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 REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Pursuant to Rule 208(a)(3), SCACR, Appellants, Richland County School District Two, Eric Barnes, and Chuck Earlés, hereby submit their Reply to Respondent Jeffrey Kennedy's Brief.

II. ARGUMENTS

A. Mr. Kennedy's Response Highlights The Insufficiency Of The Evidence Offered In Support of His Defamation Claim And The Trial Court's Error in Refusing To Grant JNOV.

Mr. Kennedy identifies the June 15, 2011 "Confidential" email from Mr. Earles to supervisors as the sole potential defamatory communication in this case. (Resp. Init. Brf. pp. 18-20.)[1] While he continues to give lip service to legal authorities suggesting that a combination of "words and conduct" could be construed as defamatory, *see Mains v. K Mart Corp.*, 297 S.C. 142, 148, 375 S.E.2d 311, 314 (Ct. App. 1988), he has not identified any conduct of the Appellants in the record that was understood by any witness to communicate a defamatory message. As such, evaluation of Appellants' JNOV motion turns entirely on the evidence in the record that could have supported a jury finding that Mr. Barnes and Mr. Earles published the June 15, 2011 Confidential email beyond the group of supervisors addressed in the email.

First, the Trial Court properly found the Confidential email to be a qualifiedly privileged communication as a matter of law. (R. p. 981 ll. 17-21.) It is undisputed that Mr. Barnes and Mr. Earles both denied circulating the Confidential email or re-sending it to anyone who was not an addressee of the email. (R. p. 308 l. 25 – p. 309 l. 23, p. 518 l. 15 – p. 519 l. 20.) Mr. Kennedy offered no testimony or other evidence that Mr. Barnes or Mr. Earles did so. In fact, it appears that Mr. Kennedy cannot settle on a theory as to

[1] There was also testimony from Lieutenant John Reid, a supervisor, that Mr. Barnes told him verbally that Mr. Kennedy was not to have keys. (R. p. 249 l. 16 – p. 250 l. 5.)

who may have printed it out, as he alleges both that Appellants Earles and Barnes intentionally left it out to harm him, (Resp. Init. Brf. pp. 22, 26), and also that they "failed to ensure that it was kept confidential among supervisors or not printed out." (Resp. Init. Brf. pp. 27, 45.)

Mr. Kennedy further argues that the unprivileged publication element of his defamation claim could be satisfied based solely on the jury's disbelief of Mr. Barnes' and Mr. Earles' testimony that they did not further publish the Confidential email. (Resp. Init. Brf., pp. 19, 26.) However, it is settled, axiomatic law that a jury verdict based solely on rejection of defense testimony, without affirmative evidence of the element to be proven by the plaintiff, cannot stand. Most notably, Judge Learned Hand addressed this issue in *Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952). He reasoned that although a witness's demeanor alone might rationally justify a finding opposite to the witness's testimony in court, the theory must be rejected on the policy ground that there could be no effective appellate review of a trial judge's decision to permit an issue to go to the jury on the basis of witness demeanor alone. In Judge Learned Hand's words: "although it is . . . true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him." *Id.* at 269. The U.S. Supreme Court affirmed this sound logic in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), holding that a plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial. *See Id.* at 252; *see also*, *Peeler v. Spartanburg Herald-Journal Div. of The New York Times Co.*, 681 F. Supp. 1144, 1147 (D.S.C. 1988) ("The Plaintiff cannot rely upon the hope that witness cross-examination will raise a credibility issue as regards actual malice."); *Jones v. Owens–Corning Fiberglas Corp.*, 69 F.3d 712, 718 (4th

Cir. 1995) (party opposing summary judgment may not "merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof"); *McManus v. Taylor*, 756 S.E.2d 709, 716 (Ga. Ct. App. 2014).

> The party with the burden of proof does not make an issue for the jury's determination by relying on the hope that the jury will not trust the credibility of the witnesses. If all of the witnesses deny that an event essential to the plaintiff's case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event in question actually occurred.

§ 2527 Credibility of Witnesses, 9B Fed. Prac. & Proc. Civ. § 2527 (3d. ed.). To hold otherwise would impermissibly shift the burden of proof (making it a burden of "disproof") to the defendant.

The Trial Court implicitly recognized this in rejecting Mr. Kennedy's *ipso facto* argument that if non-supervisory co-workers saw the Confidential email in paper form, Mr. Barnes and/or Mr. Earles must have printed and left it out rather than one of the supervisors to whom it was addressed, or even Mr. Kennedy himself. (R. pp. 926-927.) Nevertheless, the Trial Court erred in allowing the jury's apparent disbelief of Mr. Barnes' and Mr. Earles' testimony that they did not print out or further distribute the Confidential email, without affirmative evidence to the contrary, to support its finding that Messrs. Barnes and Earles actually published the Confidential email to non-supervisory employees.

For these reasons, Mr. Kennedy's proof is no different from that this Court rejected in *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). The plaintiff in *Williams* attempted to rely on a similar *ipso facto* argument. He argued that because the school principal had asked him about his apparent romantic relationship with the school secretary, the jury could find that the principal was

responsible for publishing rumors of the affair outside the "need to know" group. Implicit in the *Williams* Court's rejection of the plaintiff's logic was that it was not enough for the jury to simply disbelieve the principal's testimony without affirmative evidence that he started or repeated the rumor. *Id.*

As in *Williams*, any of the email recipients in the instant case could have been responsible for printing it out and failing to maintain its confidentiality. Accordingly, the jury's finding that Mr. Earles and Mr. Barnes published the Confidential email to individuals outside the supervisory group, based only on its presumed disbelief of Mr. Earles' and Mr. Barnes' testimony on that issue, cannot support the verdict and it must be set aside.

B. Even If The Evidence Supported A Finding Of An Unprivileged Defamatory Publication By Either Mr. Earles or Mr. Barnes, The Record Is Devoid Of Evidence That Any Such Communication Was Made With Actual Malice.

Second, the Trial Court erred in permitting even more attenuated and impermissible inference building by upholding the jury's finding that Mr. Barnes and Mr. Earles exceeded the scope of the qualified privilege or further published the Confidential email with actual malice.

Whether malice is the incentive for a publication is *ordinarily* for the jury to decide. *See Murray v. Holnam, Inc.*, 344 S.C. 129, 144, 542 S.E.2d 743, 751 (Ct. App. 2001 (*emphasis added*). However, as noted in Appellants' Initial Brief, it is not *always* for the jury to decide. (App. Init. Brf. pp. 13-14.) *See also Woodward v. S. Carolina Farm Bureau Ins. Co.*, 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981) ("While abuse of the conditional privilege is ordinarily an issue reserved for the jury . . . in the absence of a controversy as to the facts, as here, it is for the court to say in a given instance whether or not the privilege has been abused or exceeded.") (internal citations omitted).

Actual malice must be proven and is not presumed.[2] *Bell v. Bank of Abbeville*, 208 S.C. 490, 494-95, 38 S.E.2d 641, 643 (1946). On its face, there is nothing false or malicious about the Confidential email. It is a directive from a manager to supervisors, limited in scope to address Mr. Kennedy's return to work following an investigation of theft at Spring Valley High School (SVHS). In fact, the Trial Court specifically found:

> [T]he 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 it's confidential.

(R. p. 939 l. 21 – p. 940 l. 8.)

Further, no reasonable jury could have found that Mr. Earles' directive to the security department in August 2010 to stop engaging in rumors and gossip in the workplace was evidence that Mr. Earles or Mr. Barnes somehow believed or intended that department supervisors would release the Confidential email to their subordinates and injure Mr. Kennedy. (R. p. 1008.) Mr. Earles' prior directive negates, rather than supports, any finding that he sent the Confidential email to supervisors with the intent that they do the exact opposite of what the email instructed them to do. Regardless, if Mr. Kennedy's theory is that Mr. Barnes or Mr. Earles failed to prevent a subordinate supervisor from further publishing the Confidential email, that at most would prove

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[2] Contrary to Mr. Kennedy's arguments, proof of an alleged libelous statement that is subject to a qualified privilege does not obviate a plaintiff's burden to prove actual malice to defeat the qualified privilege. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999).

negligence and fall well short of the required showing that Mr. Earles or Mr. Barnes made a defamatory communication with actual malice.

To prove actual malice in the defamation context, the plaintiff has to show that *the defamatory communication* was made "by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the *statements were published* with such recklessness as to show a conscious indifference toward plaintiff's rights." *Murray*, 344 S.C. at 143, 542 S.E.2d at 750 (emphasis added). It is not enough to show that a defendant believed that the plaintiff was responsible for missing money or should have been terminated from employment. As with the evidence of lack of publication, the jury's mere disbelief of Mr. Barnes' and Mr. Earles' testimony is not enough to support a finding that they published a defamatory email about Mr. Kennedy with actual malice. By permitting the jury to consider whether the scope of the qualified privilege had been exceeded or whether evidence of actual malice existed, and refusing to grant JNOV, the Trial Court improperly granted the jury Orwellian authority[3] to punish Appellants merely for their beliefs that Mr. Kennedy was responsible for the missing money, rather than for any actual malicious communications to others, as Mr. Kennedy was required to prove.

C. The Evidence Mr. Kennedy Presented Does Not Support The Jury's Actual Or Punitive Damages Award And A New Trial Is Required Because The Jury Capriciously Fixed Damages Without Regard To The Evidence.

When a verdict is "grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other considerations not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict." *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (quoting *Small v. Springs Indus., Inc.*, 292 S.C.

[3] George Orwell's *1984* introduces the concept of "thoughtcrime," by which unspoken beliefs or thoughts are punishable as criminal acts. George Orwell, 1984 (New York: Signet Classic, 1950).

481, 487, 357 S.E.2d 452, 455 (1987)). If a jury arbitrarily and capriciously fixes damages without reference to the evidence, it is error for the court to refuse a motion for new trial. *Carrigg v. Blue*, 283 S.C. 494, 500, 323 S.E.2d 787, 790 (Ct. App. 1984). The trial judge's failure to grant a new trial absolute in such situations amounts to an abuse of discretion and on appeal this court will grant a new trial absolute. *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 518, 435 S.E.2d 864, 868-69 (1993); *Sparrow v. Toyota of Florence, Inc.*, 302 S.C. 418, 422, 396 S.E.2d 645, 647-48 (Ct. App. 1990).

At the close of evidence, the Trial Court granted a directed verdict to the extent that Mr. Kennedy claimed that the termination of his employment in October 2012, more than a year after he returned to work at Richland Two following the SVHS theft investigation, communicated a defamatory message. (R. p. 908 l. 20 – p. 910 l. 2, p. 922 ll. 18-23.) Thus, it is undisputed that the loss of Mr. Kennedy's employment was not a result of or accompanied by any alleged defamation by Appellants and the jury could not have considered it or its effects in calculating damages for defamation.

Mr. Kennedy's trial testimony tied the following losses to the termination of his employment – loss of his marriage, eviction from his house, repossession of his car, and cashing out his retirement savings. (R. pp. 180-183.) In an attempt to save an award that shocks the conscience, Mr. Kennedy now attempts to argue that these alleged injuries were caused by the Confidential email's statement that in his new assignment, he was not to be given keys.

The cases upon which Mr. Kennedy relies on to support a $550,000 verdict for a denial of a promotion and sixteen-month reassignment of job duties are clearly distinguishable. In *Miller v. City of W. Columbia*, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996), for example, the evidence showed that the plaintiff was forced to resign his employment and:

> Broom's defamatory statement effectively destroyed Miller's reputation and ended his distinguished twenty-five year law enforcement career. Miller had been the assistant chief of police for seventeen years, and during this time he had received the highest awards available to law enforcement officers. However, after resigning from the West Columbia Police Department, Miller had difficulty obtaining employment.

Miller, 322 S.C. at 231, 471 S.E.2d at 687. *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 447 S.E.2d 194 (1994), is likewise distinguishable because the defamatory communication resulted in the termination of employment of a 53-year-old employee who had been working for Spartanburg Steel for 10 years and had not been able to find another job at the time of trial. *Constant*, 316 S.C. at 91, 447 S.E.2d at 197.

In contrast to *Miller* and *Constant*, Mr. Kennedy concedes that, for his remaining sixteen months with the School District, he did not seek employment outside Richland Two, and continued to enjoy his job. (R. p. 214.) Respondent concedes that "despite a few months following his [non-actionable] termination, he has been gainfully employed since." (Resp. Init. Brf. p. 39.) Of course, at the time of trial, Mr. Kennedy had already been terminated from another, higher paying job for alleged third-shift thefts and had promptly found another job with GEO Care. (R. p. 183 ll. 13-16, p. 208 ll. 7-11.)

Finally, *Wilhoit v. WCSC, Inc.*, 293 S.C. 34, 40, 358 S.E.2d 397, 400 (Ct. App. 1987), did not arise out of the employment context, and is easily distinguished in that it involved five news broadcasts to the public at large insinuating that plaintiff, who was merely a trial witness, was the defendant found guilty of embezzlement following a criminal trial. The *Wilhoit* actual damages award of $1 was appropriate on those facts because the plaintiff, like Mr. Kennedy, did not prove any special damages or other injury from the publication.

The verdict the Supreme Court set aside as "grossly excessive" in *Small*, 292 S.C. at 481, 487, 357 S.E.2d at 455, is more analogous to the verdict in Mr. Kennedy's favor. In *Small,* a breach of implied employment contract agreement resulted in termination of the plaintiff's employment, the jury awarded $300,000 in actual damages. The Supreme Court noted, "The jury's verdict would put Small in the position of never having to work again and having no obligation to mitigate her damages . . . To allow Small to recover for loss of wages and benefits for the remainder of her life is unreasonable and contrary to her duty to minimize her damages." *Id.*

In this case, it was undisputed that Mr. Kennedy was an at-will employee. (R. p. 1007.) Following the Spring Valley investigation, Mr. Kennedy was, at most, denied a promotion, the difference in pay for which he offered no evidence at trial, and was reassigned to a job which he testified that he liked and did not seek alternative employment for sixteen months. (R. p. 214.) A comparison of the verdict in this case with the verdicts in *Miller* and *Constant*, which involved the deprivation of the plaintiffs' livelihoods resulting from termination of employment and difficulty finding comparable employment, leads to the obvious conclusion that the jury improperly awarded damages as though the termination of Mr. Kennedy's employment with Richland Two in October 2012 was an actionable injury. Thus, the award was clearly excessive and fixed capriciously without regard to the evidence the jury should have considered.

This was not a "wrongful termination" or "negligent investigation" case. The Trial Court should have instructed the jury as to the alleged defamation they were to consider when presented with questions that suggested the jury was considering Mr. Kennedy's termination from employment or other matters outside the evidence in their verdict. (*See* Appellants' Init. Brf. pp. 25-26.) Employees are investigated, transferred, and denied promotions every day in this state. Allowing this verdict to stand

will effectively create an unnecessary exception to the doctrine of employment at-will permitting employees to legally challenge virtually any undesired change in job status short of a termination on the grounds that the change was accompanied by or caused some form of reputational injury to the employee. This Court has been reluctant to create a catch-all defamation cause of action to permit at-will employees to challenge employment decisions. *See McNeil v. S. Carolina Dep't of Corr.*, 404 S.C. 186, 743 S.E.2d 843 (Ct. App. 2013), *reh'g denied* (June 25, 2013).

Particularly, as applied to a public school employee like Mr. Kennedy, the verdict upon the facts at trial further ignores *Singleton v. Horry Cnty. Sch. Dist.*, 289 S.C. 223, 227–28, 345 S.E.2d 751, 753–54 (Ct. App. 1986), and *Laws v. Richland Cnty. Sch. Dist. No. 1,* 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978), which recognize that school districts should have significant discretion in employee assignments and personnel matters to carry out the duties required of them. The damages award should be set aside and a new trial absolute ordered.

D. The Applicable Factors For The Court's Consideration Do Not Support An Award Of Punitive Damages In This Case.

A punitive damages award based on an unsupported actual damages award also fails. *See Sparrow*, 302 S.C. at 422, 396 S.E.2d at 648. In this case, the punitive damages award is even more problematic than the compensatory damages award given that the "multiplier" factor is the only *BMW N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), or *Gamble v. Stevenson,* 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991), factor that would arguably support the award. Mr. Kennedy points to no evidence, let alone clear and convincing evidence, that either Mr. Barnes or Mr. Earles was responsible for circulating the Confidential email to non-supervisory employees or otherwise engaged in conduct that was willful, wanton, or in reckless disregard of Mr. Kennedy's rights.

See Taylor v. Medenica, 324 S.C. 200, 220, 479 S.E.2d 35, 46 (1996) (punitive damages may only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights). He further offers no precedent that would suggest that the denial of a promotion, with no proof of the difference in pay between the job sought and the job retained, and reassignment to a job he liked and from which he did not seek to leave until he was terminated for other reasons in October 2012, could support a $350,000 punitive damages windfall. Mr. Kennedy has had little trouble finding other, better paying jobs in the security industry following the SVHS investigation. As noted, any alleged special damages would have been occasioned by Mr. Kennedy's termination from the School District or from Allied Barton/SCANA prior to trial. The mere fact that another employee who was not suspected of theft was treated differently than Mr. Kennedy by other supervisors was not evidence that any Appellant acted willfully, wantonly, or in reckless disregard of Mr. Kennedy's rights. Accordingly, this Court should, at a minimum, set aside the award of punitive damages in this case under *Gore* and *Gamble*.

E. The Great Weight Of Authority Confirms That The Trial Court Committed Reversible Error By Excluding Evidence Of Mr. Kennedy's Theft Accusations, Termination, And Criminal Charges Pursued By His Immediate Subsequent Employer.

Mr. Kennedy's response completely ignores the language and rationale of SCRE 405, which permits more extensive inquiry into and proof of other bad acts when character and reputation have been placed *directly in issue* by the claim alleged. In fact, Mr. Kennedy simply dismisses the notion that when character and reputation have been placed directly in issue, the evidence should be treated differently than character evidence in any other type of case. He labels almost 200 years of settled legal authority to the

contrary as "pre rules" or as nonbinding authority from out of state. (Resp. Init. Brf. p. 46.)

Moreover, the SCANA theft evidence was not offered solely for purposes of the truth defense, as Mr. Kennedy argues, but also for purposes of refuting causation of Mr. Kennedy's alleged damages, the extent of his alleged damages, and his failure to mitigate damages. Though ignored in Mr. Kennedy's response, this was clearly argued and rejected by the Trial Court. (R. pp. 118-122.)

It was manifestly unfair for Mr. Kennedy to argue that the sole blemish on his otherwise stellar reputation at the time of trial was the Spring Valley theft accusation. In addition to denying the Appellants the right to fairly challenge that assertion, the Trial Court unfairly allowed Mr. Kennedy to: (1) bolster that reputation by prohibiting witnesses from referencing the SCANA accusations, investigation, and employment termination when Respondent's counsel asked if Mr. Kennedy had ever been accused or implicated in any other thefts; (2) deny Respondents the opportunity to show other potential causes for Mr. Kennedy's alleged financial losses and alleged personal problems; and (3) discount the obvious similarities in the SVHS and SCANA charges which both involved using the convenience of his third-shift position to engage in petty theft.

Finally, Mr. Kennedy's focus on the time lapse between his reassignment in June 2011 and the alleged SCANA thefts is misplaced. Mr. Kennedy certainly did not limit his proof of damages to the time period from June 2011 until his SCANA termination in March 2014. He claimed that he had recently overheard remarks about the Spring Valley theft at a Wal-Mart and argued for future damages based on 10 years of employment, the loss of which was not the result of any alleged defamation as a matter of law. Mr. Kennedy's reputation and character at the time of trial, rather than at a discrete time

in the past, was the relevant issue for the jury to consider. Appellants were unfairly and prejudicially prohibited from challenging that alleged character and reputation with the Allied Barton/SCANA evidence and are entitled to a new trial.

III. CONCLUSION

For the foregoing reasons and those set forth in Appellants' Initial Brief, Appellants are entitled to Judgment Notwithstanding the Verdict. In the alternative, Appellants must be granted a new trial absolute; at a bare minimum, Appellants are entitled to a reduction in the jury's award of actual and punitive damages.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

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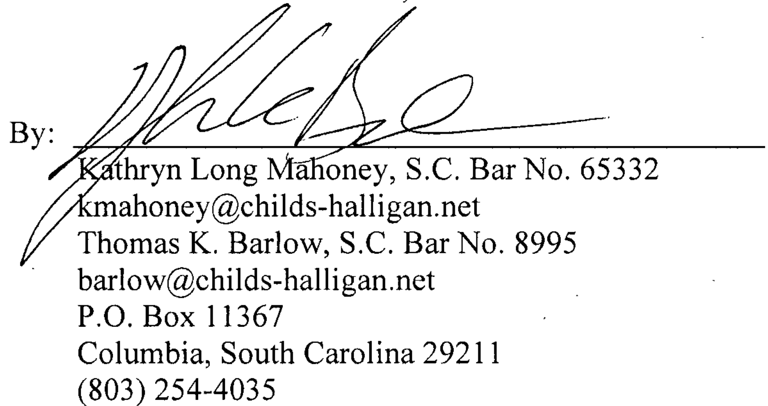

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