THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 5669 (filed July 24, 2019)
Appellate Case No.: 2015-000613

Jeffrey Kennedy ..... Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASE LAW:

COURT OPINIONS:

COURT RULES:

STATUTES:

I. INTRODUCTION

Pursuant to Rule 242, SCACR, Petitioners Richland School District Two, Eric Barnes, and Chuck Earles hereby petition this Court for a Writ of Certiorari to review Jeffrey Kennedy v. Richland School District Two, Eric Barnes, and Chuck Earles, Opinion No. 5669 (S.C. Ct. App. Filed July 24, 2019).

II. CERTIFICATE OF COUNSEL

Counsel certifies that a petition for rehearing was timely filed on August 8, 2019, and denied by the Court of Appeals by order of October 24, 2019. (R. 51.)

III. QUESTIONS PRESENTED FOR REVIEW

A. Did The Court of Appeals Err In Concluding That Evidence Supported A Finding That The June 2011 Confidential Email Was Published Due To Fault of Barnes or Earles?

B. Did The Court Of Appeals Err In Finding That Kennedy Introduced Sufficient Evidence Of Common Law Actual Malice To Support A Finding Of Individual Liability Under The South Carolina Tort Claims Act?

C. Did The Court Of Appeals Misapply The Clear And Convincing Evidence Standard For Punitive Damages?

D. Did The Court Of Appeals Err In Focusing On The Magnitude Of The Verdict Rather Than The Lack Of Evidence Supporting The Amount Of The Verdict In Denying Petitioners A New Trial?

E. Did the Court Of Appeals Err In Finding That The Trial Court Properly Excluded Evidence Of A Subsequent Theft Accusation Offered Pursuant To SCRE 405 That Was Directly Relevant To Causation, Mitigation, And Extent Of Kennedy's Alleged Damages?

F. Did The Court Of Appeals Misapply The *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009), Constitutional Factors In Upholding The Punitive Damages Awards?

IV. STATEMENT OF FACTS

Respondent, Jeffrey Kennedy, began working third shift as a security guard in Richland Two's security department in May 2008. (R. 318 line 22 - 320 line 15.) His starting rate of pay was $11.77 per hour. (R. 319 lines 12-14.) In his position, he was essentially the night watchman. (R. 322 lines 2-6.) Spring Valley High School ("SVHS") was his base school. He was also responsible for security at seven other schools on nightly rounds. (R. 323 lines 13-23.)

At relevant times, Petitioner Charles "Chuck" Earles was Richland Two's Emergency Services Manager. (R. 590 line 22 – 591 line 1.) Petitioner Eric Barnes was Richland Two's Assistant Security Manager. (R. 465 lines 13-20; 591 lines 2-5.)

In February 2011, Kennedy applied for a lieutenant position in the security department, which was essentially a patrol supervisor, shift leader job. (R. 330.) He was to move to the second shift and would have received an unspecified pay raise. (R. 593 lines 14-21; 1193.) Kennedy offered no evidence of the difference in pay he would have received as lieutenant. *Id.* Earles recommended Kennedy to Richland Two's Human Resources department for the position on or around February 28, 2011. (*Id.*) The position was scheduled to start March 7, 2011. (R. 416 lines 1-15; 1193.)

On the morning of March 4, 2011, SVHS Athletic Director Tim Hunter reported that $1,000 in cash was missing from his office in the athletic department at SVHS. (R. 788 line 25 - 789 line 9; 1209.) Hunter left the money under his desk in a cash box after collecting it from a sporting event the previous night. (R. 791 line 25 - 792 line 18; 1209.)

Kennedy became the focus of the investigation of the missing funds. Specifically, the money went missing during his shift and on his watch, there were some other thefts at

SVHS on his watch in other parts of campus that were under investigation at that time, he had a key that would open any door on campus, and videotape surveillance showed him engaging in what numerous school district administrators, including Hunter, Barnes Earles, and the human resources department considered unusual behavior in lingering off camera for five minutes in the SVHS athletic department. (R. 691 line 14 – 697 line 20.) According to defense witnesses, this would have provided Kennedy an opportunity to rifle through Hunter's office, which was not covered by a security camera. (R. 672; 692 line 10 - 697 line 20; 800 line 11 - 802 line 21.)

Kennedy was placed on paid administrative leave and the matter was referred to the Richland County Sheriff's Office. (R. 388 lines 11-14.) Kennedy was not criminally charged for the theft. (R. 345 lines 9-11; 388.) He was returned to full duty security work with Richland Two on or around June 16, 2011. (R. 947 line 16 – 948 line 9; 1194-1196.) Richland Two's Human Resources Department, led by Roosevelt Garrick and Traci Batchelder, met with Mr. Kennedy and performed an internal investigation regarding whether he should be retained as an employee in light of the suspicion surrounding the theft. (R. 351 line 5 - 352 line 14; 631 line 15 - 632 line 18; 603 line 10 - 604 line 12; 944 line 3 - 947 line 23, 1001 line 5 - 1013 line 23.) Garrick, who was then Richland Two's Chief Human Resource Officer, informed Kennedy that he would be permitted to return to work, but due to concerns with Kennedy's lack of candor during the investigation and suspicious behavior, he would not be promoted to lieutenant at that time. (R. 972 lines 6-22; 1007 line 2 – 1017 line 8; 1195-1196.)

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

> THE INFORMATION CONTAINED IN THIS EMAIL IS CONFIDENTIAL AND WILL ONLY BE SHARED WITH OTHER DISTRICT SECURITY SUPERVISORS, AS NEEDED, WHEN THEY WILL BE SUPERVISING MR. KENNEDY.
>
> Mr. Kennedy will be reporting to work tomorrow night (Thursday, June 16) to work on third shift, weekdays. This will be his permanent assignment.
>
> I have told him that he will be assigned to work in the watch room answering phones and performing whatever other duties are necessary in the watch room.
>
> He is NOT to be given any assignment that involves having keys to any District facility.
>
> Thank you.

(R. 605 line 22 – 609 line 2; 699 line 15 –701 line 25; 1194.) Two of Kennedy's former coworkers testified that they saw Earles' confidential email printed out at the security office. (R. 407 line 21 – 409 line 1; 452 line 16 – 453 line 17.) However, both of those co-workers testified that they first heard Kennedy was under investigation for the SVHS theft from Kennedy himself. (R. 413 lines 6-23; 454 line 23 – 455 line 1.) Kennedy testified that he also saw the email "lying out" in security vehicles and in offices. (R. 346 lines 17-23.) No evidence was presented at trial that Earles or Barnes had printed out the email or were aware that it had been printed out prior to the litigation, although Earles testified that he printed out the email and put it in a folder in his office. Both Earles and Barnes testified that they were not aware of any rumors or allegations that the email had

been printed out until Kennedy alleged it by way of this action. (R. 486 line 11 – 490 line 4; 610 lines 2-7; 700 lines 15-20.)

After returning to work in June 2011, Kennedy did not look for another job for the next fourteen months. (R. 391 lines 17-24.) He testified that he continued to enjoy his job. (R. 391 line 23 - 392 line 17.) Kennedy did not receive any reprimands or warnings after reinstatement to his position in June 2011. (R. 392 lines 18-23.) His at-will employment with Richland Two was ultimately terminated in October 2012. (R. 391 lines 17-18.)

Kennedy contended that he was further defamed by way of his termination and by Kim Jones, a bus driver for Richland Two who had reported Kennedy for intimidating behavior toward her during an investigation of whether Jones may have improperly reviewed a school video with Kennedy's assistance. (R. 193.) However, the Trial Court granted Jones a directed verdict on that claim and held that Kennedy did not prove any defamatory communication in connection with his termination.

Kennedy testified that *after his termination* in October 2012, he was evicted from his house, his car was repossessed, and ultimately he was divorced from his wife. (R. 358-361; 1197-1198.) At the time of trial, he was working for GEO Care as a security officer, where he was eligible for stock and participation in its 401(k) program. (R. 361 lines 11-24.) Between his employment at Richland Two and GEO Care, he worked for Allied Barton as a security guard at an hourly rate of $13.26. (R. 383 lines 10-11.) His final hourly rate at Richland Two was $12.77 per hour. (R. 397 lines 13-18.) Kennedy testified that he resigned from Allied Barton in February 2014. (R. 382 line 8 - 383 line 17.) The Trial Judge limited defense counsel's ability to cross examine

Kennedy under Rule 405 of the South Carolina Rules of Evidence regarding the circumstances of his resignation from Allied Barton. (R. 371 line 11 – 379 line 25.) At the time of trial, Kennedy had pending charges of petty larceny for thefts at the SCANA campus where he was assigned to work through Allied Barton. (R. 383; 294-302.) Petitioners seek review of this ruling. Kennedy testified that he had no evidence that anyone at Richland Two had provided a negative reference or had attempted to keep him from securing subsequent employment. (R. 395 lines 8-14; 399 lines 2-10.)

V. ARGUMENTS

A. The Court of Appeals Erred In Holding That Evidence Supported A Finding That The June 2011 Confidential Email Was Published Due To Fault of Barnes or Earles.

The Court of Appeals' opinion recognizes that to prove defamation, a plaintiff must show "the publisher was at fault." *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006). However, the Court of Appeals did not properly analyze whether Petitioners were at fault in drafting and publishing the email to supervisors, which is the crux of a defamation case. Rather, the Court of Appeals instead focused on the alleged lack of investigative basis to support the underlying belief of Petitioners (as well as numerous other School District employees who were not sued or who were dismissed from the suit) that Kennedy was responsible for the missing money. (R. 1012-1017; 1195-1196.) This assessment of "general" fault, rather than fault in the challenged publication, is inconsistent with *Bell v. Bank of Abbeville*, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947) and its progeny, which confirm that the fault to be assessed is fault in making the publication. *See also Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001) (focusing on malice in making the publication as the main issue in determining actual malice in a

defamation case). The Trial Court specifically found that Earles was not at fault in sending the email, which is the alleged defamatory communication in this case. (R. 1123 line 14 - 1125 line 7.) Likewise, there was no evidence at trial that either Barnes or Earles was directly responsible for distributing the email beyond its intended recipients or that they were aware of its distribution before the lawsuit was filed. The language of the email itself demonstrates that Earles took reasonable precautions to assure its confidentiality. The Trial Court so held in granting JNOV on Kennedy's negligent supervision claim:

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

(R. 1123 line 14 - 1125 line 7.) Even if Earles could have gone to each supervisor individually, or not sent the email at all, or kept his suspicions to himself, it does not negate the reasonableness of the precautions demonstrated by Earles' testimony and the text of the email itself. (R. 606 line 1 - 609 line 8; 699 line 15 - 700 line 23.) The Trial Court specifically found that there was no evidence that any of the specific addressees were likely to violate confidentiality or had a tendency to ignore directives to keep employee information confidential.

With proper focus on whether Barnes or Earles was at fault for re-publication of the email, rather than at fault in allegedly not conducting a full investigation of the theft, the Court of Appeals erred when it did not reverse the Trial Court and grant a directed verdict.

B. The Court of Appeals Erred In Finding That Respondent Introduced Sufficient Evidence Of Common Law Actual Malice To Support A Finding Of Individual Liability Under The Tort Claims Act.

The Court of Appeals' opinion addressed only Petitioners' alternative argument that a constitutional malice standard should apply to the Tort Claims Act's "actual malice" definition under S.C. Code Ann. § 15-78-70(b) in defamation cases. The Court of Appeals erred by focusing solely on this alternative argument, without examining whether Kennedy actually introduced sufficient evidence to prove common law actual malice by Barnes or Earles. Petitioners submit that the Supreme Court's ruling in Opinion No. 2019-MO-014, filed March 20, 2019, that sufficient evidence existed to permit a jury to determine that Petitioners exceeded a qualified privilege is not tantamount to a finding that Petitioners acted with actual malice for purposes of the Tort Claims Act. Narrow construction in favor of limited liability for governmental entities and employees acting within the scopes of their official duties is required. *See* S.C. Code Ann. § 15-78-20(f) ("The provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State"). There is no dispute in this case that Appellants were acting at all times in the scope of their official duties. It would unduly and improperly expand the Tort Claims Act to simply assume that a scintilla of evidence that a qualified privilege

had been exceeded in a defamation case is sufficient to satisfy the definition of "actual malice" under the Tort Claims Act. *See Id.*

"Common law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, *i.e.*, with conscious indifference of the plaintiff's rights." In a defamation case, it is clear that the plaintiff must show that *the publication* was made with actual malice. *See Murray*, 344 S.C. at 143-44, 542 S.E.2d at 750-51. In the instant case, the Court of Appeals further erred by apparently concluding it was sufficient for the jury to infer malice from Barnes' and Earles' allegedly incorrect belief that Kennedy was responsible for the missing money. Rather, the Court should have examined whether evidence existed to support a finding that Barnes and Earles were motivated to defame, and maliciously defamed Kennedy by way of the email. *See Bell*, 211 S.C. at 174, 44 S.E.2d at 330 ("in answering these questions we are not concerned with the guilt or innocence of the respondent in respect to the matters charged in the alleged slanderous statements quoted in the complaint and disclosed by the testimony").

The Court of Appeals further erred in assuming that because Barnes and Earles did not personally conduct a police-level investigation of the theft, their belief that Kennedy was the culprit was somehow not supported by *any* facts. However, the School District's human resources department investigated the incident, reviewed video evidence with Barnes and Earles, interviewed Kennedy extensively, and conferred with SVHS officials about their concerns with Kennedy's behavior. Barnes and Earles were entitled to rely upon that information, as well as Garrick's decision to deny Kennedy's promotion, in developing the plan to reassign Kennedy.

Moreover, sending an email addressed "CONFIDENTIAL" to a limited audience of supervisors negates recklessness, ill will, or conscious indifference in that communication. Combined with the lack of evidence that Barnes or Earles was at fault in the email being released to or seen by others, the Court of Appeals should have reversed the Trial Court on the grounds that there was not sufficient evidence of actual malice to support a verdict against either Barnes or Earles in his individual capacity under the Tort Claims Act. In summary, Kennedy did not offer a scintilla of evidence that Barnes or Earles acted with ill will or conscious indifference to his rights by way of Earles' very limited, confidential email communication, clearly within the scope of his employment, to the supervisors to whom Kennedy would be reporting once he returned to work.

C. The Court of Appeals Misapplied The Clear And Convincing Evidence Standard For Punitive Damages To The Evidence At Trial.

The Court of Appeals properly recognized that S.C. Code Ann. § 15-33-135 places the burden on the plaintiff to establish defamation that was willful, wanton, or in reckless disregard of his rights by clear and convincing evidence. *See also 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). However, the Court of Appeals erred by ignoring the "clear and convincing" standard and instead simply considered whether there was *any* evidence from which the jury could have found recklessness or conscious disregard for Kennedy's rights.

The Trial Court properly found that a qualified privilege applied to the email as a matter of law, leaving the jury to decide whether the privilege had been exceeded.

Notwithstanding the Supreme Court's ruling upholding the Trial Court on that factual issue in Opinion No. 2019-MO-014, Petitioners submit that the mere existence of a factual issue regarding applicability of a qualified privilege is far from "clear and convincing" evidence that they acted with reckless disregard of Kennedy's rights. A scintilla of evidence is, by definition, not "clear and convincing." There was simply no evidence in this case that Barnes or Earles acted with any conscious failure to exercise due care, as there was no evidence presented that they were aware of the further distribution of the email beyond its addressees until after the case had been filed. (R. 486 line 11 - 490 line 4; 610 lines 2-7; 700 lines 1-20.)

Kennedy submitted no direct evidence that Barnes or Earles intentionally or consciously communicated any information regarding his June 2011 employment status beyond the supervisory group to whom the email was originally addressed, with the exception of a soon-to-be supervisor whom Kennedy relieved on his shift. These facts are clearly distinguishable from *Miller v. City of West Columbia*, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996), which involved circumstances that led to a public employee's forced retirement despite affirmative evidence of the plaintiff's innocence, the likes of which Kennedy did not produce at trial. In addition, this case is distinguishable because numerous other managers investigated and made challenged employment decisions for which Earles and Barnes were subjected to punitive damages.

Essentially, the Court of Appeals' opinion upholds an award of punitive damages for Earles' and Barnes' alleged failure to properly supervise the security department, which is a claim upon which the trial court granted a directed verdict, or for the alleged fault of Richland Two's Human Resources department in not conducting a full-scale

investigation of the theft. Earles' efforts to limit communication to supervisors, the text of the email itself, and Kennedy's return to employment for more than a year without incident until his unrelated termination undermines any finding of "clear and convincing" evidence of willful, wanton, or reckless conduct that supported an award of punitive damages against Earles or Barnes.

D. The Court Of Appeals Erred By Limiting Its Review Of Petitioners' Motion For New Trial To The Magnitude Of The Verdict Rather Than The Evidence Supporting The Verdict.

In rejecting Petitioners arguments in favor of a new trial absolute or new trial nisi remittitur, the Court of Appeals relied primarily on the magnitude of the verdict and attributed damages to the publication of the email that were clearly caused by other decisions regarding Kennedy's employment. It was undisputed that the decision to deny Kennedy promotion to supervisor was made by Roosevelt Garrick, not Barnes or Earles. (R. 971 line 15 – 972 line 15; 1012 line 17 – 1017 line 13.) Moreover, Kennedy's alleged inability to earn overtime was not proximately caused by a defamatory publication, but by a decision to reassign him to an office position. Kennedy offered no evidence of the income he allegedly lost as a result of these decisions, nor did he offer a single witness who offered an opinion that they thought less of him after seeing the email. The majority of witnesses testified that they heard from Kennedy himself that he was under investigation for the Spring Valley theft. (R. 413 lines 6-21; 454 line 20 - 455 line 1.) Further, there was no evidence that the 2011 email impeded Kennedy's ability to find employment after his termination from the School District, which clearly distinguishes this case from *Miller*, 322 S.C. at 231, S.E.2d at 687, and *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C. 86, 88, 447 S.E.2d 194, 195 (1994).

The magnitude of the verdict given the lack of evidence of actual damages proximately caused by the alleged defamatory email obviously shows the taint that resulted from the Trial Court's failure to instruct the jury that the termination of Kennedy's employment was not to be considered for purposes of liability or damages. In fact, the Trial Court's order denying Petitioners' post trial motion itself directly references only damages that could have occurred post-termination. (R. 186.)

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. 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 should 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).

The verdict the Supreme Court set aside as "grossly excessive" in *Small*, 292 S.C. at 481, 487, 357 S.E.2d at 455, should have guided the Court of Appeals' analysis of Petitioners' motion for new trial in this case. In *Small*, a breach of implied employment contract resulted in the termination of the plaintiff's employment, for which 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 Kennedy was an at-will employee. (R. p. 1191.) Contrary to the Court of Appeals' opinion, the alleged defamatory publication did not cause Kennedy's reassignment or the denial of his promotion. He returned to a job he liked and received no warnings or other discipline from Barnes or Earles until his termination. (R. 392.) There was no testimony that any publication of the email affected Kennedy's post-termination job search. As in *Small*, the award in this case was clearly excessive and fixed capriciously without regard to the evidence the jury could have considered.

Although this was not a "wrongful termination" or "negligent investigation" case. the jury was allowed to consider it as one and award damages against two employees, acting fully within their official job duties, for decisions made by or highly influenced by others in the organization. The verdict reflects that error and should have been set aside for a new trial, or in the alternative, reduced in accordance with the damages proximately caused by publication of the email, rather than damages alleged to flow from Kennedy's non-promotion, reassignment, or termination.

E. Kennedy Placed His Reputation And Character In Issue For Purposes Of Rule 405 And The SCANA Evidence Would Have Gone Directly To Causation, Mitigation, And Extent Of Kennedy's Alleged Damages.

With the exclusion of the SCANA theft evidence, Kennedy was effectively and unfairly insulated from any challenge to the causation, mitigation, or extent of the

damages he attributed to the loss of his "good name" as a result of the publication of Earles' June 2011 email directive. Importantly, Kennedy did not limit his evidence of reputational injury to a finite period occurring between his return to work in June 2011 and the trial of the case. In fact, his testimony referenced an alleged incident that occurred recently before the trial as evidence of his injured reputation, (R. 362 lines 3-13), and asked for damages based on 10 years of future employment. Kennedy was able to insulate his allegedly damaged reputation from a highly similar and probative accusation that had been made by a subsequent employer while his case was pending against Petitioners. While South Carolina law directly interpreting or analyzing the applicability of Rule 405 is lacking, pre-rules authority confirms the obvious relevance and admissibility of such evidence when character and reputation are directly at issue in the case. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579 (1922) ("the plaintiff's character is directly put in issue by the action of slander, and the defendant may, in mitigation, give in evidence his general bad character . . .") (citing *Buford v. McLuny*, 10 S.C.L. 268 (S.C. Const. App. 1818). "This court expressly recognizes that an action for libel or slander is embraced within the exception to the general rule that 'reputation, good or bad, may not be pleaded or proved' " in a civil action. *Id.*, citing *Smith v. Lafar*, 67 S.C. 495, 46 S.E. 333 (1903). Further, "[O]ne of disparaged fame is not entitled to the same measure of damages with one whose character is unblemished, and it is competent to show that by evidence." *Id.* There is nothing in Rule 405 that limits evidence to prior misconduct, and evidence that Kennedy, while awaiting trial in this case, had been accused by another employer of a similarly-executed theft during his third shift security detail is probative not just of Kennedy's character, but also whether he was acting

pursuant to a common scheme or plan when patrolling the Spring Valley campus in 2011 pursuant to Rule 404(b).

Cases from other states and federal courts interpreting identical, or practically identical, versions of Rule 405 uniformly recognize a clear exception from normal character evidence rules that applies to defamation or slander cases when character and reputation are directly placed in issue. *See State v. Doherty*, 437 A.2d 876, 878 (Me. 1981); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995); *Pierson v. Robert Griffin Investigations, Inc.*, 555 P.2d 843 (1976); *Holiday v. Cutchin*, 305 S.E.2d 45, 47 (N.C. Ct. App. 1983) *aff'd.*, 316 S.E.2d 55 (N.C. 1984); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554 at n. 5 (N.D. Ill. Oct. 8, 1996); *Ajouelo v. Auto–Soler Co.*, 6 S.E.2d 415, 419 (Ga. Ct. App. 1939); *United States v. Manos*, 848 F.2d 1427, 1432 (7th Cir. 1988); *Redfearn v. Thompson*, 73 S.E. 949 (Ga. Ct. App. 1912); *Schafer v. Time, Inc.*, 142 F.3d 1361, 1371-72 (11th Cir. 1998).

Kennedy's complaint alleged that he suffered "loss of reputation in the security industry" solely as a result of Defendants' alleged defamatory statements. (R. 193-195.) The Court of Appeals should have held that he further opened the door to evidence of his loss of employment at SCANA, the reasons for that loss of employment, and accusations of theft at SCANA on multiple occasions by:

1) Introducing evidence regarding his subsequent, current employment at GEO Care without offering any testimony about his tenure at Allied Barton or SCANA following his employment at Richland Two. (R. 361-362; 369-370.)

2) Offering hearsay testimony that he had "recently" overheard a former student saying that he had stolen items from SVHS. (R. 362 lines 3-13.)

3) Cross-examining defense witnesses on the issue of whether Kennedy had been accused of other thefts (after the Trial Court had excluded such evidence regarding SCANA) and citing the absence of other theft accusations to bolster his proclaimed innocence of SVHS thefts. (R. 730-736.)

4) Eliciting Kennedy's testimony regarding alleged financial damages incurred following his October 2012 termination from Richland Two, the causation of which Petitioners were unable to effectively challenge without being able to question Kennedy as to his SCANA separation. (R. 358-362.)

According to the Court of Appeals, the SCANA evidence would have potentially caused confusion of the issues "because it would present difficultly in determining when the actual injury to Kennedy's reputation occurred." (R. 22.) To the contrary, this is precisely why the evidence is so probative to causation and damages in a defamation case. It does not confuse the jury or prejudice the plaintiff to allow the defense to inquire into or present other alternative causes of plaintiff's claimed reputational injuries, the extent of damages allegedly caused by the defendant, or plaintiff's failure to mitigate damages. It is patently unfair to allow the plaintiff to come to court alleging that his otherwise stellar reputation has been irreparably damaged by the defendant, and then prohibit the defendant from introducing evidence that the plaintiff's reputation "in the security industry" may have been damaged either by his own actions or by the actions of others. Taking the Court of Appeals' analysis to its logical extreme, Kennedy could have been convicted of robbing a bank while awaiting trial and that charge could not have been presented to the jury if it occurred two years after the CONFIDENTIAL email. As

such, the exclusion of the evidence was prejudicial error and the Court of Appeals should have remanded for a new trial on this ground.

F. The Court Of Appeals Misapplied The *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009), Constitutional Factors In Upholding The Punitive Damages Awards.

An overarching flaw in the Court of Appeals' punitive damages constitutionality analysis is that the jury was asked to decide a defamation case, not a wrongful termination claim or other tort claims that the Trial Court dismissed. As such, the Court of Appeals' focus on alleged damages caused not by the alleged defamatory communication, but resulting from personnel decisions made by or participated in by other managers of the School District, led to its erroneous conclusion that the punitive damages awards against Barnes and Earles comported with constitutional due process. The Court of Appeals further erred by ignoring the limited extent of the economic harm to Kennedy, instead improperly concluding that *any evidence* of economic harm was enough to satisfy constitutional requirements.

1. Reprehensibility

As the U.S. Supreme Court noted in its reprehensibility analysis in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576, 116 S. Ct. 1589, 1599, 134 L. Ed. 2d 809 (1996), "some wrongs are inherently more blameworthy than others, that the harm BMW had inflicted on plaintiff was purely economic, and that BMW had not evinced indifference or reckless disregard for the health and safety of others." *See Id.* at 576, 116 S. Ct. 1589. Further, the Supreme Court cautioned that not all acts that cause economic harm should be converted into torts sufficiently reprehensible to justify significant punitive sanctions in addition to compensatory damages. *Id.* The Court of Appeals did not apply this

standard in holding that the limited economic harm to Kennedy in this case was sufficient to support an award of punitive damages. In this case, Kennedy offered no evidence of any lost income that proximately flowed from the alleged defamatory publication, as opposed to Garrick's decision not to promote him and the reassignment itself. While the Court of Appeals noted Kennedy's lack of physical harm, it should be further noted that he likewise offered no evidence of emotional harm requiring medical or psychiatric treatment. As such, the Court of Appeals misapplied the first *Mitchell v. Fortis* reprehensibility factor.

Second, there was no evidence of a reckless disregard for the health or safety of Kennedy, who kept his job after the alleged thefts without reprimand or warning for fourteen months. Kennedy admittedly sought no other jobs until his termination for reasons the Trial Court found non-actionable as a matter of law.

Third, while Kennedy may have been financially vulnerable in a general sense, his financial vulnerability clearly was not exploited or exacerbated by the alleged defamation in this case. For example, Kennedy offered no evidence that, prior to his termination, he had any difficulty paying bills or had other financial problems, or that the CONFIDENTIAL email affected or even minimally impacted his ability to secure comparable employment at Allied Barton/SCANA or Geo Care, his employer at the time of trial.

Fourth, the Court of Appeals erred in concluding that the alleged defamation was a "repeated event" simply because Barnes and Earles, like other school and district administrators, continued to hold an uncommunicated belief that Kennedy was

responsible for the disappearance of the money and other items from the Spring Valley athletic department. (R. 789-790; 809; 915-916; 1202.)

Finally, there was no trickery, deceit, or intentional malice even if a jury could somehow find from the evidence that either Earles or Barnes was responsible for any communications about Kennedy's trustworthiness outside the supervisory chain addressed in the "CONFIDENTIAL" email. The evidence presented at trial was that other witnesses who were not defendants at trial, including Garrick, Tim Hunter, and Jim Childers, similarly believed that Kennedy was responsible for the SVHS thefts or had, at a minimum, created trust issues with his responses when questioned. Those beliefs were communicated internally among supervisors who had a legitimate need to know the information. The Trial Court held that a qualified privilege applied to the CONFIDENTIAL email. The scintilla of evidence that would have allowed the jury to find that the qualified privilege had been exceeded does not support a finding of trickery, deceit, or intentional malice.

2. Disparity Between Actual Harm and Punitive Damages

As to the second constitutionality factor, the Supreme Court has indicated that the reasonableness of a punitive damages award cannot be determined solely by comparing the punitive damages award to the actual damages award; rather, the touchstone of the inquiry is reasonableness. *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. While the multiplier for punitive damages is low in this case, the punitive damages awards are unreasonable based on the lack of actual, objective, and demonstrable harm to Kennedy proximately caused by the publication of the email, as opposed to the denial of his

promotion by Garrick, the reassignment itself, or his unrelated termination. As such, merely comparing the actual and punitive damage ratios was error.

3. *Mitchell v. Fortis* Comparative Penalty Awards

As to the final factor, *Miller, 322* S.C. at 231, 471 S.E.2d at 687, and *Constant*, 316 S.C. at 88, 447 S.E.2d at 195, are simply not analogous in this case. Each of those cases involved defamation that resulted in the plaintiff's actual loss of employment and a demonstrable, objective, and quantifiable loss of future employment opportunities that Kennedy did not experience or prove.

Petitioners submit that the punitive damages awards in this case therefore did not comport with due process and should have been set aside or reduced by the Court of Appeals. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *Gore*, 517 U.S. at 575, 116 S. Ct. 1589 (describing reprehensible conduct sufficient for an award of punitive damages as reflecting " 'the enormity of [the] offense' " and "the accepted view that some wrongs are more blameworthy than others" (quoting *up- v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)).

VI. CONCLUSION

For the foregoing reasons, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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November 21, 2019

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Alison Renee Lee, Circuit Court Judge

Opinion No. 5669 (filed July 24, 2019)
Appellate Case No.: 2015-00613

Jeffrey Kennedy .....Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served of the aforementioned **Petition for Writ of Certiorari** by depositing a copy of it in the U.S. Mail, postage prepaid, on November 21, 2019, addressed to T. Jeff Goodwyn, Esq., Goodwyn Law Firm, LLC, 2519 Devine Street, Suite A, Columbia, SC 29205.

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