The State of South Carolina
In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

D Craig Brown, Circuit Court Judge

Case No 2010 CP 21 131

Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart, and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are, Respondents

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Appellant's Final Brief

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Statement of the Issues

1 A jury determines if words are defamatory if the words are capable of a defamatory meaning In denying a loan, a banker named Ewart tells a business owner named Pennell, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan " Can a jury infer from this that Fountain is unfit to manage Pennell's operation?

2 Opinions lack special constitutional protection and are actionable if they imply an assertion of objective fact Ewart implied that Fountain is unfit to do the job that Pennell hired him to do Can a jury find that this asserts an objective fact?

3 A jury determines if qualified privilege is abused upon proof that the defamation was unnecessary or made recklessly Ewart violated bank policy and banking regulations by denying Pennell a loan based solely on obsolete information about his manager Can a jury find that the privilege was abused?

Statement of the Case

On January 14, 2010, Mark Fountain brought suit against First Reliance Bank, its Chief Banking Officer Thomas C Ewart, and Ernest

C Pennell Fountain claims that the three defamed him by implying that he was unfit to manage Pennell's convenience store, that this intentionally inflicted emotional distress upon him, and that Pennell breached his contract to employ Fountain to manage the store Complaint, R p 24 31 The three answered with general denials Bank Answer, R p 32 34, Ewart Answer, R p 35 37, Pennell Answer, R p 38 45 The Bank and Ewart further alleged truth, opinion, and the business interest privilege as affirmative defenses to the defamation claim Bank Answer, ¶ 15, R p 33, Ewart Answer, ¶ 15, R p 36

The defendants then moved for summary judgment on the defamation and emotional distress claims Bank and Ewart's Motion for Summary Judgment, R p 46 49, Pennell's Motion for Summary Judgment, R p 50 51

At the motions' hearing, the Bank and Ewart admitted that Ewart told Pennell that the Bank would not make Pennell a loan if Fountain was managing the operation Hearing Tr , p 6 ll 5 8, R p 97 They argued that the statement was truthful and privileged Hearing Tr , p 6 l 21 p 9 l 7, R p 97 100 Fountain responded that the innuendo from Ewart's statement and the meaning that Pennell gave it is that Fountain is a bad business man incapable of fulfilling his

contract to manage Pennell's convenience store Hearing Tr , p 11 ll 1 20, R p 102 He further argued that the jury had to determine if the qualified privilege was abused and recounted evidence on file that he relied on to show an abuse Hearing Tr , p 12 l 5 p 21 l 23, R p 103 112

The court granted the Bank and Ewart summary judgment on the defamation claim for three reasons [1] The court first recognized that Ewart implied that he and the Bank lacked faith in Fountain's management skills, yet described as "tortured speculation" the further implication that Fountain was an unfit manager The court ruled that the statement was not defamatory because it was literally true and because the implication of unfitness was not a clear, exclusive, or direct comment on one's fitness for a trade or profession Order Granting Summary Judgment, pp 8 10, R p 9 11

The court next held that Ewart's and the Bank's lack of faith in Fountain's management skills was constitutionally protected opinion Order Granting Summary Judgment, pp 8 9 and n 11, R p 9 10

The court lastly held that the statement was privileged and that

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[1]This appeal is limited to granting the Bank and Ewart summary judgment on the defamation claim Fountain is not appealing the summary judgment to Pennell or the summary judgment on the outrage claims

there was no evidence that the privilege was abused Order Granting Summary Judgment, p 13, R p 14 The court did not address the record evidence that Fountain relied on at the hearing to show abuse Hearing Tr , p 12 l 5 p 21 l 23, R p 103 112

On reconsideration, Fountain cited *Adams v Daily Telegraph Printing Co* , 292 S C 273, 356 S E 2d 118 (Ct App 1986) and *Swinton Creek Nursery v Edisto Farm Credit, ACA,* 334 S C 469, 514 S E 2d 126 (1999) Motion to Reconsider, p 1, R p 52

Fountain cited *Adams* to show that the test is not whether an implication is clear, exclusive, and direct The test is instead whether the words "are capable" of the offensive meaning attributable to them To sustain a summary judgment, a court must be able to say that the words are incapable of any reasonable construction which will render them defamatory *Adams*, 292 S C at 279, 356 S E 2d at 122

Fountain cited *Swinton Creek* to show that the Supreme Court held that a jury had to decide if a lender abused its qualified privilege when explaining the denial of a loan to a potential borrower The Court held that the jury could find that the lender abused its privilege by making the statement unnecessarily or recklessly Fountain then again cited some of the record evidence that he relied on to establish the

privilege's abuse here Motion to Reconsider, pp 5 6, R p 56 57

The court denied reconsideration In doing so, the trial court did not rule that Ewart's statement is incapable of defaming Fountain as an unfit manager The trial court instead ruled that the statement's implication is not defamatory because it was made in a private business discussion and did not charge Fountain with illegal, immoral, or unethical behavior within a licensed or regulated profession Order Denying Reconsideration, pp 1 2, R p 20 21

On privilege, the court found that *Swinton Creek* was "deceptively similar" but not controlling because of "subtle differences " *Id* at p 3, R p 22 The court concluded that the privilege was not abused because Pennell and Fountain shared common interests, because the Bank was not reckless, and because there is no factual controversy over Fountain's management experience Order Denying Reconsideration, p 3, R p 22 The court yet again failed to address the record evidence that Fountain relied on to show an abuse

Fountain timely appealed the grant of summary judgment to the Bank and Ewart on the defamation claims

Statement of Facts

Fountain is currently Timmonsville's Town Administrator

Fountain Depo , p 10 ll 17 19, p 36 ll 10 15, R p 114, 131 Prior to 2010, when the Town chose Fountain as its Administrator, Fountain, Attorney Hugh Willcox, and three others formed Bojo Tim, LLC as equal owners Fountain Depo, p 21 ll 3 24, R p 116 This LLC was formed to build and own a combination Bojangles/gas station Fountain Depo, p 21 l 25 p 22 l 15, R p 116 117 Fountain was not a day to day manager in this operation While he checked on the store daily, he and the other owners within the LLC hired separate managers for the operation Fountain Depo, p 24 l 10 p 26 l 2, R p 119 121

Bojo Tim was financed in part from a loan from Carolina First Fountain Depo, p 27 ll 4 22, p 29 ll 6 8, R p 122, 124 Bojo Tim had problems paying its Carolina First note, and Attorney Willcox and some of the other partners ultimately assumed the loan Fountain Depo , p 30 l 7 p 31 l 20, p 32 l 22 p 33 l 11, R p 125 128 At the time, Thomas Ewart was at Carolina First and was Bojo Tim's contact there Ewart could not recall that Bojo Tim ever went into default before he left to go to First Reliance in 2003 Ewart Depo , p 26 l 17 p 27 l 14, R p 217 218

Ewart also never asked Bojo Tim to replace Fountain Ewart Depo, p 30 ll 3 5, R p 219 The other members of the LLC likewise

never fired Fountain or took him off of the payroll, and Attorney Willcox never expressed disappointment in Fountain's role in the LLC Fountain Depo , p 74 ll 9 12, p 148 ll 8 13, R p 154, 168

Yēars after Ewart left Carolina First for First Reliance, in 2008 Ernest Pennell approached Fountain for help in obtaining a loan on a Hess Mart convenience store that he and another man owned in Florence Fountain Depo , p 40 l 16 p 41 l 7, R p 132 133, Order Granting Summary Judgment, pp 1 2 and n 2, R p 2 3 Fountain warned Pennell that he had previous credit problems from the Bojangles/gas station operation Fountain, p 68 ll 14 17, R p 151 Ewart nonetheless contracted to employ Fountain as his Hess Mart manager Employment Agreement, R p 30 31

The two never intended that Fountain would be on the new loan Pennell Depo , p 30 ll 19 25, R p 177, Fountain Depo , p 45 ll 6 8, p 48 ll 23 24, p 141 ll 5 7, R p 137, 140, 166 This agreement also did not give Fountain any ownership interest in Pennell's business Employment Agreement, R p 30 31, Pennell Depo , p 30 l 19 p 31 ll 1 4, R p 177 178

Ewart and Fountain approached Rick Saunders, the President and CEO of First Reliance, about a loan Fountain Depo , p 132 l 25 p

133 l 19, R p 161 162, Pennell Depo , p 47 l 24 p 48 l 4, R p 181 182 Saunders knew that Fountain was not going to be on the proposed loan and had at least as much if not more knowledge of the criteria for making commercial loans than does Ewart Saunders never objected to Fountain managing the Hess Mart and never brought up the Bojo Tim operation Fountain Depo , p 132 ll 2 24, p 134 l 23 p 135 l 5, p 139 ll 17 23, R p 161, 163 165, Pennell Depo, p 47 ll 8 23, R p 181, Ewart Depo , p 53 ll 8 25, R p 236

Saunders instead referred the two to Dwayne Brockington, the Bank's commercial lending officer Pennell Depo, p 48 l 17 p 49 l 7, R p 182 183, Ewart Depo , p 11 l 17 – p 12 l 18, R p 204 205 Brockington also knew that Fountain would be managing the store but would not be on the loan Fountain Depo , p 139 ll 17 23, R p 165, Pennell Depo , p 50 l 16 p p 51 l 13, R p 184 185 Pennell gave Brockington a financial statement revealing that he was worth over $ 1 million and possibly over $ 2 million Pennell Depo , p 51 ll 18 20, p 53 ll 11 22, R p 185, 187

After this meeting, Brockington telephoned Ewart, who was then his supervisor and First Reliance's Chief Banking Officer Ewart Depo , p 4 ll 11 13, p 12 l 13 p 13 l 12, R p 197, 205 206 Brockington told

Ewart that Fountain would be managing Pennell's store Ewart Depo , p 14 ll 3 14, R p 207 Ewart met with Pennell and told him, "If Mark [Fountain] was going to be managing the operation, we would not be making the loan " Ewart Depo , p 6 ll 18 21, p 56 ll 13 19, R p 199, 237

When he made this statement, Ewart knew that Fountain would not be obligated on the proposed loan and that he would have no ownership interest in the business Ewart Depo , p 38 ll 11 14, p 50 ll 5 12, R p 224, 233 Ewart also denied the loan without looking at Pennell's loan application, his personal financial statement, the property appraisal, or the records showing the proposed business's profitability Ewart Depo , p 39 ll 12 23, R p 225

Ewart instead denied the loan solely because Fountain was Pennell's store manager Ewart Depo, p 37 l 25 p 38 l 10, p 56 ll 6 12, p 58 l 5 p 61 l 7, R p 223 224, 237 241 At that point, Ewart's knowledge of Fountain's management skills had ended in 2003 during Ewart's days at Carolina First Fountain Depo , p 155 ll 1 16, R p 170, Ewart Depo , p 18 ll 3 13, R p 211 Neither he nor Brockington asked Fountain to update his management training or experience over the intervening five to six years Ewart Depo , p 18 ll 14 21, p 43 ll 3 15, p

52 ll 1 7, R p 211, 226, 235 Ewart further failed to offer Pennell a loan if Pennell took Fountain out of the picture Ewart Depo, p 22 l 2 p 23 l 10, R p 213 214

Ewart could not name any other commercial loan that had ever been denied solely because of the choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p 222 223 Fountain's expert avers that the denial violated the bank's policies and existing bank regulations Seitz Affidavit, R p 242 245

After hearing Ewart say, "If Mark was going to be managing the operation, we would not be making the loan," Pennell asked Fountain to tear up their management contract Fountain Depo , p 128 l 5 p 129 l 3, R p 158 159 Timmonsville later hired Fountain as its Town Administrator Fountain Depo , p 10 ll 17 19, p 36 ll 10 15, R p 114, 131

Standard of Review

Appellate courts review a grant of summary judgment under the same standards that the trial courts apply Under these standards, all ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party And even when there is no dispute as to evidentiary facts, but only as to the conclusions

or inferences to be drawn from them, summary judgment must be denied *Murray v Holnam, Inc*, 344 S C 129, 137 138, 542 S E 2d 743, 747 (Ct App 2001)

Argument

A reasonable jury could infer from Ewart's statement that Fountain is unfit to do the job that Pennell hired him to do This implication is not constitutionally protected because it falsely implies an objective fact Fountain's purported unfitness to manage Pennell's store And a jury could also find that the privilege was abused because Ewart falsely insinuated this unnecessarily or recklessly

This case thus presents issues for a jury to resolve The grant of summary judgment to Ewart and the Bank must be reversed and the case remanded for a jury trial against them for slander *per se*

I The trial court applied the wrong standard in ruling that Ewart's statement is not defamatory as a matter of law

The trial court strayed from the *Adams* standard for granting summary judgment Under that standard, summary judgment must be denied unless the trial court can affirmatively say that a statement is incapable of a defamatory meaning If not, the jury decides if the

meaning was defamatory *Adams,* 292 S C at 279, 356 S E 2d at 122

A The statement is capable of a defamatory meaning

Factual issues exist over whether Fountain is unfit to manage Pennell's store While the trial court said that there is no factual controversy over Fountain's management experience, Ewart testified that his concern about Fountain came from the BoJo Tim operation Ewart Depo, p 58 l 5 p 61 l 7, R p 238 241 But Fountain was not a day to day manager during the BoJo Tim operation he was one of five LLC members who had others manage it Fountain Depo, p 24 l 15 p 25 l 7, R p 119 120 There is also no evidence none that Fountain contributed to Bojo Tim's financial problems Fountain was lastly a good enough manager to later be hired as Timmonsville's Town Administrator Fountain Depo, p 10 ll 17 19, p 36 ll 10 15, R p 114, 131 A jury could thus conclude that Fountain would have made a fine store manager and that Ewart defamed him when he insinuated otherwise

The Court reasoned, however, that Ewart did not flat out say, "Mark Fountain is a poor manager " Order Granting Summary Judgment, p 7, R p 8 But a jury could find that this was what Ewart meant when he said, "If Mark [Fountain] was going to be managing the

operation, we would not be making the loan " Ewart Depo , p 6 ll 18 21, R p 199 The proof of this pudding is in the eating Pennell knew Fountain had credit problems from the Bojo Tim endeavor when he hired Fountain as his manager but then after hearing from Ewart asked Fountain to tear up their management contract Fountain Depo, p 68 ll 14 17, p 128 l 5 p 129 l 3, R p 151, 158 159 A jury could conclude from this that Ewart implied and Pennell inferred that Fountain was unfit to perform the management contract

Illustrations may be helpful Say parents approach a local teacher about transferring a child to the teacher's school The teacher responds, "If Mr X remains Principal, I would not put my child in the school " Or an insurance adjuster calls a law firm and finds out that the firm was planning on bringing Lawyer Z in as a partner The adjuster responds, "If Lawyer Z is going to be a partner, we will not use your firm " Or a widget retailer discovers that its wholeseller hired Mrs Y as its manager The retailer says, "If Mrs Y is your manager, we will get our widgets elsewhere "

Now these statements may be literally true All may further truthfully imply a lack of faith in Mr X as a Principal, Lawyer Z as a lawyer, and Mrs Y as a manager But what if all are fine and capable

members of their respective professions? Isn't the insinuation that they are not? And couldn't a reasonable jury find that this was what was meant? *Adams* shows that the answer is yes because the test is whether the words are capable of a defamatory meaning And Ewart's words are

The Supreme Court has also allowed a defamation case to go forward where the implication was less clear In *Tyler v Mack's Stores of South Carolina, Inc*, 275 S C 456, 458 459, 272 S E 2d 633, 634 (1980), an employee was discharged after he took a polygraph test and his manager was fired He alleged that the mere act of discharging him defamed him by insinuating that he had done something wrong While he could have been fired for a multitude of legitimate reasons, the Supreme Court held that he presented a trial issue on the claim So too here While Ewart's statement may have truthful meanings, Fountain is entitled to have a jury decide if Ewart meant the defamatory one

B The trial court's distinctions do not hold

The trial court offered several reasons why it nevertheless believes that Ewart did not defame Fountain as a matter of law The court found that the statement is literally true, was made in a private business conversation, and that its implication is not a clear, exclusive, and direct comment that Fountain is a criminal or is unfit morally or

ethically for a licensed or regulated profession Order Granting Summary Judgment, pp 7 10, R p 8 11, Order Denying Reconsideration, pp 1 2, R p 20 21 None of these distinctions persuade

1 A true statement may convey a defamatory insinuation

The trial court initially focused on whether Ewart's statement was literally true in that the Bank would in fact not make the loan if Fountain managed the convenience store The court also twice found that the statement implied that the Bank lacked confidence in Fountain's management skills and that this was true too Order Granting Summary Judgment, pp 8 9, R p 9 10, Order Denying Reconsideration, p 2, R p 21 But the implications do not stop there Again, a reasonable jury could also infer that Fountain is in fact unfit to manage Pennell's convenience store That is not true

At least three decisions deal with true statements that have defamatory insinuations In *Eubanks v Smith*, 292 S C 57, 354 S E 2d 898 (1987), a City Manager suspended some city employees during an investigation into licensing electricians and plumbers During the suspension, the City Manager issued press releases that implied that the employees were guilty of some undisclosed misconduct The

Supreme Court affirmed a verdict against the City Manager for the defamation While the City Manager argued that his statements were substantially true, the Supreme Court held that a defamation "need not be accomplished in a direct manner" and affirmed because the insinuation was false *Id* at 62 63, 354 S E 2d at 901

In *Adams*, the trial court granted a television station summary judgment based on a broadcast's literal truthfulness On appeal, this Court concluded that the literally truthful broadcast was susceptible of the inference that the plaintiff had murdered two teenagers or was withholding information about the crimes The Court thus reversed summary judgment because the broadcast was capable of this further innuendo *Adams,* 292 S C at 279 280, 356 S E 2d at 122 In this case, Ewart's statement likewise carries the false innuendo that Fountain is unfit to do the job that Pennell hired him to do

In *Richardson v State Record Co , Inc* , 330 S C 562, 499 S E 2d 822 (Ct App 1998), the trial court granted a newspaper summary judgment because its accounts of an automobile accident were literally true The driver claimed that the article was still defamatory because it falsely implied that she contributed to the victim's subsequent death On appeal, this Court held that the truth of each sentence of the

artıcles, vıewed separately, ıs ırrelevant Thıs Court thus reversed summary judgment because the newspaper faıled to demonstrate the absence of a genuıne ıssue of materıal fact on the ınsınuatıon that the drıver caused the death *Id* at 566 567, 499 S E 2d at 824 825

Ewart and the Bank lıkewıse faıled to show the absence of a genuıne ıssue of materıal fact on the ınsınuatıon that Fountaın was unfit to be Pennell's manager Thıs omıssıon ıs hıghlıghted ın that the statements ın *Rıchardson* touched on a matter of publıc concern thus requırıng the plaıntıff to prove falsıty *Id* at 566 n 2, 499 S E 2d at 824 n 2 The defamatıon here ıs a matter of prıvate concern It ıs thus up to Ewart and the Bank to prove the ımplıcatıon's truthfulness *See Parrısh v Allıson*, 376 S C 308, 326, 656 S E 2d 382, 391 392 (Ct App 2007)(holdıng that truth ıs an affirmatıve defense ıf the statements are a matter of prıvate concern) And they dıd not prove the absence of a genuıne ıssue of materıal fact that Fountaın now a Town Admınıstrator was unfit to manage a convenıence store

2 Defamatıon may occur wıthın a prıvate busıness conversatıon

To further dıstınguısh *Adams*, the trıal court noted that thıs case ınvolves a prıvate busıness conversatıon Order Denyıng

Reconsideration, p 2, R p 21 Yet the court also discussed *Swinton Creek* In that case, the Supreme Court reversed a directed verdict on striking similar facts As here, a lender allegedly defamed a man while explaining to a loan applicant why his loan was denied The only hearer was the loan applicant The Court held that the defamation claim could go forward even though the statement lacked the publicity necessary to maintain an invasion of privacy claim *Swinton Creek*, 334 S C at 484 487, 514 S E 2d at 133 135

This Court has likewise held that defamation will lie where employees acting within their employment slander someone to only one other person *See McBride v School District of Greenville County*, 389 S C 546, 561 562, 698 S E 2d 845, 852 853 (Ct App 2010) (reversing a directed verdict on a defamation claim where a school Principal allegedly defamed a teacher to a teacher's aide), *Mains v Kmart Corp* , 297 S C 142, 148, 375 S E 2d 311, 314 (Ct App 1988)(affirming a verdict for the plaintiff where a store employee defamed him to his wife)

3 The defamatory meaning need not be the exclusive meaning

Adams further shows that the trial court also erred by requiring

that the defamatory implication of Fountain's unfitness be the exclusive implication Again, summary judgment is improper unless the trial court can say that the words are incapable of any defamatory meaning If the words can defame, the jury decides if they did defame *Adams*, 292 S C at 279, 356 S E 2d at 122 The trial court here did not rule that Ewart's statement was incapable of meaning that Fountain was unfit to fulfill his and Pennell's management contract

4 Defamation need not be direct

The insinuation need also not be as direct as the trial court suggests The Supreme Court held years ago that a "defamation need not be accomplished in a direct manner" *Tyler,* 275 S C at 458, 272 S E 2d at 634 Again, the Court there allowed a defamation claim to go forward where there were no statements at all The alleged defamation was implied from the employee's discharge

5 Slander *per se* is not limited to regulated professions

The *Tyler* and *Eubanks* decisions further show that slander per se is not limited to unfitness within a licensed or regulated profession The plaintiff in *Tyler* was a store employee *Tyler*, 275 S C at 457 458, 272 S E 2d at 633 The plaintiffs in *Eubanks* were City employees

Eubanks, 292 S C at 59, 354 S E 2d at 899 Slander *per se* generally applies to anyone engaged in a business be they masons, blacksmiths, or tenant farmers *See* Prosser and Keeton, *On the Law of Torts* § 112, p 791 n 71 (5th Ed 1984)(citing cases)

6 Slander *per se* is not limited to crimes or moral unfitness

Slander per se is lastly not limited to charges that one has committed a crime or is unfit morally or ethically

In *Capps v Watts*, 271 S C 276, 246 S E 2d 606 (1978), the defendant called the plaintiff a "paranoid sonofabitch " The Supreme Court held that proof of special damages were not required because the statement imputed "conduct or characteristics incompatible with a person's office, trade, or profession " *Id* at 286, 246 S E 2d at 612

In *Goodwin v Kennedy*, 347 S C 30, 36 39, 552 S E 2d 319, 322 324 (Ct App 2001), this Court likewise affirmed a verdict for slander per se where an African American assistant principal was called a "house n_____ " The Court reasoned that the statement charged unfitness within in his profession by impugning his impartiality and decision making as an assistant principal

Neither *Capps* nor *Goodwin* involved crimes or moral failings The test is instead whether one is charged with characteristics that are

incompatible with a person's trade Falsely implying that Fountain was unfit to do the job that Pennell hired him to do qualifies

II Ewart's implication lacks special constitutional protection

Applying the wrong standard in determining if a statement can be defamatory is not the trial court's only error It likewise wrongly suggested that Ewart's statement is a constitutionally protected opinion Order Granting Summary Judgment, pp 8 9 and n 11, R p 9 10 But the opinion that the court was referring to was the Bank's lack of faith in Fountain's management skills *Id*

That is not the insinuation that Fountain is suing on The insinuation that Fountain is suing is that he is in fact unfit to manage Pennell's store This assertion may be proved either true or false It is thus not a constitutionally protected opinion

In *Goodwin*, the Court upheld the trial court's refusal to charge that the mere expression of opinion is not slander Citing *Milkovich v Lorain Journal Co* , 497 U S 1, 18 19 (1990), this Court noted that expressions of "opinion" are actionable if they imply an assertion of objective fact *Goodwin,* 347 S C at 39 41, 552 S E 2d at 324 325 This Court more recently affirmed that "the same constitutional analysis applies to statements of opinion that imply an assertion of fact, unless,

of course, the statement is not capable of being proved either true or false " *Anderson v The Augusta Chronicle*, 355 S C 461, 487 n 11, 585 S E 2d 506, 520 n 11 (Ct App 2003)

As in those cases, Ewart's statement is actionable because it implies on objective fact Fountain's unfitness to manage Pennell's convenience store

III A jury could find that the qualified privilege was abused

Lastly, the trial court had to find subtle differences between this case and *Swinton Creek* to be able to grant the Bank summary judgment on its qualified privilege defense While the trial court described the case as "deceptively similar," it is in fact spot on

In *Swinton Creek*, a potential borrower approached Edisto Farm Credit about borrowing money to buy some of a business's assets The business had in fact twice defaulted on a loan that it had with Edisto, and Edisto told the potential borrower that the business had been under financial distress Edisto told this to no one other than the potential borrower The business owner sued Edisto for defamation The trial court directed a verdict based on qualified privilege, reasoning like the court here that Edisto made the statement to protect its own interests and for the limited purpose of assisting the potential

borrower

While this Court affirmed, the Supreme Court reversed and held that "the question whether the privilege has been abused is one for the jury " *Swinton Creek,* 334 S C at 485, 514 S E 2d at 134 The Court then noted that there are two ways to abuse a qualified privilege

statements made in good faith can go beyond the scope of what is reasonably necessary, or

• a statement can be made with ill will or with a reckless and conscious disregard for the plaintiff's rights *Id* at 485 487, 514 S E 2d at 134 135 The Court then concluded that a jury could find either or both abuses of the privilege

In this case, the trial court tried to distinguish *Swinton Creek* by saying that Pennell and Fountain shared common interests that were lacking between the potential borrower and business owner in *Swinton Creek*, the Bank was not reckless, and there is no factual controversy over Fountain's management experience Order Denying Reconsideration, pp 3 4, R p 22 23 These distinctions also do not hold

A The privilege initially requires shared interests

The court's first distinction seems to suggest that *Swinton Creek*

would have turned out differently had the potential borrower and the business owner already had a contract for sale when the lender allegedly defamed the owner Nothing within the decision suggests this distinction, however, and the point confuses the cart with the horse

The qualified privilege that the Bank asserts here and that Edisto asserted in *Swinton Creek* requires shared interests before the privilege is ever triggered *Swinton Creek*, 334 S C at 484, 514 S E 2d at 134 No shared interests equals no privilege

We are not, however, arguing about the privilege's existence We are beyond that point The issue is whether the privilege was abused And nothing within *Swinton Creek* suggests that the privilege's abuse turns on the relationship between the one defamed and the one who heard the defamation It instead turns on whether the defamation was reasonably necessary or made recklessly This is normally a jury issue *Swinton Creek,* 334 S C at 485, 514 S E 2d at 134 So too here

B A jury could find that Ewart went beyond the reasonably necessary

Ewart knew when he made his statement that Fountain was not going to have any obligation on Pennell's proposed loan or any ownership interest in Pennell's proposed business Ewart Depo, p 38

ll 11 14, p 50 l 5 p 51 l 13, R p 224, 233 234 He further failed to follow up and offer Pennell a loan if Pennell took Fountain out of the picture Ewart Depo, p 22 l 2 p 23 l 10, R p 213 214 A jury could find from this that Ewart had no legitimate reason to drag Fountain into a conversation with Pennell over whether Pennell would get the loan

C **A jury could find that Ewart was reckless**

A jury could likewise find that Ewart interjected Fountain into the conversation in reckless disregard of Fountain's rights While the trial court said that the statement was not reckless, it did not address any of the evidence that Fountain relied on during the hearing or again on reconsideration

Ewart denied the loan without looking at the loan application, Pennell's financial statement, the property's appraisal, or records showing the proposed business's profitability Ewart Depo , p 9 l 25 p 10 l 9, p 39 ll 5 23, R p 202, 225 There was also nothing about Pennell that would cause Ewart to deny the loan, and a glance at his financial statement would have revealed that Pennell's personal net worth was over $ 1 million and possibly over $ 2 million Ewart's Depo , p 44 ll 2 5, R p 227, Pennell's Depo , p 53 ll 11 22, R p 187

Rather than consider these materials, Ewart denied the loan solely because Fountain was the proposed manager and his experience with Fountain during the Bojo Tim operation Ewart Depo, p 10 ll 10 22, p 39 ll 5 23, p 58 l 5 p 61 l 7, R p 203, 225, 238 241 But Ewart could not say that Fountain contributed to Bojo Tim's financial woes or that those woes ever drove Bojo Tim into default

Saunders, the Bank's President and CEO, also did not object to Fountain's management of the Hess Mart even though he knew at least as much about making commercial loans Ewart Depo, p 53 ll 8 25, R p 236, Fountain Depo, p 132 ll 2 24, p 134 l 23 p 135 l 5, R p 161, 163 164, Pennell Depo , p 47 ll 8 23, R p 181 Ewart likewise could not name any commercial loan that had ever been denied solely because of the choice of management Ewart Depo , p 35 ll 17 21, p 37 ll 7 16, R p 222 223

Lastly, Ewart's knowledge about Fountain's skills was five to six years old Ewart Depo , p 18 ll 3 13, R p 211 He never bothered to ask Fountain to update his training and experience over the intervening years Ewart Depo , p 43 ll 3 15, p 52 ll 1 6, R p 226, 235 He instead defamed Fountain based on information that was years obsolete Had Ewart instead asked Fountain, Fountain could have shared his

qualities that prompted his hire as a Town Administrator Fountain Depo , p 10 ll 17 19, p 36 ll 10 15, R p 114, 131 But Ewart did not ask

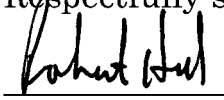
Fountain's expert opines that these and other acts and omissions violated the bank's policies and existing bank regulations Seitz Affidavit, R p 242 245 A jury could likewise find that they were reckless

Conclusion

A bank has the right to decide to whom it will and will not loan money But *Swinton Creek* shows that it does not have the right to needlessly or recklessly slander someone in the process A jury could find that Ewart needlessly or recklessly slandered Fountain by falsely insinuating that he was unfit to do the job that Pennell hired him to do

Summary judgment must thus be reversed and the case remanded for a jury to determine if Ewart and the Bank defamed Fountain and abused their privilege

Respectfully submitted,



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In the Court of Appeals

Appeal from Florence County
Court of Common Pleas

D Craig Brown, Circuit Court Judge

Case No 2010 CP 21 131

Mark Fountain, Appellant,

v

First Reliance Bank, Thomas C Ewart, and Ernest Pennell, Defendants

Of whom First Reliance Bank and Thomas C Ewart are,

Respondents

Rule 211(b), SCACR, Certification

I certify that the Appellant's Final Brief and Final Reply Brief complies with Rule 211(b), SCACR

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Certificate of Service

I certify that I am co counsel for the Appellant Mark Fountain and that I on December 7, 2011 served the Appellant's Final Brief and Final Reply Brief by first class mail, sufficient postage pre paid, to

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