THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jeffrey Kennedy, Respondent,

v.

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

Appellate Case No. 2015-000613

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 5669
Heard November 17, 2016 – Filed July 24, 2019

AFFIRMED

Kathryn Long Mahoney and Thomas Kennedy Barlow, both of Halligan Mahoney & Williams, of Columbia, for Appellants.

Thomas Jefferson Goodwyn, Jr. and Rachel Gottlieb Peavy, both of Goodwyn Law Firm, LLC, of Columbia, for Respondent.

WILLIAMS, J.: In this civil matter, Richland County School District Two (the District), Eric Barnes, and Chuck Earles (collectively, Appellants) appeal the circuit court's award of actual and punitive damages to Jeffrey Kennedy in his defamation claim against them. Upon our initial consideration of this appeal, we reversed, finding Appellants acted within their qualified privilege. *See Kennedy v. Richland Cty. Sch. Dist. Two*, Op. No. 2017-UP-040 (S.C. Ct. App. filed Jan. 25,

2017). Respondent petitioned for a writ of certiorari. Our supreme court granted the writ, reversed our decision, and remanded the case to this court for consideration of Appellants' remaining issues on appeal. As to their remaining issues, Appellants contend the circuit court erred in (1) denying their motions for directed verdict and judgment notwithstanding the verdict (JNOV) regarding the defamation claim; (2) denying their motion for JNOV regarding individual capacity claims under the South Carolina Tort Claims Act (SCTCA); (3) denying their motion for JNOV regarding punitive damages, or alternatively, for a new trial absolute or *nisi remittitur*, and in affirming the constitutionality of the punitive damages award; (4) excluding evidence of Kennedy's alleged theft and termination from a subsequent employer that occurred during the pendency of the trial; and (5) failing to instruct the jury that no defamatory communication was made as a result of Kennedy's termination from the District and that Kennedy's termination was not part of his defamation claim. On remand, we affirm.

FACTS/PROCEDURAL HISTORY

Kennedy started working for the District in May 2008 as a security guard. Kennedy worked the third shift from 11:00 P.M. to 7:00 A.M., and he provided security for several schools, including Spring Valley High School (Spring Valley),[1] his base of operation. Specifically, Kennedy's security job required him to patrol the grounds of each school in his rotation, check all of the windows, secure doors, activate and reset alarms, and respond to alarm calls in the District. Although the third shift provided Kennedy with a normal hourly rate, Kennedy obtained a greater amount of pay by working overtime hours during events at Spring Valley.

Spring Valley gave Kennedy a set of keys, which provided him access to the various buildings and offices on campus and allowed him to properly perform his security duties. Unfortunately, security at Spring Valley was difficult to maintain because of the numerous keys issued to various groups of people including parents, students, teachers, coaches, administration, student groups, and custodial staff.

In 2010, the District named Earles as the Emergency Services Manager—essentially, the District's head of security—and Earles hired Barnes as his Assistant Security Manager. After perceiving the department's reputation of spreading

[1] Although Kennedy covered up to seven schools during his shift, Spring Valley is the focus school because it is the one in which the events leading to the defamation occurred.

gossip and rumors, Earles issued a "Change of Culture" memorandum to the entire department imploring the staff to not repeat rumors and to "MIND YOUR OWN BUSINESS." In February 2011, Earles recommended Kennedy for a promotion to lieutenant after Kennedy applied for the position. Kennedy was scheduled to start his new position within the department on March 7, 2011.

However, on March 4, 2011, Tim Hunter, Spring Valley's athletic director, reported a theft of $1,000 from his office in Bates Hall. Several people had keys to Hunter's office, including Kennedy, the custodial staff, and the athletic coaches. Kennedy was on duty the night of the alleged theft, and as a result, he set the alarm in Bates Hall that night, and he turned the alarm off the next morning. Sometime between when Kennedy initially set the alarm and when he turned it off the next morning, the baseball team returned from a game and set off the alarm in Bates Hall. Kennedy was called to respond, but he did not enter the building because he observed the baseball team inside as well as the baseball coach disarming and re-setting the alarm.

Following the reported theft, Appellants reviewed the videotape footage from the time Kennedy set the alarm to when he turned it off. There were only two cameras with recorded images. One showed traffic going by outside, and one showed the entrance and exit of Bates Hall. Neither of these camera covered the athletic director's office—the location of the reported missing funds. The videotape of the entrance to the building showed Kennedy turning off the alarm around 5:50 A.M. and leaving the camera's viewing range for about five minutes before exiting the building.

After reviewing the inconclusive video footage, Appellants believed Kennedy was the thief, and they questioned him about the incident twice in the presence of human resources (HR) staff. Appellants performed no further investigation and, specifically, did not interview others who were present in the building that night with access to the athletic director's office, including coaches, players, and custodial staff. Instead, Appellants placed Kennedy on paid administrative leave and turned over the investigation to the Richland County Sheriff's Office. Barnes acted as "liaison" between the District and the sheriff's office. The investigation focused mainly on Kennedy, although testimony indicated that various other people were around the area of the theft on the night of March 3, 2011. The sheriff's office never criminally charged Kennedy, or anyone else, with the theft of $1,000, but Appellants testified they believed Kennedy was the thief, and stated Kennedy could not be trusted as a security officer because he was a "common

denominator" in the various other thefts that occurred at Spring Valley around the same time.

Following the theft accusations and subsequent investigations, the District's HR office informed Kennedy that he would no longer be considered for the promotion to lieutenant, but they permitted him to return to work. The District scheduled Kennedy to return to work on June 16, 2011. Prior to his return, however, Earles decided Kennedy would not be allowed to have keys or patrol buildings. Instead, Earles assigned Kennedy to the security watch room in what amounted to a reduced, desk-duty role. Due to the twenty-four-hour nature of the security department and the rare interaction with second and third shift personnel, instead of holding a mandatory meeting, Earles elected to send a confidential email on June 15, 2011, informing personnel of his decision regarding Kennedy. Earles addressed the email to security supervisors and an HR director. [2]

Earles's June 15, 2011 email, addressed with the subject line "**CONFIDENTIAL**," read as follows:

> THE INFORMATION CONTAINED IN THIS E-MAIL 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 3rd shift, weekdays. This will be his permanent assignment.
>
> I have told him that he will be assigned to work the watch room answering phones and performing whatever other duties are necessary in the watch room. [sic]
>
> His [sic] is NOT to be given any assignment that involves having keys to any District facility.
>
> Thank you.

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[2] Witness testimony indicated Barnes also informed some personnel of Earles's decision.

Appellants admit the email contained sensitive information that could harm Kennedy if it was released beyond its intended recipients. The email managed, however, to reach personnel beyond those intended recipients. While Appellants claim they did not print and place the email within the confines of the District,[3] Kennedy and other witnesses testified they saw and read the printed email while it was located in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards.

Kennedy stated Appellants' distrust in him and their belief that he was a thief negatively impacted his life outside of the District. Prior to the theft accusations, Kennedy was actively involved in his church as a youth mentor and as security for his church's pastor during the collection of the offering plate. After the accusations, however, the church no longer scheduled Kennedy or asked for his assistance.

Kennedy continued to work at the District until October 2012, when he was terminated from his position.[4] At trial, Kennedy presented evidence of his difficult home life following his termination, which included his eviction from his home, divorce from his long-term wife, repossession of his car, and cashing out of his retirement fund. Kennedy was able to secure work with Allied Barton Security, but he resigned in February 2014 after allegations surfaced that he stole a five-dollar pair of safety goggles and ten dollars in cash.[5] At the time of trial, Kennedy was working for GEO Care as a security officer.

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[3] Earles admitted to printing one copy of the email and placing it in a file in his office.

[4] Kennedy's termination did not directly result from the March 2011 theft allegation but rather from an incident involving a violation of District policy and another employee. While initially part of his underlying complaint, the circuit court directed a verdict against Kennedy's claims related to the termination. Thus, any defamation related to his termination was not part of this appeal.

[5] These charges were raised during the pendency of the trial and were the subject of a motion in limine, which is part of this appeal. *See* Part III, *infra.*

On March 11, 2013, Kennedy filed a lawsuit in the circuit court alleging multiple causes of action against numerous defendants, including Earles and Barnes. Prior to trial, Kennedy dismissed certain named defendants, leaving only the District, Appellants, and Kim Jones as named defendants. On the first day of trial, Kennedy filed a motion in limine seeking exclusion of any evidence or cross-examination related to specific instances of petty theft he was accused of while working as a security guard for Allied Barton in February 2014.[6] The circuit court granted the motion to exclude the proffered witness' testimony as inadmissible character evidence under Rules 403 and 404, SCRE. At the close of Kennedy's case, the circuit court granted the defendants' directed verdict motion as to Kennedy's claim for intentional infliction of emotional distress. The court additionally granted Jones's directed verdict motion as to Kennedy's defamation claim. After the defense rested, the circuit court granted the District's directed verdict motion as to Kennedy's claim for negligent supervision. Consequently, the only causes of action before the jury were Kennedy's claims of defamation against Earles and Barnes.

On October 3, 2014, the jury returned a verdict against Barnes for $100,000 in actual damages and $150,000 in punitive damages and against Earles for $100,000 in actual damages and $200,000 in punitive damages. Appellants filed post-trial motions, which the circuit court denied in its February 24, 2015 order. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in denying Appellants' motions for directed verdict and JNOV regarding the defamation claim?

II. Did the circuit court err in denying Appellants' motion for JNOV regarding individual capacity claims under the SCTCA?

III. Did the circuit court err in denying Appellants' motion for JNOV regarding punitive damages or, alternatively, for a new trial absolute or *nisi remittitur* and in affirming the constitutionality of the punitive damages award?

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[6] This incident occurred after Kennedy filed his complaint. These charges were pending at the time of trial and are submitted as part of this appeal.

IV. Did the circuit court err in excluding evidence of Kennedy's alleged theft and termination from a subsequent employer that occurred during the pendency of the trial?

V. Did the circuit court err in failing to instruct the jury that no defamatory communication was made as a result of Kennedy's termination from the District and that Kennedy's termination was not part of his defamation claim?

STANDARD OF REVIEW

In actions at law, when a case tried by a jury is appealed, "the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006).

When a circuit court's ruling on a motion for directed verdict or JNOV is appealed, an appellate court must apply the same standard as the circuit court. *RFT Mgmt. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012). In determining these motions, the circuit court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party. *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 558, 698 S.E.2d 845, 851 (Ct. App. 2010). If the evidence at trial yields more than one reasonable inference or its inference is in doubt, the circuit court must deny the motion for directed verdict or JNOV. *RFT Mgmt.*, 399 S.C. at 332, 732 S.E.2d at 171. "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Parrish v. Allison*, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). "However, if the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and the motion should be denied." *Id.*

"An appellate court will reverse the [circuit] court's ruling only if no evidence supports the ruling below." *RFT Mgmt.*, 399 S.C. at 332, 732 S.E.2d at 171. "When considering [such] motions, neither the [circuit] court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Parrish*, 376 S.C. at 319, 656 S.E.2d at 388.

LAW/ANALYSIS

I. Directed Verdict/JNOV

Appellants argue the circuit court erred in denying Appellants' motions for directed verdict and JNOV on Kennedy's defamation claim. We disagree.

The tort of defamation allows a plaintiff to recover when a defendant communicates a false message about the plaintiff to others that injures the plaintiff's reputation. *McBride*, 389 S.C. at 559, 698 S.E.2d at 852. To prove defamation, the plaintiff must show: "(1) a false and defamatory statement was made; (2) the unprivileged publication of the statement to a third party; (3) the publisher was at fault; and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Williams v. Lancaster Cty. Sch. Dist.*, 369 S.C. 293, 302–03, 631 S.E.2d 286, 292 (Ct. App. 2006). "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002).

First, a jury could find that the insinuation in Earles's June 15, 2011 email and in Barnes' statement to employees was not only that Kennedy was a thief but, more importantly, that Kennedy was not to be trusted with keys. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 441–42, 730 S.E.2d 305, 309 (2012) ("To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." (quoting *Tyler v. Macks Stores of S.C., Inc.*, 275 S.C. 456, 458, 272 S.E.2d 633, 634 (1980))). Kennedy presented testimony that a security guard without keys is "worthless"[7] and demonstrated his reputation in his community was damaged when

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[7] Barry Mitchell, a former security guard and Kennedy's former co-worker at the District, testified as follows:

> Q: And so the letter says that he is not to have keys?
> A: Yes, ma'am.
> Q: Are you interpreting that how?
> A: He was not to be trusted.
> Q: A security guard without keys really isn't a security guard?
> A: Worthless.

he testified his role as a mentor in his church significantly decreased following the publication of the email. *See Timmons v. News & Press, Inc.*, 232 S.C. 639, 644, 103 S.E.2d 277, 280 (1958) ("[The] plaintiff may offer evidence of the surrounding circumstances from which defamatory meaning may be inferred."). Undoubtedly, the statement of distrust—"[Kennedy] is NOT to be given any assignment that involves having keys to any District facility"—coupled with the inference that Kennedy was a thief was damaging to Kennedy's previous reputation as a reliable security guard, especially one for whom Appellants believed was worthy of a promotion to lieutenant. We find Kennedy presented sufficient evidence to raise a jury question as to whether a false and defamatory statement was made.

Second, evidence of the defamatory statement's publication came in the form of Earles's June 15, 2011 email—containing the defamatory statement—that Earles sent to third parties, District employees. The record contains evidence that the email ultimately reached personnel well beyond its intended recipients. While Appellants claim they did not print and place the email within the confines of the District, Kennedy and other witnesses testified they saw and read the printed email while it was located in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 520, 506 S.E.2d 497, 507 (1998) (Toal, J. concurring) ("The publication of defamatory matter is its communication, intentionally or *by a negligent act*, to a third-party—someone other than the person defamed." (emphasis added)); *Kendrick v. Citizens & S. Nat'l Bank*, 266 S.C. 450, 454, 223 S.E.2d 866, 868 (1976) ("Publication includes proof that the complaining party was the person with reference to whom the defamatory matter was spoken.").

Kennedy was also required to present some evidence of fault on behalf of the publisher. *Williams*, 369 S.C. at 302–03, 631 S.E.2d at 292 (finding a plaintiff must prove the following elements to establish defamation . . . "(3) the publisher was at fault . . . ."); *Jones v. Sun Publ'g. Co.*, 278 S.C. 12, 15, 292 S.E.2d 23, 24 (1982) (finding an appellant was only required "to establish some measure of legal fault by the publisher in order to warrant submission of the matter to the jury" when the appellant was not a public official or public figure). Our courts have chosen to retain the common law malice standard and its accompanying

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Q: I'm sorry?
A: Is worthless, for what we do. If you can't use keys, you can't work.

presumptions when addressing fault in private-figure actions. *See Erickson v. Jones St. Publishers., LLC*, 368 S.C. 444, 475–76, 629 S.E.2d 653, 670 (2006). When the defamatory comments were made in this case, Appellants' belief that Kennedy committed the thefts at Spring Valley was based on an incomplete and cursory investigation. Moreover, Earles testified he was aware of the security department's propensity to spread gossip, and both Appellants alluded to the harm the email would cause if it reached other employees. Despite this awareness, copies of the email were seen in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. We find Kennedy presented sufficient evidence to raise a jury question as to fault.

Based on the foregoing analysis, we find the circuit court did not err in submitting Kennedy's defamation claim to the jury.[8]

II. Individual Liability under the SCTCA

Appellants assert the circuit court erred in denying their motion for JNOV on the individual liability claims against Appellants because the evidence does not support a finding of actual malice under the SCTCA. We disagree.

The SCTCA sets forth the liability of government employees as follows:

> (a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b).
>
> (b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit

[8] Appellants do not present any arguments on the final element of a defamation claim. Moreover, based on our supreme court's decision finding Appellants exceeded the scope of their privilege, we need not address Appellants' arguments regarding privilege or actual malice on remand. *See Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (finding a qualified privilege can be abused either by a party exceeding the scope of the privilege *or* by proof of actual malice).

> 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.

S.C. Code Ann. § 15-78-70(a)-(b) (2005).

Appellants argue "actual malice" under the SCTCA is interpreted by our courts as the equivalent of "constitutional malice." The term "actual malice" is often used to describe the standard associated with constitutional malice—publication of a defamatory statement with knowledge of its falsity or reckless disregard for its truth. *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964). However, Appellants' use of actual malice confuses the common law actual malice standard with the constitutional actual malice standard. *See Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 134 n.7, 492 S.E.2d 103, 106 n.7 (1997) (noting the distinction between common law actual malice and constitutional actual malice); *Sanders v. Prince*, 304 S.C. 236, 239, 403 S.E.2d 640, 642–43 (1991) ("[T]he [circuit court]'s instructions on the definition of actual malice were erroneous because they included the definition of common law malice."). The constitutional actual malice standard, upon which Appellants base their individual liability argument, should only be used when the plaintiff is a public official or public figure allegedly defamed in matters of public interest or concern. *Sanders*, 304 S.C. at 239, 403 S.E.2d at 643 ("In cases involving the defamation of a public official, the plaintiff must prove that the defendant acted with constitutional actual malice, that is, with knowledge that the statement was false or with reckless disregard of its falsity.").

According to Appellants, because constitutional malice is a higher standard than common law malice and Kennedy failed to sustain his burden of proof under this heightened standard, the circuit court erred in denying Appellants' motions relating to individual liability under the SCTCA. We agree that actual malice does, in fact, refer to constitutional malice when defamation involves the First Amendment, a public official, or an issue of public concern. *See id.* at 239–240, 403 S.E.2d at 642–43. The defamation in this case, however, does not involve the First Amendment, a public official, or a matter of public concern. Accordingly, Appellants have misinterpreted the standard as it applies to this argument, and as such, we find this argument is without merit. Thus, we affirm the circuit court's denial of Appellants' motion for JNOV as to this issue.

III. Damages

Appellants contend the damages award was grossly excessive and not founded upon the evidence presented at trial. Thus, Appellants argue the circuit court erred in denying their motion for JNOV regarding punitive damages, denying their alternative motions for a new trial absolute and a new trial *nisi remittitur*, and affirming the constitutionality of the punitive damages award. We disagree and address each argument in turn.

A. Motion for New Trial Absolute and *Nisi Remittitur*

Appellants dispute the denial of their motion for a new trial, or in the alternative, new trial *nisi remittitur*, claiming the evidence did not support the size of the award and the jury capriciously fixed damages without regard to the evidence. We disagree.

The jury maintains discretion, as reviewed by the circuit court, in awarding actual and punitive damages. *Miller v. City of W. Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 687 (1996). "The grant or denial of new trial motions rests within the discretion of the [circuit court] and [its] decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628–29 (Ct. App. 1999), *aff'd,* 342 S.C. 47, 536 S.E.2d 663 (2000). While a circuit court may grant a motion for a new trial on the ground that the verdict is inadequate or excessive, a jury's determination of damages is given substantial deference. *Id.* at 446–47, 520 S.E.2d at 629. An appellate court will only intervene when the verdict is "so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence." *Miller*, 322 S.C. at 231, 471 S.E.2d at 687.

The circuit court may grant a new trial *nisi* when it finds the amount of the verdict to be merely inadequate or excessive. *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). However, a party must provide compelling reasons to justify invading the province of the jury. *Id.* "The [circuit court] that heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt. Accordingly, great deference is given to the [circuit court]." *Id.* at 405–06, 477 S.E.2d at 723. The denial of a motion for a new trial *nisi* will not be reversed on appeal unless there was an abuse of discretion. *Id.* at 406, 477 S.E.2d at 723. An appellate court is obligated to review the record and determine whether an abuse of discretion amounting to an error of law exists. *Id.* at 406, 477 S.E.2d at 723–24.

In this case, Appellants argue the verdict—$100,000 in actual damages and $150,000 in punitive damages against Barnes and $100,000 in actual damages and $200,000 in punitive damages against Earles—is one that shocks the conscience based on the evidence presented at trial, and at a minimum, they are entitled to a new trial *nisi remittitur*. In particular, they point to the fact that Kennedy remained employed with the District for fourteen months following the investigation and defamatory statements. Additionally, they claim Kennedy only suffered a "minor indignity," was paid the same rate, and no witness testified to having a different perception of Kennedy after the investigation.

We find the circuit court did not abuse its discretion in denying Appellants' motions for a new trial absolute or a new trial *nisi remittitur*. In examining the record, we note Kennedy testified to not being able to obtain the same amount of overtime hours after being removed from his original job with the District because he was limited in his role as a result of having his keys taken away. Furthermore, Kennedy testified his reputation outside of the District diminished after the email was published, specifically mentioning his reputation as a youth mentor and security guard at his church. Finally, the evidence indicates his reputation as a trustworthy guard, who was once recommended for a promotion, had diminished to the point where he was considered a thief, who could no longer trusted with keys, and who could be viewed as a "worthless" security guard. Considering these factors and that a person's reputation is invaluable,[9] we find the verdict is supported by the evidence, did not shock the conscience, and the circuit court did not err in denying Appellants' motions for a new trial absolute, or in the alternative, a new trial *nisi remittitur*.

B. Punitive Damages

"The purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future." *Clark v. Cantrell*, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). In addition, "[p]unitive damages also serve to vindicate a private right of the injured party by requiring the wrongdoer to pay money to the injured party." *Id.* at 378–79, 529 S.E.2d at 533. Recklessness is a "conscious failure to exercise due care[,]" and "implies the doing of a negligent act knowingly." *Solley*

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[9] *See Miller*, 332 S.C. at 231, 471 S.E.2d at 687 ("[A] person's reputation is invaluable.").

v. Navy Fed. Credit Union, 397 S.C. 192, 211, 723 S.E.2d 597, 607 (Ct. App. 2012) (quoting *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Id.* This present consciousness of wrongdoing justifies the assessment of punitive damages against the tortfeasor, meaning "at the time of his act or omission to act the [tortfeasor must] be conscious, or chargeable with consciousness, of his wrongdoing." *Id.* (quoting *Cody P. v. Bank of Am., N.A.*, 395 S.C. 611, 625, 720 S.E.2d 473, 480 (Ct. App. 2011)).

1. Motion for JNOV

Appellants assert Kennedy failed to present clear and convincing evidence that any defamation by Appellants was willful, wanton, or in reckless disregard of Kennedy's rights. Thus, Appellants contend the circuit court erred in denying their motion for JNOV as to whether the jury had sufficient evidence to consider a punitive damages award. We disagree.

To receive an award of punitive damages, a plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights. S.C. Code Ann. § 15-33-135 (2005) ("In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence."); *see also Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480 ("In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights."). "A conscious failure to exercise due care constitutes willfulness." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). The circuit court must submit the issue of punitive damages to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton. *Id.*

Appellants argue there was insufficient evidence to support submitting the punitive damages issue to the jury. Specifically, Appellants state that finding they acted with "such conduct" would be inconsistent with the circuit court's ruling in granting a directed verdict on the issues of negligent supervision and intentional infliction of emotional distress. In particular, Appellants note in ruling on those two issues, the circuit court found the District had a reasonable expectation the email would remain confidential while also pointing out that, as with the actual

malice argument, the "greater weight of the evidence" supported the lack of willful, wanton, or malicious conduct by Appellants.

We find, however, the punitive damages issue does not involve whether sufficient evidence shows Appellants' negligence in preventing the email from being printed and placed by non-supervisory employees, as it would in a negligent supervision discussion. Rather, the issue here is whether evidence exists to allow a jury to find Appellants acted recklessly or with a conscious disregard for Kennedy's rights in making the defamatory statements. Moreover, as previously stated in the actual malice discussion, when viewing the evidence as a whole, we find there was clear and convincing evidence of actual malice to support an award of punitive damages. *See Hainer*, 328 S.C. at 135 n.8, 492 S.E.2d at 107 n.8 ("We remind [circuit courts] that in cases in which the issue of punitive damages is submitted to the jury, there must be clear and convincing evidence of [common law actual malice] to warrant such an award.").

In particular, we note that at the time the defamatory comments were made, Appellants' belief that Kennedy committed the thefts at Spring Valley was based on an incomplete and cursory investigation. Moreover, Earles testified he was aware of the security department's propensity to spread gossip, and both Appellants alluded to the harm the email would cause if it reached other employees. Despite this awareness, copies of the email were seen in unsecured District security vehicles and on a desk in an unsecured office where every security employee filled out their time cards. Thus, we find this was sufficient evidence to create a jury issue as to recklessness. *See Welch*, 342 S.C. at 302, 536 S.E.2d at 420; *see also Solley*, 397 S.C. at 211, 723 S.E.2d at 607 ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." (quoting *Cody P.*, 395 S.C. at 625, 720 S.E.2d at 480)); *Miller*, 322 S.C. at 231–32, 471 S.E.2d 687–88 (finding the circuit court did not err in denying the motion to strike punitive damages when defendant published a defamatory statement without factual support knowing that the publication would defame plaintiff). We find the circuit court did not err in submitting the punitive damages issue to the jury because clear and convincing evidence existed at trial to permit the jury to find Appellants acted willfully, wantonly, or with reckless disregard for Kennedy's rights—as defined by law in South Carolina—in publishing their statements to security department personnel.

2. Constitutionality of Award

Appellants also challenge the constitutionality of the punitive damages award. Thus, we are required to conduct a de novo review to determine whether the award of punitive damages in this case is consistent with due process. *See Hollis v. Stonington Dev., LLC*, 394 S.C. 383, 396, 714 S.E.2d 904, 911 (Ct. App. 2011); *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009) (holding "appellate courts must conduct a de novo review when evaluating the constitutionality of a punitive damages award"). We are required to determine whether the award was reasonable in light of the following three guideposts:

> (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Austin v. Stokes–Craven Holding Corp., 387 S.C. 22, 52, 691 S.E.2d 135, 151 (2010). Based on our determinations, we find the punitive damages awards to be constitutional. We address each factor in turn.

a. Reprehensibility

In reviewing the reasonableness of a punitive damages award, a court should first consider the degree of reprehensibility of the defendant's conduct. *See Mitchell, Jr.*, 385 S.C. at 587, 686 S.E.2d at 185. This is "perhaps the most important indicium of the reasonableness of a punitive damages award." *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). Moreover, reprehensibility represents the idea that "some wrongs are more blameworthy than others." *Id.* Our supreme court dictated that, in evaluating reprehensibility, a court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was

> the result of intentional malice, trickery, or deceit, rather than mere accident.

Mitchell, Jr., 385 S.C. at 587, 686 S.E.2d at 185. "The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). Reviewing the reprehensibility factors, we agree with the circuit court's findings and find Appellants' misconduct was reprehensible.

As to the first two factors, we find the weight of the evidence is in favor of Appellants. Although Appellants' conduct demonstrated reckless disregard for Kennedy's rights, no evidence indicates Appellants acted with reckless disregard for Kennedy's health or safety. *See Hollis*, 394 S.C. at 398, 714 S.E.2d at 912 ("Reckless disregard for the property rights of others can be sufficient misconduct to support an award of punitive damages . . . However, when evaluating the degree of a defendant's reprehensibility in a post-trial review of the award, the defendant's reprehensibility is not enhanced pursuant to this second consideration unless it involves the reckless disregard for the health or safety of people.") (internal citation omitted). Moreover, we agree with the circuit court's finding that Kennedy did not suffer physical harm, other than embarrassment and distress. Typically, finding only economic harm would weigh against reprehensibility and in favor of the defendant. *See id.* at 397, 714 S.E.2d at 912. However, "infliction of economic injury, especially . . . when the target is financially vulnerable, can warrant a substantial penalty." *Gore*, 517 U.S. at 576. While Appellants argue no evidence demonstrated the economic harm caused to Kennedy, we find they failed to consider the evidence demonstrating Kennedy's damaged reputation, the removal of the recommendation for a promotion, and the reduced overtime hours and pay available to him, all of which show economic harm.

Under the third factor, we find Kennedy presented evidence of financial vulnerability. Appellants contend the circuit court erred in finding Kennedy "was forced to cash out his retirement as a result of the alleged defamation (as opposed to his termination from either Richland Two or SCANA)." Moreover, they assert Kennedy presented no evidence of the financial impact the defamatory communication had on him. First, the circuit court simply stated in its order, "Evidence was presented that [Kennedy] was financially vulnerable; for example, after his termination, he cashed out his retirement." This statement does not mean the circuit court based its finding of financial vulnerability on the termination, which would have been inappropriate for the defamation verdict. Rather, this was

merely an example of how the jury may have interpreted the evidence presented at trial as showing Kennedy's financial vulnerability, regardless of how it developed. This demonstrates Kennedy's financial vulnerability because the impact of losing a source of income was so great on Kennedy that he had to resort to the extreme measure of cashing out his retirement fund. Furthermore, Kennedy demonstrated he was a financially vulnerable target because he testified to being evicted from his house and having his car repossessed following his termination from the District. Again, this evidence attests only to Kennedy's financial vulnerability not to the financial impact the termination had on him. Accordingly, we agree with the circuit court, and we disagree with Appellants' argument.

As to the fourth factor, while we agree that the defamation was a one-time event, we find the evidence demonstrates Appellants maintained a continuing and persistent belief that Kennedy was a thief without verified, factual support or regard for Kennedy's rights or reputation. *See Hollis*, 394 S.C. at 398, 714 S.E.2d at 912 (finding a higher degree of reprehensibility because defendant continued for years to engage in conduct the jury determined to be reckless). We believe this factor weighs in favor of reprehensibility and against Appellants.

Examining the final factor, we agree with the circuit court's finding that the jury could have inferred that the harm caused to Kennedy was the result of intentional malice, trickery, or deceit. Specifically, Appellants testified to being frustrated with the District's HR department for allowing Kennedy to remain on staff instead of being fired following the theft investigation. Moreover, Appellants testified they believed Kennedy actually committed the theft and conveyed that he could not be trusted with keys. As previously mentioned, there was sufficient evidence to allow the jury to infer actual malice, and malice is indicative of reprehensible conduct. Thus, when examining the record in light of these five considerations, we believe the circuit court did not err in finding Appellants' conduct reprehensible.

b. Disparity between Actual Harm and Punitive Damages

While a well-defined constitutional limit on the ratio between actual and punitive damages does not exist, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425. When determining the reasonableness of a particular ratio of actual harm suffered to punitive damages awarded, a court may consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such

conduct; and the defendant's ability to pay." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 185. Essentially, an appellate court "must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Campbell*, 538 U.S. at 426.

In this case, the jury determined that Barnes was liable to Kennedy for $100,000 in actual damages and $150,000 in punitive damages, and Earles was liable to Kennedy for $100,000 in actual damages and $200,000 in punitive damages. We note this amounts to a 1.5 to 1 ratio of punitive damages to actual damages for Barnes and a 2 to 1 ratio of punitive damages to actual damages for Earles. First, we find it probable that awarding $150,000 and $200,000, respectfully, in punitive damages will deter Appellants from similar conduct in the future and will likely encourage Appellants to implement more effective safeguards to prevent the release of sensitive information.

Considering the second factor, we believe the award of punitive damages is "reasonably related to the harm likely to result from such conduct." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 185. While we recognize determining whether a compensatory damages award is "substantial" is a relative and imprecise review, we, nonetheless, believe the cumulative $200,000 award of actual damages to Kennedy is a substantial compensatory damages award in South Carolina. *See id.* at 592, 686 S.E.2d at 187 (finding an award of $150,000 actual damages is a "fairly substantial compensatory damage award in South Carolina"). When the actual damages awarded are substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outer limits of the due process guarantee." *Id.* (quoting *Campbell*, 538 U.S. at 425).

Here, the evidence established that, prior to the theft occurring, Kennedy earned approximately $1,600–$1,700 per pay period at the District, which equates to approximately $38,400 per year.[10] Moreover, Kennedy testified to suffering harm to his reputation outside of the District, which is an invaluable asset. *See Miller*, 322 S.C. at 231, 471 S.E.2d at 687 ("[A] person's reputation is invaluable."). During closing argument, Kennedy suggested the jury consider an award of $400,000 as an appropriate award based on the evidence at trial because this amount represented approximately ten years pay for Kennedy at the rate he earned prior to the Spring Valley theft and prior to having his keys taken away from him.

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[10] This figure was estimated using a conservative estimate of $1,600 every pay period with pay periods occurring twice a month. Thus, $1,600 x 24 = $38,400.

Additionally, Kennedy suggested this amount would convey the idea that Appellants were wrong in their actions and in their treatment of Kennedy. Thus, we believe the cumulative award of $350,000 in punitive damages was reasonably related to the actual harm suffered by Kennedy.

As to the third consideration, there is no direct evidence in the record to indicate Appellants' ability to pay a punitive damages award. When considering all three factors, we believe a 2 to 1 ratio for Earles and a 1.5 to 1 ratio for Barnes does not exceed due process limits.

c. Comparative Penalty Awards

When assessing the reasonableness of a punitive damages award, a court should also consider "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 186. When identifying "comparable cases," our supreme court has instructed courts to consider: "the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant." *Id.* at 588–89, 686 S.E.2d at 186.

Initially, we note there are no authorized civil penalties that would apply to this case. Additionally, while we are unable to find a case factually on point with this case, there is a history of appellate courts in South Carolina upholding an award of punitive damages in defamation cases. *See Miller*, 322 S.C. at 230–32, 471 S.E.2d at 687–88 (affirming $250,000 in actual damages and a $500,000 punitive damages award); *Constant v. Spartanburg Steel Products, Inc.*, 316 S.C. 86, 88, 91, 447 S.E.2d 194, 195, 197 (1994) (upholding the jury verdict of $400,000 actual damages and $100,000 punitive damages); *Rogers v. Florence Printing Co.*, 233 S.C. 567, 574, 106 S.E.2d 258, 262 (1958) (finding, although the verdict for punitive damages was four times as large as that for actual damages, it was not a basis for reversal by an appellate court). Moreover, as it relates to comparable cases involving identifiable ratios, we note that South Carolina courts have most often upheld verdicts on the lower end of the single-digit spectrum, but will deviate from this standard when a case involves particularly egregious conduct. *See James v. Horace Mann Ins. Co*, 371 S.C. 187, 196–97, 638 S.E.2d 667, 671–72 (2006) (upholding a 6.82 to 1 ratio); *Cock–N–Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 4, 9–10, 466 S.E.2d 727, 729, 731–32 (1996) (upholding a 28 to 1 ratio); *Rogers*, 233 S.C. at 574, 106 S.E.2d at 262 (upholding a 4 to 1 ratio); *Mackela v. Bentley*, 365 S.C. 44, 49–50, 614 S.E.2d 648, 651 (Ct. App. 2005)

(upholding a 3.75 to 1 ratio); *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 318, 594 S.E.2d 867, 877 (Ct. App. 2004) (upholding a 2.54 to 1 ratio and a 2.5 to 1 ratio); *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 141, 584 S.E.2d 120, 129 (Ct. App. 2003) (upholding a 10:1 ratio).

In conclusion, we find the punitive damages award meets constitutional due process because the conduct was reprehensible, the ratio of punitive damages to actual damages was on the low end of the single-digit spectrum, and comparable cases justify upholding the award.

IV. Exclusion of Evidence

Appellants contend the circuit court committed prejudicial error by excluding evidence or cross-examination related to the alleged petty theft charges against Kennedy, which occurred at SCANA in February 2014 while he was employed as a night-shift security guard for Allied Barton.[11] We disagree.

The admission or exclusion of evidence is within the circuit court's discretion, and its decision will not disrupted or reversed absent an abuse of discretion. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005). Our supreme court has "recognized that similar acts are admissible if they tend to prove or disprove some fact in dispute." *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmtys, Inc.*, 397 S.C. 348, 360, 725 S.E.2d 112, 119 (Ct. App. 2012). However, "[e]vidence of similar acts has the potential to be exceedingly prejudicial." *Id.* Even if evidence is relevant and falls within an exception allowing for its admission, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE; *see also State v. Clasby*, 385 S.C. 148, 155–56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed

[11] Appellants sought to introduce Bill Simpson, a SCANA investigator, as a witness who would testify to his investigation into Kennedy's role in the alleged SCANA thefts, Kennedy's confession to some of the thefts, Kennedy's payment of restitution for the thefts, and the end of Kennedy's employment with Allied Barton. Furthermore, Appellants assert Simpson was prepared to authenticate a video showing Kennedy committing the thefts.

by the danger of unfair prejudice to the defendant." (quoting *State v. Gaines*, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008))).

In this case, Appellants first claim the evidence is probative of their truth defense. We disagree. Truth of a statement is a defense to defamation. *See Parrish*, 376 S.C. at 327, 656 S.E.2d at 392 (noting truth is an affirmative defense in a defamation action). Here, however, Appellants cannot possibly claim this subsequent evidence as probative of their truth defense because the subsequent SCANA theft occurred *after* Appellants filed their answer containing their affirmative truth defense.[12] Thus, we do not find the evidence is probative of an affirmative defense if the evidence in question arose after the assertion of the affirmative defense.

Appellants also assert the excluded evidence was highly probative to Kennedy's damages claim as it related to his reputation. "The tort of defamation allows a plaintiff to recover for injury to his or her reputation *as the result* of the defendant's communications to others of a false message about the plaintiff." *Swinton Creek Nursery*, 334 S.C. at 484, 514 S.E.2d at 133 (emphasis added). Thus, *Swinton Creek Nursery* indicates that the plaintiff's reputation would have to be in good standing prior to the defamation occurring. In this case, Appellants sought to introduce evidence at trial resulting from an event occurring three years after the defamatory comments were made in an apparent attempt to portray Kennedy's reputation as retroactively soiled and damaged so that Appellants' defamatory statement would not appear to be damaging. Thus, we do not find the excluded evidence was probative to Kennedy's damages following the 2011 incident.

Finally, Appellants correctly state that character evidence can be admitted because Kennedy opened the door for this evidence by asserting a defamation claim. *See Sheriff v. Cartee*, 121 S.C. 143, 113 S.E. 579, 580 (1922) (finding the general good character of a plaintiff may be given in an action for slander). However, we find the circuit court did not abuse its discretion in excluding the evidence because its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. When the SCANA theft occurred, Kennedy's reputation had already been damaged. Allowing the SCANA theft evidence would be unfairly prejudicial or cause confusion of the issues because it would present difficulty in determining when the

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[12] Appellants filed their answer with affirmative defenses on May 16, 2013, whereas, Kennedy's incident at SCANA did not occur until February 2014.

actual injury to Kennedy's reputation occurred. Thus, we find the circuit court did not abuse its discretion or commit an error in law in excluding the SCANA evidence.

IV. Jury Instructions

Regarding the final issue, Appellants claim the circuit court erred in failing to instruct the jury regarding its ruling that no defamation accompanied Kennedy's termination from the District. Appellants cite no legal authority or provision supporting their argument, and their argument is largely conclusory. Thus, we find Appellants have abandoned this issue and we need not address its merits. *See Snow v. Smith*, 416 S.C. 72, 91 n.7, 784 S.E.2d 242, 252 n.7 (Ct. App. 2016) (finding appellants abandoned their argument because they failed to provide legal citations or authority).

CONCLUSION

Based on the foregoing analysis, the circuit court's decisions as to Appellants' remaining issues are

AFFIRMED.

SHORT and THOMAS, JJ., concur.