THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2015-000613

Opinion No. 5669

Filed July 24, 2019

JEFFREY KENNEDY,

RESPONDENT

V.

RICHLAND COUNTY SCHOOL DISTRICT TWO, ERIC BARNES, AND CHUCK EARLES,

PETITIONERS.

RETURN TO PETITION FOR WRIT OF CERTIORARI

T. Jeff Goodwyn, Jr. [SC Bar No. 73789]
Goodwyn Law Firm
2517 Devine Street
Columbia, SC 29205
(803)251-4517

Rachel G. Peavy [SC Bar No. 69397]
Hawkins Law Firm, P.A.
1835 Gervais Street, Suite C
Columbia, SC 29201
(803)500-2000

Attorneys for Respondent Jeffrey Kennedy

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INTRODUCTION

Over five years ago, this defamation case was tried before twelve citizens of Richland County. On October 3, 2014, the jury returned a verdict in favor of the Respondent, Mr. Kennedy. The jury specifically found that Petitioners defamed Mr. Kennedy and acted with actual malice in doing so. Petitioners appealed, and the Court of Appeals reversed the trial court's denial of their motions for directed verdict and JNOV, finding no evidence that they exceeded the scope of their qualified privilege.

Mr. Kennedy petitioned for a writ of certiorari, and this Court granted the writ and heard argument on November 7, 2018. In a *per curiam* opinion, the Court reversed the lower court and remanded the matter for consideration of the remaining issues on appeal. *See Kennedy v. Richland County School Dist. Two, et al.*, Op. No. 2019-MO-014 (S.C. S. Ct. filed March 20, 2019). On July 24, 2019, the Court of Appeals issued a unanimous opinion affirming the circuit court's rulings at trial and in its post-verdict review.

Now, Petitioners again request further review. Given that this case has already been subjected to exhaustive appellate review, Kennedy respectfully submits that the petition should be denied. Rule 242, SCACR, provides that "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

None of these scenarios are present in the instant case. This case involves the Court of Appeals, upon its second look, correctly applying the longstanding law of defamation and damages in affirming the trial court's rulings, and correctly concluding that the exclusion of certain evidence was without error. Petitioners have identified no errors, or points overlooked or misapplied, by the Court of Appeals that support the granting of their Petition. No new law was created or novel questions answered, nor are any constitutional issues directly implicated. For the reasons set forth in Kennedy's prior briefing before this Court and contained within this Return, the Petition should be denied. The voluminous record that resulted from the week-long trial has been reviewed once by this Court and twice by the Court of Appeals; further consideration is unnecessary.

COUNTER-STATEMENT OF FACTS

Mr. Kennedy began working the night shift in the security division of Richland Two in 2008. R. pp. 140-141. Mr. Kennedy was trained by the then-chief of security to "space out" his duties so they were not completed too quickly and to change up his routine so that others could not predict his actions. R. pp. 144–148; 559; 888; 893-896. Kennedy's duties included patrolling schools, setting alarms, and checking windows and doors, including at Spring Valley High School. R. pp. 142-143. At the beginning of his shift, he was given keys to school buildings and offices.

In 2010, Petitioner Earles assumed the position of Emergency Services Manager after the former chief was fired. R. p. 149. Mr. Earles hired Petitioner Barnes as his Assistant Security Manager. R. p. 150. Petitioners were former employees of the sheriff's department; district employees believed they wanted to make Richland Two more like law enforcement. R. p. 151. Petitioners believed that the Security Division had a rumor and gossip problem. R. pp. 305 – 306; pp. 418- 419; pp. 423 – 424. Earles sought to "change the culture" by having employees, including

Kennedy, read and sign a "Change of Culture" memorandum which provided, in part, that employees were to "mind their own business." R. p. 1008; R. pp. 149-150.

In or around February 2011, Mr. Kennedy applied for a supervisor's job as a lieutenant. The position paid more and was the "second shift", allowing for more family - friendly hours. Petitioners decided that Mr. Kennedy was the best candidate for the job and Mr. Earles sent his hiring recommendation up to HR on February 28, 2011, which would run a background check. Sometime after being recommended for the promotion (but before HR formally approved it), Mr. Kennedy was invited to the regular supervisor's meeting and introduced as the new lieutenant, and his fellow employees knew he was getting the promotion.[1] R. pp. 151-154; R. pp. 225–226; R. p. 268; R. p. 301.

On March 4, 2011, Spring Valley's athletic director, Tim Hunter, alleged that he left $1,000 in boxes under the desk in his office the night before, and discovered the money missing the next morning. R. pp. 319–320; R. pp. 608–611; R. p. 1025. Hunter's office is located in the athletic department (AD) building, known as Bates Hall. None of the security cameras in Bates Hall were pointed at Mr. Hunter's office. R. p. 349; R. p. 442–443. As a result, there was no video of anyone entering or exiting the office.[2]

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[1] Announcing a promotion before HR approval was against Earles's policy. R. p. 417.

[2] There are approximately 100+ thefts every year at Spring Valley; however, many are never reported to security. R. pp. 713- 722; R. pp. 745-747. Witnesses testified that "everyone had keys" at Spring Valley and, in fact, Petitioners did not even know who had keys to what – the decision as to who was given keys was made by Spring Valley's principal. R. pp. 154–156; R. p. 248; R. pp. 419– 421. Petitioners testified that it was a challenge to maintain security. R. pp. 243–248; R. pp. 363–364. Students, parents, and staff were given or loaned keys occasionally. R. p. 227; R. pp. 317-318.

Mr. Hunter had a safe where he usually locked up money; however, he alleged that he felt sick the evening of March 3rd and elected to leave the cash boxes out, in case a staff member needed to access the cash the next day.[3] This was not his standard practice. R. pp. 611-612. Mr. Hunter testified that someone would have had to have gotten down on the ground to find the boxes – they were not visible otherwise. R. p. 633. Security division employees believed that Hunter's actions were "odd" and "suspicious", especially since others had the safe's combination. R. pp. 226- 227; R. p. 362; R. pp. 434-435. However, Hunter was a longtime employee and was never considered a suspect. R. p. 390; R. p. 601. Hunter's "right hand man," Sonny Uker, knew that Hunter had left the cash out; however, Uker was also never considered a suspect. R. p. 719.

Mr. Kennedy was on duty the evening of March 3rd and, as part of his rounds with a fellow guard, John Reid, turned on the alarm in Bates Hall around 11:00 p.m. Kennedy then returned to disarm it alone sometime around 5:55 a.m. on March 4th. R. p. 159. Mr. Kennedy told Petitioners that on that night, as well as on other occasions, he sometimes spent time in the weight room "killing time." R. pp. 515 – 517. Barnes admitted that "boredom is a problem" on the job. R. pp. 313-315. During his time in the weight room on the night in question, Kennedy received a call from his supervisor, Lt. Young, directing him to open a gate at another school. R. pp. 162–163.

Sometime between when the alarm was first set late on March 3rd and when Kennedy returned around 5:55 a.m. on March 4th, the baseball team returned to Bates Hall and set off the alarm. Mr. Kennedy was instructed by Lt. Young to drive over and check on things. By the time he arrived, the baseball coach was already turning the alarm off and Kennedy did not re-enter the building. However, while sitting in his vehicle outside, Mr. Kennedy observed players and coaches

[3] Mr. Hunter did end up coming to work the following day.

in the hallway by Hunter's office through the windows; additionally, players and coaches were observed on the videotape from the security camera. R. pp. 159 -161; R. pp. 243- 244.

Hunter testified that he did not recall seeing players near his office on the security video, nor did he recall whether the coach came back down the hall to turn the alarm back on, so the alarm actually could have been off the rest of the night. R. p. 623. Hunter also testified that the video showed that only the coach came up the hallway near his office, R. pp. 615- 618.[4]

Custodians had keys to the AD offices, as did coaches. R. p. 227; R. pp. 722-726. The security camera footage from Bates Hall was taped over by Richland Two, except for a few camera views. Earles testified he only saved 2 out of 16 camera views from the night in question. R. p. 442. While some witnesses testified that they saw the team on the footage from that evening, Earles did not recall seeing the team at all; however, he admitted seeing Mr. Kennedy on his phone as he exited Bates Hall around 5:55 a.m. R. pp. 559– 560.

Earles never followed up to see with whom Mr. Kennedy was speaking, or to confirm the length of the conversation, even though the district provided phones to security staff and could access that data. Earles refused to testify as to whether "it would be highly unlikely that [Kennedy] would be in the process of robbing something while he is talking to somebody else." R. pp. 543-546.

Richland Two's HR department, which interviewed Kennedy as part of the investigation, found that others had "access and opportunity" to Mr. Hunter's office. However, neither HR nor the Petitioners ever met with the other employees who had such access and opportunity. R. pp.

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[4] Earles did not save any video showing Hunter leaving Bates Hall or arriving the next day, nor did he save video from the period of time after Kennedy disabled the alarm around 5:55 a.m. R. pp. 560-561. The assistant principal, Jim Childers, also viewed the video, but also did not save it. R. pp. 735 –737. The District no longer uses the system due to software deficiencies. R. p. 504. There was evidence that the video would tape over itself. R. pp. 570–571.

173; R. pp. 255-256; R. pp. 845-847; 1011-1012. Kennedy testified he never went into Hunter's office that night or checked the office door. R. p. 164.

Despite no one ever observing Kennedy – during the three years he had been a night watchman - entering or exiting any office where he was not supposed to be,[5] and despite others having had "access and opportunity", Mr. Kennedy was the sole focus of the investigation. R. p. 272. pp. 351-352; R. p. 565. Earles admitted that he formed his opinion that Mr. Kennedy was the thief based on a "very limited set of facts." R. p. 569. Earles never sought to learn what training Kennedy had received. R. pp. 533-535. Petitioners also never interviewed the baseball team, the custodial staff or Sonny Uker. R. pp. 323 -325, R. pp. 184-186; R. pp. 331– 332.

Petitioners alternately testified that they did not "really" perform an investigation, but merely handed it over to the sheriff's department and acted as "liaisons." R. pp. 319-322, 329. However, Petitioners reviewed videotape; met with HR and with Mr. Kennedy; reviewed instances of other thefts at Spring Valley; and sought to "catch" the thief by placing "bait money" in a certain location. R. pp. 323-325; R. pp. 482 – 483.[6]

Against the backdrop of the alleged theft from Mr. Hunter's office, a check, some cash, and a ring were reported stolen from the administrative offices at Spring Valley. However, some staff could not confirm when the items had gone missing, as they were kept in drawers and not checked on regularly. R. pp. 386 - 388; R. pp. 701 -704.

As a result, Mr. Kennedy was questioned about his actions in the administration building, because he was deemed to have taken "excessive time" in the break room there and gone through

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[5] Testimony was that security guards always know they may be recorded on camera at any given time, even if they don't know where the cameras are pointed. R. p. 273; R. p. 282.

[6] Their investigation included Mr. Barnes showing up with "carloads of police" from the sheriff's department at Mr. Kennedy's mother's home, in an effort to interview Kennedy. R. pp. 157-158.

a back door instead of a front door. Again, Petitioners did not save all of the video and there was no footage showing Kennedy entering locked offices, R. p. 400; R. p. 551; R. p. 565. No one followed up to see if the stolen check had ever been cashed, and no fingerprints were collected. R. p. 738; R. p. 761. Petitioners never questioned Mr. Kennedy about what his training or habits; reviewed prior video; or spoke with his supervisors. R. pp. 314-315; R. pp. 406- 407; R. pp. 533-535; r. p. 564. Kennedy told them it was his habit to take breaks. R. p. 338.

Following Tim Hunter's report on March 4th, Mr. Kennedy was placed on paid administrative leave. Mr. Kennedy was not surprised, given that security guards on duty are always questioned. However, from the very beginning, Kennedy vehemently denied stealing anything, and told them that he had been "doing the same things" on his shift for 4 years. He readily admitted to HR that during the times when he was "off camera" in buildings, he was wasting time and taking breaks. Kennedy further stated that he had a wife and mortgage and was up for a promotion – "why would I steal?" R. p. 793; R. pp. 1029-1037; R. p. 165; R. pp. 786-789.

After conducting its investigation into the alleged $1,000 theft, the sheriff's department declined to charge anyone – including Kennedy.[7] Despite this decision, Petitioners both believed that Kennedy was the thief, and withdrew the recommendation for the promotion. HR informed Mr. Kennedy that he would need to restore Richland Two's trust and confidence in him. R. pp. 351-352; R. pp. 444-445; p. 834; R. pp. 1011-1012.[8] No one from HR (nor the Petitioners) ever

[7] Tracy Batchelder, an HR employee, testified that she would have liked for the sheriff's department to have taken fingerprints and checked Kennedy's phone records. R. pp. 793–794.

[8] Roosevelt Garrick, the Chief HR Officer of Richland Two, was extremely disappointed by Mr. Kennedy's admission of "wasting time." R. pp. 822-823; R. pp. 825- 827. Garrick was also concerned that Mr. Kennedy's recollection of the nights in question revealed inconsistencies. R.

interviewed the other employees who had "access and opportunity." R. p. 173; R. pp. 255 -256; R. pp. 845 – 847. Mr. Barnes was "very frustrated" and simply could not believe that Mr. Kennedy was not fired, describing Richland Two to the jury as a "beautiful place to work." R. p. 328; R. pp. 366–367; R. p. 847.

Mr. Kennedy returned to work at the security division in June 2011; however, Chuck Earles, convinced of his guilt, decided that he was to be assigned to desk duty only, with no access to keys. R. pp. 422–423. As part of implementing his decision to punish Mr. Kennedy, Mr. Earles sent out an e-mail, marked confidential, to the supervisors within the security division (including Mr. Barnes). The e-mail states that Mr. Kennedy is returning to work on desk duty and is "NOT to be given any assignment that involves having keys to any District facility." R. p. 1010. This "confidential" e-mail was printed out and left out for rank and file employees to see in both the security division office and their vehicles. R. pp. 168-169; R. pp. 229-230; R. pp. 246-247. Current and former Richland Two employees testified that they knew what it meant – that Petitioners considered Kennedy to be the thief. These same witnesses testified that you can "put two and two together", and that it was "obvious" that Petitioners thought Kennedy was guilty. It was undisputed that a security guard without keys was worthless. R. pp. 227-230; R. pp. 274-276.

Petitioners denied printing out the e-mail or leaving it out. R. pp. 364-365; R. p. 519. Despite acknowledging that the security division was a "rumor mill" and had a "gossip problem", Petitioners did nothing to ensure the confidentiality of the email besides marking it as such, despite acknowledging that the contents of the e-mail would harm Mr. Kennedy if they got out. R. pp. 359 - 360; R. pp. 423-426.

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pp. 170-173; R. pp. 825-827. Ultimately, the promotion to the lieutenant position was given to John Reid.

Petitioners also communicated their belief that Mr. Kennedy was a thief to his fellow employees. John Reid recounted the following for the jury:

Q. **How did you find out that he wasn't supposed to have keys or drive vehicles.**
A. **It was told to us. Because he came in on third shift and he would relieve us, and sometimes he would beat the shift supervisor to work himself . . .**
Q. **Who told you he was not supposed to have keys?**
A. **It was put out by Mr. Barnes.**
Q. What did you think of that?
A. Well you know, it's pretty obvious. I mean, a guy supposed to get promoted; and all of a sudden, they move. He didn't get promoted, and then he is brought into the office. All he can do is answer telephones. Evidently he was under suspicion for something.

. . .

Q. So you ended up getting the job that Jeffrey had been promoted to and that was revoked?
A. Yes, sir.
Q. . . . Did Jeffrey's job overlap with what you thought your job was supposed to be as the second shift supervisor?
A. I didn't get the job until later on.

R. at p. 249, l. 14 – p. 251, l. 3.

Barry Mitchell, another shift security guard, also testified that Mr. Barnes and Mr. Earles let the staff security guards know that they considered Kennedy to be the thief:

Q. **Based on your personal knowledge, going back to those days and months around March 2011, personally was it obvious to you that Mr. Earles and Mr. Barnes thought that Jeffrey was not to be trusted?**
A. **Yes, ma'am. Once they promoted him to lieutenant and then demoted him to a desk job, it was rather obvious that he was under investigation for it.**

. . .

Q. **Where did you see this [Earles e-mail] before?**
A. **There is an office in the support service center where we have a file cabinet where we keep our time sheets . . . and it was laying on the desk.**
Q. **So that office is not a secure area?**
A. **No.**
Q. Staff goes in and out of there?
A. Yes, ma'am.

. . .

Q. **And so the letter says [Kennedy] is not to have keys?**
A. **Yes, ma'am.**
Q. **And you interpreting that how?**
A. **He was not to be trusted.**
Q. A security guard without keys really isn't a security guard?
. . .
A. Is worthless, for what we do. If you can't use keys, you can't work.

R. p. 229, l. 13 – p. 231, l. 1.

Upon learning that the "confidential" e-mail had been printed and left out for all to see, the Petitioners never followed up with their supervisory staff to find out who had done so or why the confidentiality directive was ignored. R. pp. 311-312; R. pp. 426-428. At trial, the Petitioners did not call any of the recipients of the e-mail to testify.[9] *See Record* (Trial Transcript).

Mr. Kennedy testified that he heard that Petitioners said he was a thief. Mr. Kennedy testified that as a result of their actions, he was humiliated, embarrassed, and faced financial problems. R. p. 168; pp. 174-175. Additionally, he and his wife were put under significant stress and eventually split up. He also testified that church members found out about the accusation and he lost his stature within the church and was barred from assisting with the collection plate. R. pp. 180-182. While he was at Wal-Mart, Mr. Kennedy overheard Spring Valley students snickering about him being a thief. R. p. 184.

During the same time that the AD theft was reported in March 2011, Spring Valley's assistant principal, Jim Childers, took away the master key from the night shift custodian, Ms. Jackson, after a reported theft.[10] R. p. 707. Childers wanted to rule her out as a suspect, as he had

[9] Presumably the recipients, all members of the Petitioners' supervisory staff, would have denied printing out and distributing the e-mail.

[10] Richland Two's cleaning crews are subcontracted out through Service Solutions and there is significant turnover. R. pp. 683-684. Richland Two relies upon Service Solutions to perform background checks and screen individuals. R. p. 732.

the utmost trust in her. R. p. 736. In order to protect her reputation, Mr. Childers told her directly that he was taking her key away – he also verbally told one or two other people on a "need to know" basis. R. pp. 755-756. He did not send out an e-mail or other written correspondence. R. p. 708. He did not inform Petitioners of his decision. R. p. 304; R. p. 741. Ms. Jackson's key was subsequently returned to her and she remained employed at Richland Two. There was no evidence that Mr. Childers's action was made known to Ms. Jackson's fellow employees, nor was there any evidence that fellow employees learned she was under suspicion.

Mr. Childers's discretion in dealing with Ms. Jackson was characterized as the "gold standard" by Mr. Garrick, because Richland Two strives for a "culture of excellence." R. pp. 849-851. Mr. Garrick testified that a confidential memo being left out did not reflect the "culture of excellence", nor is the dissemination of sensitive employee information to fellow employees indicative of "best practices" in the HR field. R. pp. 851-852; R. p. 857.

In October 2012, Mr. Kennedy was accused of violating District policy by showing a security video to a fellow employee and parent, Kim Jones. R. p. 177. Mr. Kennedy denied the allegation or knowledge of any District policy. R. pp. 175-176; R. p. 898. Richland Two did not find him credible, and terminated him. R. p. 179. Ms. Jones received a letter of caution. R. pp. 770-771.

ARGUMENT

I. The Court of Appeals Correctly Applied Well-Established South Carolina Law in Upholding the Denial of the Motions for Directed Verdict and JNOV.

Petitioners assert that that the Court of Appeals did not properly analyze the "fault" component of the law of defamation. A plain reading of the opinion reflects an exhaustive analysis as to why Mr. Kennedy met each of the requirements necessary to prove defamation. The Court of Appeals correctly noted that while Petitioners claimed they did not print out the email, Mr.

Kennedy and other witnesses testified they saw and read the e-mail in unsecured vehicles and offices. The credibility of the witnesses, and the belief or disbelief of their testimony, is solely the province of the jury.

There was evidence in the record from which the jury could find that the email being left out for public consumption and on view for all to see was the fault of the Petitioners. Petitioners fail to acknowledge that the jury simply could have disbelieved their testimony when they denied printing the email out or placing it in District offices and vehicles. *See, e.g., Cook v. Regions Bank*, 2016-UP-387 (per curiam) (Ct. App. July 27, 2016) (upholding denial of motions for directed verdict and JNOV in workplace defamation case because a reasonable jury could have believed the plaintiff's version of events, even if contradicted by the defense.)[11] *See also Travelers Property Casualty Co. v. Senn Freight Lines, Inc.*, 2014-MO-022 (per curiam) (S.C. S. Ct.) (July 2, 2014) (where credibility of the witnesses was central to the plaintiff's argument that there was sufficient evidence, if believed, to support the verdict, the trial court's denial of JNOV motion was proper.)[12]

"The fact that testimony is not contradicted directly does not render it undisputed. There remains the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation. If there is anything tending to create distrust in his or her truthfulness, the question must be left to the jury." *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991). A jury is "simply not required to believe [uncontradicted] evidence." *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997) (sustaining verdict for plaintiff). "Credibility determinations regarding testimony are a matter for the finder of fact, who has the

[11] Counsel is aware that citation to unpublished opinions is disfavored under the Appellate Court Rules; however, counsel respectfully believes that this opinion could aid in the Court's consideration of this matter.
[12] Id.

opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) (affirming award in favor of plaintiff where there was reason for disbelief of undisputed evidence which purported to establish "the truth"); *See also Graham v. Whitaker,* 282 S.C. 393, 321 S.E.2d 40 (1984) (affirming verdict and noting that the Court is "not at liberty to pass upon the veracity of the witnesses and determine this case according to what we think is the weight of the evidence.")

The evidence was that Petitioners, either directly or through their conduct and insinuations, let the security staff know – specifically Messrs. John Reid and Barry Mitchell - that they believed Mr. Kennedy was the thief, by taking away his keys, withdrawing the promotion, and assigning him to desk duty. It was already known among the staff that the athletic director had reported the money missing.[13]

There was evidence that, even after learning that the e-mail had been printed out and left out, Petitioners never asked the recipients if they printed it out, nor if they left it out in the office or in the vehicles. The jury could have reasonably concluded that Petitioners did not inquire because they themselves were the ones who printed it out. This is a logical inference, because one would presumably not ask others if they posted it or left it in vehicles if you yourself had done so. In short, the jury was free to disbelieve the Petitioners. "Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left for the jury to decide." *Ross v. Paddy,* 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000) (upholding denial of directed verdict motion) (*citing Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165 (1952) (upholding denial of motion for

[13] See Record at. pp. 226-227; R. pp. 248-249; R. p. 271 (Testimony of Richland Two employees Barry Mitchell, John Reid, and Anthony Permenter).

directed verdict, even though appellant contended testimony was uncontradicted, because "if there is **anything** tending to create distrust in [a witness's] truthfulness, the question must be left to the jury") (emphasis added)).

It was entirely reasonable for the jury to find that the Petitioners were not credible; for instance, Eric Barnes testified at trial that that there had been no thefts reported at Spring Valley since the Hunter theft in March 2014. R. p. 361. The jury could have found his testimony absurd, given the assistant principal, Jim Childers, estimated that on average he sees 100+ thefts a year at the school. R. pp. 746-747. Likewise, the jury could have found Mr. Earles not credible, given that he did not recall seeing the baseball team on the video footage, nor would he admit on the stand that it would be "highly unlikely" that Mr. Kennedy would be robbing someone while simultaneously talking on his cell phone. R. pp. 559- 560; R. pp. 545-546.

Because credibility determinations are entitled to great deference on appeal, the Court of Appeals correctly affirmed the trial court's denial of Petitioners' motions for directed verdict and JNOV, as there was some evidence of defamation under South Carolina law sufficient to support a verdict. Under South Carolina law, when an employer or supervisor conveys their belief that an employee is guilty of a crime to others, despite having actual knowledge otherwise, the denial of a directed verdict motion as to a defamation claim is proper. *See, e.g., Constant v. Spartanburg Steel,* 316 S.C. 86, 447 S.E.2d 194 (1994).

The Court of Appeals also did not overlook and/or fail to examine whether there was any evidence of actual malice sufficient to support a verdict against Petitioners in their individual capacities under the Tort Claims Act. The court correctly noted that "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." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (S.C. 1999) (emphasis added). Because there was evidence to support a finding that Petitioners exceeded the scope of their privilege, the Court of Appeals properly found that there was sufficient evidence for the jury to find that they acted with actual malice within the meaning of the Tort Claims Act. *See Swinton Creek, supra* (finding error in granting of directed verdict because it was for the jury to decide whether the privilege was exceeded and there was evidence suggesting reckless disregard which could constitute actual malice). In fact, Petitioners specifically agreed to a special interrogatory on the verdict form to address this issue. R. pp. 1057-1065; R. pp. 3 – 4.

Section 15-78-80(b) of the Tort Claims Act provides that "nothing in the chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011).

In *Pridgen*, the defendants were supervisors tasked with investigating alleged infractions at the prison where the plaintiff worked. The Court of Appeals held that the denial of defendants' motions for directed verdict and JNOV as to immunity under the SCTCA was proper. Because the plaintiff alleged personal motives and bias on the part of the defendants, "there was at least circumstantial evidence that the defendants acted outside the scope of their employment and with the intent to harm the plaintiff . . . [and] [t]he jury could infer from . . . the nature of their actions that they intended to harm [the plaintiff]." 705 S.E.2d at 64.

"Common law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff's rights." *Murray v. Holnam*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001) "Malice may be proved by

direct or circumstantial evidence . . . Whether malice is the incentive for a publication is ordinarily for the jury to decide. Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury." Id. at 750-751.

For the reasons previously cited, the Court of Appeals correctly found that the jury could certainly have found that the Petitioners acted with "actual malice" when the memo was left out and they clearly communicated their belief that Kennedy was a thief. The jury could have concluded that Earles and/or Barnes printed out the memo and left it out, and that they lied on the stand when they denied doing so.

II. The Court of Appeals Correctly Affirmed the Verdict

An appellate court must view the facts in the light most favorable to the plaintiff in evaluating a challenge to a verdict's amount. *Watson v. Wilkinson Trucking Co.*, 244 S.C. 217, 136 S.E.2d 286 (1964). The Court of Appeals did not overlook and/or misapprehend the law of damages in South Carolina; the evidence in the record; the standard of review for motions for JNOV; motions for new trial absolute; and motions for new trial *nisi remittitur* . The verdict is not excessive or capricious, much less grossly excessive, given that, under South Carolina law, "[a] person's reputation is invaluable." *Miller v. City of W. Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996) (upholding award of $250,000 actual damages and $500,000 in punitive damages in defamation case). "A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive." *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969).

The evidence in the record was that Jeffrey Kennedy's promotion was withdrawn; his income was reduced; and his reputation both inside and outside the District diminished after the email was published and he was considered a thief and a "worthless" security guard. Contrary to the Petitioners' contention that Mr. Kennedy only suffered a "minor indignity" as a result of their

conduct, the Court of Appeals correctly noted that there was evidence from which a jury could find recklessness on the part of the Petitioners, since clear and convincing evidence existed at trial to find they acted willfully, wantonly, or with reckless disregard for Mr. Kennedy's rights. *See, e.g., Cody P. v. Bank of America*, 395 S.C. 611, 720 S.E.2d 473 (Ct. App. 2011) (denial of bank's motion for JNOV on punitive damages proper when the evidence, viewed in the light most favorable to the plaintiff, showed that a person of ordinary reason and prudence would have known that he or she was acting in contravention to the bank's policies and procedures and, further, had acted recklessly when he or she opened bank accounts carelessly).

The Petitioners contend that there was "simply no evidence in the case that Barnes or Earles acted with any conscious failure to exercise due care" and that "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 which the email was originally addressed, with the exception of a soon-to-be supervisory whom Kennedy relieved on his shift." Petition at p. 11. Petitioners again ignore the record, which contains evidence showing that they knew there was a rumor and gossip problem in the security division, but chose to disseminate false and harmful information about Kennedy regardless, and failed to ensure that it was kept confidential or not printed out (or, in fact, printed it out themselves). This was in stark contrast to the "gold standard" exemplified by the treatment of a custodian who also had keys to the AD office, and in direct contravention of Richland Two's "best practices", which seek to keep sensitive employee information confidential. R. pp. 848–851. Given that Petitioners clearly believed Kennedy was a thief, and were frustrated that he was not fired and charged criminally by the Sheriff's Department, there was sufficient evidence for the jury to consider awarding punitive

damages. Furthermore, the emotional testimony of Mr. Kennedy himself, which was apparently believed by the jury, was certainly sufficient to support an award of punitive damages.

Considering the factors in both *Gamble* and *Mitchell*, the evidence supports the trial court's post-trial review of the punitive damages award and the Court of Appeals properly affirmed the denial of JNOV as to punitive damages. The Court of Appeals properly considered the entire record when it applied the *Mitchell v. Fortis* factors.

Mr. Kennedy's own testimony, which was apparently believed by the jury, could be described as heartbreaking and certainly sufficient to support a punitive damages award. Mr. Kennedy testified that because of the smear on his reputation he suffered stress and humiliation and loss of income; that this stress and humiliation adversely affected his marriage; and that he was essentially shunned at church. Furthermore, he testified that he was the subject of stares and gossip. This testimony and supporting exhibits were entered without objection from the defense.

The Petition expresses displeasure at the description of the evidence sufficient to support an award of punitive damages; however, the description of an "incomplete and cursory investigation", and the Petitioners' knowledge of the department's propensity for gossip and the harmful nature of the e-mail itself, are faithful to the record and relevant to the jury's punitive verdict. The Court of Appeals correctly noted that while Petitioners continue to argue that there was no evidence of economic harm caused to Kennedy, the record itself reflected reduced overtime and pay, along with a damaged reputation and loss of the already-announced promotion, as sufficient to support the constitutionality of the award. Petitioners now seek to place blame on the HR manager, Roosevelt Garrick, as the cause of any alleged damages. This argument is nonsensical, given that the decision to brand Mr. Kennedy a thief originated with Messrs. Earles and Barnes and their testimony at trial was that they were very frustrated when the District failed

to fire him. The jury heard the following at trial: Petitioners focused their investigation solely on Mr. Kennedy from day one and, when law enforcement declined to press charges and HR refused to fire him, chose to let everyone know that they considered him guilty regardless. They failed to safeguard confidential information and failed to control the very "rumor mill" that they knew existed at Richland Two.

As to Mr. Kennedy's financial vulnerability, he testified that the District job came with state benefits, including a pension; accordingly, Petitioners' assertion that he secured "comparable employment at Allied Barton or GeoCare" is not supported by the record, as there was no evidence that either private-sector company offered benefits comparable to a government employer.

Furthermore, as to emotional harm, Petitioners assert that Mr. Kennedy "offered no evidence of emotional harm requiring medical or psychiatric treatment." However, Kennedy testified to the significant distress he experienced after the e-mail - and the "no keys" directive - was conveyed to his fellow employees. The Court of Appeals properly applied the *Mitchell v. Fortis* factors in reviewing the record and upholding the decision of the trial court, correctly noting that Petitioners maintained the belief that Mr. Kennedy was a thief despite no verified factual support or regard for his reputation. As to its finding that the jury could have inferred intentional malice, trickery, or deceit, the Court of Appeals correctly noted that the jury was free to consider the testimony of the Petitioners when finding their actions malicious and reprehensible.

In *Lynch v. Toys R Us*, 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007), the Court of Appeals upheld the denial of motions for JNOV or *nisi remittitur* based on the jury's award of $50,000 in actual damages and $250,000 in punitive damages. The court noted that the plaintiff was arrested without justification and view of customers, and the combination led to humiliation, sleeplessness, and emotional pain, which constituted actual damages. The award was upheld "as a warning and

example to deter the wrongdoer and others from committing like offenses in the future." 654 S.E.2d at 552. In this case, the Court of Appeals correctly reasons that the jury may have wanted their award to send a message that the Petitioners needed to be much more careful in the future.

Similarly, in *Miller v. City of West Columbia, supra*, the Court of Appeals held that the denial of the defendants' motion for a new trial and to strike the punitive damages was proper where the evidence showed that the city administrator carelessly investigated claims of sexual harassment against the plaintiff, and made a statement, not based on evidence and in the presence of others, that the plaintiff had, in fact, harassed the dispatcher. The Court held that the jury's award of $250,000 actual damages and $500,000 punitive damages was "appropriate and necessary" under *Gamble*.

III. The Evidentiary Rulings of the Trial Court Were Properly Affirmed.

The Court of Appeals properly determined that the trial court did not abuse its discretion when it excluded an unproven allegation of theft years after the Tim Hunter allegation, noting longstanding South Carolina law which provides that even relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" under Rule 403, SCRE.

On March 25, 2014 – over 3 years after the alleged theft at the AD's office – Mr. Kennedy was charged with misdemeanor petty larceny relating to his employment by Allied Barton as a security guard at a SCANA plant. At the time of the trial, the charges were pending.[14] The charges alleged that Mr. Kennedy stole a pair of plastic safety glasses (valued at $5.00) and $10.00 in cash from a room at SCANA. Kennedy filed a motion *in limine* seeking to exclude evidence of the

[14] Respondent filed a motion to enlarge the record on appeal to include the Richland County Summary Court record reflecting the jury's April 8, 2015, not guilty verdict on the petty larceny charges. The Court of Appeals denied the motion pursuant to Rules 209(b) and 210(c), SCACR.

alleged SCANA theft, arguing that any mention of the unproven charges would result in extreme prejudice and, further, were irrelevant as they concerned future events –years down the road – that were not in existence at the time this defamation action arose. Kennedy further asserted that Petitioners were trying to prove what they were unable to prove (or even charge) three years prior at Spring Valley. See R. pp. 37-45; See R. pp. 109–127.

The Court of Appeals correctly found no abuse of discretion in the trial court's ruling that the SCANA evidence would be unfairly prejudicial because "[e]vidence of similar acts has the potential to be exceedingly prejudicial" and such evidence "must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Op. at pp. 21-22. Petitioners contend that the SCANA charges were evidence of a "common scheme or plan" and that the Court of Appeals erred when it affirmed the trial court. Again, Petitioners ignore the law in asserting this argument. "Evidence of similar acts has the potential to be exceedingly prejudicial." *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2003); *See also USA v. Queen*, 132 F.3d 991, 996 (4th Cir. 1997) ("noting the tendency to condemn not because the accused is believed guilty of the present charge but because he has escaped unpunished from other offenses.")

Under *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), the Supreme Court considered the exclusion of evidence which was from 10 days to 7 weeks removed from the crime charged. The Court asked, "what is there in the alleged passing of forged checks at widely separated points . . . prior to the commission of the crime charged that tends, in a legal sense, to identify the defendant as the man who uttered the forged paper....? True, such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty

of the latter, but that is the precise inference the general rule was wisely designed to exclude . . . There is no connection of time and place . . ." 118 S.E. at 808 (holding evidence was improperly allowed). Similarly, there was no connection as to time and place between the SCANA incident and the Spring Valley incident three (3) years prior.

Furthermore, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." *State v. Billy Wayne Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013) (citing Rule 404(b), SCRE). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Id. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within [this] exception in Rule 404(b)." Id. In *Cope*, the Supreme Court held that there was no abuse of discretion in the trial judge's exclusion of evidence of other crimes under Rule 404(b) where the other crimes occurred subsequent to the murder at issue and there were "many distinctions" as well, although there were also some similarities. Of note, the other crime in Cope occurred within 6 weeks of the underlying offense

Petitioners contend that the Court of Appeals erred in affirming the trial court's exclusion of the SCANA evidence under Rule 405, SCRE. Rule 405, SCRE, allows that on cross-examination of the witness as to reputation, "the court may allow an inquiry into relevant specific instances of the person's conduct." Accordingly, before inquiry can be made, the specific instances of conduct must still be found to be relevant (and not unfairly prejudicial) under Rules 401 and 404, SCRE. Rule 405 does not exist in a vacuum, and the Court of Appeals properly found no abuse of discretion by the trial court in its exclusion of the evidence (really an unproven accusation) as unfairly prejudicial. Petitioners can point to no South Carolina law that was overlooked which provides that the admission of other acts or instances of conduct, under either

Rule 404 or Rule 405, is not subject to an evaluation of relevancy and prejudice. Petitioners cannot circumvent the plain language of Rules 403 and 404, SCRE, in arguing for the primacy of Rule 405. Petitioners cite to various out-of-state cases in support of their position, along with several pre-rule cases; however, none have precedential value.

CONCLUSION

For the reasons stated herein, the Court should deny the Petition for a Writ of Certiorari. This court has already heard this case on other issues, no special or important reasons exist to grant the Petition on the issues raised, and the unanimous opinion of the Court of Appeals is based on a thorough and reasoned review of the voluminous record, and properly applies longstanding, well-established case law to the facts of the case.

Respectfully submitted,

T. Jeff Goodwyn, Jr. [SC Bar No. 73789]
Goodwyn Law Firm
2519 Devine Street
Columbia, South Carolina 29205

Rachel G. Peavy [SC Bar No. 69397]
Hawkins Law Firm, P.A.
1835 Gervais Street, Suite C
Columbia, South Carolina 29201
Attorneys for Respondent

January 13, 2020

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge
Appellate Case No. 2015-000613
Opinion No. 5669
Filed July 24, 2019

JEFFREY KENNEDY,

RESPONDENT

V.

RICHLAND COUNTY SCHOOL DISTRICT TWO, ERIC BARNES, AND CHUCK EARLES,

PETITIONERS.

PROOF OF SERVICE

I certify that I have served the **Return to Petitioners Writ of Certiorari**, by depositing a copy of same in the United States Mail, postage prepaid, on **January 13, 2020**, addressed to counsel for Respondents, Thomas K. Barlow, Esquire and Kathryn Long Mahoney, Esquire, at the Law Firm of Halligan, Mahoney & Williams, PA to P.O. Box 11367, Columbia, SC 29211 and by filing the original and six (6) copies of same, via hand delivery, to the South Carolina Supreme Court, 1231 Gervais Street, Columbia, South Carolina.

T. Jeff Goodwyn, Jr., Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205

January 13, 2020