, as opposed to a need to communicate operational instructions for supervisory employees in the security department and advise them of the conditions of Mr. Kennedy's return to full employment. Nothing in the email itself is false or would support a finding of malice. In addition to *Bell II*, numerous courts applying South Carolina law have granted summary judgment, directed verdict, or JNOV on qualified privilege grounds when evidence of actual malice was lacking. *See Wright*, 298 S.C. at 469, 381 S.E.2d at 503 (summary judgment granted for defendant; lack of evidence of actual malice); *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1985) (directed verdict upheld for lack of evidence of actual malice) (reversal of jury verdict on appeal because evidence of mere false statement and strained relations was insufficient to send issue of actual malice to jury); *Austin*, 810 F.2d at 416 (applying South Carolina law and reversing lower court's denial of directed verdict because evidence insufficient to demonstrate actual malice as a matter of law); *Cosby v. Legal Servs. Corp, Inc.*, 2006 WL 4781412 (D.S.C. 2006) (summary judgment on qualified privilege proper where no evidence of malice presented).

As in those cases, Mr. Kennedy offered no evidence that Mr. Earles, the drafter of the confidential email, was motivated by ill will or a desire to injure him, in either drafting the email or sending it to the addressees, as opposed to being motivated by legitimate operational concerns regarding his return to work from leave as directed by Human Resources. Mr. Earles' undisputed testimony was that he communicated to the supervisors by electronic mail because security runs three round-the-clock shifts, which made in-person communication too difficult. (R. pp. 426-427.)

Even more tenuous is Mr. Kennedy's claim that Mr. Barnes was motivated by malice or ill will in making the communication, because Mr. Kennedy simply did not offer any evidence of any communication by Mr. Barnes regarding his job status or suspected involvement in the SVHS thefts to any non-supervisory employee. Even if he had, any such investigative communications would be privileged under *McBride v. Sch. Dist. of Greenville Cnty.*, 2013 WL 8541576 at *1 (S.C. Ct. App. Nov. 20, 2013) (principal's statement to school secretary that teacher "cleaned us out" was qualifiedly privileged as a matter of law).

In contrast, the great weight of evidence negated any suggestion of ill will or desire to harm Mr. Kennedy by way of the communication regarding his return to work. Prior to the SVHS thefts, it was undisputed that Mr. Kennedy had been recommended for promotion by Mr. Barnes and Mr. Earles. There was no evidence of prior animosity between Mr. Kennedy and any Richland Two supervisors. Mr. Barnes' and Mr. Earles' mere unexpressed belief that Mr. Kennedy had a role in the SVHS thefts and could not be trusted is insufficient to establish actual malice. *See Bell II*, 211 S.C. at 174, 44 S.E.2d at 330 ("in answering these questions we are not concerned with the guilt or innocence of the respondent in respect to the matters charged in the alleged slanderous statements quoted in the complaint and disclosed by the testimony.") It was further undisputed that

upon his return to work at the same pay, same hours, and same benefits, Plaintiff did not receive any warnings or reprimands for the next fourteen months and that the termination of Mr. Kennedy's employment was not a defamatory communication that could have been considered by the jury.

In summary, Mr. Kennedy did not offer even a scintilla of evidence that Mr. Barnes or Mr. Earles acted with ill will or conscious indifference to his rights by way of Mr. Earles' very limited, confidential email communication to the supervisors to whom Mr. Kennedy would be reporting once he returned to work. The trial court thus erred by failing to grant Mr. Barnes and Mr. Earles a directed verdict on Mr. Kennedy's defamation claim on qualified privilege grounds.

B. The Trial Court Erred In Failing To Grant JNOV On Individual Capacity Claims Against Mr. Barnes And Mr. Earles Under The Tort Claims Act.

S.C. Code Ann. § 15-78-70 provides:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

For the reasons set forth above, Mr. Kennedy did not prove "actual malice" sufficient to overcome the qualified privilege that attached to the alleged defamatory communications by Mr. Barnes and Mr. Earles. Even assuming *arguendo* that that the jury could have

properly found actual malice for purposes of the qualified privilege, the evidence does not support a finding of "actual malice" for purposes of individual liability under the Tort Claims Act.

The term "actual malice" under the Tort Claims Act has been interpreted by the courts to mean "constitutional malice." *See Gause v. Doe*, 317 S.C. 39, 42, 451 S.E.2d 408, 409 (Ct. App. 1994). In at least three other cases, courts in South Carolina have applied the constitutional "actual malice" standard when addressing individual immunity under the Tort Claims Act. *Thompson v. Univ. of S.C.*, No. 04–219, 2006 WL 2583595, at *15 & n. 6 (D.S.C. Sept. 5, 2006); *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640, 643 (S.C. 1991); *Seaton v. City of N. Charleston*, 2:10-CV-03186-DCN, 2012 WL 6186158 (D.S.C. Dec. 12, 2012). To meet the constitutional malice standard, the plaintiff must show that at the time the alleged defamatory statement was made, either that the defendant knew the statement was false or that the defendant made the statement with reckless disregard of its falsity. *Gause*, 317 S.C. at 42, 451 S.E.2d at 409 (*citing New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). This is a higher standard than the common law "actual malice" standard which Mr. Kennedy did not prove for the reasons set forth above. There was simply no showing that either Mr. Barnes or Mr. Earles published any defamatory statement or insinuation about Mr. Kennedy with either knowledge of its falsity or reckless disregard of its falsity under the actual malice standard applicable to the Tort Claims Act immunity. As such, Mr. Kennedy did not carry his burden of proving the requisite "actual malice" sufficient to maintain individual capacity claims against Mr. Barnes and Mr. Earles under the Tort Claims Act.
Mr. Kennedy's claims against Mr. Barnes and Mr. Earles in their individual capacities should not have been allowed to go to the jury under S.C. Code Ann. § 15-78-70(b) and they were each entitled to JNOV on this additional ground.

C. The Trial Court Erred In Failing To Grant JNOV Regarding Punitive Damages Because Mr. Kennedy Did Not Prove By Clear And Convincing Evidence Any Defamation By Mr. Barnes Or Mr. Earles That Was Willful, Wanton, Or In Reckless Disregard Of Mr. Kennedy's Rights.

Notwithstanding the unconstitutionality of the punitive damages award in this case, *see infra*, the Trial Court erred by failing to grant JNOV on the issue of whether there was sufficient evidence to allow the jury to consider punitive damages. In South Carolina, punitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's actions were willful, wanton, malicious, or in reckless disregard of the plaintiff's rights indicating a failure to exercise even the slightest care. S.C. Code Ann. § 15-33-135 (Supp. 1999); *Taylor v. Medenica*, 324 S.C. 200, 470 S.E.2d 35 (1996). A plaintiff cannot recover punitive damages based on merely negligent conduct. *See Hicks v. McCandlish*, 221 S.C. 410, 415, 70 S.E.2d 629, 631 (1952). Recklessness is distinguished from negligence. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). While negligence is the failure to use due care, recklessness is a higher degree of culpability and responsibility and signifies a conscious failure to exercise due care. *Id.*

A finding of such conduct by Mr. Barnes or Mr. Earles is entirely inconsistent with the Trial Court's rulings granting directed verdict on Mr. Kennedy's claims for intentional infliction of emotional distress and negligent supervision. In granting the directed verdict on the negligent supervision claim, the Trial Court noted that the School District, through Mr. Earles, had a reasonable expectation that the email would be kept confidential and there was no reason to believe supervisors would violate his confidentiality directive. (R. pp. 939-940.) As with the actual malice analysis, the great weight of the evidence shows the lack of any willful, wanton, or malicious conduct by either Mr. Barnes or Mr. Earles toward Mr. Kennedy with regard to any alleged

defamatory publication, and certainly not recklessness. Mr. Barnes and Mr. Earles recommended Mr. Kennedy for a promotion shortly before the SVHS theft investigation. Following the police investigation by the Richland County Sheriff's Department, Mr. Kennedy returned to essentially the same job for fourteen months without reprimand, warning, or negative impact on his pay, work hours, or benefits that could be attributed to any defamatory publication by Mr. Barnes or Mr. Earles. The ultimate termination of Mr. Kennedy's employment for reasons not attributable to the 2011 SVHS theft investigation, or to Mr. Barnes or Mr. Earles at all, appears to have been a likely, but completely impermissible, basis for the jury's award of punitive damages. The Trial Court properly found no actionable defamation in connection with the termination of Mr. Kennedy's employment in 2012. (R. p. 922 ll. 18-22.) Accordingly, there was insufficient evidence to send the punitive damages issue to the jury and the punitive damages awards must be set aside as a matter of law.

D. The Trial Court's Exclusion Of Evidence Or Cross-Examination Regarding Mr. Kennedy's Other Alleged Thefts And The Resulting Termination Of His Subsequent Employment At SCANA Was Prejudicial Error.

Mr. Kennedy submitted to the Court on the first day of trial a motion *in limine* seeking to bar any evidence or cross examination on specific instances of similar petty thefts he was accused of committing as a night shift security guard with Allied Barton, his immediate subsequent employer, while on duty at SCANA. (R. pp. 37-45.) On the same date they learned of the information, Defendants timely identified Bill Simpson, an investigator employed with SCANA, as a witness who would testify to his investigation of Mr. Kennedy for thefts that occurred at SCANA in February 2014; Mr. Kennedy's confession to some of the thefts; Mr. Kennedy's payment of restitution for the thefts; and his termination of employment from SCANA and Allied Barton. Mr. Simpson was prepared to authenticate a video recording showing Mr. Kennedy in the act of committing

petty thefts during his third shift security work at SCANA. (R. pp. 27-32, 116-124.) The Court excluded the testimony of Mr. Simpson and the desired cross-examination as inadmissible character evidence under Rules 404 and 403 of the South Carolina Rules of Evidence on the grounds that: the evidence was not a "prior" bad act of Mr. Kennedy; it was unrelated in time to his alleged defamation by Appellants; it would be more prejudicial than probative; and Rule 404 requires clear and convincing evidence of other crimes, wrongs, or acts that are not the subject of a criminal conviction. (R. pp. 193-199.)

The Trial Court erred by excluding this "other acts" evidence because Mr. Kennedy's defamation claim placed his reputation and character for petty theft and lack of trustworthiness directly in issue under Rules 404 and 405, SCRE, and the evidence was highly probative to Appellants' truth defense, Mr. Kennedy's damages for alleged loss of reputation, causation of Mr. Kennedy's alleged damages for lost reputation and alleged special damages, and Mr. Kennedy's failure to mitigate damages.

Neither the South Carolina appellate courts nor any other court interpreting the identical federal rule have ever applied a "clear and convincing" standard under Rule 405 to cases in which character is a direct issue in the claim or defense. Because Mr. Kennedy placed his character and reputation squarely in issue with his defamation claim, the evidence was not *unfairly* prejudicial to his claims under Rule 403, even though it was highly probative of his lack of character or trustworthiness, diminished reputation, and suggested another obvious cause of his diminished reputation. *See State v. Lee*, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403.") (internal quotations omitted, emphasis in original). The exclusion of the SCANA evidence effectively allowed Mr. Kennedy to extol his character and reputation and claim

continuing damages, allegedly suffered only due to the Appellants' alleged defamatory communication, while at the same time, insulating his character and reputation from legitimate questioning and attack based on a nearly identical alleged theft committed at his new job during the pendency of this litigation.

SCRE 405 provides:

> Rule 405. Methods of Proving Character
>
> (a) **By Reputation or Opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.
>
> (b) **By Specific Instances of Conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

The South Carolina appellate courts do not appear to have addressed the applicability of Rules 404 and 405 to a defamation case. However, pre-rules cases clearly provide that a defamation claim puts character directly in issue and character evidence is admissible in defamation cases. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579 (1922) ("the plaintiff's character is directly put in issue by the action of slander, and the defendant may, in mitigation, give in evidence his general bad character . . .") (citing *Buford v. McLuny*, 10 S.C.L. 268 (S.C. Const. App. 1818). "This court expressly recognizes that an action for libel or slander is embraced within the exception to the general rule that 'reputation, good or bad, may not be pleaded or proved" in a civil action. *Id.*, citing *Smith v. Lafar*, 67 S.C. 495, 46 S.E. 333 (1903). Further, "[O]ne of disparaged fame is

not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence." *Id.*

Cases from other states and federal courts interpreting identical, or practically identical, versions of Rule 405 uniformly recognize a clear exception from normal character evidence rules that applies to defamation or slander cases when character and reputation are directly placed in issue. *See State v. Doherty*, 437 A.2d 876, 878 (Me. 1981) ("A prominent example of 'character in issue' is the defamation action where, to support the defense of truth, the defendant may prove that his or her allegedly defamatory communication accurately depicted the plaintiff's character."); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995) ("Character may be 'in issue,' as when a statute specifies the victim's chastity as an element of the crime of seduction, or when the defense to a defamation action is the truth of the allegedly defamatory statement."); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843 (1976) ("Appellant Pierson brought suit to recover damages for respondents' publication of an alleged document concerning Pierson. Pierson contends the district court erred in admitting into evidence criminal acts committed by him more than 10 years before the alleged libel. Pierson's reliance is misplaced. Since Pierson's character was put in issue by respondents' defense of truth, the evidence was properly admissible."); *Holiday v. Cutchin*, 305 S.E.2d 45, 47 (N.C. Ct. App. 1983) *aff'd*, 316 S.E.2d 55 (N.C. 1984) ("Therefore, character evidence is admissible when character is directly in issue as in actions involving moral intent: seducing an innocent or virtuous woman, defamation, or malicious prosecution."); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554 at n. 5 (N.D. Ill. Oct. 8, 1996) ("It is rare that character is an essential element. The typical example of such a case is defamation where injury to reputation must be proven."); *Ajouelo v. Auto–Soler Co.*, 6 S.E.2d 415, 419 (Ga. Ct. App. 1939) ("It is generally held that the foundation of an action

for defamation is the injury done to the reputation, that is, injury to character in the opinion of others arising from publication...."); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988) ("Here the district court decided that specific instances of conduct were admissible under Rule 405(b) because they demonstrated the honesty of the defendant, which was an essential element of the crime charged."); *Redfearn v. Thompson*, 73 S.E. 949 (Ga. Ct. App. 1912) (permitting the jury to consider plaintiff's bad reputation in mitigation of damages); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1371-72 (11th Cir. 1998) ("Since the plaintiff's character is substantively at issue in a libel case under Georgia law, Rule 405(b) permits the admission of evidence regarding specific instances of the plaintiff's conduct on that issue."); *Government of the Virgin Islands v. Grant*, 775 F.2d 508, 511 n. 4 (3d Cir. 1985); *cf. Longmire v. Alabama State Univ.*, 151 F.R.D. 414, 419 (M.D. Al. 1992) (permitting discovery regarding specific incidents of misconduct because libel plaintiff put his character in issue).

The rationale for admission of other acts evidence in defamation cases is that "[t]he hazards of prejudice, surprise, and time consumption implicit in this manner of proof are more tolerable when character is itself in issue than when this evidence is offered as an indirect indication of how [the party] behaved on a specific occasion." *See Character in Issue*, 1 McCormick on Evidence, § 187 (7th Ed.). "[T]he possibility that specific acts may be inquired into on cross examination (which may prompt barring specific act evidence when character is not in issue) is hardly of concern, since the door to such evidence is already open." *Id.* "For example, testimony concerning a defendant's reputation for truthfulness is admissible in a defamation action, and evidence of specific instances of a plaintiff's conduct is admissible in a libel action because the plaintiff's character is substantively at issue." 32 C.J.S. Evidence § 664.

Mr. Kennedy's complaint alleged that he suffered "loss of reputation in the security industry" as a result of Defendants' alleged defamatory statements. (Compl. ¶¶ 19, 26; R. pp. 15-17.) In addition to coming to trial with the door wide open, Mr. Kennedy further opened the door to evidence of his loss of employment at SCANA, the reasons for that loss of employment, and accusations of theft at SCANA on multiple occasions by:

1) Introducing evidence regarding his subsequent, current employment at GEO Care without offering any testimony about his tenure at Allied Barton or SCANA following his employment at Richland Two. (R. pp. 183-184, 191-192.)

2) Eliciting Mr. Kennedy's hearsay testimony that he had "recently" overheard a former student saying that Mr. Kennedy had stolen items from SVHS. (R. p. 184.)

3) Cross-examining defense witnesses on the issue of whether Mr. Kennedy had been accused of other thefts (after the Trial Court had excluded such evidence regarding SCANA) and citing the absence of other theft accusations to bolster his proclaimed innocence of SVHS thefts. (R. pp. 549-555.)

4) Eliciting Mr. Kennedy's testimony regarding alleged financial damages incurred following his October 2012 termination from Richland Two[3], the causation of which Appellants were unable to effectively challenge without being able to question Mr. Kennedy as to his SCANA separation. (R. pp. 180-184.) The SCANA accusations and employment termination would be an obvious alternative cause of his alleged financial difficulties or current state of his reputation or character at the time of trial.

[3] Appellants submit that all of Mr. Kennedy's alleged damages would have resulted from either his termination from Richland Two in October 2012 or from a subsequent employer, rather than from a June 2011 alleged publication, and thus, cannot support the actual damages or punitive damages awards erroneously approved by the Trial Court in this case.

Finally, the Trial Judge erred in drawing a distinction between "prior bad acts" and "subsequent bad acts" for purposes of Rule 405. Federal and state courts interpreting the identical rule have noted this lack of a distinction, and have not distinguished between prior and subsequent bad acts when evaluating admissibility under either Rule 404 or 405. *See State v. Weaverling*, 337 S.C. 460 523 S.E.2d 787 (Ct. App. 1999) (affirming admission of both prior and subsequent wrongful acts to show common scheme or plan); *United States. v. Lighty*, 616 F.3d 321 (4th Cir. 2010) (no distinction between prior and subsequent bad acts for purposes of rule 404(b)); *United States v. Cardenas*, 32 F.3d 563 (4th Cir. 1994) ("We have consistently recognized that under Rule 404(b), a court may admit subsequent bad acts to establish prior intent or knowledge."); *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982) ("subsequent conduct may be highly probative of prior intent. That one has thought in a particular illegal way over a period of time is evidence that one's thought patterns had already been so developed and were so operating on another previous occasion."); *see also Fielder v. Magnolia Beverage Co.*, 757 So. 2d 925, 930 (Miss. 1999) ("the analysis as to the admissibility of specific instances of conduct on cross-examination under Rule 405 appears to apply equally to prior and subsequent acts. Similar to Rule 404, Rule 405 makes no distinction between prior and subsequent specific instances.") (citing *United States v. Latney*, 108 F.3d 1446, 1449 (D.C. Cir. 1997); *Bullock v. Commonwealth of Virginia*, 498 S.E.2d 433, 437 (Va. 1998) (holding that the same principle of admission of prior bad acts "applies equally in cases of subsequent bad acts."). In the context of defamation or slander, Mr. Kennedy's subsequent misconduct at SCANA was directly probative on the truth defense (that Mr. Kennedy is not trustworthy/is prone to petty theft), as well as Mr. Kennedy's reputation at the time of the damages award, causation of his alleged reputational injury, and his failure to mitigate damage to his reputation allegedly caused by Appellants. It

was also relevant to show absence of mistake or common scheme or plan under Rule 404(b), as his alleged third shift rifling through SCANA employees' desks and cabinets was practically identical to the manner, method of operation, and type of thefts reported at SVHS in February and March 2011. As a result of the exclusion of the evidence, Mr. Kennedy was able to present himself at trial as someone with a long-standing, current reputation of trustworthiness in the security industry who had only allegedly been accused of workplace theft by Mr. Barnes and Mr. Earles in June 2011. Appellants were not permitted to challenge that false representation or challenge Mr. Kennedy's claim that Appellants, rather than another employer, were the proximate cause of that alleged reputational injury. Accordingly, it was prejudicial error to exclude the evidence and a new trial is warranted.

E. The Trial Court Erred In Failing To Instruct The Jury Regarding Its Ruling That No Defamation Accompanied Mr. Kennedy's Employment Termination.

At the conclusion of evidence, the Trial Court specifically ruled that Mr. Kennedy's testimony or any communication surrounding his termination in 2012 would not support a defamation claim:

> Mr. Barlow: As far as the defamation claim, we feel that the evidence has not established any of the requisite publication.
>
> Specifically with regard to the termination, there has not been anything published to anyone. There is no evidence of that, that anybody heard or understood that to be defamatory in any way, shape or form.
>
> The Court: You're saying the termination?
>
> Mr. Barlow: The termination itself. I think the termination can be severed from the reassignment in terms of an adverse action to the plaintiff. I think it's unfair for the jury to consider this as a wrongful termination case. He's an at-will employee.

The Court: I certainly haven't considered it as a wrongful termination case or that the defamation related to the termination. It's always been my understanding from everything I've heard and everything that I've read that it related to purely the circumstances regarding the investigation and the claims relating to the money that was missing in these other instances.

* * * * *

The Court: I'm sorry. Before I get to that, we're all in agreement then that any defamation does not relate to the termination?

Ms. Peavy: Yes, Your Honor.

(R. p. 909 ll. 2-22; p. 922 ll. 19-22.)

Upon receipt of the jury's question regarding the terms "actual, punitive, and malice" and request for a percentage chart to calculate damages, Appellants' counsel suspected the jury was considering this is a termination case and requested that the Trial Court correct its earlier charge and instruct the jury that Mr. Kennedy's employment termination was not part of the case and should not be considered. The Trial Court refused. (R. pp. 996-997, 1016.)

This ruling effectively allowed the jury to consider and award damages for Mr. Kennedy's claims that the conduct of Mr. Barnes and Mr. Earles forced him to cash out his retirement, sleep in his car after being evicted, and effectively ended his marriage. No reasonable jury could have found a causal connection to the alleged defamatory communications in 2011 and these alleged injuries and damages following either Mr. Kennedy's employment termination in October 2012 or his subsequent termination from Allied Barton/SCANA. Accordingly, the jury's apparent consideration and award for these alleged damages prejudicially deprived Appellants of a fair trial and a new trial is warranted.

F. The Trial Court Erred By Refusing To Grant A New Trial Absolute Because The Size Of The Verdict, Given The Evidence Presented, Demonstrated That It Was Motivated By Caprice, Passion, Or Prejudice.

"If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (quoting *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)); *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 241, 734 S.E.2d 148, 159 (2012). "The Court should grant a new trial absolute when the verdict rendered is so "shockingly disproportionate to the injuries suffered" that it must have been motivated by passion, prejudice, and caprice. *See Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 762 (Ct. App. 2000).

The size of this verdict in relation to any injuries caused by or damages proximately flowing from the alleged defamatory communication in the Spring of 2011 shocks the conscience. In this case, the undisputed testimony was that, despite being questioned and placed on administrative leave with full pay during a criminal investigation which did not result in charges, Mr. Kennedy's employment was not terminated. He was not promoted, but he was returned to his job with the same pay, benefits, and hourly schedule. Mr. Kennedy received no warnings or reprimands for the next fourteen months until his employment was terminated. In return for the minor indignity of being subjected to an investigation of money that went missing on his direct watch, in an area and during a time when he was on duty, the jury awarded Mr. Kennedy more than a half-million dollars. This outcome defies both logic and more than 35 years of jurisprudence that requires courts to grant deference to internal reassignments and other employment decisions of public school districts. *See Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005); *accord Singleton v. Horry Cnty.*

Sch. Dist., 289 S.C. 223, 227–28, 345 S.E.2d 751, 753–54 (Ct. App. 1986); *Laws v. Richland Cnty. Sch. Dist. No. 1*, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978); *see also Palms v. Sch. Dist. of Greenville Cnty.*, 408 S.C. 576, 579, 758 S.E.2d 919, 920 (Ct. App. 2014), *reh'g denied* (July 10, 2014), *cert. denied* (May 7, 2015).

The Trial Court specifically held, and Mr. Kennedy conceded, there were no defamatory communications arising in the context of the ultimate termination of his employment in October 2012 from which he could recover damages. Nevertheless, the jury was permitted, without clarification from the Trial Court, to consider and award damages that would not have been supported even in a wrongful termination case.

During the fourteen months Mr. Kennedy remained employed with Richland Two following the alleged defamatory communications by Mr. Barnes and Mr. Earles, he testified that he liked his job and did not apply for any positions outside Richland Two. (R. pp. 213-214.) Following his termination from Richland Two, Mr. Kennedy promptly secured a job making a higher hourly wage at Allied Barton. (R. pp. 205, 219.) He remained in that job until he "resigned" his employment in February 2014. He promptly found another job at GEO Care. It was further undisputed that neither defendant gave Mr. Kennedy a negative job reference or took any action to prevent him from securing comparable employment.

Mr. Kennedy produced no witness testimony or other evidence that any non-supervisor's opinion of him had changed following Richland Two's investigation and his reassignment to a position in which he testified he was performing "supervisory" duties. Two of Mr. Kennedy's three witnesses testified that *Mr. Kennedy himself* was the source of their knowledge that he had been accused of theft at SVHS and was under investigation. None of them actually believed that he had taken the money or had a lesser

opinion of him as a result of any alleged defamatory communication by Mr. Barnes or Mr. Earles. (R. pp. 233, 242, 267-268.)

Moreover, Mr. Kennedy offered no testimony or evidence that either Mr. Barnes or Mr. Earles told anyone other than supervisory-level employees that Mr. Kennedy was not a supervisor upon his return to work. It was also undisputed that Roosevelt Garrick, who was in charge of human resources, made the decision to deny Mr. Kennedy the promotion for which he had initially been recommended, and that neither Mr. Barnes nor Mr. Earles was responsible for the denial of the promotion. (R. pp. 831-836.)
Mr. Kennedy produced no evidence of special damages and testified only to his own alleged hurt feelings and embarrassment at being accused of and investigated for the SVHS thefts. Any special damages alleged by Mr. Kennedy (*i.e.*, cashing out retirement, living out of his car) would have been attributable to the termination of his employment from the School District or SCANA, and thus not recoverable as proximately caused by the alleged defamation. *See Wardlaw v. Peck*, 282 S.C. 199, 205-06, 318 S.E.2d 270, 275 (Ct. App. 1984) ("special damage must consist of some provable material loss to the plaintiff as a result of the injury to his reputation.") The Trial Court ignored its own trial ruling in its post-trial finding that these alleged post-termination injuries could support the jury's award of punitive damages. (R. pp. 5-9.)

Despite this paucity of liability and damages evidence, the jury awarded Plaintiff $200,000 in actual damages and $350,000 in punitive damages. Given the evidence presented at trial, the sheer amount of the verdict clearly shows forces at work other than a legitimate review and assessment of the evidence of liability and damages presented at trial. The Trial Court's failure to instruct the jury that Mr. Kennedy's termination from employment should not have been considered for liability or damages in this case clearly confused the jury and deprived Appellants of a fair trial. Accordingly, the Trial Court

erred in failing to set aside the verdict and order a new trial absolute.

G. The Trial Court Erred In Failing to Rule That, At A Minimum, Defendants Were Entitled To A New Trial *Nisi* Remittitur.

Even if the verdicts were not the result of passion, caprice, or prejudice, they were at least excessive and Appellants submit that they are entitled to a remittitur. "The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive." *O'Neal v. Bowles*, 314 S.C. 525 at 527, 431 S.E.2d 555 at 556; *see also Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct. App. 1997) (stating "[t]he trial judge has the discretionary power to grant a new trial *nisi*"). When a party moves for a new trial *nisi*, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) (citing *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993)). Even assuming the award was not the result of passion, caprice, prejudice, or matters outside the evidence, its undue liberality is patently obvious given that Mr. Kennedy offered no evidence of special damages arising from the only alleged defamatory publication that the jury could have considered, and punitive damages were completely inappropriate for the reasons previously stated and for the reasons set forth below. Accordingly, the Trial Court abused its discretion by failing to reduce the verdict.

H. Appellants Are Entitled To A Reversal Or Reduction In The Amount Of Punitive Damages Because They Did Not Comport With Constitutional Due Process.

To receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights. *Solanki v. Wal-Mart Store No. 2806*, 2012-213247, 2014 WL 4087911 (S.C. Ct. App., Aug. 20, 2014). The awards of punitive

damages in this case do not comport with constitutional due process. *See Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); *BMW N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). The practice of awarding punitive damages originated in principles of criminal law "to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 393, 134 S.E.2d.206, 210 (1964) (internal citation omitted). Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 164, 604 S.E.2d 385, 389 (2004); *see also Gore*, 517 U.S. at 568, 116 S. Ct. at 1595 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.") (internal quotations omitted).

The United States Supreme Court has set forth three guideposts that trial courts must apply to an award of punitive damages to determine whether the award violates due process. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. Those guideposts include: (1) the reprehensibility of the defendant's conduct; (2) the ratio to the compensatory damages awarded (actual or potential harm inflicted on the plaintiff); and (3) comparison of the punitive damages award and civil or criminal penalties that could be imposed for comparable misconduct. *Gore*, 517 U.S. at 574, 116 S. Ct. at 1598.

Reprehensibility is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 75, 116 S. Ct. at 1599. "This principle reflects the view that some wrongs are more blameworthy than others." *Id.* In considering reprehensibility, a court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had

financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 587, 686 S.E.2d 176, 185 (2009).

Each of the *Campbell/Fortis* factors demonstrates that the punitive damages the jury awarded Mr. Kennedy were constitutionally impermissible. First, despite the Trial Court's mistaken finding that Mr. Kennedy was forced to cash out his retirement as a result of the alleged defamation (as opposed to his termination from either Richland Two or SCANA), Mr. Kennedy offered no proof of any economic harm from the alleged defamation and certainly no physical harm. Second, there was no evidence of a reckless disregard for the health or safety of Mr. Kennedy, who kept his job after the alleged thefts without reprimand or warning for fourteen months. Mr. Kennedy admittedly sought no other jobs until his termination fourteen months later for reasons the Trial Court found non-actionable as a matter of law. Third, Mr. Kennedy offered no evidence of any financial impact that *the alleged defamatory communication*, as opposed to his employment termination, had upon him. Fourth, the alleged defamation was a one-time event and Mr. Kennedy continued working for fourteen months after the alleged defamatory email to supervisors, segueing into another job with a better per-hour pay rate upon his discharge from Richland Two in 2012. Finally, there was no trickery, deceit, or intentional malice even if a jury could somehow find from the evidence that Mr. Earles or Mr. Barnes was responsible for any communications about Mr. Kennedy's trustworthiness outside the supervisory chain addressed in the "CONFIDENTIAL" email. The conduct of Mr. Barnes and Mr. Earles was not even negligent, as the Trial Court specifically found in granting directed verdict on the negligent supervision claim. The evidence presented at trial was that other witnesses who were not named defendants,

including Roosevelt Garrick, Tim Hunter, and Jim Childers, similarly believed that Mr. Kennedy was responsible for the SVHS thefts and that they communicated that belief internally among supervisors who had a legitimate need to know the information. Moreover, the undisputed testimony was that it was the decision of Mr. Garrick, not Mr. Barnes or Mr. Earles, to deny Mr. Kennedy the promotion to lieutenant originally recommended by Mr. Barnes and Mr. Earles. (R. pp. 833-842, 1011-1012, 1038-1040.) Mr. Earles merely effectuated that decision by returning Mr. Kennedy to work and reassigning his position, which was communicated only to supervisors.

As to the second *Gore* factor, the Supreme Court has indicated that the reasonableness of a punitive damages award cannot be determined solely by comparing the punitive damages award to the actual damages award; rather, the touchstone of the inquiry is reasonableness. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. While the multiplier for punitive damages is low in this case, the unreasonable amount of actual damages based on the lack of evidence presented by Mr. Kennedy to support a $200,000 award of actual damages makes the amount of the punitive damages award completely unreasonable.

As to the final *Gore*, factor, *i.e.*, comparison of the punitive damages award to civil fines and criminal penalties that could be imposed for similar conduct, there are no criminal penalties for workplace defamation in South Carolina. Consequently, there is nothing to assess this particular factor against.

Moreover, application of the eight factors set forth by our own state Supreme Court, in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), for a post-verdict review of due process of punitive damages awards also warrants reversal of the jury's punitive damages awards against Defendants.

The *Gamble* factors are:

(1) defendant's degree of culpability;

(2) duration of the conduct;

(3) defendant's awareness or concealment;

(4) the existence of similar past conduct;

(5) likelihood the award will deter the defendant or others from like conduct;

(6) whether the award is reasonably related to the harm likely to result from such conduct;

(7) defendant's ability to pay; and

(8) other factors deemed appropriate.

Id. at 111-12, 406 S.E.2d at 354.

Defendants' analysis of the *Fortis/Campbell* reprehensibility factors disposes of the first four *Gamble* factors. Mr. Earles' and Mr. Barnes' conduct was, at its very worst, negligent and numerous other employees participated in or made decisions regarding Mr. Kennedy's employment and shared the belief that Mr. Kennedy's trustworthiness was implicated by the SVHS investigation. The alleged defamatory email was a one-time event, as Mr. Kennedy did not show any prior or subsequent defamation and could not sustain a negligent supervision claim or an intentional infliction of emotional distress claim as a matter of law. Moreover, Mr. Kennedy's continuation in employment without complaint or incident and the lack of testimony that any co-workers or non-supervisors considered Mr. Kennedy a thief after the reviewing Mr. Earles' email demonstrates a lack of harm from the email communication. Any communications Mr. Barnes and Mr. Earles made were limited in scope to proper parties on a proper occasion and related to business operations.

With regard to the final four factors, Mr. Kennedy offered no evidence whatsoever of the Defendants' ability to pay. As noted above, the punitive damages

award is not likely to deter future workplace defamation because the award of punitive damages was completely unpredictable and bore no reference to the alleged culpability of Mr. Barnes and Mr. Earles, who were merely acting as part of a larger organizational personnel and operational management decision. Finally, the award is not reasonably related to the harm likely to arise from the alleged defamatory communication in this case. As such, the punitive damages awards in this case do not comport with due process and should have been set aside or reduced by the Trial Court.

V. CONCLUSION

For all of the reasons stated above, this Court should reverse the judgment of the trial court and grant Appellants judgment notwithstanding the verdict. In the alternative, this Court should grant Appellants a new trial absolute, or at a minimum, *nisi* remittitur, and vacate the punitive damages awards.

Respectfully submitted,

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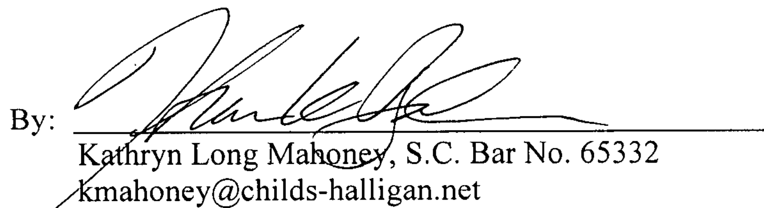
By: 

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November 30, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No.: 2015-000613

Jeffrey Kennedy ....Respondent,

v.

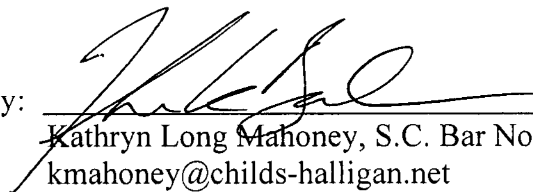
Richland County School District Two, Eric Barnes, and Chuck Earles .... Appellants.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

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