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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-001700

J. Scott Kunst, ...Respondent

v.

David Loree, ...Petitioner.

BRIEF OF RESPONDENT

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RESPONSE TO PETITIONER'S STATEMENT OF FACTS

The Petitioner's Brief contains a Statement of Facts that appears to focus on Loree's failed truth defense and the Gaby default action and contains no value to the qualified privilege arguments at hand. Nonetheless, the Respondent is obligated to make the following corrections.

David Loree was not an employee of Richard and Barbara Gaby. He was employed by a Van Andel family holding company named JVA Enterprises as a bodyguard (Appx. 291) for Barbara. Although his salary was expensed through the company, the Gabys used him for personal chores such as their fraudulent actions involving their Pickens, SC property as well as managing other private properties.

The Gabys and Kunst signed a simple reimbursement contract in 2004 that required weekly reimbursement for expenditures that Kunstwerke had already made on the Gaby's behalf. In February 2006, Richard Gaby and Loree conspired to default on three such weekly payments creating a large >$100,000 balance of debt owed Kunstwerke which Gaby refused to pay. Kunst's only option was to reconcile the account and refund any items that Gaby had paid Kunstwerke for, but had not yet been disbursed.

This was a simple reimbursement contract with 908 finite, knowable, and auditable transactions totalling $2,656,492 of which Gaby reimbursed $2,554,087 (Appx 312). Loree's own forensic expert Larkin supposedly "looked at everything" during discovery for this present trial (as referenced in the arguments below). For obvious reasons, Loree declined to use him as a witness at trial. Loree can only reference in his brief the uncontested Gaby default damages award. All of the alleged "findings" that he lists on page 3 were easily refuted at trial in a

contested environment. For example, on page three Loree alleges "Kunst diverted the Gaby's funds for his own personal use." When asked at trial "Mr. Loree, did I take money from the Gabys and spend it on personal things?" Loree responded "Unknown, sir." (Appx. 135, Tr.179, lines 19-23)

It should be noted that even though the causes of action are deemed admitted in a default case, final judgment was only entered in the breach of contract claim. There was no defective work and Judge Welmaker specifically did not find unfair trade practices.

The Gabys had the option to actually litigate their account in a contested environment but chose not to. Kunst answered the original Gaby complaint days late and Kunst's counterclaims were dismissed. Kunst fought all the way to this present Court to have the default set aside and have the case litigated. Kunst warned the Court at that time that the Gaby's intentions by forcing the default would not be honest. A decade has proved that to be an understatement.

And so Loree's Statement of Facts appears to be one last smear of a coward who spouts "facts" in a State Supreme Court brief from an uncontested default damages hearing where Kunst was barred from testifying or submitting any evidence such as the actual acounting records and source documents. There is a six-year-old published opinion by the Court of Appeals that is often referenced in South Carolina courtrooms regarding what is deemed "actually litigated" - *Kunst v. Loree,* 404 S.C. 649 746 S.E.2d 360 (2013). The Petitioner should read it.

At the end of his Statement of Facts, Loree attempts to blame all of the post-slander devastation on tax liens or Kunst's own inability to keep his business afloat. But a slanderous accusation of grand larceny that caused other clients to stop paying their debt during the

explosion that these statements caused would immediately and overwhelmingly destroy any business, livelihood, and reputation. The total debt default during this time was $539,027 (Appx. 312).

Nonetheless, it is worth clarifying that the tax liens were a result and not cause of the financial devastation. The tax liens Loree references were put in place in 2009 (public record), three years after the slander. Most of the IRS tax liens have already been removed and the remainder will be removed shortly. All of the South Carolina Department of Revenue tax liens have been removed. The only instance of an uncontested genuine tax liability arose from unpaid South Carolina employment taxes due from Eugene Covington's project that Covington never reimbursed to Kunstwerke. This is fully supported by Covington billings, time sheets, and worker testimony.

This has been a tortured thirteen-year case plagued by inexcusable delays resulting in two published opinions. As in all slander cases, a speedy resolution should have been a priority because the damage continues during litigation. Loree has been free to continue the harm caused by his slander through smears in briefs such as this for over a decade.

This Court has asked for briefs on Loree's two arguments regarding the affirmative defense of privilege. Based on the findings of fact by the jury and this Court's responsibility to view the evidence in the light most favorable to the Respondent, the presumption now is that Loree is a liar who falsely imputed serious financial crimes to another man. The only relevant facts here should be those related to the affirmative defense of a qualified privilege.

Argument

I. The Court of Appeals erred concerning the defense of qualified privilege when it made the *factual* finding that Petitioner acted in a reckless and wanton manner with a conscious disregard for Respondent's rights.

In its published opinion 5564 (Appx. 1464), the Appeals Court properly noted that "Loree miscontrues the law" regarding actual malice *or* the abuse of privilege: **"Loree argues Kunst failed to meet his burden of showing an abuse of privilege because he failed to prove actual malice by Loree. However, we find that Loree misconstrues the law because a plaintiff may also show an abuse of a qualified privilege by demonstrating the speaker exceeded the scope of the qualified privilege."**

The Appeals Court properly emphasizes the conjunction *or*:

"When the occasion gives rise to a qualified privilege, a prima facie presumption to rebut the inference of malice exists, and the plaintiff has the burden to show either actual malice *or* that the scope of the privilege has been exceeded. Swinton Creek Nursery, 334 S.C. at 484, 514 S.E.2d at 134. The privilege is abused and lost, leaving the speaker unprotected, when either of following situations occur: '(1) a statement [is] made in good faith that goes beyond the scope of what is reasonable under the duties and interests involved or (2) a statement [is] made in reckless 'disregard of the victim's rights.' " (Appx. 1464, Opinion 5564, p. 13)

Nowhere in its opinion does the Court of Appeals make any conclusions regarding actual malice other than to confirm that it is not necessary to prove actual malice in order to prove that the scope of privilege had been exceeded. (The Court of Appeals did not address actual malice,

nevertheless, it is argued below that there is certainly evidence of actual malice in all of the occasions.) Loree's argument is factually false on its face.

Remarkably, Loree continues this misconstrued understanding of the law by conflating actual malice with scope throughout his Brief of Petitioner to this Court. Loree falsely alleges that the Appeals Court made a "factual finding" of actual malice (a reckless and wanton manner with a conscious disregard for the rights of another) when it simply concluded that "evidence existed for the jury to determine that Loree abused or exceeded privilege" (Appx. 1464, Opinion 5564, p. 13). The Appeals Court was responding to Loree's false argument that such evidence did not exist.

Indeed, both Petitioner Arguments I and II now being considered by this Court are wholly dependent on a false premise that there was no evidence in conflict at trial regarding whether the occasions gave rise to a qualified privilege and if any possible privilege was abused. It is difficult to imagine how one can misconstrue this Court's ruling in *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 134 when the language is explicitly clear. The relevant three paragraphs to this argument are:

"In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.

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

To prove actual malice, the plaintiff must show that the defendant was activated 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 disregard for plaintiffs rights. Holtzscheiter, supra. In addition, "the person making [the defamatory statement] must be careful to go no further than his interests or his duties require. And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though the publisher acted in good faith." Fulton, 220 S.C. at 297, 67 S.E.2d at 429; accord Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 282 S.E.2d 599 (1981).

Based on *Swinton*, Loree is not liable for a statement if (1) the matter is published upon an occasion that makes it conditionally privileged, and (2) the privilege is not abused. Condition (1) speaks to whether the *occasion* gives rise to a qualified privilege. Regard must be had to the specific occasion *and* to the relationship between Loree and Goad or Loree and Alfonso (and, as we will discover, the crowd standing around Alfonso). *Swinton* requires that Loree (a) have an interest in the subject matter and that witnesses Goad or Alfonso have a corresponding interest, and (b) the statement must be honestly made by Loree. Only then would a statement be considered privileged by reason of an occasion and give rise to a qualified privilege.

Condition (2) assumes an occasion gives rise to privilege, but it can be lost by abuse if Kunst can show there was actual malice or that Loree exceeded the scope of privilege by going further than his interests or duties required.

In *Swinton*, this Court held that the scope of privilege must be strictly narrowed to the occasion, so much so that a mere remark about a parties' "financial duress" was deemed unnecessarily defamatory given the circumstances. This court also found that there was even evidence of actual malice in choosing that phrase in the light of the surrounding circumstances.

In *Fulton,* this Court held that "It is not necessary that evidence must be offered of malignity or ill will, nor that those facts should be found. The time, place, and other circumstances of the preparation and publication of defamatory charges, as well as the language of the publication itself, are admissible evidence to show that the false charge was made with malice." Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951).

In *Harris*, the Court of Appeals held that the specific occasion of an employee's evaluation which consisted of three *internal* memos gave rise to a qualified privilege. That is to say, based on *Swinton* condition (1), there was a corresponding interest and the memos were honestly written. "These communications concerned the evaluation of an employee's job performance; Therefore, the qualified privilege applies in the absence of evidence of actual malice or abuse of privilege." *Harris v. Tietex 417 S.C. 533, 540, 790 S.E. 2D 411, 415, Ct. App.2016.* That is to say, it applies in the absence of evidence of *Swinton* condition (2) above.

An occasion is a specific event and it must have a narrow and determinable purpose upon which one can apply the law as was done in *Harris*. South Carolina case law does not define an occasion as broadly as Loree argues. Loree's misconstrued argument demands that *every*

conversation within a working construction site relationship between Loree and witnesses Goad and Alfonso (and group) gave rise to a conditional privilege. *Swinton* does not give Loree that broad of a brush.

In order to properly apply *Swinton* to Loree, we must review what actual evidence does exist regarding the occasions upon which these statements were made to Goad and Alfonso. Due to Loree's lack of memory, most or all of the evidence that exists comes from the witnesses themselves.

As to witness Goad:

What we know from witness Goad is that he spoke with Loree on "numerous occasions" in the spring of 2006. (Appx. 121, Tr. 122, lines 6-9). Goad understood that Loree was to be his new contact person on the Gaby project (Appx. 122, Tr. 125, lines 8-14). In cross examination he describes these conversations as having to do with "paperwork." (Appx. 124, Tr. 135, lines 9-12).

A project this large had dozens of windows and doors ordered in stages over months of time. It is reasonable to expect that Loree and Goad indeed spoke on "numerous occasions." At the time Loree took over the Gaby project on March 3, 2006, he had already received from Kunst on February 15, 2006 (Appx. 298) all the paperwork he would need from Kunstwerke to ascertain the current order status and any balances owed Goad's company. At best, the only legitimate financial discussion with Goad would have been to reconcile what final balance was owed in order to get the last window order delivered. It would have only required one occasion to obtain documents from Goad and ascertain the account status and balance owed. Goad implies that the balance due his company was readily paid by Loree once Loree took over the

project (Appx. 124, Tr. 133, lines 11-15).

Loree seeks immunity from four falsehoods (Statements 1-4) spoken to Goad presumably at one or more of the above "numerous occasions." But these falsehoods can only be considered privileged by reason of a specific occasion and the evidence is not clear as to what the specific occasion or purpose was other than the "paperwork" involved in determining what had been paid and what was owed Goad.

There is no evidence that a type of occasion occurred that could give rise to immunity for such explosive allegations as embezzlement from four named clients other than the Gabys, as well as embezzlement from "many clients," or to allege that dummy invoices were created to embezzle from "clients" (plural). There is no evidence of a type of occasion that could give rise to immunity to Loree for describing in great detail to Goad an embezzlement scheme involving a speculative project Kunst was involved in - a project that neither Loree nor Goad were involved in at all.

There is also evidence presented below that the statements were not honestly made. Loree knew he was lying. Therefore, *Swinton* condition (1) is not met because Goad did not have a corresponding interest in the falsehoods and Loree consciously knew that they were falsehoods when spoken. These communications are not considered qualifiedly privileged by reason of an occasion as required by *Swinton*.

But there is more, and this is the killer. Goad testified: "David Loree presented to me that he was a former detective and was in the process of investigating Scott Kunst's financial dealings with his clients" (Appx. 121, Tr. 122, lines 9-12). This was a lie. Loree fraudulently presented himself to Goad as someone who was doing more than taking over a project and

accounting for his boss's money. Loree was not in the process of investigating Kunst's financial dealings with his other clients in any capacity and was not a former detective. When asked at trial, he knew nothing about these other clients financial dealings with Kunst (Appx. 136, Tr. 182, lines 17-19). His boss Richard Gaby testified that he did not ask Loree to contact other clients of Kunstwerke (Appx. 213, Tr. 489, lines 17-21).

Loree misrepresented who he was in order to add false credibility to his four falsehoods, *each* of which included lies about clients other than the Gabys. He named no other source for this information when he spoke it to Goad nor when he testified at trial nine years later because *he*, Loree, was the implied source. These were supposedly *his* findings.

If a defendant fraudulently presents their official capacity and purpose and then proceeds to lie about supposed findings he made from that capacity, in no way do those occasions give rise to a qualified privileged in any state that allows the affirmative defense of qualified privilege.

Nonetheless, if one were to ignore the evidence presented above and condition (1) of *Swinton* and thus surmise that these Goad occasions still gave rise to a qualified privilege, the burden would have then been on Kunst at trial to show actual malice or that the scope of the privilege had been exceeded (*Swinton* condition (2)). The evidence presented below for each statement overwhelmingly proves that Loree abused any privilege if it existed and the privilege was lost.

Statement 1

"He stated that Scott Kunst had taken $400,000 from the Gaby project and had left his other clients in a similar situation." (Appx. 121, Tr. 122, lines 16-18)

If a reasonable person were to extrapolate this $400,000 to "other clients in a similar situation," the embezzlement would be in the millions. Loree is alleging that Kunst is one of the worst embezzlers in South Carolina history. Loree's own testimony regarding this statement is so damning that it is worth presenting it here from the Appendix.

Q. Kunst: "Did you state to Kevin Goad that Scott Kunst had taken $400,000 from the Gaby project and left his other clients in a similar situation."

A. Loree: "Unknown, sir, nine years ago." (Appx. 141, 204, lines 2-5)

Because Loree did not deny stating it and because he was permitted to plead a truth defense immediately prior to trial, Kunst asked him what evidence he had:

Q. Kunst: "Did you ever ask to have the Kunstwerke books audited?"

A. Loree: "No, sir."

Q. Kunst: "Are you in possession of any kind of audit of Kunstwerke records?"

A. Loree: "No, sir."

Q. Kunst: "Do you have any evidence that I embezzled money from any other client other than the Gabys?"

A. Loree: "No, sir."

Q. Kunst: "Do you have any evidence that I embezzled money from the Gabys?"

A. Loree: "We have a judgment against you of funds that were unpaid by you to vendors

relative to their project" (Appx. 136, Tr. lines 28-50).

Q. Kunst: "Is it a default judgment?"

A Loree: "Unknown sir."

Q. Kunst: "Do you know what a default judgment is?"

A. Loree: "No, sir." (Appx. 136, Tr. 183, lines 2-5).

Q. Kunst: "I understand. Did you take the Gaby family's judgment to a prosecutor?"

A. Loree: "No, sir."

Q. Kunst: "Has there been any kind of criminal finding?"

A. Loree: "Not to my knowledge, sir" (Appx.136, Tr. 183, lines 16-20).

Q. Kunst: "Mr. Loree, did I take money from the Gabys and spend it on personal things?"

A. Loree: "Unknown, sir."

Q. Kunst: "Have you ever stated to anyone that?"

A. Loree: "No, sir (Appx. 135, Tr.179, lines 19-23)."

Q. Kunst: "As you sit here now, do you have any evidence that $400,000 was taken from the Gabys by me?"

A. Loree: "We actually -- I think the Gaby family has a judgment in the courts here in South Carolina in favor of the Gabys awarding them over $400,000, so I'd say

yes, we have plenty of that, sir."

Q. Kunst: "Do you have evidence of actual theft?

A. Loree: "It's a civil trial, not a criminal trial. No, Sir (Appx. 140, Tr. 197, lines 18-25)".

The accounting records that Kunst submitted into evidence clearly showed where every dime of Gaby money went (Appx. 312-318). Loree repeatedly referenced Mr. Larkin, a forensic accountant that supposedly looked at everything (Appx. 138, Tr. 191 lines 1-20) (Appx. 157, Tr. 266, lines 19-23) (Appx. 159, Tr. 274, lines 10-24) but was never called to testify.

A Loree: "That was well beyond -- I washed my hands of that portion of it. There were people much more intelligent than I going through accounts...(Appx. 158, Tr. 269, lines 17-19)"

Q. Kunst: "Will you have anyone here in the next few days more intelligent than you that can speak to that?"

A. Loree: "If you turn and ask my attorneys, I don't know that (Appx. 158, Tr. 269, line 23)." In a shocking admission, Loree the fraudulent investigator testified that he *still* has never reviewed or looked at the actual Kunstwerke accounting records (Appx. 157, Tr. 267, lines 2-4).

Loree admits that he has no evidence that money was taken from "other clients" and he can only point to a Gaby default judgment that was easily refuted at trial with the actual accounting records. A jury could then reasonably infer that Loree had to know that his statement was a lie when he said it and that he continued to have no interest in seeking out the truth in a way that one would properly investigate the truth of such a statement. He not only "washed his hands" and left the clean up to people smarter than him, he never cared enough to ever find out

from these smarter people if his statements were ultimately true - apparently even in trial prep. It was reckless for Loree to speak on matters he was incapable of understanding.

None of the seven statements to Goad or Alfonso or the unknown others standing around the construction site who overheard Loree speak (Appx 128, Tr. 151, lines 9-15) were spoken in confidence. The rumors spread rapidly throughout the community. A careful man of good faith would not have made such explosive accusations and then never follow up with Goad to correct the record (Appx. 123, Tr. 129, lines 14-17). Instead, the jury saw a man who was *still* publicly pleading at trial *nine years* later that all seven of his statements were substantively true, and yet he *still* had no provable truth. At trial he *still* showed the same reckless disregard toward Kunst and to the harm that such accusations continued to inflict nine years later. The jury noticed that his demeanor on the stand was that he simply didn't care. He couldn't even recall, it was "nine years ago," after all. But as Kunst reminded the jury in his closing argument: "Ladies and gentlemen, Kevin Goad recalls." (Appx. 220, Tr. 518, lines 3-4)

There is no doubt Loree was actuated by malice. The real question is: When in nine years has Loree ever *not* been reckless, and when has he ever showed regard for Kunst's rights? Circumstantial evidence as prescribed in *Fulton* showed the jury that this fraud of an "investigator" was motivated by ill will toward Kunst and sought to smear his good name to achieve a result that the truth would not have otherwise afforded him. Would Goad have cooperated if Loree had told Goad the truth of what was really going on? Such as the truth that his boss had stiffed Kunst three weekly payments and used that cash deficit to falsely make it appear that money had been taken by Kunst. There is also the truth of lien fraud and the other fraudulent manuevers Gaby made to take over the project quickly and get it done for the

summer. Those involved in the project did not become aware of the scam perpetrated against them until months later when Kunst began to respond and publish regular updates (Appx. 341). Others did not fully understand until reading *Cold and Greedy* (Appx. 461) at *ColdandGreedy.com*.

Lastly, Loree's reckless, open-ended throw away line about "other clients in a similar situation" clearly exceeded the narrow scope dictated by *Swinton* and *Harris*.

Statement 2

"Money was missing from many of Scott Kunst's clients. He referenced to Parham, Covington, Coco, and Hickey specifically." (Appx. 121, Tr. 122, Lines 14-16)

This statement is as open-ended as Statement 1. Loree premised his statement with "many" clients and then referenced specific examples of the "many." The abuse of privilege is the same as above. Loree's own attorney shed light on the scope of the occasion being exceeded in her cross examination of Goad.

Q. Wright: "Do you recall Mr. Loree specifically stating to you that Mr. Kunst had taken money from Parham, Covington, Coco, and Hickey?"

A. Goad: "I do."

Q. Wright: "Do you recall when that was?"

A. Goad: "When he told me that?"

Q. Wright: "Yes"

A. Goad: "I don't specifically, It was one of the intial meetings where he was introducing himself, telling me he was, I guess, taking over the project in Scott's absence." (Appx. 124, Tr. 135, lines 12-24).

Statement 3

"Scott Kunst had provided his clients with dummy invoices from dummy companies to take monies from these clients." (Appx. 121, Tr. 122, Lines 18-20)

Q. Kunst: "Did Mr. Loree make this reference pertaining specifically to the Gaby project or any other project?"

A. Goad: "I don't know that it was specific. It seemed like it was a general statement." (Appx 121, Tr. 124, lines 14-21).

Note that "clients" is plural and open-ended and that Goad perceived it as a general statement. This falsehood in the context of a fraudulent investigator of Kunst's financial dealings with all of his clients was malicious. Loree provided no examples to Goad and more importantly he provided no examples of dummy invoices related to Goad's company.

Statement 4

" ...the money Scott Kunst had taken from his clients were spent on his, Scott Kunst's, speculative project with an investor named Hickey." "...there was no money to be illegally transferred from his clients to the speculative project." (Appx. p. 121, Tr. p. 122-123)

Note that Hickey was also mentioned in Statement 2. Goad confirmed at trial that he had

no corresponding interest in the Hickey project. Loree had no interest in Hickey either, but that did not stop the fraudulent investigator from telling Goad a remarkably detailed lie about Kunst's private partnership with Hickey.

Q. Kunst: "Did you provide windows and doors for this Hickey speculative project you reference in your affidavit?"

A. Goad: "We did not."

Q. Kunst: "Was Loree trying to get -- David Loree trying to get information from you about the Hickey project?"

A. Goad: "I don't believe so. I had no interest in that project in any way. We weren't working on it in any way.

Q Kunst: "Would there be any reason for David Loree to say anything to you regarding the Hickey project?"

A. Goad: "I don't know (Appx. 122, line 76 – Appx. 123, line 2)."

In direct examination, Loree again could not recall and said it was a long time ago (Appx 142, Tr. 205, lines 5-11). A man pleading for privilege had better remember the occasion in which he spoke something so explosive and had better explain to the jury why it was necessary to tell Goad this big of a detailed lie about a relationship that neither of them had any interest in. What possible occasion warranted this whopper of a lie? The abuse of privilege is identical to the first three statements and any privilege, if it existed, was lost.

As to witness Alfonso:

What we know from witness Alfonso is that he also spoke with Loree on "numerous occasions" in the spring of 2006. (Appx. 127, Tr. 145, lines 3-6) Alfonso understood only that Loree was "managing the construction" of the Gaby house (Appx. 127, p 145, lines 1-4). There is no evidence that Loree represented to Alfonso that he was investigating anything. Alfonso only knew him as someone managing the project above the site manager Bronson Shepherd.

Alfonso's role in the Gaby project was small as of March 2006 and there were only three Gaby billings to date. Alfonso testified that Bronson was usually around during these "numerous occasions." Bronson would have been his more immediate contact. It should be noted that Bronson Shepherd was to be the main witness at trial. (It is worth reading Tracey Hilton's testimony regarding what happened to Bronson (Appx. 116, Tr. Pages 101-102)).

The bombshell here is that Alfonso never recalls being alone with Loree. The three statements Alfonso testified to, he heard in a group (Appx. 128, Tr. 151, lines 9-15). Loree never investigated anything directly with Alfonso. Alfonso had absolutely no corresponding interest in the subject matter of these statements and there is evidence below that Loree knew he was lying. And we have no way of knowing if the others standing around had a corresponding interest. Therefore, based on *Swinton* condition (1), these occasions did not give rise to a qualified privileged.

If a defendant repeatedly spouts defamatory falsehoods to a random group of workers standing around who have no corresponding interest in the subject matter, for no apparent purpose other than smearing someone, in no way do these occasions give rise to a qualified

privilege in any state that allows the affirmative defense of qualified privilege.

Nonetheless, if one were to ignore the evidence presented above and condition (1) of *Swinton* and thus surmise that these Alfonso occasions still gave rise to a qualified privilege, the burden would have then been on Kunst at trial to show actual malice *or* that the scope of the privilege had been exceeded (*Swinton* condition (2)). The evidence presented below for each statement overwhelmingly proves that Loree abused any privilege if it existed and the privilege was lost.

Statement 5

"I recall David Loree referring to Scott Kunst as 'criminal' on more than one occasion." (Appx. 127, Tr. 145, Lines 6-9)

This was another reckless, open-ended, non-specific criminal accusation spoken on mutliple occasions to unknown groups in what could not have possibly been privileged occasions.

Statement 6

"In one particular instance I recall him stating to me that 'I'm not supposed to be telling you this, but to give you an idea of some of the criminal things Scott has been doing...' David Loree then referenced an insurance policy for the Gaby project and claimed that Scott Kunst took out the policy, billed the Gabys, and intentionally cancelled the policy the next day so that he could keep the money.." (Appx. 127, Tr. 145, Lines 8-15)

No need for circumstantial evidence here. Loree admits malice in the first phrase of the quote: 'I'm not supposed to be telling you this." This was a declarative statement blurted out recklessly in a random crowd of workers standing around - none of whom could have had any

interest in this insurance policy.

One cannot make this statement with this amount of specificity without also knowing that it was a simple insurance agency error (Appx. 289). Loree could not have avoided this fact, yet he chose to impute criminal intent to Kunst. It is not possible that Loree did not know he was lying. This was not a privileged occasion, but if it were, it would be an example of abuse on steroids.

Statement 7

"During this same period of time, David Loree also stated that Scott Kunst had taken money from his other clients and that money was "missing" from these other projects." (Appx. 127, Tr. 145, Lines 16-19)

This statement is identical to statements 1 and 2 to Goad except that it was even more reckless because it was spoken to a group of unknown size. There is no evidence as to what the occasion could have possibly been (*Swinton* condition 1) to ascertain if the scope had been exceeded (*Swinton* condition 2). We cannot ascertain the relationship of the parties if we don't know specifically who all of the parties were. A reasonable jury would see this falsehood as nothing more than the last of seven damaging, open-ended, and malicious smears.

In Conwell v. Spur Oil Co. of Western SC, 125 S.E.2d 270 (S.C. 1962), this Court concerned itself with "the primary question whether there is in the record any credible testimony pointing to the fact that the occasion was used for the unlawful purpose of defaming and injuring the respondent, rather than to make a bona fide inquiry..."

None of the seven statements fit the definition of a bona fide, good faith inquiry spoken in a proper manner to only the appropriate parties by a petitioner who was attempting to uphold some interest. They do fit perfectly into the surrounding circumstances of what Loree was trying to do with his malicious slander. In this case the surrounding circumstances do indeed prove fact and motive.

The theme of the trial focused on Loree's motivation for his slander. In his opening statement, Kunst told the jury: "Defamation law, folks, it's clear. It's been around before this country was founded. Defamation law exists for people like me because there is always somebody out there who's trying to get a result that the truth would not afford them." (Appx 111, Tr. 84, Line 24).

If Loree had told Goad and Alfonso the truth about why he was suddenly managing the project and the underlying financial scam that he and his boss were perpetrating against Kunst, Kunst's contractors and workers, and lien laws, he would not have gotten very far. Loree's own attorneys placed the first seventeen chapters of Kunst's book *Cold and Greedy (ColdandGreedy.com)* detailing the scam into evidence. The jury was also aware of the resolution of the nineteen related lawsuits exposing the scam.

This was never a privilege case. Qualified privilege was pled by Loree for the first time the morning of trial as a Hail Mary and nowhere, even in his petitioner's brief, does Loree ever argue specific occasions and quotes. Kunst hereby continues his objection and argument presented pretrial (Appx 100-101) and on appeal that, after an inexcusable delay of nine years, privilege should not have been allowed to be pled at the 11th hour. Loree had waived his right to

plead such.

But if one were to surmise privilege out of these circumstances and motives, the evidence presented in the pages above overwhelmingly shows that it was abused. The jury resolved that conflict in favor of Kunst.

II. The Court of Appeals erred in failing to find that the trial court should have determined as a matter of law as to whether petitioner had proven defense of qualified privilege.

In *Bell v. Bank of Abbeville*, the South Carolina Supreme Court held: "In general, the question whether an occasion gives rise to qualified or conditional privilege is one of law for the court." (50 Am.Jur.2d Libel and Slander §276 (1995) (*Bell v. Bank of Abbeville* 208 S.C 490, 38 S.E. 2D 641 (1946)). "In general" is defined as usually.

Per *Swinton*, privilege is to be applied by reason of the occasion. Here, the circumstances are not so crystallized so as to resolve the issue as a matter of law.

Whether it was the *fraudulent detective Loree* falsely telling Goad he was investigating Kunst's financial dealings with all of his clients and reporting his findings in statements 1-4 or the *new project manager Loree* who had a penchant for blurting out and defaming Kunst at the jobsite to unknown small groups that included Alfonso with statements 5-7, none of these occasions gave rise to a qualified privilege under South Carolina Law.

Swinton states: *"In determining whether or not the communication was qualifiedly privileged, regard must be had to the occasion and to the relationship of the parties. When one has an interest in the subject matter of a communication, and the person (or persons) to whom it*

is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion."

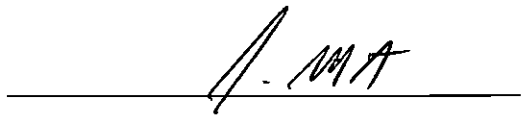
As detailed in **Argument I** above, evidence presented at trial proved that privilege could not be applied by reason of the occasion as prescribed in *Swinton.* It could not be determined as Loree argues here **"as a matter of law as to whether petitioner had proven defense of qualified privilege."** The Court of Appeals did not err.

The jury resolved all conflicts in the evidence in favor of Kunst.

This Court held in *Davis vs. Niederhof*: "The verdict has resolved all conflicts in the evidence in favor of respondent. As is our duty in passing upon the issues before us, we have considered only the evidence tending to support only the verdict and that in the light most favorable to the respondent." (*Davis vs. Niederhof,* 246 S.C. 192 143 S.E. 2D 367)

CONCLUSION

For the reasons stated above, the Court of Appeals properly affirmed the Trial Court and the jury's verdict must not be disturbed.



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July 13, 2019

Pittsburgh, Pennsylvania

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2018-001700

J. Scott Kunst, ...Respondent

v.

David Loree, ...Petitioner.

PROOF OF SERVICE

I Hereby certify that I have served a copy of the **Brief of Respondent** upon the Petitioner by mailing a copy to both counsels of record for the Petitioner: V. Elizabeth Wright, *217 E. Park Avenue, Greenville, SC 29601, and* Gregory K. Smith, SMITH, GAMBRELL & RUSSELL, 1230 Peachtree Street N.E. Atlanta, GA 30309, by depositing it in the US Mail on July 13, 2019.

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