

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

APR 18 2013

**SC Court of Appeals**

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2011-CP-07-00013

Maureen T. Coffey,..... Respondent,

v.

Community Services Associates, Inc., and  
George F. Breed, Jr. .... Appellants.

**INITIAL BRIEF OF  
APPELLANT GEORGE F. BREED, JR.**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	ix
STATEMENT OF THE CASE.....	1
STANDARD OF REVIEW.....	11
ARGUMENTS.....	11
I.    The Circuit Court committed reversible error by failing to rule as a matter of law that, as a public official, Judge Coffey failed to meet her burden of proof.....	12
A. Judge Coffey failed to prove Mr. Breed acted with actual malice.....	13
B. Judge Coffey failed to meet her burden of proving the statements about her were false.....	19
C. Judge Coffey failed to meet her burden of proving damages.....	26
II.   The Circuit Court committed reversible error by failing to rule as a matter of law that Mr. Breed’s publication of the Letter was privileged.....	30
A. Mr. Breed’s publication of the Letter was absolutely privileged.....	30
B. Mr. Breed’s publication of the Letter was conditionally privileged.....	33
1. Mr. Breed’s publication to his employer was conditionally privileged.....	34
2. Mr. Breed’s publication to the Assistant Town Manager was conditionally privileged.....	35
III.  The Circuit Court committed evidentiary errors that require reversal.....	39
A. The Circuit Court erred by admitting evidence into the record after closing arguments and after the jury had been instructed and sequestered.....	39
B. The Circuit Court erroneously admitted character and prior bad act evidence.....	42
C. The Circuit Court erred by admitting other irrelevant and highly prejudicial evidence.....	47
D. The Circuit Court erred by allowing witnesses to testify who had not been identified prior to trial.....	50
E. The Circuit Court erroneously admitted impermissible hearsay evidence.....	52
F. The Circuit Court erred by refusing to admit relevant evidence.....	53
IV.   The Circuit Court committed reversible error by giving an erroneous and prejudicial spoliation charge.....	54
CONCLUSION.....	56

TABLE OF AUTHORITIES

CASES

<u>5 Star, Inc. v. Ford Motor Co.</u> , 395 S.C. 392, 718 S.E.2d 220 (Ct. App. 2011).....	54
<u>Anderson v. Augusta Chronicle</u> , 365 S.C. 589, 619 S.E.2d 428 (2005) .....	<i>ibid.</i>
<u>Bell v. Evening Post Publ. Co.</u> , 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1995).....	35
<u>Bensch v. Davidson</u> , 354 S.C. 173, 580 S.E.2d 128 (2003) .....	50
<u>Bowers v. Bowers</u> , 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).....	34
<u>Branham v. Ford Motor Co.</u> , 390 S.C. 203, 701 S.E.2d 5 (2010) .....	41
<u>Brown v. National Home Ins. Co.</u> , 239 S.C. 488, 123 S.E.2d 850 (1962) .....	27
<u>Cartwright v. Herald Pub. Co.</u> , 220 S.C. 492, 68 S.E.2d 415 (1951) .....	38
<u>Conley v. Southern Import Sales, Inc.</u> , 382 F. Supp. 121 (M.D. Ala. 1974) .....	28
<u>Conwell v. Spur Oil Co.</u> , 240 S.C. 170, 125 S.E.2d 270 (1962) .....	35, 36
<u>Cooper Corp. v. Jeffcoat</u> , 217 S.C. 489, 61 S.E.2d 53 (1950) .....	52
<u>Craig v. Harney</u> , 331 U.S. 367, 67 S. Ct. 1249 (1947).....	31
<u>Creech v. South Carolina Wildlife &amp; Marine Resources Dep't</u> , 328 S.C. 24, 491 S.E.2d 571 (1997) .....	35
<u>Dauterman v. State-Record Co.</u> , 249 S.C. 512, 154 S.E.2d 919 (1967) .....	19

<u>Doe v. Chao,</u> 540 U.S. 614, 124 S. Ct. 1204 (2003)	28
<u>Dunn v. Charleston Coca-Cola Bottling Co.,</u> 311 S.C. 43, 426 S.E.2d 756 (1993)	49
<u>Elder v. Gaffney Ledger,</u> 341 S.C. 108, 533 S.E.2d 899 (2000)	<i>ibid.</i>
<u>Erickson v. Jones Street Pub. LLC,</u> 368 S.C. 444, 629 S.E.2d 653 (2006)	<i>ibid.</i>
<u>Fountain v. First Reliance Bank,</u> 398 S.C. 434, 730 S.E.2d 305 (2012)	33, 34
<u>Frasier v. Palmetto Homes of Florence, Inc.,</u> 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996)	11
<u>George v. Fabri,</u> 345 S.C. 440, 548 S.E.2d 868 (2001)	<i>ibid.</i>
<u>Goodwin v. Kennedy,</u> 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001)	28
<u>Hanahan v. Simpson,</u> 326 S.C. 140, 485 S.E.2d 903 (1997)	35
<u>Harris v. State,</u> 168 Ga. App. 159, 308 S.E.2d 406 (Ga. Ct. App. 1983)	40
<u>Haulbrooks v. Overton,</u> 295 S.C. 380, 368 S.E.2d 676 (Ct. App. 1988)	13, 19
<u>Hinkle v. Nat'l Cas. Ins. Co.,</u> 354 S.C. 92, 579 S.E.2d 616 (2003)	39
<u>Holtzscheiter v. Thomson Newspapers, Inc.,</u> 332, S.C. 502, 506 S.E.2d 497 (1998)	11, 13, 26, 27
<u>In re Smith,</u> 989 P.2d 165, 1999 Colo. LEXIS 1006 (Colo. 1999)	30
<u>Judy v. Judy,</u> 384 S.C. 634, 682 S.E.2d 836 (Ct. App. 2009)	43, 44

<u>Kershaw Cnty. Bd. of Educ. v. United States Gypsum Co.</u> , 302 S.C. 390, 296 S.E.2d 369 (1990) .....	54
<u>Masson v. New Yorker Mag., Inc.</u> , 501 U.S. 496, 111 S. Ct. 2419 (1991) .....	15
<u>McClain v. Anderson Free Press</u> , 232 S.C. 448, 102 S.E.2d 750 (1958) .....	33
<u>Metts v. Mims</u> , 384 S.C. 491, 682 S.E.2d 813 (2009) .....	17-18
<u>Mizell v. Glover</u> , 351 S.C. 392, 570 S.E.2d 176 (2002) .....	34
<u>Morgan &amp; Pottinger v. Botts</u> , 348 S.W. 3d 599, 2011 Ky. LEXIS 55 (Ky. 2011).....	30
<u>Murphy v. Jefferson Pilot Commc'ns Co.</u> , 364 S.C. 453, 613 S.E.2d 808 (Ct. App. 2005).....	11
<u>Murray v. Thornton</u> , 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).....	33, 38
<u>New York Times Co. v. Sullivan</u> , 376 U.S. 254, 84 S. Ct. 710 (1964) .....	<i>ibid.</i>
<u>Oswalt v. State-Record Co.</u> , 250 S.C. 429, 158 S.E.2d 204 (1967) .....	38
<u>Parrish v. Allison</u> , 376 S.C. 308, 319 656 S.E.2d 382 (Ct. App. 2007).....	11, 19
<u>Peeler v. Spartan Radiocasting, Inc.</u> , 324 S.C. 261, 478 S.E.2d 282 (1996) .....	55
<u>Phantom Touring Inc. v. Affiliated Pubs.</u> , 953 F.2d 724 (1 <sup>st</sup> Cir. 1992).....	24, 25
<u>Pringle v. SLR, Inc. of Summerton</u> , 382 S.C. 397, 675 S.E.2d 783 (Ct. App. 2009).....	55
<u>Richardson v. McGill</u> , 273 S.C. 142, 255 S.E.2d 341 (1979) .....	30, 31

<u>Richardson v. State of South Carolina,</u> 377 S.C. 103, 659 S.E.2d 493 (2008)	31
<u>Rinaldi v. Holt,</u> 42 N.Y.2d 369, 366 N.E.2d 1299 (N.Y. 1977)	31
<u>Rivers v. Industrial Life &amp; Health Ins. Co.,</u> 173 S.C. 45, 174 S.E. 595 (1934)	34
<u>Ross v. Columbia Newspapers, Inc.,</u> 266 S.C. 75, 221 S.E.2d 770 (1976)	19
<u>Sanders v. Prince,</u> 304 S.C. 236, 403 S.E.2d 640 (1991)	29
<u>Segars-Andrews v. Judicial Merit Selection Comm'n,</u> 387 S.C. 109, 691 S.E.2d 453 (2010)	8
<u>Silvestri v. General Motors Corp.,</u> 271 F.3d 583 (4 <sup>th</sup> Cir. 2001)	54
<u>Smoak v. Robinson,</u> 156 S.C. 370, 153 S.E. 342 (1930)	42
<u>St. Amant v. Thompson,</u> 390 U.S. 727, 88 S. Ct. 1323 (1968)	14, 20
<u>Standing Comm. on Discipline v. Yagman,</u> 55 F.3d 1430 1439 (9 <sup>th</sup> Cir. 1995)	22, 23, 24
<u>State v. Brooks,</u> 341 S.C. 57, 533 S.E.2d 325 (2000)	44
<u>State v. Hill,</u> 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011)	40
<u>State v. Johnson,</u> 334 S.C. 78, 512 S.E.2d 795 (1999)	50
<u>State v. Lyle,</u> 125 S.C. 406, 118 S.E. 803 (1923)	43, 44
<u>State v. Major,</u> 301 S.C. 181, 391 S.E.2d 235 (1990)	42

<u>State v. Pete,</u> 152 Wn.2d 546, 98 P.3d 803 (Wash. 2004).....	40
<u>State v. Sweat,</u> 362 S.C. 117, 606 S.E.2d 508 (2004).....	44
<u>State v. Williams,</u> 285 S.C. 544, 331 S.E.2d 354 (Ct. App. 1985).....	52
<u>Stokes v. Spartanburg Reg. Med. Center,</u> 368 S.C. 515, 629 S.E.2d 675 (Ct. App. 2006).....	54
<u>Sulton v. HealthSouth Corp.,</u> 400 S.C. 412, 734 S.E.2d 641 (2012).....	41
<u>Swinton Creek Nursery v. Edisto Farm Credit,</u> 334 S.C. 469, 514 S.E.2d 126 (1999).....	33
<u>Tennant v. Marion Health Care Found.,</u> 194 W.Va. 97, 459 S.E.2d 374 (1995).....	50
<u>United States v. Adams,</u> 385 F.2d 548 (2 <sup>nd</sup> Cir. 1967).....	40
<u>United States v. Barnes,</u> 747 F.2d 246 (4 <sup>th</sup> Cir. 1984).....	40
<u>Vaughn v. United States,</u> 367 A.2d 1291, 1977 D.C. App. LEXIS 406 (D.C. 1977).....	41
<u>Wardlaw v. Peck,</u> 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984).....	27
<u>Watson v. Ford Motor Co.,</u> 389 S.C. 434, 699 S.E.2d 169 (2010).....	11
<u>Welsh v. Gibbons,</u> 211 S.C. 516, 46 S.E.2d 147 (1948).....	54
<u>Woodward v. S.C. Farm Bureau Ins. Co.,</u> 277 S.C. 29, 282 S.E.2d 599 (1981).....	33-34

**STATUTES**

S.C. Code Ann. § 5-7-100.....37  
S.C. Code Ann. § 5-13-90.....37

**OTHER AUTHORITY**

22 Am Jur 2d *Damages* § 776.....27  
50 Am Jur 2d *Libel and Slander* § 258.....36  
50 Am Jur 2d *Libel and Slander* § 317..... 37-38  
50 Am Jur 2d *Libel and Slander* § 363..... 28-29  
50 Am Jur 2d *Libel and Slander* § 369.....27  
Canon 2, Rule 501, SCACR.....31  
Canon 2.A, Rule 501, SCACR.....31  
Restatement 2d of Torts § 566.....22  
Restatement 2d of Torts § 575, cmt. C.....27, 28  
Restatement 2d of Torts § 600.....35  
Rule 208(b)(6), SCACR.....34  
Rule 12(a), RJDE, Rule 502 SCACR.....31  
Rule 12(d), RJDE, Rule 502, SCACR.....32  
Rule 13, RJDE, Rule 502 SCACR.....8, 30, 31, 32  
Rule 20, RJDE, Rule 502, SCACR.....8  
Rule 33(b), SCRCF.....50, 51  
Rule 40(j), SCRCF.....7  
Rule 402, SCRE.....8, 49  
Rule 403, SCRE.....8, 49



Rule 404, SCRE .....	44
Rule 404(a), SCRE .....	8, 42
Rule 404(b), SCRE .....	8, 43, 45
Rule 411, SCRE .....	49
Rule 801(d), SCRE .....	52
Rule 801(d)(1)(A)-(D), SCRE .....	52
Rule 802, SCRE .....	8

## STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE AS A MATTER OF LAW THAT, AS A PUBLIC OFFICIAL, JUDGE COFFEY FAILED TO MEET HER BURDEN OF PROOF?
- II. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO RULE AS A MATTER OF LAW THAT MR. BREED'S PUBLICATION OF THE LETTER WAS PRIVILEGED?
- V. WHETHER THE CIRCUIT COURT COMMITTED EVIDENTIARY ERRORS THAT REQUIRE REVERSAL?
- VI. WHETHER THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY GIVING AN ERRONEOUS AND PREJUDICIAL SPOILIATION CHARGE?

### Statement of the Case

This matter arises out of a June 6, 2008 letter that Appellant George F. Breed, Jr., then Director of Security & Community Affairs for Community Services Associates, Inc. ("CSA"),<sup>1</sup> sent to the South Carolina Commission on Judicial Conduct ("Commission") raising his concerns about Town of Hilton Head Island ("Town") Municipal Court Judge Maureen F. Coffey ("Judge Coffey"). (PEX #4).<sup>2</sup> Mr. Breed's June 6, 2008 letter ("Letter") addressed incidents where Judge Coffey interjected herself between CSA security and/or local law enforcement personnel and her family, her brother Otis Coffey in particular. The overall premise of the Letter was Mr. Breed's opinion that Judge Coffey was exhibiting "a pattern of reactive and overt actions that have/are undermining the criminal justice process." Based on the incidents related in his Letter, Mr. Breed believed that her "conduct was/is pervasive and invasive in nature, and directly results in Judge Coffey's inability to maintain the impartiality so necessary to the successful balance of our legal system." For reasons specifically outlined in his Letter, Mr. Breed concluded that "it is apparent that Judge Coffey has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (PEX #4).

The Letter first described an event that occurred in 2004 involving Judge Coffey's adoptive brother, Otis. Although there was some dispute as to whether Otis was a "prime suspect" or just a "suspect" in "a rash of burglaries, thefts and residential break-ins," the Sea Pines community had been experiencing at the time, (Tr. 255, lines 18-21) (Tr. 1770, lines 13-

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<sup>1</sup> CSA is a non-profit organization that owns and manages certain common property within Sea Pines Plantation, located on Hilton Head Island, South Carolina. In his role as the Director of CSA's Security & Community Affairs, Mr. Breed supervised the security forces that patrol Sea Pines Plantation. (Answer of Defendants Community Service Associates, Inc., Association of Sea Pines Plantation Property Owners, Inc. and George F. Breed, Jr. to the Amended Complaint, filed March 7, 2011, ¶¶ 4, 6) ("Defendants' Answer") (Tr. 1639, lines 17-24) (Mr. Breed and CSA are referred to herein jointly as "Appellants" or "Defendants"). Mr. Breed has since retired from CSA for medical reasons.

<sup>2</sup> Judge Coffey has served as the Municipal Court Judge for the Town on part time basis since 2000, (DEX #'s 11, 12, 13), and full time since 2005. (Tr. 204, line 16-17) (CT EX #2, pp. 16-17).

20), it is uncontroverted that he was a suspect. (Tr. 234, lines 15-20) (Tr. 1692, lines 1-13 (Judge Coffey testified that “she knew ... from [Officer] Eric Calendine, that he was a suspect”)) (*see also* Tr. 468, lines 13-19) (Tr. 532, lines 2-20) (Tr. 1603, line 21 – 1604, line 2). Judge Coffey testified that, on the morning of December 10, 2004, she received a phone call from her father, who told her Otis was being arrested for trespassing. Otis’ car was parked on property in Sea Pines that did not belong to the Coffey family,<sup>3</sup> and officers from both CSA and Beaufort County Sherriff’s Office (“BCSO”) were at the scene. Otis had left his car, and returned later in the company of his father. According to Judge Coffey, her father called her as the officers were in the process of arresting Otis. She testified, “So I said, ‘All right Dad. Hand the phone to an officer,’” after which she spoke to Officer Calendine. (Tr. 1683, line 19 – 1685, line 11). Otis was then arrested for trespassing. Judge Coffey confirmed that, at the time of his arrest for trespassing, Otis had been on the way to sell pot to his boss, who lived in Sea Pines. (Tr. 1686, line 17 – 1687, line 5). She also testified to Otis’ prior criminal and drug-related history. (Tr. 1680, line 20 – 1683, line 10) (*see also* DEX #4).

Captain Toby McSwain of BCSO testified that, some time after this incident, he met with Judge Coffey in her office because of concerns related to the fact that BCSO investigators were focusing on her brother Otis as a suspect. (Tr. 1578, line 19 – 1579, line 6). According to Captain McSwain, Judge Coffey “shared some thoughts that she felt that her brother was being harassed from Sea Pines.” (Tr. 1579, lines 14-15). He also confirmed that, during that interview, Judge Coffey told him “because ... of what she felt was harassment towards her brother, that she felt it was in his best interests to remove him from, I guess, out of Sea Pines. And if my memory serves me correctly, I thought ... he was going to Columbia, South

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<sup>3</sup> Judge Coffey’s parents lived at 4 Gadwall Road in Sea Pines. (Tr. 1665, lines 20-22). At various times, Otis lived with them at this location. (Tr. 1680, lines 3-13) (Tr. 1693, lines 11-14).

Carolina.” (Tr. 1579, line 25 – 1580, line 5). Captain McSwain said that Detective Brian Baird had a follow-up meeting with Judge Coffey some time thereafter. (Tr. 1615, lines 5-10) (Tr. 839, lines 9-21).

Although Judge Coffey disputed that she met with Captain McSwain during this time period, she acknowledged that she had a meeting with Detective Baird in early 2005. She testified that Detective Baird told her Otis was a suspect. She then spoke with her brother Otis, who told her he had not committed any crime. She testified, “I said, ‘All right. Well, then, clear your name and take the lie detector test.’ And he said ‘Okay, I will.’” When it came time to take the lie detector test, Otis refused to take the test. Judge Coffey testified that she told her brother, “Well, listen, it doesn’t look good if you’re in my jurisdiction and you’re a suspect in a crime. Go to work at the restaurant in Tybee [Georgia].” She testified that she called Detective Baird back and told him Otis didn’t want to take the lie detector test. (Tr. 1687, line 17 – 1698, line 20).<sup>4</sup> She testified that she told Otis, “[y]ou need to clear your name. If you’re not going to clear your name, then just go work at the restaurant – at the Tybee restaurant for awhile. And if they had any evidence, I would have assisted them, and they know that, in bringing him back.” (Tr. 1690, lines 2-8). She admitted that she told Otis to go to Georgia, “I told him that - well, I was trying to coerce him to take the lie detector test to clear his name. ... So I told him, ‘If you don’t want to take the test, then I really don’t think it’s a good idea if you stay in my jurisdiction; it doesn’t look good.’” (Tr. 1699, lines 2-11) (*see also* Tr. 240, line 6 – 241, line 24).

The second incident outlined in the Letter took place during the night of May 20, 2008. Then CSA Officer John Jolin testified that he was conducting a night patrol in the areas where the crimes had been occurring. (Tr. 469, lines 3-10). Mr. Jolin was outside his patrol car, which

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<sup>4</sup> Detective Baird did not recall whether Judge Coffey called him back to tell him Otis had changed his mind regarding the polygraph. (Tr. 843, lines 15-20).

was parked approximately a half a mile from the Coffey residence. (Tr. 474, lines 7-12). When he saw a black male approaching him on a bicycle, he identified himself as “Sergeant Jolin with Sea Pines Security.” (Tr. 475, lines 2-9). Instead of stopping, the individual turned toward the beach access. Mr. Jolin testified: “I almost had him. I went out to jump to grab a hold of whoever it was, but then they made a quick left behind a residence. And that’s where – where I lost them.” (Tr. 475, line 10 – 476, line 8). Although Mr. Jolin could not see any facial features, he agreed that at the time he thought it was Otis Coffey. (Tr. 549, line 8 – 551, line 8).<sup>5</sup> Mr. Jolin contacted BCSO and “immediately had Corporal Frank Fryman ... head down to the Gadwall area to – to set up a perimeter.” (Tr. 477, lines 17-19). A short time thereafter, Corporal Fryman saw a black male walk up to the residence at 4 Gadwall (the residence of Judge Coffey’s parents), go inside and turn off all the lights. (PEX #10) (Tr. 556, line 16 – 557, line 7).

Sea Pines Security Officer Randy Woods testified that, three or four hours after the incident, Mr. Jolin called him, “and he says, *I got him*. I said, *Who do you have?*. And he says, *I got – I got Otis Coffey*. I said, *You got Otis Coffey*. He goes, *Well I didn’t get him*. He said, *I chased him*.” (Tr. 858, line 20 – 859, line 8).<sup>6</sup> Mr. Jolin said he called Mr. Breed some time thereafter and told him he wasn’t 100% sure, “but I was – I was about 80 percent that ... it was possibly Otis Coffey that I saw that night. ... positive that it would have been Otis Coffey.” (Tr. 478, lines 1-17) (Tr. 553, lines 3-5). The Incident Report Mr. Jolin drafted identified Otis Coffey as the suspect. (PEX #10) (Tr. 558, line 6 – 560, line 6). Mr. Jolin testified that, along with

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<sup>5</sup> Mr. Jolin testified that he had seen Otis Coffey on previous occasions when Mr. Jolin worked the security gate and logged Otis’ pass in when he passed through the gate. (Tr. 473, line 16 – 474, line 2) (Tr. 532, lines 2-20).

<sup>6</sup> Todd McNeill (CSA Wildlife Officer) also testified that, when he came into work on May 21, “John [Jolin] was still working, and he told me that he had caught Otis Coffey. And when I asked him about it, he said that he chased him on foot down towards the beach; that he had Officer Fryman go down to Gadwall and sit there and wait, where he observed a male run inside the house. He waited for [the BCSO] deputies.”

Q: Was there any question about whether or not he had identified Otis Coffey?

A: No, there was no question.

(Tr. 1068, lines 2-11). Mr. Breed testified that he also spoke with Jolin that night, “[a]t or very close to the time that [the events] occurred.” (Tr. 1206, lines 3-24).

officers from BCSO, they contacted Mrs. Coffey, who “stated that Otis was not there.” They told her that “Mr. Breed would like to see Otis Coffey the next morning ... to have a meeting with him.” Mrs. Coffey told the officers “that Sea Pines Security was always trying to – to get Otis Coffey.” (Tr. 481, lines 7-25).

The third incident occurred on the following day, May 21, 2008. A car was parked in the road in front of 4 Gadwall. Mr. Jolin testified that the car was “parked in the roadway,” (Tr. 576, lines 2-3), blocking the road. (Tr. 577, lines 8-9). After it was confirmed that the car belonged to the Coffeys, several attempts were made to contact the Coffeys to have the car moved, to no avail. Mr. Jolin denied that ticketing the car was part of any campaign of harassment against the Coffey family. (Tr. 578, lines 1-5) (*see also* Tr. 579, lines 13-20 (Jolin was not targeting Otis Coffey on the night of May 20, 2008, or thereafter)). Judge Coffey testified that her mother told the officers, “‘Don’t you know who my daughter is,’ or something” because she believed the ticket was written for Judge Coffey’s court. (Tr. 1696, lines 2-12).

The fourth incident occurred a few days after that, on May 23, 2008. Judge Coffey testified that she was waiting outside of her mother’s house at 4 Gadwall. According to Judge Coffey, her mother was upset because she believed CSA security was driving up and down her street and following her and Otis. (Tr. 252, line 16 – 253, line 1) (Tr. 1696, line 23 – 1697, line 7). Judge Coffey was waiting on the sidewalk because she didn’t have a key to her mother’s house, when “a Sea Pines Security car drove up I thought I would recognize the person. I know most of those guys. But this was a new guy ... And I said to him, *You don’t know me; I’m Judge Coffey. He said, No, I’ve never appeared before you.* He told me he was from somewhere, ... And I said, *You all need to stop harassing my mother.* He didn’t know what I was talking about. I said, *If it’ll help, I’m going to have my brother move out. Tell Mr. Breed I don’t have time to*

*talk to him now, but I'll get with him some time in the future.*" (Tr. 253, lines 8-22) (Tr. 1697, line 16 – 1698, line 47). She testified that she told CSA Officer Stephen Wright, "that they've got to stop harassing my mother, and that I was having Otis move out, and tell Breed I'll get with him next week – which meant, since he apparently wanted Otis and my mom to meet with him, I was going to meet with him." (Tr. 1697, lines 16-22).

Q: Isn't it true that you walked up to his car, and you said words to the effect, hey, you don't know me; I'm the judge. You raised the issue that you were the judge for the Town of Hilton Head?

A: I- yes, I did. I was identifying myself, but I was not using my position. At that point, I was a daughter who was upset that her family, especially my mother, was being harassed."

(Tr. 393, lines 17-24). Officer Wright confirmed the substance of this paragraph. (Tr. 1457-1458).<sup>7</sup>

Judge Coffey conceded that the four numbered scenarios were "the only statements that are used to assign any kind of culpability to [her] in [the Breed] letter." (Tr. 256, line 22 – 257, line 2).

Mr. Breed testified that these events led him to believe that Judge Coffey was improperly inserting herself between CSA Security officers and her brother Otis. (Tr. 1131, line 14 – 1133, line 16) (Tr. 1139, lines 3-15). Mr. Breed initially contacted Mr. Greg DeLoach, an attorney who was then serving as Assistant Town Manager, about his concerns because Mr. Breed thought Judge Coffey reported to Mr. DeLoach.<sup>8</sup> Mr. DeLoach informed Mr. Breed that he was not Judge Coffey's "direct report" but, instead, that she reported to the Town Council.<sup>9</sup> When Mr. Breed asked where he could send his concerns, Mr. DeLoach provided him with information

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<sup>7</sup> Officer Wright testified Judge Coffey told him she was going to report him to Mr. Breed because of harassment, which upset Officer Wright, so he reported the incident. (Tr. 1456, lines 4-10) (Tr. 1458, lines 16-20).

<sup>8</sup> Mr. DeLoach was one of two Assistant Town Managers at the time. The other was Mr. Curtis Coltrane. (Tr. 743, line 18 – 744, line 7).

<sup>9</sup> Mr. DeLoach testified that, from time to time, his office receives complaints about town judges. (Tr. 783, line 12 – 784, line 10).

about and the address for the Commission on Judicial Conduct. (Tr. 746, lines 8-15) (Tr. 801, lines 19-23) (Tr. 1149, lines 13-19).

Prior to sending the Letter to the Commission, Mr. Breed confirmed the substance of the events set forth in the Letter with Mr. Jolin, Captain McSwain and Officer Wright. (Tr. 1609, lines 12-15) (Tr. 1631, lines 4-14) (Tr. 1147, lines 8-17) (Tr. 1123, line 23 – 1124, line 9) (Tr. 1135, lines 12-17). In addition, before mailing the Letter to the Commission, Mr. Breed showed it to Mr. Carey Kelley, who was Executive Vice President and Chief Operating Officer of CSA, and who was Mr. Breed's immediate supervisor. (Tr. 1156, lines 6-15) (Tr. 1638, lines 21-24).

Mr. Kelley shared the Letter at a June 24, 2008 meeting of the CSA Board of Directors. The copies of the Letter were marked confidential, distributed to the Board members during the meeting and then collected at the end of the meeting. (Tr. 988, line 6 – 989, line 8). Mr. Kelley said he shared the Letter with the CSA Board because he works for the Board, (Tr. 1289, lines 3-6), which shared the CSA security office's interest in keeping the plantation safe and secure. He explained that the Letter was a common interest between himself and the Board and he shared it in the normal course of business. (Tr. 1641, line 22 – 1643, line 19) (Tr. 1292, lines 12-22). Steve Birdwell, President of Sea Pines Resort and a member of the CSA Board, testified that the Letter was handed out, there was a brief discussion, and the Board was "informed." (Tr. 976, line 3 – 978, line 12) (Tr. 995, lines 1-4).

On November 20, 2008, Judge Coffey initially filed a Complaint in Beaufort County Circuit Court based on the Letter, (Complaint, filed November 20, 2008), and the Defendants duly filed answers.<sup>10</sup> The parties agreed to dismiss her complaint under Rule 40(j), SCRPC on January 12, 2010. (Rule 40(j) Consent Dismissal, filed January 12, 2010). The Circuit Court

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<sup>10</sup> (Answer of Defendants Community Services Associates, Inc., Sea Pines Security Committee and George F. Breed, Jr., filed December 29, 2008) (Answer of Defendants Community Services Associates, Inc. and George F. Breed, filed January 20, 2009).

restored the case on January 4, 2011 and allowed Judge Coffey to substitute counsel. Judge Coffey filed an Amended Complaint on February 8, 2011, (Amended Complaint, dated February 8, 2011) (“Amended Complaint”), which Appellants Breed and CSA answered. (Defendants’ Answer). The Amended Complaint alleged both common law and constitutional causes of action for libel and slander, as well as conspiracy and negligence.<sup>11</sup>

Defendants filed a motion *in limine*, seeking to bar from introduction at trial, among other things, evidence and testimony regarding a defamation lawsuit brought by Mr. Breed against a neighbor, Mr. Breed’s quitclaim deed of his one-half interest in his home, and the CSA Board’s decision to indemnify Mr. Breed, all based on Rules 402 and 403, SCRE. In addition, Defendants objected to the admission of evidence or testimony related to *nol prosequing* tickets, any alleged desire to move “undesirables” out of Sea Pines, alleged letters and/or phone calls between Mr. Breed and Judge James Herring, as well as “any alleged bad acts on the part of any of the Defendants’ witnesses or the Defendants that are not related directly to the Plaintiff,” all based on Rules 404(a) and 404(b), SCRE. Defendants also objected to hearsay based on Rule 802, SCRE. Defendants objected to the introduction at trial of evidence and witnesses that had not been disclosed in discovery. Finally, Defendants objected to admission of evidence and reference to Mr. Breed’s filing of the Letter with the Commission pursuant to Rules 13 and 20, RJDE, Rule 502, SCACR, and Segars-Andrews v. Judicial Merit Selection Comm’n, 387 S.C. 109, 691 S.E.2d 453 (2010). (Defendants’ Motion in Limine, dated May 25, 2012, and as revised May 29, 2012). Defendants also opposed Judge Coffey’s motion regarding a jury charge

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<sup>11</sup> The Association of Sea Pines Plantation Property Owners (“ASPPPO”), a voluntary property owners association that deals with issues such as neighborhood covenants and architectural review, *etc.*, was also named as a defendant. ASPPPO was dismissed from this case, along with the conspiracy claim. (Tr. 1713, line 15 – 1714, line 21) (Tr. 1841, lines 5-7).

for spoliation of evidence. (Memo in Opposition to Giving a Jury Charge for Spoliation of Evidence, dated May 25, 2012).

The Circuit Court ruled that, as Municipal Judge for the Town, Judge Coffey is a public official, which removed her common law causes of action for defamation. (Tr. 135, lines 15-20). Trial took place over seven days starting on May 29, 2012 and concluding on June 6, 2012. Judge Coffey testified at the trial and portions of her deposition testimony were read into the transcript. Mr. Breed did not testify at trial but extensive portions of the transcript from his two-day deposition were read into the transcript. Numerous objections were raised by Defense counsel based on, among other things, late admission of evidence into the record, witnesses who had not been noticed previously, irrelevant and highly prejudicial evidence, impermissible prior bad act and character evidence, hearsay, and an erroneous jury charge for spoliation.<sup>12</sup>

Defendants moved for a directed verdict at the close of Judge Coffey's case. (Tr. 1385-1397) (Tr. 1401-1408) (Defendants' Motion for Directed Verdict, dated June 4, 2012). The Circuit Court denied the request for a directed verdict with respect to the defamation causes of action. (Tr. 1424, line 10 – 1425, line 1). Defendants again moved for directed verdict at the close of their case. (Tr. 1711, line 24 – 1712, line 5). The Circuit Court dismissed the slander claim against Mr. Breed but not against CSA. (Tr. 1715, line 3 – 1721, line 7).

Over Defense counsel's objections, in closing argument counsel for Judge Coffey was allowed to suggest to the jury that she had suffered damages to her reputation in the amount of \$500,000. (Tr. 1782, line 19 – 1783, line 1). Judge Coffey's counsel then proceeded to testify to the jury regarding the amount of an unallocated reserve fund in the amount of \$6.7 million

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<sup>12</sup> See, e.g., (Tr. 138, line 18 – 170, line 20) (Tr. 213, line 11 – 214, line 14) (Tr. 217, line 20 – 226, line 23) (Tr. 257, line 8 – 258, line 23) (Tr. 284, line 17 – 285, line 7) (Tr. 309, lines 2-6) (Tr. 352, line 8 – 353, line 16) (Tr. 500, line 18 – 508, line 17) (Tr. 696, line 21 – 702, line 24) (Tr. 716, line 12 – 721, line 14) (Tr. 888, line 11 – 901, line 16) (Tr. 1012, line 8 – 1020, line 23) (Tr. 1376, lines 12-19).

dollars, (Tr. 1783, lines 9-12), even though no evidence had been admitted during the trial and no witness had testified to this fund or the amount of money in it. Counsel for Judge Coffey suggested to the jury that it award her 10% of the amount in the unallocated reserve fund. (Tr. 1783, lines 13-18).

Over the course of the six-day trial, a total of 21 witnesses testified or had deposition testimony read into the transcript, and numerous pieces of evidence were introduced, of which some 40 were entered into the record. The trial judge advised the parties that, "I want a clean charge in this case, quite frankly. I think there's so much going on. I think the law of defamation, and particularly because she's been found as a public official, is very complicated for this jury." (Tr. 1846, lines 7-10). The jury charges were a full 19 pages long. (CT EX #4). The Verdict Form was complicated. (Tr. 1842, line 23 – 1843, line 10) (Tr. 1851, line 16 – 1857, line 6). The jury deliberated for a little over an hour and a half, during which time they also had lunch, at which point they rendered a verdict in Judge Coffey's favor on all counts. She was awarded special damages in the amount of \$6,050.00, general damages in the amount of \$2,000,000.00, and punitive damages in the amount of \$4,000,000.00 for a total verdict against Mr. Breed and CSA in the amount of \$6,006,050.00. (Tr. 1920, line 3 – 1921, line 12) (Verdict Form, dated June 6, 2012).

Defendants CSA and Mr. Breed moved for judgment notwithstanding the verdict ("JNOV"), or alternatively for a new trial, and also moved to have the punitive damages award vacated or remitted.<sup>13</sup> Defendants' motions were denied in an Order filed October 15, 2012 ("Order").

Defendants CSA and Mr. Breed timely appealed to this Court.

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<sup>13</sup> (Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial, dated June 15, 2012 ("JNOV Motion") (Motion to Vacate or Remit the Punitive Damages Award on Constitutional Grounds, dated June 15, 2012) (Memorandum in Support of Defendants' Post-Trial Motions, dated June 28, 2012).

### Standard of Review

In a defamation case involving a public official, the determination of whether sufficient evidence has been presented to support a finding of actual malice is a question of law. Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). On appeal, the reviewing court “is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice.” Id., 533 S.E.2d at 902; *see also* Holtzscheiter v. Thomson Newspapers, Inc., 332, S.C. 502, 523 n.9, 506 S.E.2d 497, 508 n.9 (1998) (on appellate review, the Court must “independently examine the record to determine whether the evidence establishes actual malice with convincing clarity”).

In addition, a request for directed verdict or JNOV should be granted when, viewing the evidence and all reasonable inferences in a light most favorable to the non-moving party, the evidence yields only one result. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 243-44, 473 S.E.2d 865, 867 (Ct. App. 1996); Parrish v. Allison, 376 S.C. 308, 318, 319 656 S.E.2d 382, 388 (Ct. App. 2007). In making this determination, “the court must determine the elements of the action alleged and whether any evidence existed on each element.” Murphy v. Jefferson Pilot Commc’ns Co., 364 S.C. 453, 461, 613 S.E.2d 808, 812 (Ct. App. 2005). On appeal, the reviewing court applies the same standard. Id. An appellate court will overturn the denial of a motion for directed verdict or JNOV where there is insufficient evidence to support the ruling or where the decision is governed by legal error. *See* Watson v. Ford Motor Co., 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010).

### ARGUMENTS

In this case, the Circuit Court committed reversible error by allowing the questions of whether Judge Coffey met her burden of proving actual malice, falsity or damages to go to the

jury, and then allowing the verdict to stand. The Circuit Court erroneously failed to rule as a matter of law that the publication of the Letter was absolutely privileged. In addition, the Circuit Court failed to rule that Appellants' publication of the Letter was subject to a qualified privilege and that there was no evidence that that privilege had been exceeded or abused. Finally, the Circuit Court committed numerous prejudicial evidentiary errors and gave an objectionable spoliation jury charge that require reversal.

**I. The Circuit Court committed reversible error by failing to rule as a matter of law that, as a public official, Judge Coffey failed to meet her burden of proof.**

In this case, the Circuit Court correctly determined that, as Municipal Judge for the Town of Hilton Head, Judge Coffey is a public official. In order to prevail on a defamation claim, a public official must “prove by clear and convincing evidence that the defendant acted with actual malice in publishing a false and defamatory statement about the plaintiff.” Erickson v. Jones Street Pub. LLC, 368 S.C. 444, 468, 629 S.E.2d 653, 666 (2006), *citing* New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964); Elder v. Gaffney Ledger, 341 S.C. 108, 113, 533 S.E.2d 899, 902 (2000).

In light of Erickson and New York Times, there are several significant distinctions between a common law defamation case on one hand,<sup>14</sup> and a defamation case involving a public official or public figure, on the other. First, in a public official defamation case, the plaintiff must prove the defendant acted with actual malice. Second, the plaintiff's burden of proof is by clear and convincing evidence, as opposed to a preponderance of the evidence. Third, “[t]his heightened burden of proof for public officials ... requires an affirmative showing by the

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<sup>14</sup> In order to recover on a common law defamation claim, a plaintiff must prove by a preponderance of the evidence: 1) a defamatory statement was made about the plaintiff; 2) an unprivileged publication was made to a third party; 3) the publisher was at fault; and 4) the existence of special damages, unless the statement is actionable without proving special damages. Erickson, 368 S.C. at 465, 629 S.E.2d at 665. Thus, the statement must be about the plaintiff and be defamatory. The publication must be both unprivileged and the fault of the defendant and, except in certain circumstances not relevant here, the plaintiff must prove special damages. As a defense, the defendant may prove that the statements were true.

plaintiff that the defamatory statement was false.” Haulbrooks v. Overton, 295 S.C. 380, 383, 368 S.E.2d 676, 678. (Ct. App. 1988). Fourth, the plaintiff enjoys no presumption of special damages but, instead, must prove them. And finally, the court must determine, in the first instance, whether the record contains clear and convincing evidence of actual malice before sending the case to the jury. Erickson, 368 S.C. at 477, 629 S.E.2d at 670. In short, “speech about a public figure is properly measured against the actual malice rule which offers substantial protection to the critic of a public figure.” George v. Fabri, 345 S.C. 440, 462, 548 S.E.2d 868, 879 (2001).<sup>15</sup> In this case, the Circuit Court erred by failing to hold Judge Coffey did not meet her burden of proving actual malice, falsity, unprivileged publication or damages.

A. Judge Coffey failed to prove Mr. Breed acted with actual malice.

Because Judge Coffey is a public official, she was required to prove by clear and convincing evidence, either that Mr. Breed knew the statements he was making about her were false, or that he had serious reservations about their truthfulness. *See, e.g., Holtzscheiter*, 332, S.C. at 515, 506 S.E.2d at 504. However, Judge Coffey presented no evidence, let alone clear and convincing evidence, that any statement about her in the Letter was made with either knowledge that it was false or with reckless disregard for its truth. *See Elder*, 341 S.C. at 113, 533 S.E.2d at 901.<sup>16</sup> “A ‘reckless disregard for truth’ requires more than a departure from reasonably prudent conduct. ‘There must be sufficient evidence to permit the conclusion that the defendant **in fact entertained serious doubts as to the truth of his publication.**’ ... There must

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<sup>15</sup> Our Supreme Court has explained that public officials “are entitled to less protection from defamation than private figures because they enjoy greater media access and are less vulnerable to injury from defamatory statements due to their ability to publicly rebut such statements. Furthermore, ... public officials are less deserving of protection because they have voluntarily exposed themselves to the increased risk of defamation.” Erickson, 368 S.C. at 473, 629 S.E.2d at 668.

<sup>16</sup> Note that the actual malice analysis assumes the statements are false. *See George*, 345 S.C. 440, 456 n.7, 548 S.E.2d 868, 876 n.7 (2001) (for purposes of determining whether the plaintiff had met the burden of proving actual malice, assuming, without deciding, that the statements were false and defamatory). Thus, for the purpose of this actual malice analysis, Appellant Breed assumes without conceding that the statements about Judge Coffey in the Letter are false.

be evidence the defendant had a ‘**high degree of awareness of ... probable falsity.**’” Elder, 341 S.C. at 114, 533 S.E.2d at 902. And while, “[n]either lies nor false communications serve the ends of the *First Amendment*,” in order “to insure the ascertainment and publication of the truth about public affairs, it is essential that the *First Amendment* protect some erroneous publications as well as true ones.” St. Amant v. Thompson, 390 U.S. 727, 732, 88 S. Ct. 1323, 1326 (1968).

In order to determine whether a defendant acted with actual malice, “the court must use a subjective standard to test the ‘publisher’s good faith belief of the truth of his or her statements.’” Anderson v. Augusta Chronicle, 365 S.C. 589, 595, 619 S.E.2d 428, 431 (2005); *see also* Elder, 341 S.C. at 114, 533 S.E.2d at 902 (explaining that actual malice is a “subjective standard testing the publisher’s good faith belief in the truth of his or her statement”). Stated another way, “[t]here must be sufficient evidence to conclude either that the defendant made the statements with a ‘high degree of awareness of ... probable falsity,’ ... or that the defendant ‘in fact entertained serious doubts as to the truth of his publication.’” George, 345 S.C. 456, 548 S.E.2d at 876 (citations omitted). In this case, because there is no evidence whatsoever that Mr. Breed believed his statements were false or had reason to doubt the truth of the statements about Judge Coffey contained in the Letter, the Circuit Court committed reversible error by sending this issue to the jury. (Tr. 1424, lines 10-15).

A mere failure to investigate, even where a “reasonably prudent person would have done so,” is insufficient to prove actual malice, unless there is an obvious reason to doubt the veracity of a statement or an informant. George, 345 S.C. at 459, 548 S.E.2d at 878. In other words, “there must be evidence at least that the defendant purposefully avoided the truth.” Elder, 341 S.C. at 114, 533 S.E.2d at 902. Here, there is no evidence that Mr. Breed either failed to

investigate or purposefully avoided the truth. In fact, Mr. Breed spoke to Mr. Jolin, Captain McSwain, and Officer Wright in order to confirm the information in his Letter.<sup>17</sup>

“Actual malice under the New York Times standard should not be confused with the concept of [common law] malice as an evil intent or a motive arising from spite or ill will.” Masson v. New Yorker Mag., Inc., 501 U.S. 496, 510, 111 S. Ct. 2419, 2429 (1991). The United States Supreme Court has acknowledged that, unfortunately, the use of the term “actual malice” can cause jury confusion. Unlike actual malice, “[c]ommon law malice means the defendant acted with ill will toward the plaintiff, or acted recklessly or wantonly, *i.e.*, with conscious indifference of the plaintiff’s rights.” Erickson, 368 S.C. at 466, 629 S.E.2d at 665. However, because “evidence of ill will is not part of the actual-malice test, its admission could cause unnecessary jury confusion and arguably restrict the speech rights of adversaries without commensurate proof that the defendant knew or suspected a falsehood.” Elder, 341 S.C. at 117, 533 S.E.2d at 904.

The evidence found to be insufficient in Elder is strikingly similar to the evidence presented by Judge Coffey in this case. In Elder, the evidence put forth by the public official plaintiff to prove actual malice consisted of evidence: 1) that the editor of the Gaffney Ledger, Sossamon, failed to investigate or verify information left by an anonymous caller; 2) that the phone recording of the anonymous call was “erased” by the newspaper; 3) that Sossamon had pled guilty to manufacturing marijuana (purportedly to prove Sossamon was acting out of malice or ill will); and 4) that Sossamon had been rude to the plaintiff’s wife when she had placed an advertisement for her husband. The Supreme Court held that this evidence “was patently

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<sup>17</sup> See (Tr. 1609, lines 12-15) (Tr. 1631, lines 4-14) (Tr. 1147, lines 8-17) (Tr. 1121, line 18 – 1123, line 14) (Tr. 1123, line 23 – 1124, line 4) (Tr. 1135, lines 12-17).

insufficient to demonstrate Sossamon in fact entertained serious doubts as to the truth of the publication.” 341 S.C. at 115, 533 S.E.2d at 902.

The same is even truer here. First, as noted above, Mr. Breed checked with his sources before submitting his Letter to the Commission. There is simply no evidence that he had any reason to doubt the things he wrote in the Letter. Second, even if she had proved tapes had been erased, which Appellant Breed disputes (*see* Section IV below re: spoliation), mere erasure of a tape does not demonstrate actual malice. Third, although Judge Coffey erroneously was allowed to present various “character” and “prior bad acts” evidence to the jury, (*see* Section III.B. below re: character evidence and prior bad acts), that evidence was both irrelevant and insufficient to prove actual malice. Finally, her attempt to prove Mr. Breed had some motive to harass or unfairly focus on her or her family both fails for lack of evidence,<sup>18</sup> and fails to prove actual malice. “Although evidence concerning motive or care may bear some relation to the actual malice inquiry; however, ‘courts must be careful not to place too much reliance on such factors.’” Elder, 341 S.C. at 115, 533 S.E.2d at 902. As our Supreme Court cautioned, the use of the phrase “‘actual malice’ is unfortunately confusing in that it has nothing to do with bad motive or ill will.” Id. at 117, 533 S.E.2d at 903. Thus, in this case, as was the case in Elder, the evidence is patently insufficient to demonstrate Mr. Breed believed the statements in the Letter were false or in fact entertained serious doubt as to their truth.

Mr. Breed testified unequivocally that he believed the statements in the Letter were true. Although Judge Coffey was entitled to submit both direct and indirect evidence to attempt to meet her burden of proving actual malice, Mr. Breed’s belief in the truth of his statements is not insignificant. *See* George, 345 S.C. at 459-60, 548 S.E.2d at 878-79 (finding insufficient

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<sup>18</sup> The only evidence Judge Coffey presented was her own insistence that Mr. Breed was harassing her family or “out to get Otis.”

evidence of actual malice to send to the jury where the defendant testified she subjectively believed the statements about the plaintiff were true); Elder, 341 S.C. at 118, 533 S.E.2d at 904 (accepting the defendant's statement that he believed the information "could be true" as proof that he did not purposefully avoid the truth).

Further, in many of its evidentiary rulings, discussed in more detail below, the Circuit Court appeared to confuse the statement from Anderson that "any direct or indirect evidence relevant to the defendant's state of mind is admissible to prove actual malice," 365 S.C. at 596, 619 S.E.2d at 432, with the standard for proving common law malice. The "state of mind" relevant to an actual malice inquiry is not, as noted above, ill will or intent to cause harm, but the intent to publish what one knows or has a strong suspicion is false. In Anderson, the alleged defamatory statement accused the plaintiff, a candidate for public office, of falsely claiming to have served in the National Guard. By way of contrast to the evidence in Elder and in the instant case, in Anderson the circumstantial evidence of actual malice consisted of: Anderson's testimony that he had told a reporter from the Augusta Chronicle that he had been called away to process claims for the National Flood Insurance Program, not to serve in the National Guard; attempts by Anderson to get the newspaper to correct its mis-statement; the fact that Anderson faxed his resume (which showed the flood insurance program work and noted his military service in the Korean War but mentioned nothing about the National Guard) to the newspaper; and the fact that, at the time the false statement was published, Anderson was 67 years old. The Court held that this circumstantial evidence was sufficient to submit the question of actual malice to the jury. Anderson, 365 S.C. at 597, 619 S.E.2d at 432-33. In Metts v. Mims, the Supreme Court found sufficient direct evidence of actual malice to let the case go to the jury where there was evidence in the defendant's possession that indicated its statement was not true. 384 S.C.

491, 501-502, 682 S.E.2d 813, 819 (2009).<sup>19</sup> In contrast, the “state of mind” and circumstantial evidence introduced by Judge Coffey in this case has nothing whatsoever to do with whether Mr. Breed knew or recklessly disregarded whether any of the statements in the Letter about Judge Coffey were false. (See Section III.B. below re: “prior bad acts”).

Finally, at trial Judge Coffey pointed to the fact that Mr. Breed admitted that he could not cite any case pending before Judge Coffey in which she had been biased, prejudiced or impartial, (Tr. 1126, line 2 – 1127, line 16), as proof of actual malice. Setting aside the fact Mr. Breed clearly stated that his opinions were based on the specific incidents recounted in his Letter and not on her “actions on the Bench,” (Tr. 1128, line 3 – 1130, line 5), Mr. Breed’s lack of knowledge simply is not evidence of actual malice. See, George, 345 S.C. at 457-60, 548 S.E.2d at 877-78 (defendant’s acknowledgement that she did not know whether her statements about the plaintiff were true was not evidence that she entertained serious doubts about the truth of the statements). In George, the Supreme Court held that the only reasonable conclusion, based on the defendant’s testimony that she believed her statements to be true, was that she subjectively believed the truth of her statements when she published them. 345 S.C. at 457, 548 S.E.2d at 877. Here, Mr. Breed also testified unequivocally that he believed the statements in his Letter to be true. (Tr. 1126, lines 2-11) (Tr. 1128 lines 9-20) (Tr. 1129, line 8 – 1133, line 16). Judge Coffey presented absolutely no evidence that Mr. Breed doubted the truth of the statements made in the Letter, either at the time he wrote it or any time afterward.

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<sup>19</sup> Although Judge Coffey repeatedly argued that Metts allowed her to introduce “prior bad acts” evidence to show Mr. Breed’s “state of mind” or “guilty knowledge,” (Tr. 311, line 5 – 312, line 4) (Tr. 335, line 8 – 336, line 21) (Tr. 631, lines 11-25), that is not the test elucidated in Metts or any other case for actual malice. 384 S.C. at 501-502, 682 S.E.2d at 819 (finding “direct evidence that called into question the accuracy of Mims’ statements”). Although the Metts Court stated that, “[l]ooking at the totality of the evidence, a jury could infer reckless conduct sufficient to meet the *New York Times* standard of actual malice,” 384 S.C. at 502, 682 S.E.2d at 819, the evidence the Court focused on related directly to whether the defendant had reasons to disbelieve the statements published about the plaintiff.

In this case, the Court allowed testimony regarding a defamation suit Mr. Breed brought against a neighbor, (Tr. 1186, line 25 – 1187, line 24), presumably to show he knew that slander/defamation could cause harm. This is no part of the test for actual malice and only served to confuse and inflame the jury. Even if it could be proven that Mr. Breed may have been “thoughtless and negligent” in publishing the statements, that would not meet Judge Coffey’s burden of proving actual malice.

Because there is no evidence, let alone clear and convincing evidence, of actual malice, the trial judge should have granted Appellants’ motion for a directed verdict or JNOV Motion. This Court must reverse and dismiss the case based on Judge Coffey’s failure to meet her burden of proving Appellants acted with actual malice.

B. Judge Coffey failed to meet her burden of proving the statements about her were false.

“The truth of the matter is a complete defense to an action based on defamation and evidence establishing a statement is substantially true is a sufficient defense.” Haulbrooks, 295 S.C. at 383, 368 S.E.2d at 678, *citing* Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 80, 221 S.E.2d 770, 772 (1976), and Dauterman v. State-Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967). Although at common law, a defendant has to plead substantial truth as an affirmative defense, Parrish, 376 S.C. at 326, 656 S.E.2d at 391, as a public official, Judge Coffey bore the burden of proving by clear and convincing evidence that the statements about her contained in the Letter were false. *See* Erickson, 368 S.C. at 467, 629 S.E.2d at 665 (explaining that, in order “to prove fault in a defamation action, a plaintiff who is a public official or public figure must prove by **clear and convincing evidence** that the defendant acted with actual malice in publishing a **false and defamatory statement about the plaintiff**”) (emphasis added).<sup>20</sup>

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<sup>20</sup> Note that the entire phrase regarding actual malice, falsity and publication follows the clear and convincing evidentiary standard applied to public officials. However, even if this Court applies a lesser standard of proof to the

As explained above, a defamation action is based on false and defamatory statements made about the plaintiff. “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.**” Erickson, 368 S.C. at 464, 629 S.E.2d at 664 (emphasis added); *see also* St. Amant, 390 U.S. at 732-33, 88 S. Ct. at 1326 (emphasizing that nothing in that case indicated an awareness by the defendant that statements about the plaintiff were probably false); New York Times, 376 U.S. at 288, 84 S. Ct. at 730 (finding a failure of proof, in part, where the plaintiff could not establish that the allegedly defamatory comments were about him). The statements that Judge Coffey asserts are false are, by and large, about her brother, her father or her mother. Judge Coffey’s burden was to prove that the statements about her in the Letter were false. In fact, when Judge Coffey’s counsel was questioning Mr. Breed, he objected to Mr. Breed’s statements regarding Otis and Judge Coffey’s mother and father on the basis that this information was not about Judge Coffey and was, therefore, irrelevant. (Tr. 1130, line 8 – 1131, line 3) (Tr. 1137, lines 8-9).

The statements about Judge Coffey contained in the numbered paragraphs of the Letter are substantially true. Judge Coffey confirmed the basic facts surrounding her intervention during Otis Coffey’s arrest in 2004 for trespassing. She testified at her deposition that she received the phone call from her father, who told her Otis was being arrested for trespassing. “So I said, ‘All right Dad. Hand the phone to an officer.’” And she spoke to Officer Calendine. (Tr. 1683, line 19 – 1685, line 10).

Although Judge Coffey insists she did not meet with Captain McSwain in late 2004 or early 2005, Captain McSwain testified that the meeting took place, and that she stated that she

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issues other than actual malice, Judge Coffey has not proved by a preponderance of the evidence that the statements about her in the Letter were false, that Appellants’ publication was unprivileged, and/or that she sustained recoverable damages as a result.

felt it was best if Otis left the area. (Tr. 1578, line 15 – 1579, line 19). Furthermore, both Judge Coffey and Detective Baird confirmed that they met in either late 2004 or early 2005 and discussed Otis Coffey. (Tr. 240, line 6 – 241, line 6) (Tr. 839, lines 14-21) (Tr. 840, lines 2-24).<sup>21</sup> Judge Coffey admitted that she attempted to “coerce” her brother into taking a lie detector test, (Tr. 1699, lines 2-11) (Tr. 402, line 18 – 403, line 6), and that, after Otis backed out of the lie detector test, she told him, “Well, listen, it doesn’t look good if you’re in my jurisdiction and you’re a suspect in a crime. Go to work at the restaurant in Tybee [Georgia].” (Tr. 404, lines 13-19) (Tr. 1688, line 16 – 1690, line 8) (Tr. 1699, lines 2-11). She testified that she called Detective Baird back and told him Otis didn’t want to take the lie detector test, (Tr. 1687, line 17 – 1689, line 20), although Detective Baird could not recall whether she called him back. (Tr. 843, lines 15-20).

Judge Coffey substantiated the interaction with CSA Officer Wright on May 23, 2008 outside her mother’s home. (Tr. 252, line 16 – 253, line 22) (Tr. 393, lines 17-24) (Tr. 1696, line 23 – 1698, line 17). Officer Wright confirmed the substance of this paragraph. (Tr. 1455, line 9 – 1458, line 22).

Pointing out minor discrepancies in the Letter about Otis (*i.e.*, whether he was a primary suspect in 2004, whether he moved back to the community in 2008, whether he was 80% or 100% positively identified on the night of May 20, 2008), or her father (*i.e.*, whether he “inserted” himself in the arrest process in 2004) do not satisfy her burden of proving by clear and convincing evidence that the statements about her were false.<sup>22</sup>

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<sup>21</sup> Detective Baird testified that, “at one point, [Judge Coffey] mentioned she was in the process of having [Otis] relocate to another area.” (Tr. 840, lines 22-24).

<sup>22</sup> In fact, some of the issues Judge Coffey raised as being “untrue” were not even stated in the Letter. For example, although her counsel questioned Mr. Jolin as to whether or not her mother “slammed” the door in the face of the officers on the night of May 20, 2008, (Tr. 481, lines 20-25), the Letter says nothing about slamming doors. (PEX #4). In fact, Judge Coffey and her counsel were the only persons who talked about whether her mother slammed the door. (Tr. 198, lines 12-19) (Tr. 247, lines 11-13).

Furthermore, even these statements are substantially true. First, Judge Coffey admitted that Otis was a suspect in 2004. She admitted, “I knew that, from Eric Calendine, that he was a suspect.” (Tr. 234, lines 15-20). She testified that, in 2008, she read an article in the Island Packet about break-ins in the South Beach area, “[a]nd I knew at the time my brother was living in the South Beach area, and I knew that since they suspected him of the 2004 ... But I knew he would be a suspect since he was in the proximity of those crimes at the time.” (Tr. 1692, lines 1-13).<sup>23</sup> With respect to the incident that took place on the night of May 20, 2008, Mr. Jolin testified that, although he was not 100% certain the black male on a bicycle that he chased was Otis Coffey, he agreed that he thought it was, (Tr. 549, line 8 – 551, line 8) (Tr. 558, line 6 – 560, line 6), and, as a result of this belief, he “immediately had Corporal Fryman ... head down to the Gadwall area to – to set up a perimeter.” (Tr. 477, lines 17-25).<sup>24</sup> Mr. Jolin also substantiated the car towing incident on May 23, 2008. (Tr. 577, line 8 – 578, line 5).

The one statement that Judge Coffey asserted was not only false “but ... that caused [her] the most heartburn was the last sentence of the third page. ... *In summary, as a result of Judge Coffey’s actions, she has given the distinct and transparent appearance of bias and partiality, and is not able to be a neutral and detached arbiter of the many cases that have been and will be pending before her.*” (Tr. 232, lines 7-17). However, fair comment or an opinion of a public official that is based on enumerated facts that are themselves not false is not actionable. Restatement 2d of Torts § 566; *see also* Standing Comm. on Discipline v. Yagman, 55 F.3d

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<sup>23</sup> Other witnesses confirmed that Otis Coffey was a suspect. Detective Florencio agreed that “Otis Coffey was a person worth looking at in the investigation,” in 2008, “[a] person of interest.” (Tr. 657, lines 1-3) (Tr. 661, lines 21-23). Mr. Jolin testified that he had “heard of Otis Coffey’s name ever since I first started in May of 2001 ...” (Tr. 468, lines 13-19) (Tr. 532, lines 2-20). Captain McSwain testified that Otis Coffey was a suspect. When Judge Coffey’s counsel tried to push him to deny that Otis was a “prime suspect,” Captain McSwain said, “it’s all the same. A suspect is a suspect.” (Tr. 1603, line 21 – 1604, line 2).

<sup>24</sup> Sea Pines Security Officer Randy Woods testified that, three or four hours after the incident, Mr. Jolin called him “and he says, *I got him. ... I got Otis Coffey. ... Well I didn’t get him. ... I chased him.*” (Tr. 858, line 20 – 859, line 8). Todd McNeill (CSA Wildlife Officer) also testified that Mr. Jolin told him that he had chased and almost caught Otis Coffey. (Tr. 1068, lines 2-11).

1430, 1439 (9<sup>th</sup> Cir. 1995) (a statement of opinion based on expressly stated facts is not actionable). Furthermore, rhetorical hyperbole and statements that use language in a “loose, figurative sense” are not actionable. Yagman, 55 F.3d 1430, 1438.

Since the *Fourteenth Amendment* requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here.

New York Times, 376 U.S. at 292 n.30, 84 S. Ct. at 732, n.30. When asked “Is it your **opinion** that Judge Coffey was biased, partial, and prejudiced?” Mr. Breed replied, “I believe that the – that’s reflected in here. I believed that to be the truth as reflected in this letter, referring to the scenario described in that letter.” (Tr. 1126, lines 2-11) (emphasis added).<sup>25</sup> Mr. Breed explained the apparent contradiction between his response to Judge Coffey’s Interrogatory Number 19, in which Defendants stated “None” in response to Judge Coffey’s request to identify “each case in which the Defendant contents [sic] that the Plaintiff has acted with bias, partiality or prejudice,” (PEX #6), and the opinion in his Letter: “One’s referring to a criminal case before her. This is referring to scenarios that occurred beginning of 2004, and again in 2008.” (Tr. 1126, line 8 – 1128, line 6). Mr. Breed confirmed he believed Judge Coffey was “biased, prejudiced, and partial” based on the scenarios set forth in the Letter.<sup>26</sup> He clarified that he was not speaking about actions she took judging cases, or “on the Bench.” (Tr. 1128, lines 9-20) (Tr. 1129, line 8 – 1131, line 16).

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<sup>25</sup> As noted above, the “scenarios” described in the Letter are substantially true.

<sup>26</sup> Judge William L. Howard confirmed that, in his expert opinion, Judge Coffey’s actions in 2004 and 2008, as outlined in Mr. Breed’s Letter and as testified to by Judge Coffey, violated Cannons 1, 2, and 4 of the code of judicial ethics. (Tr. 1514, line 8 – 1527, line 16). Specifically, “a judge must make sure that they don’t do something that gives the appearance to other people that they may not be fair and impartial.” (Tr. 1521, lines 15-18).

Even if Judge Coffey argues that Mr. Breed's statement that she "is not able to be a neutral and detached arbiter of the many cases that have been and will be pending before her," is a factual statement (as opposed to opinion), which Appellant Breed does not concede, she has not presented clear and convincing evidence (or even a preponderance of evidence) that it was false. Judge Coffey merely questioned various witnesses, including Mr. Breed, as to whether they knew of specific instances where she had been biased and/or prejudiced. *See* (Tr. 463, line 23 – 464, line 2 (Mr. Jolin)) (Tr. 1362, line 5 – 1363, line 6 (Mr. Kelley)) (Tr. 1598, lines 14-24 (Captain McSwain)). Merely asking some witnesses at this trial, a small and select group of individuals, whether they know of any instances in which Judge Coffey was unable to be a neutral and detached arbiter does not constitute proof that the statement is factually untrue. *See Yagman*, 55 F.3d at 1441 (despite Court's disinclination to believe a statement that a judge was "drunk on the bench," the falsity of such statement still had to be proved). Nor is this proof that she was or would be, in fact, a fair and detached arbiter of the many cases before her.<sup>27</sup> In fact, Judge Coffey recounted at least one accusation of bias lodged against her, although she characterized the complainant as a "crazy person." (Tr. 384, line 9 – 386, line 21).

In addition, Judge Coffey has presented absolutely no evidence that Mr. Breed published this statement with actual malice. The mere fact that, at the time of trial, Mr. Breed could not specify any dockets in which Judge Coffey demonstrated bias or impartiality does not constitute proof that, at the time he made the statement, he was aware or that he disregarded evidence that it was false. In *George*, the South Carolina Supreme Court held that, simply because the defendant testified that she did not know whether an allegedly defamatory statement was true, "is not

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<sup>27</sup> If Judge Coffey attempts to argue that it would be impossible for her to prove that she has been unbiased and/or unprejudiced, she supports Appellant Breed's position that this is opinion rather than a factual statement. *Phantom Touring Inc. v. Affiliated Pubs.*, 953 F.2d 724, 727 (1<sup>st</sup> Cir. 1992) (statements of opinion that do not "contain a provably false factual connotation will receive full constitutional protection").

evidence that she entertained ‘serious doubts’ about the truth of the statements she made.” 345 S.C. at 457, 548 S.E.2d at 877. Instead, the Court found that the defendant “subjectively believed in the truth of her statements and their implications,” when she published them, and noted the various facts stated by the defendant on which she relied to come to her conclusion. *Id.* The same is true here. Mr. Breed testified that he believed the statement that Judge Coffey was unable to be a neutral and detached arbiter in the many cases that had been and would be pending before her, and pointed to the specific instances in his Letter that supported this conclusion.<sup>28</sup> The Court also held in George that, simply because the defendant admitted she did not know of any specific instances that factually supported her statement, did not demonstrate she acted with reckless disregard of the truth. 345 S.C. at 460, 548 S.E.2d at 878. Like the plaintiff in George, the fact that Mr. Breed could not point to a specific case in which Judge Coffey had acted with bias did not prove he acted with actual malice.

Finally, the statement that Judge Coffey was unable to be a neutral and detached arbiter in the many cases that have been and would be pending before her is a qualitative statement, not factually provable and is, therefore, entitled to protection as an opinion. *See, Phantom Touring*, 953 F.2d at 728 n.7 (holding that a statement that the producers of a show based on Phantom of the Opera were “blatantly misleading the public” is “subjective and imprecise, and therefore not capable of verification or refutation by means of objective proof”). If, on the other hand, Mr. Breed had written something to the effect that Judge Coffey ruled in favor of a particular party because she had accepted a bribe, that statement could be verified by objective proof. The statement that she is unable to be a neutral and detached arbiter is purely a matter of one’s opinion, and cannot be conclusively proven by any set of facts.

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<sup>28</sup> Furthermore, this sentence is clearly a conclusion of the evidence Mr. Breed laid out in the heart of his Letter. The allegedly offending sentence begins with the phrase, “In summary, as a result of Judge Coffey’s actions” indicating he is summarizing his conclusions based on the preceding paragraphs.

Because Judge Coffey failed to meet her burden of proving that any of the statements about her in the Letter were false, the verdict should be reversed and the case dismissed.

C. Judge Coffey failed to meet her burden of proving damages.

A public official must prove special damages caused by the alleged defamation. “Special damages are tangible losses or injury to the plaintiff’s property, business, occupation or profession, capable of being assessed monetarily, which result from injury to the plaintiff’s reputation.” Holtzscheiter, 332 S.C. at 510 n.4, 506 S.E.2d at 502, n.4. Plaintiff failed to prove any calculable damages to her reputation or her career.<sup>29</sup> She proved no loss of salary or employment.<sup>30</sup> Instead, she has continued to be employed in the same capacity by the Town and has continued to receive raises.<sup>31</sup> Without such proof, Judge Coffey’s defamation claim fails.

Judge Coffey testified that, as a result of the alleged libel and slander, she sustained injury in the form of mental stress. (Tr. 267, line 18 – 269, line 8). As proof of special damages, Judge Coffey submitted her medical bills from a psychologist incurred from July 2008 through July 2011. (Tr. 269, line 22 – 270, line 17). Judge Coffey also testified that she was damaged by having to pay for additional babysitting services for her children during her period of chronic stress. (Tr. 274, lines 18-22). She testified that she paid babysitters “approximately \$800.00 in cash, I think.” (Tr. 276, lines 1-6). The jury awarded recovery of Judge Coffey’s counseling

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<sup>29</sup> See (Tr. 265, lines 23-24) (Tr. 360, line 14 – 362, line 16) (Tr. 365, lines 20-25) (Tr. 1671, line 7 – 1672, line 12) (Tr. 1677, lines 14-16) (Tr. 1700, line 6 – 1702, line 20). Plaintiff presented nothing more than her perception that the atmosphere at the court was “frosty” and her speculation that confrontations with Mr. Tom Fultz, department head over the Town’s court administrative staff, may have had something to do with the Breed Letter. (Tr. 262, line 22 – 264, line 21) (Tr. 717, lines 15-17). She speculated that this, in turn, was a result of the fact that the Town had to pay a judge to hear the Sea Pines cases from which she recused herself when Mr. Breed sent his Letter to the Commission. (Tr. 1701; lines 17-20). After the Letter complaint to the Commission was dismissed, however, she continued to recuse herself from hearing Sea Pines cases because of the lawsuit she herself filed. (Tr. 266, line 22 – 267, line 8).

<sup>30</sup> Plaintiff claimed the loss of a year’s salary because the contract negotiated after the Breed Letter and her lawsuit were filed was a 2-year, as opposed to a 3-year contract. (Tr. 276, line 14 – 280, line 7) (PEX #1). However, the jury apparently rejected this element of her damages, as the special damages awarded Plaintiff reflect only the amounts paid to Dr. Geiger and for babysitting.

<sup>31</sup> Her “aspiration” to become a family court judge was shown to be speculative at best. See (Tr. 282, line 9 – 284, line 25) (Tr. 453, line 25 – 454, line 22).

bills and babysitting costs as special damages. (Verdict Form) (PEX #9 (showing special damages in the amount of \$6,050, which is the total of the counseling fees of \$5,250.00 shown on Pl. Exh. 9 plus babysitting costs of \$800.00)). These costs do not constitute special damages in a defamation case, as they are not “tangible losses or injury to the plaintiff’s property, business, occupation or profession.” See Holtzscheiter, 332 S.C. at 510 n.4, 506 S.E.2d at 502, n.4.

“Emotional distress caused to the plaintiff by his knowledge that he has been defamed is not special harm.” Restatement 2d of Torts § 575, cmt. c. Humiliation or mental suffering “is not properly proven as a ‘special damage’ without proof of some other injury or damage.” Holtzscheiter, 306 S.C. at 305, 411 S.E.2d at 668; Brown v. National Home Ins. Co., 239 S.C. 488, 494-495, 123 S.E.2d 850, 853 (1962); Wardlaw v. Peck, 282 S.C. 199, 206, 318 S.E.2d 270, 275 (Ct. App. 1984). “[A] plaintiff can recover for emotional and physical harm only upon a showing of special damages; emotional and physical harms in such a case are not special damages in themselves, but rather are parasitic damages, viable only when attached to normal pecuniary damages.” 50 Am Jur 2d *Libel and Slander* § 369. Thus, Judge Coffey’s bills for psychological counseling cannot constitute special damages, and it was clear error for the trial judge to allow such evidence to serve as the basis for the jury’s determination of damages. 22 Am Jur 2d *Damages* § 776 (“... it is for the court to say what acts, omissions, facts, and circumstances are competent evidence of damages to be considered by a jury”).

Even if costs incurred for treatment of mental distress were recognizable as appropriate special damages, which Appellant Breed does not concede, Judge Coffey failed to prove any causal connection between her stress and any alleged defamatory publication of Mr. Breed’s

Letter.<sup>32</sup> Judge Coffey admitted that there were other things going on in her life that caused her stress. (Tr. 447, line 22 – 451, line 22). Although her psychologist, Dr. Geiger, indicated that Plaintiff's stress was higher when she talked about "litigation" issues, Dr. Geiger admitted that she did not know "which litigation stress" was the cause of her anxiety. (Tr. 966, line 24 – 967, line 25). The only litigation that Dr. Geiger knew about was the instant lawsuit filed by Plaintiff herself<sup>33</sup> and threats of litigation made by Judge Coffey's estranged husband. (Tr. 952, line 7 – 967, line 4). Additionally, Judge Coffey failed to prove that Mr. Breed's Letter caused her to incur greater babysitting expenses. She testified that she had to obtain a sitter for her children during times she was incapacitated by headaches and had no one around to help her. (Tr. 275, lines 4-19). However, Plaintiff's first and only documented report of headaches to Dr. Geiger was in March 2009, but the notes of that visit do not mention any litigation or any alleged defamation. (Tr. 970, line 17 – 971, line 16). Again, as with the counseling expenses, Judge Coffey cannot attribute her babysitting bills to Mr. Breed because she failed to prove that her headaches were caused by Mr. Breed's Letter.

Without evidence of monetary losses or injury to the plaintiff's property, business, occupation or profession, Judge Coffey cannot recover general damages.<sup>34</sup> See Doe v. Chao, 540 U.S. 614, 625, 124 S. Ct. 1204, 1211 (2003); Restatement 2d of Torts § 575, cmt. C (stating that if a plaintiff proves special damages, then general damages may also be recovered). Moreover, "there can be no award of punitive damages without a finding of actual damages." 50 Am Jur 2d

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<sup>32</sup> See (Tr. 269, line 22 – 271, line 21) (Tr. 447, line 22 – 453, line 14) (Tr. 944, line 7 – 967, line 4) (Tr. 1674, line 6 – 1679, line 17).

<sup>33</sup> Damages to a plaintiff's reputation resulting from publication of information about a libel suit filed by the plaintiff are not recoverable. Conley v. Southern Import Sales, Inc., 382 F. Supp. 121, 125 (M.D. Ala. 1974). "The theory is that the Plaintiff himself has filed the suit and made a public utterance of the libelous statements thereby compounding the libel on a voluntary basis in a way that the Defendant should not be responsible for." Id.

<sup>34</sup> General damages in a defamation action include injury to reputation, mental suffering, hurt feelings, and other similar types of injuries which are not capable of a definite monetary valuation. Goodwin v. Kennedy, 347 S.C. 30, 45, 552 S.E.2d 319, 327 (Ct. App. 2001).

*Libel and Slander* § 363. In short, Judge Coffey's claim of headaches and stress fail to meet the requisite standard for special damages in a defamation claim; without competent evidence of special damages, she cannot prove either general or punitive damages, and her defamation claim falls like a house of cards.

Furthermore, even if she had been able to surmount the first obstacle to recovering damages in her case, the verdict here was grossly excessive. "When a verdict is grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, prejudice, or other considerations not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict." Sanders v. Prince, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991). Here, no competent evidence exists to show any damage to Judge Coffey's reputation. Judge Coffey testified that Mr. Breed's Letter did not damage her reputation among people who know her. (Tr. 360, lines 20-25). Although she claimed that Mr. Breed's Letter caused harm to her reputation among her work colleagues, her testimony was based upon pure conjecture. (Tr. 361, lines 3-19). She offered no competent evidence that anyone thought less of her. In fact, her liaison with the Town, Mr. DeLoach, testified that the Town never considered replacing her as municipal judge. (Tr. 789, lines 7-22) (795, lines 15-23). Judge Coffey received a raise in salary when her employment contract was renewed in 2011 because the Town Council was pleased with her performance. (Tr. 791, lines 6-25). Mr. DeLoach testified that Mr. Breed's Letter had no effect on his relationship with Judge Coffey. (Tr. 796, lines 21-24). Given the sparse evidence of any damages in this case, a \$6 million dollar verdict is excessive and unwarranted, and should be set aside. Prince, 304 S.C. at 239, 403 S.E.2d at 642.

**II. The Circuit Court committed reversible error by failing to rule as a matter of law that Mr. Breed's publication of the Letter was privileged.**

A. Mr. Breed's publication of the Letter was absolutely privileged.

Under the law of defamation, certain communications are deemed absolutely privileged, and "no action will lie for [their] publication, no matter what the circumstances under which [they are] published." Richardson v. McGill, 273 S.C. 142, 146, 255 S.E.2d 341, 343 (1979). Whether an absolute privilege exists is based upon considerations of public policy. Id. In Judge Coffey's Amended Complaint, she alleged that Mr. Breed "prepared a letter addressed to the Commission on Judicial Conduct ... in which he impugned the character, honesty and fitness of the Plaintiff to engage in her business, trade, profession and/or office." (Am. Compl. ¶ 14). Mr. Breed's Letter to the Commission is protected by an absolute privilege. Rule 13, RJDE, Rule 502 SCACR. Under Rule 13, "communications made to the Commission, Commission counsel, or their staffs relating to misconduct or incapacity ... shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant."

Rules such as Rule 13 articulate a broad public policy of encouraging people to report judicial misconduct without fear of retaliation. *See, e.g., Morgan & Pottinger v. Botts*, 348 S.W. 3d 599, 604, 2011 Ky. LEXIS 55, \*14 (Ky. 2011) ("In order to maintain a self-regulating profession, the investigation of unethical conduct must be vigorous and complainants must be free of any civil liability. Any lesser grant of immunity would have a chilling effect on the reporting of attorney misconduct"); In re Smith, 989 P.2d 165, 172, 1999 Colo. LEXIS 1006 \*19 (Colo. 1999) ("The public policy of encouraging people to report lawyer misconduct has been consistently favored over the right of a lawyer who has been falsely accused to obtain judicial relief"). In her Amended Complaint, Judge Coffey acknowledged that the action of filing the Letter with the Commission was "privileged by rule;" however, she then proceeded to allege that

the contents of the Letter were defamatory. (Am. Compl. ¶ 15). Rule 13 makes no distinction between the act of filing the complaint and the substance of the complaint itself. To conclude otherwise would defeat the privilege clearly intended to protect those who file complaints against a sitting judge. The Letter is absolutely privileged, and any defamation suit predicated thereon is not actionable.

Mr. Breed was not prohibited from disclosing his complaint to others. *Cf. Richardson v. State of South Carolina*, 377 S.C. 103, 107, 659 S.E.2d 493, 495 (2008) (stating that under Rule 12(a) of the Rules for Lawyer Disciplinary Enforcement, the complainant is not prohibited from disclosing complaint against attorney). Although Rule 13 may not state explicitly that absolute privilege attaches to a copy of a letter to the Commission provided to persons other than the Commission, the limits of absolute privilege are determined by consideration of public policy. *Richardson v. McGill*, 273 S.C. at 146, 255 S.E.2d at 343. Courts have long held that, “Judges are supposed to be men [and women] of fortitude, able to thrive in a hardy climate.” *Rinaldi v. Holt*, 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1306 (N.Y. 1977), *citing Craig v. Harney*, 331 U.S. 367, 376, 67 S. Ct. 1249, 1255 (1947). “An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs.” *Rinaldi*, 42 N.Y.2d at 381, 366 N.E.2d at 1306. A judge “runs the risk of closer public scrutiny than might otherwise be the case.” *Id.* This is so because a judge shall “avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Canon 2, Rule 501, SCACR.<sup>35</sup> If this Canon is to be more than mere words, the public must be able to voice any impropriety, real or perceived, without fear of retribution exacted by a member of the judiciary. The policy reflected in South Carolina’s Rules for Judicial Disciplinary Enforcement seeks to shelter complainants

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<sup>35</sup> Under Canon 2, judges are further instructed that they must “respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Canon 2.A, Rule 501, SCACR.

from the inherently more powerful position of a judge. In fact, the outcome in this case is precisely what Rule 13 seeks to avoid. In this case, an individual filed a complaint with the Commission against a municipal judge. In his preparation and after sending the complaint, he published the complaint to the people he believed should see it – his employer and a town administrator. In retaliation, the judge brought a lawsuit and was awarded a multi-million dollar award. This message will not be lost on future potential complainants who will think long and hard before raising perceived issues of judicial impropriety to the Commission.

Judge Coffey testified before the jury that the only way to get rid of the negativism and stigma that came from the judicial complaint filed by Mr. Breed was to file this lawsuit because “there was no other way for me to be vindicated, ... my stress wouldn’t leave until I was vindicated” and “my future wouldn’t be any brighter unless I was vindicated.” (Tr. 284, lines 14-23). However, she was not without recourse to protect her interests. In order to protect his or her interests, a judge may apply to the Commission for a protective order “prohibiting the disclosure of specific information otherwise privileged ....” Rule 12(d), RJDE, Rule 502, SCACR. Thus, a mechanism exists where an absolute privilege enjoyed by a complainant must yield upon application for a protective order and for good cause shown. As Judge Coffey did not seek a protective order covering the Letter, she voluntarily passed up the opportunity afforded her under Rule 12 to require confidentiality.

Because the Letter is absolutely privileged, the trial judge committed reversible legal error in failing to dismiss Judge Coffey’s claims that are based on it. This issue should never have gone to the jury; instead, the Circuit Court should have determined the absolute privilege

barred any defamation claims based on the Letter.<sup>36</sup> This Court should reverse the verdict and hold as a matter of law that the Letter is absolutely privileged and that, to the extent Judge Coffey's claims are based on the contents of the Letter, those claims are dismissed.

B. Mr. Breed's publication of the Letter was conditionally privileged.

In a defamation action, a defendant may assert the affirmative defense that his publication was conditionally privileged. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). A publication is conditionally privileged if: "1) the matter is published upon an occasion that makes it conditionally privileged, and 2) the privilege is not abused." Fountain v. First Reliance Bank, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012). "The essential elements of a conditionally privileged communication may be enumerated as good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only." Id. It is the duty of the court to determine if the statement is privileged as a matter of law. Murray v. Thornton, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001). A conditional privilege must be proved by the defendant by the greater weight of the evidence or the preponderance of the testimony. McClain v. Anderson Free Press, 232 S.C. 448, 465, 102 S.E.2d 750, 759 (1958). Where the occasion gives rise to a qualified privilege, the burden shifts to the plaintiff to show that the privilege was lost through abuse or excessive publication. Swinton Creek, 334 S.C. at 484, 514 S.E.2d at 134.

If the trial judge determines that a conditional privilege exists, then generally, a jury decides whether the privilege was abused. Swinton Creek, 334 S.C. at 484-85, 514 S.E.2d at 134. However, "in the absence of a controversy as to the facts ... it is for the court to say in a given instance whether or whether not the privilege has been abused or exceeded." Woodward

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<sup>36</sup> In fact, the trial judge seemed confused about the privilege issue, (Tr. 1752, line 20 – 1753, line 12) (Tr. 1825, line 20 – 1827, line 21), and improperly sent the issue of whether the Letter was absolutely privileged to the jury. (Tr. 1883, line 23 – 1886, line 14).

v. S.C. Farm Bureau Ins. Co., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981); Fountain, 398 S.C. at 446, 730 S.E.2d at 311 (instructing that, “[w]hile abuse of the privilege ordinarily is a question of fact for the jury, it is for the court to determine in the first instance whether there are facts demonstrating abuse”).

The only publications of the Letter by Mr. Breed – to Mr. Kelley and to Mr. DeLoach – were conditionally privileged.<sup>37</sup> To the extent the Letter was published to the broader community, such publication was the result of Plaintiff’s own actions in filing a public complaint and otherwise disseminating the contents of the Letter herself.<sup>38</sup>

1. Mr. Breed’s publication to his employer was conditionally privileged.

Mr. Breed testified that he provided a copy of his Letter to Mr. Kelley, his supervisor, before he mailed it to the Commission. (Tr. 1155, line 21 – 1156, line 9) (Tr. 1159, lines 6-10). After the Letter was mailed, on June 11, 2008, Mr. Breed provided Mr. Kelley with a routine security report in which he included, under the heading of “Confidential,” a copy of his Letter. (PEX #8). Mr. Breed attached his Letter because he believed it to be relevant to his duties as Director of Security. (Id.) Mr. Breed did not provide a copy of the Letter to anyone else affiliated with Sea Pines CSA. (Tr. 1178, lines 7-18). Mr. Breed’s transmittal of a copy of his Letter to his employer, Sea Pines CSA, is conditionally privileged.

“Under South Carolina law, communications between servants, business associates,

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<sup>37</sup> Appellant CSA addresses publication to the CSA Board in its Brief. Appellant Breed adopts their argument pursuant to Rule 208(b)(6), SCACR.

<sup>38</sup> Although her counsel argued in closing that Appellants “started passing it out in the Sea Pines Community – and we all know that’s what happened – that’s a further publication,” (Tr. 1761, lines 15-18) (Tr. 1813, line 5 (“It went all over the place”)), Judge Coffey failed to prove that Mr. Breed or CSA made any publication of the Letter that was unprivileged. Instead, Judge Coffey admitted her assertions of broad dissemination were based on speculation and hearsay. (Tr. 215, lines 23-25) (Tr. 412, line 16 – 427, line 19) (Tr. 1705, lines 17-23). The Supreme Court “has repeatedly announced that counsel must make arguments which are fair and justified by the facts ...” Rivers v. Industrial Life & Health Ins. Co., 173 S.C. 45, 49, 174 S.E. 595, 596 (1934); *see also* Mizell v. Glover, 351 S.C. 392, 401, 570 S.E.2d 176, 181 (2002) (finding incorrect statements of fact in a closing argument to be highly prejudicial). Furthermore, argument of counsel is not evidence. *See, e.g., Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991).

officers, or agents of the same corporation enjoy a qualified privilege.” Bell v. Evening Post Publ. Co., 318 S.C. 558, 560, 459 S.E.2d 315, 317 (Ct. App. 1995). It was entirely appropriate for Mr. Breed to provide a copy of the Letter to his supervisor. Mr. Breed wrote the Letter in his capacity as Director of Security. The Letter related to law enforcement investigations of incidents occurring within Sea Pines Plantation. Therefore the Letter was communicated in a proper manner and on a proper occasion. Conwell v. Spur Oil Co., 240 S.C. 170, 180, 125 S.E.2d 270, 275 (1962).

Judge Coffey failed to adduce evidence showing that Mr. Breed exceeded this privilege. The undisputed evidence shows that Mr. Breed provided a copy of the Letter to Mr. Kelley and no one else within CSA; thus, the privilege was not exceeded. Further, Judge Coffey failed to meet her burden of establishing abuse of this privilege.<sup>39</sup> “[W]hen only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court.” Hanahan v. Simpson, 326 S.C. 140, 149, 485 S.E.2d 903, 908 (1997). Here, the trial court erred by failing to conclude that the privilege was not exceeded or abused. *See* Creech v. South Carolina Wildlife & Marine Resources Dep’t, 328 S.C. 24, 491 S.E.2d 571 (1997).

2. Mr. Breed’s publication to the Assistant Town Manager was conditionally privileged.

Mr. Greg DeLoach was employed by the Town as an Assistant Town Manager. (Tr. 743, lines 16-21). He reported to the Town Manager who answered directly to the Town Council. (Tr. 744, lines 10-19) (Tr. 762, lines 4-17). One of Mr. DeLoach’s areas of responsibility was supervision of the municipal court. (Tr. 746, lines 20-22) (Tr. 785, lines 8-16). He was responsible for negotiating the Town’s employment contract with Judge Coffey and had in the past made recommendations to the Town Council regarding renewal of her contract. (Tr. 762,

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<sup>39</sup> To show abuse of a conditional privilege in this case, Judge Coffey must show constitutional actual malice. Restatement 2d of Torts § 600. Section I.A. of this Brief addresses Judge Coffey’s failure to meet her burden of proving actual malice.

line 22 – 763, line 8) (Tr. p. 764, lines 4-7). As Assistant Town Manager, Mr. DeLoach has received complaints about town employees, including town judges. (Tr. 783, lines 12-25). Judge Coffey testified that Mr. DeLoach is her liaison to the Town Council. (Tr. 214, line 24 – 215, line 1). She further testified that Mr. DeLoach is the designated person to negotiate her contract on behalf of the Town. (Tr. 1671, lines 2-6).

Mr. DeLoach testified that Mr. Breed called him to complain that Judge Coffey was inserting herself into an investigation of her brother. (Tr. 746, lines 6-9) (Tr. 747, line 25 – 748, line 6). Mr. Breed called Mr. DeLoach because he believed that Judge Coffey reported directly to Mr. DeLoach. Mr. DeLoach told Mr. Breed that he could complain to the Town Council or file a complaint with the Commission. (Tr. 1124, line 5 – 1125, line 21). At some point in time, Mr. DeLoach received a copy of the Letter to the Commission. (Tr. 749, lines 2-6) (Tr. 1124, lines 15-24). Mr. DeLoach testified that Mr. Breed never said anything to him that was derogatory toward Judge Coffey, nor did he say that he wanted Judge Coffey fired. (Tr. 796, lines 2-7).

Mr. Breed's transmittal of the Letter to Mr. DeLoach is conditionally privileged. "A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty ...." Conwell, 240 S.C. at 178, 125 S.E.2d 274-275. A conditional privilege "is based on the public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public." 50 Am Jur 2d *Libel and Slander* § 258. Mr. Breed's position as head of CSA Security required him to protect the interests of the residents and guests of Sea Pines. (Tr. 1641, line 22 – 1642, line 1). It was in this capacity that he wrote

the Letter and shared his concerns about Judge Coffey with Mr. DeLoach. (Tr. 1124, line 5 – 1125, line 21) (Tr. 1645, line 15 – 1646, line 5).

The Assistant Town Manager exercises authority delegated by the Town Manager, who is the chief executive officer and administrative head of the Town. S.C. Code Ann. § 5-13-90. “The governing body of the municipalities or its agents may investigate any department of the municipal government and any office thereof ....” S.C. Code Ann. § 5-7-100 (emphasis added). Thus, Mr. DeLoach or the Town Manager possessed the statutory authority to initiate an investigation of Judge Coffey.

Additionally, Judge Coffey’s employment contract with the Town of Hilton Head Island implicitly gave the Town administration authority to investigate or oversee compliance with its terms. Her employment contract obligated Judge Coffey to “at all times and to the best of her ability perform the duties of this position as set forth by The Supreme Court of South Carolina ....” (PEX #1). Under the contract, the Town had the right to terminate Judge Coffey’s employment without notice if she engaged in “misfeasance or malfeasance in office.”<sup>40</sup> (*Id.* at p. 3). Again, Mr. Breed’s provision of his Letter to the Assistant Town Manager, Mr. DeLoach, fell within the authority of his office to receive.

In addition, because Judge Coffey holds a public office, representing the judicial branch of the Town of Hilton Head Island, her actions as municipal judge are matters of public interest and are subject to criticism. The privilege of fair comment applies to opinion, comment, or criticism based upon facts that are true or substantially true. 50 Am Jur 2d *Libel and Slander* §

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<sup>40</sup> Mr. DeLoach testified that a judge who was not fair and impartial would cause him concern. (Tr. 796, line 25 – 797, line 3). He testified that a judge should not become involved in a criminal investigation of a family member and should not tell a law enforcement officer to stop harassing her family. (Tr. 797, lines 4-12). These concerns could very well have been sufficient, in the discretion of the Town, to trigger an investigation of Judge Coffey.

317. As noted above, Judge Coffey failed to meet her burden of proving the statements in the Letter were false. Hence, the communication of the Letter to Mr. DeLoach is protected by the fair comment privilege.

“Publications dealing with political matters, public officers and candidates for office are entitled to a measurable privilege by reason of the public interest involved therein.” Cartwright v. Herald Pub. Co., 220 S.C. 492, 499-500, 68 S.E.2d 415, 418 (1951). “When a citizen holds a public office or holds himself as a candidate for public office, he becomes an object of legitimate criticism, his policies, acts, and fitness, and qualifications for the office he holds, and any newspaper or any citizen is privileged to publicly criticize him and discuss him thereabout without being held liable for damages.” Id., 220 S.C. at 503, 68 S.E.2d. at 419. “The likelihood of criticism, justified or unjustified, is one of the hazards of public service.” Oswalt v. State-Record Co., 250 S.C. 429, 434, 158 S.E.2d 204, 207 (1967). “When a citizen holds a public office he becomes subject to criticism; any citizen and any newspaper is privileged to criticize his acts, fitness and qualifications for the office he holds and discuss his work without being liable for damages so long as the criticism is fair and honest, and made without malice.” Id., 250 S.C. at 435, 158 S.E.2d at 207.

Thus, the important public interest in accountability of public officers gives rise to a conditional privilege attaching to Mr. Breed’s transmittal of his Letter to the Assistant Town Manager. The trial judge erred by allowing the question of whether this privilege existed to go to the jury. (Tr. 1424, lines 21-24); see Murray, 344 S.C. at 140, 542 S.E.2d at 749 (holding that it is the duty of the court to determine if the statement is privileged as a matter of law). Further, because Judge Coffey has failed to establish any excessive publication or actual malice<sup>41</sup> toward her on Mr. Breed’s part, there is no evidence in this record that the privilege was forfeited.

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<sup>41</sup> See footnote 40 above.

To compound these errors, the trial judge rejected Appellants' qualified privilege argument in their JNOV Motion, erroneously holding that "while a qualified privilege likely extended to Breed's publication of the Letter to the CSA Board, his employer, it is clear that any privilege that may have existed between Breed and the CSA Board was exceeded when that confidential Letter was given to Greg DeLoach, the Assistant Hilton Head Town Administrator whose departments include managing the Town's Municipal Court." (Order, p. 2). Thus, the trial judge erred as a matter of law by failing to distinguish between two separate privileges, one applicable to Mr. Breed's publication to Sea Pines CSA (via Mr. Kelley) and another to the Town (via Mr. DeLoach). Where a ruling on a motion for directed verdict or judgment notwithstanding the verdict is controlled by errors of law, reversal is warranted. Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003).

This Court should reverse the verdict and hold, as a matter of law, that any publication of the Letter by Mr. Breed was privileged and, therefore, not actionable.

**III. The Circuit Court committed evidentiary errors that require reversal.**

- A. The Circuit Court erred by admitting evidence into the record after closing arguments and after the jury had been instructed and sequestered.
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During the course of the hearing, a CSA financial statement ("Financial Statement") (PEX #36), was identified for the record but not admitted. Defense counsel stipulated to its authenticity but objected to its admissibility. (Tr. 1376, lines 12-19). Judge Coffey's counsel did not move again to have the Financial Statement entered into evidence until after closing arguments, at which time he admitted he had been waiting to hear how the Judge would rule on the motions for directed verdict and then simply forgot to move to have it admitted. At that point, the trial judge advised Judge Coffey's counsel that she did not believe he could enter it into the record, "because you didn't get it in for anyone." (Tr. 1866, line 6 – 1869, line 10).

Nonetheless, after the jury had been charged and sequestered, the Financial Statement was reconsidered. Defendants again objected to admission of the Financial Statement, prompting the trial judge to ask:

Court: Why wasn't it admissible?

Defense Counsel: Because you have to do something to admit it, and he didn't do anything to admit it.

...

Court: Okay. Never mind. I am going to let it in.

(Tr. 1914, lines 4-15).

The admission of the Financial Statement at this point in the trial raises serious due process concerns and requires a new trial. State v. Hill, 394 S.C. 312, 714 S.E.2d 879 (Ct. App. 2011); *see also* State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (Wash. 2004). In both Hill and Pete, evidence was put before the jury that had not been admitted at the trial.<sup>42</sup> In both cases, the courts held that exposing the jury to evidence that had not been admitted during the trial was reversible error because, among other reasons, the defendants were not able to object or explain or cross-examine witnesses regarding the evidence. Hill, 394 S.C. at 328, 714 S.E.2d at 888; Pete, 152 Wn.2d at 555, 98 P.3d at 808. Other courts concur. “[T]he principle that the jury may consider only matter that has been received in evidence is so fundamental that a breach of it should not be condoned if there is the slightest possibility that harm could have resulted.” United States v. Adams, 385 F.2d 548, 550-551 (2<sup>nd</sup> Cir. 1967);<sup>43</sup> *see also* United States v. Barnes, 747 F.2d 246, 250 (4<sup>th</sup> Cir. 1984) (holding that “[i]f prejudicial evidence that was not introduced at trial comes before the jury, the defendant is entitled to a new trial”); Harris v. State, 168 Ga. App. 159, 162, 308 S.E.2d 406, 408 (Ga. Ct. App. 1983) (the danger of allowing a jury to review evidence not admitted during trial presents an “extreme” danger and requires reversal);

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<sup>42</sup> In both cases, although never formally moved into evidence, the evidence was clearly admissible.

<sup>43</sup> As was the case here, when it was pointed out to the court in Adams that the evidence had not been admitted during the hearing, “the court replied, ‘if it isn’t in evidence, it is now,’ and sent the exhibits to the jury room.” Id.

Vaughn v. United States, 367 A.2d 1291, 1296, 1977 D.C. App. LEXIS 406 \*16 (D.C. 1977) (holding that, “[w]here unadmitted evidence is transmitted to the jury by a mistaken ruling of the trial court over the objection of trial counsel, we deem that error to be so fundamental that it would require reversal if there is the ‘slightest possibility that harm could have resulted’”).<sup>44</sup>

In this case, the admission of the Financial Statement after the Defense had rested its case, after closing arguments and jury instructions had been given, and the jury had been sequestered denied Appellants the opportunity to explain the document or the purpose of the funds in the unallocated reserve fund or any other relevant information regarding CSA’s financial situation. It denied Appellants the opportunity to offer a witness, testimony or other evidence in rebuttal of the suggestion that the \$6.7 million in the unallocated reserve fund was available to pay Judge Coffey’s damages. (Tr. 1783, lines 2-12). It denied Appellants the opportunity to seek a jury instruction limiting the use to which the Financial Statement could be put. The prejudicial effect of this erroneous ruling is evident from the facts that: 1) Judge Coffey sought only \$500,000 in actual damages and, at most, twice that in punitive damages, (Tr. 1783, line 1 – 1785, line 5); 2) Judge Coffey failed to prove any ascertainable damages to her reputation as the result of CSA and/or Mr. Breed’s publication of the Letter; 3) the jury deliberated for only a short period of time in what was an admittedly long and complex case; and, in the end, 4) the total award, \$6,006.050 was only slightly less the amount of the unallocated reserve fund (\$6,700,000.00) that the Financial Statement described. Because there is evidence of the prejudicial effect of the late submission of the Financial Statement to the jury, at a minimum the verdict must be overturned and a new trial ordered.

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<sup>44</sup> Evidence relating to the financial wealth of a defendant “must be handled cautiously, since ‘the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses ...’” Sulton v. HealthSouth Corp., 400 S.C. 412, 420, 734 S.E.2d 641, 645 (2012), citing Branham v. Ford Motor Co., 390 S.C. 203, 239, 701 S.E.2d 5, 24 (2010).

B. The Circuit Court erroneously admitted character and prior bad act evidence.

The Judge in this case committed reversible error by admitting character evidence and allowing testimony intended to establish prior bad acts in order to “smear” the character of Mr. Breed. Judge Coffey’s counsel readily admitted that her case-in-chief was designed specifically to “damage” and to “show George Breed is not [a] teller of the truth.” (Tr. 899, line 20- 900, line 2). These errors were extremely prejudicial and require this Court, at a minimum, to order a new trial.

Evidence of a person’s character generally “is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” Rule 404(a), SCRE. “The general rule in civil cases is that reputation or character of the ... defendant is not admissible.” Smoak v. Robinson, 156 S.C. 370, 373, 153 S.E. 342, 343 (1930). The three exceptions listed under Rule 404(a)<sup>45</sup> are not applicable to the case at hand.

The Circuit Court erred by allowing Judge Coffey to introduce extremely prejudicial evidence intended to cast Mr. Breed’s character in a negative light before he or any other witness put his character at issue. *See, e.g., State v. Major*, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990) (prosecution can inquire into an accused’s character once the accused puts his character at issue, but “is restricted ... to showing bad character only for the traits initially focused on by the accused”). The trial judge recognized this rule, (Tr. 352, line 8 – 353, line 16) (Tr. 636, lines 10-15), indicating that she would let character evidence in if Mr. Breed put his character at issue, but then allowed the prejudicial character evidence to be presented to the jury before Mr. Breed’s

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<sup>45</sup> Rule 404(a) allows “[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same,” as well as evidence concerning the character of a victim or a witness.

deposition testimony was even read to the jury.<sup>46</sup> The closest Mr. Breed came to testifying to his character was when Judge Coffey's counsel asked him whether the contents of the deposition he gave in an unrelated case were true:

Q: Do you have a habit of not telling the truth?

A: No, sir, I'm not.

(Tr. 1229, lines 16-23). Nonetheless, the Circuit Court allowed additional character evidence to be presented to the jury. (Tr. 1139, line 25 – 1140, line 12) (Tr. 1313, line 19 – 1315, line 3 (Judge Coffey's counsel accusing Mr. Breed of "banishing" "undesirables" from Sea Pines)) (Tr. 1315, line 12 – 1318, line 24 (accusing Mr. Breed of suspending Anne Coffey's guest pass privileges)) (Tr. 1583, lines 14-23 (accusing Mr. Breed of lying about whether he knew who John Levy was)).<sup>47</sup>

In addition, evidence of other "crimes, wrongs or acts" *i.e.*, prior bad acts, is generally inadmissible except to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; *see also* Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009). The reason for this prohibition is that this kind of evidence risks predisposing a jury to find that, because a defendant has committed other "bad acts," he or she is guilty of the one at issue in the case. It confuses the issues, requires a defendant to defend against multiple, unrelated charges, and "diverts the attention of the jury from the one immediately before it." State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). That is precisely what occurred here. Furthermore, where the prior bad acts were not the subject of a conviction, "they must be proven by clear and convincing evidence." Judy, 384 S.C. at 642,

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<sup>46</sup> *See, for example* (Tr. 260, line 24 – 261, line 12 (Judge Coffey testifying that Mr. Breed said she had had an affair with Mr. Jolin)) (Tr. 500, line 10 – 508, line 14 (Mr. Jolin testifying about the "light kicking incident")) (Tr. 570, lines 14-25 (Mr. Jolin testifying that Mr. Breed told him to lie to Detective Florencio)).

<sup>47</sup> Mr. Breed never denied knowing who Mr. Levy was. He readily acknowledged he knew Mr. Levy was arrested. What Mr. Breed could not state with certainty is for what crimes he was arrested and convicted. (Tr. 1222, lines 15-21).

682 S.E.2d at 840. None of the prior bad acts submitted by Judge Coffey met this standard. In addition, there must be at least some logical connection between the prior bad act and the burden of proof the party introducing it must meet. In other words, simply showing someone may have committed other objectionable acts is insufficient. See State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (2004); see also. Lyle, 125 S.C. at 417, 118 S.E. at 806 (explaining that “the acid test is [the evidence’s] logical relevance to the particular excepted purpose or purposes for which it is sought to be introduced,” and cautioning that, “the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the Courts to rigid scrutiny”). Here, there was no logical relevance between the bad acts testimony and Judge Coffey’s burden of proof in this case. Finally, even where evidence is submitted under the rationale that it proves motive or intent, “it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). “Unfair prejudice means ‘an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one.’” Sweat, 362 S.C. at 128, 606 S.E.2d at 514. Again, that is precisely what occurred here.

While evidence of motive or care may “bear some relation to the actual malice inquiry ... ‘courts must be careful not to place too much reliance on such factors.’” Elder v. Gaffney, 341 S.C. at 115, 533 S.E.2d at 902. In this case, Judge Coffey presented no evidence whatsoever that Mr. Breed had any underlying motive with respect to her, other than that he wanted her to stop interposing herself between security and law enforcement activities and her brother Otis. Thus, the prior bad acts evidence does not fall within the motive exception to Rule 404, SCRE.

Judge Coffey suggested she was offering the “prior bad acts” evidence of various CSA personnel (such as the allegations regarding what was referred to as the “light kicking” case) because she wanted “to show guilty state of mind by people at Sea Pines Security, at or about the same time this event went on.” (Tr. 331, line 24 – 336, line 21).<sup>48</sup> However, a defendant’s state of mind is not one of the exceptions listed in Rule 404(b), SCRE. Although the trial judge cautioned Judge Coffey that, despite her burden of proof, she still had to “live by the rules under 404(b),” (Tr. 336, lines 14-16), the judge later allowed the testimony. (Tr. 500, lines 16 – 501, line 3) (Tr. 507, line 13 – 508, line 17). At one point, the trial judge agreed that additional evidence regarding this issue was “too far fetched,” (Tr. 909, line 18 – 915, line 19), but still allowed those portions of Mr. Breed’s and Mr. Kelly’s depositions to be read to the jury. (Tr. 1250, line 6 – 1251, line 2) (Tr. 1355, line 13 – 1358, line 22).

In addition, despite a running objection from the Defense, (Tr. 716, lines 12-16) (Tr. 718, lines 9-11), the trial judge allowed testimony regarding allegations that Sea Pines Security “*not prossed*” tickets in return for a contribution to the Forest Preserve. (Tr. 696, line 21 – 702, line 24) (Tr. 716, line 12 – 721, line 14).<sup>49</sup> Judge Coffey’s counsel said he was offering it for impeachment purposes, and the Circuit Court ruled, “if [Mr. Breed] flat out denied it ever occurred, I think it can be used for impeachment purposes. So, he’ll be allowed to use it.” (Tr. 702, lines 20-24). However, the testimony was presented to the jury before Mr. Breed’s deposition testimony was read. Furthermore, Mr. Breed never testified that it did not occur, but only that he was unaware of it.

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<sup>48</sup> Judge Coffey argued repeatedly that she was trying to show Mr. Breed’s “state of mind.” (Tr. 311, lines 20-22) (Tr. 335, lines 9-11) (Tr. 336, lines 9-11) (Tr. 631, lines 11-15).

<sup>49</sup> Mr. Brian Hulbert, attorney for the Town, only testified that he was aware of one incident of *not prossing* involving Sea Pines, and that he went to meet to Mr. Kelley, Executive V.P. of CSA. Mr. Hulbert indicated that Mr. Kelley said he was unaware of it but would look into it, and would stop it if it was occurring. Ultimately it turned out to be an isolated incident and was nothing more than an attempt to help a defendant out. (Tr. 716, line 22 – 719, line 10). Mr. Hulbert did not testify that Mr. Breed knew about it.

The Circuit Court erroneously allowed testimony regarding whether Mr. Breed had taped a conversation with Judge Herring in order to show that he “did record it; they have the ability to; he has; and they’re not there.” (Tr. 908, line 12 – 909, lines 17) (Tr. 881, line 5 – 882, line 15). First, the fact that Mr. Breed may have purposefully taped one phone conversation does not mean or prove that all in-coming or out-going calls from the CSA offices are taped and/or how long they would have been preserved in the normal course of business. Furthermore, the deposition sections Judge Coffey was allowed to read to the jury included her counsel’s accusations and insinuations that Mr. Breed had done something illegal. (Tr. 1191, line 19 – 1194, line 21).

As noted above, this kind of evidence is insufficient to establish constitutional actual malice. Furthermore, “[s]ince evidence of ill will is not part of the actual-malice test, its admission could cause unnecessary jury confusion and arguably restrict the speech rights of adversaries without commensurate proof that the defendant knew or suspected a falsehood.” Elder, 341 S.C. at 117, 533 S.E.2d at 904. Finally, none of the “prior bad acts” that Coffey elicited (whether CSA *not* proessed tickets; whether CSA prosecuted a defendant for an offense after a deal had been worked out; whether Mr. Breed taped a telephone conversation with Judge Herring) (Tr. 627, line 16 – 635, line 5) bore any relation to the contents of the Letter or to her burden of proof. The prior bad acts evidence introduced in this case was neither the subject of a conviction nor proven by clear and convincing evidence. Finally, the prior bad acts evidence was highly prejudicial, as it tended to paint an unflattering picture of Mr. Breed, which had nothing to do with whether he acted with actual malice in publishing the statements in the Letter.

The erroneous admission of this prejudicial and irrelevant character and prior bad acts evidence requires, at a minimum, that this Court reverse the verdict and order a new trial.

C. The Circuit Court erred by admitting other irrelevant and highly prejudicial evidence.

Numerous accounts of extraneous and unrelated alleged events or actions were introduced over Defense counsel's objections. For instance and as noted above, evidence relating to a defamation action Mr. Breed filed against a neighbor was allowed. (Tr. 1186, line 25 – 1187, line 24). Judge Coffey argued that this case “shows that [Mr. Breed] knows the value of a reputation, and what he did was willful,” and that was somehow related to his “state of mind, in that, he would understand that somebody would have an interest in protecting his reputation ...” (Tr. 904, line 9 – 907, line 16).<sup>50</sup> The trial judge expressed concern that defendants “have insisted on the heightened standard of the actual malice,” and then made the surprising statement that “[i]t's a hard burden for [Judge Coffey] to prove. And so, I don't want to tie their hands,” (Tr. 908, lines 4-11), indicating there was a loosening of the evidentiary standards in Judge Coffey's favor due to the burden she had to meet. The burden of proof a party has to meet should have nothing to do with whether particular evidence is admissible or not.<sup>51</sup>

The Circuit Court erroneously allowed testimony regarding Mr. Breed's assignment of his one-half interest in his home to his wife in July 2008 over Defense objections. (Tr. 309, lines 2-6) (Tr. 1150, line 6 – 1153, line 23). Mr. Breed consistently testified that the assignment was made for medical reasons. (Tr. 1150, lines 6-10) (Tr. 1153, lines 14-17). The Circuit Court allowed the testimony regarding the assignment solely on Judge Coffey's counsel's unfounded

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<sup>50</sup> The trial judge agreed that, “it's relevant to show that he understands the value of a reputation, a professional reputation. And I do think it goes toward showing actual malice. That, knowing all that, he still allegedly made those statements.” (Tr. 922, lines 11-22).

<sup>51</sup> At other points in the hearing, the trial judge appeared to side with or instruct Judge Coffey's counsel how to proceed with her case. For example, with respect to the indemnification issue, the Court suggested to Judge Coffey's counsel: “I think you could certainly ask Mr. Birdwell that, you're sitting in a meeting, and you read this letter; and by reading the letter, anyone with a modicum of life experience would understand how detrimental it would be to someone's profession. I mean, all you have to do is put yourself in the place of who it was written about.” (Tr. 1003, lines 11-17).

insinuation that it was indicative of “guilty knowledge” or “anticipation” that Judge Coffey might someday sue him. (Tr. 311, line 5 – 312, line 4). There is no proof whatsoever that the assignment had anything to do with anything other than personal medical reasons. Inflammatory statements and insinuations by Judge Coffey’s counsel do not constitute proof but were, in fact, highly prejudicial.

A great deal of time was spent detailing the arrest of Mr. John Thomas Levy in 2004 for certain “peeping tom” crimes in Sea Pines. Although Mr. Breed stated that he knew who Mr. Levy was, he could not specify which particular crimes he had been charged with, (Tr. 1222, lines 15-19), or for what crimes he was convicted. (Tr. 1233, line 16 – 1234, line 9). Furthermore, the sole point to the introduction of evidence and testimony regarding Mr. Levy appeared to be to prove that Otis Coffey was not the “primary suspect” in 2004. As noted above, Judge Coffey acknowledged that her brother was a suspect in 2004. The issue of whether he was the primary suspect or just a suspect is irrelevant with respect to whether the Letter was defamatory and/or false with respect to the statements made about Judge Coffey.<sup>52</sup>

Judge Coffey also asserted that Mr. Breed had had her mother’s “gate pass” pulled for a long period of time. *See* (Tr. 1140, lines 10-19). Whether or not this event even occurred, it is both irrelevant and prejudicial, as its only purpose was to cast Mr. Breed in the light of a “bully,” and thereby inflame the jury.

The Circuit Court also erred in admitting the letter from the Commission to Mr. Breed dismissing his complaint. (Tr. 257, line 8 – 258, line 23). Whether the statements in the Breed Letter were false was Judge Coffey’s burden to prove to the jury. *See, e.g., Erickson*, 368 S.C. at

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<sup>52</sup> The Levy issue was another instance where Judge Coffey’s counsel asked questions in an inappropriate and unfair manner, insinuating that Mr. Breed was untruthful. Although, as noted above, Mr. Breed acknowledged he knew who John Levy was, Judge Coffey’s counsel asked Captain McSwain, “Would it surprise you to learn ... that Mr. Breed did not know who John Thomas Levy was? A: I would – yeah, I would find that hard to believe.” (Tr. 1583, lines 14-16).

467, 629 S.E.2d at 665. The Commission letter was highly prejudicial in that it improperly suggested to the jury that the statements and opinions in Mr. Breed's Letter were false. (Tr. 135, line 24 – 138, line 11).

The Circuit Court also erred in allowing testimony and evidence concerning the CSA Board's decision to indemnify Mr. Breed, which should have been excluded under Rules 402, 403 and 411, SCRE. (Tr. 1023, line 4 – 1026, line 4). Upon objection, (Tr. 284, line 25 – 285, line 8) (Tr. 313, lines 14-18), Judge Coffey's counsel explained that he wanted to present this to show the jury that the Board ratified Mr. Breed's actions in sending the Letter to the Commission, and/or that the CSA Board believed the statements about Judge Coffey in the Letter. (Tr. 288, line 13 – 290, line 13) (Tr. 313, line 19 – 314, line 24) (Tr. 877, lines 4-18). The Circuit Court initially ruled that the indemnification issue was not admissible. (Tr. 873, lines 19-23). However, at a point during the testimony of Mr. Birdwell, Judge Coffey's counsel again moved to introduce the indemnity issue and the Circuit Court allowed it over Defense counsel's running objection. (Tr. 1001, line 5 – 1021, line 12) (Tr. 1248, line 10 – 1249, line 19).

First, the indemnification issue was raised to prove liability and, as such, runs afoul of Rule 411, SCRE, which provides, in relevant part, that “[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” Second, its potential for prejudice clearly outweighed any probative value, given the lack of relevance and the clear signal that the jury could award a substantial verdict against Mr. Breed because his costs were being covered by the CSA Board. *See Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 45, 426 S.E.2d 756, 757-58 (1993)

(admonishing that the “reason for the rule is to avoid prejudice in the verdict, which might result from the jury’s knowledge that the defendant will not have to pay it”).

Because all of this evidence was irrelevant but highly prejudicial,<sup>53</sup> the verdict must be reversed and the case remanded for a new trial.

D. The Circuit Court erred by allowing witnesses to testify who had not been identified prior to trial.

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Over objection by Defense counsel, (Tr. 138, line 18 – 159, line 25), the Circuit Court erred by allowing several witnesses to testify who had not been identified by Judge Coffey in her response to interrogatories. *See* Bensch v. Davidson, 354 S.C. 173, 182, 580 S.E.2d 128, 132-33 (2003) (noting that the “parties’ disclosure of information before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing”). Despite her ongoing duty under Rule 33(b), SCRCP, to update her responses, Judge Coffey failed to identify several fact witnesses or any expert witnesses. (CT EX #2). Nonetheless, at trial, Judge Coffey was allowed to present the testimony of a number of fact witnesses who had not been identified prior to trial, as well as one expert witness, Dr. Lynn E. Geiger. The trial judge failed to perform any meaningful analysis as required under Bensch,<sup>54</sup> which constitutes legal error and requires reversal.

With respect to fact witnesses, Judge Coffey’s counsel acknowledged that he had failed to list Richard Sonberg as a witness, but argued the testimony was “in lieu of” another witness who was unavailable and that he had been “disclosed” during Judge Coffey’s deposition. (Tr.

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<sup>53</sup> *See* State v. Johnson, 334 S.C. 78, 92-93, 512 S.E.2d 795, 803 (1999) (advising that the “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial”),  *citing* Tennant v. Marion Health Care Found., 194 W.Va. 97, 117-118, 459 S.E.2d 374, 394-395 (1995) (noting that the cumulative error rule applies to civil cases).

<sup>54</sup> The factors the trial court should have considered are: “the type of witness involved, the content of the evidence, the explanation for the failure to name the witness in answer to the interrogatory, the importance of the witness’ testimony, and the degree of surprise to the other party.” Bensch, 354 S.C. at 182, 580 S.E.2d at 133.

140, line 20 – 142, line 10) (Tr. 147, line 17 – 149, line 13). Defense counsel had no opportunity to depose Mr. Sonberg prior to trial, and the Circuit Court’s resolution – providing Mr. Sonberg’s phone number the day before he was to testify, (Tr. 150, lines 7-23) – did not cure the error. A similar error was committed when the Circuit Court allowed the testimony of William Waxel, a CSA employee who was not identified until immediately prior to trial. Judge Coffey argued that her interrogatory responses included “any other CSA employee.” (Tr. 142, lines 14-25) (Tr. 152, lines 5-12). Despite the Circuit Court’s concern about “trial-by-ambush,” and Judge Coffey’s failure to update her discovery responses pursuant to Rule 33(b), (Tr. 158, lines 1-18), and despite the Circuit Court’s conclusion that she would allow the late-noticed witnesses to testify as rebuttal witnesses, (Tr. 159, lines 17-20), Mr. Sonberg and Mr. Waxel were allowed to testify in Judge Coffey’s direct case.<sup>55</sup>

Judge Coffey insists that Dr. Geiger was disclosed through her “catch all” interrogatory response that every physician she had seen was a “likely witness in this case.” (Tr. 149, lines 17-25) (Tr. 139, line 13 – 140, line 10). Despite Defendants’ objections, (Tr. 927, line 10 – 929, line 22), Dr. Geiger was allowed to testify. (Tr. 931). Defendants were prejudiced in that the only way they could have adequately prepared for trial under Judge Coffey’s and the Circuit Court’s approach was to depose every single one of the 11 health care providers Judge Coffey saw over the past five years, as well as every current and former CSA employee and any individual mentioned in any deposition. Such an approach is inherently unfair and essentially results in “trial-by-ambush.”

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<sup>55</sup> The trial judge explained her ruling on the deposition, and “I think there was even a mention of, well, you need to go talk to him.” (Tr. 635, line 7 – 636, line 9). The trial judge allowed Mr. Waxel to testify, stating its only concern was whether he was (or had been) a CSA employee. (Tr. 153, line 22 – 154, line 10).

E. The Circuit Court erroneously admitted impermissible hearsay evidence.

Over Defense counsel's objections, numerous instances of hearsay were permitted based on the premise that the individual who allegedly made the statement was subpoenaed to testify and/or was present in the courtroom at the time of the hearsay testimony. *See, e.g.*, (Tr. 213, line 11 – 214, line 14) (Tr. 217, line 8 – 226, line 23) (Tr. 278, lines 2-22). The Circuit Court relied on Rule 801(d), SCRE, ruling that, "statements which are not hearsay is a prior statement by a witness that is subject to cross-examination either by deposition or, more specifically, in this case, it's who's going to be testifying." (Tr. 226, lines 2-7). This is not and never has been the test for whether a statement is hearsay. The problem with the trial judge's ruling is that she failed to take into account all of the requirements of Rule 801(d), which provides a statement is not hearsay if the declarant testifies at the trial, is subject to cross-examination **and** the statement is: inconsistent with the declarant's testimony, or consistent with the declarant's testimony and offered to rebut a charge of recent fabrication, or an identification of a person after observation, or a statement by the victim in a criminal sexual conduct case. Rule 801(d)(1)(A)-(D), SCRE. As none of these sections apply to any of the hearsay testimony in this case, it should not have been allowed. The hearsay evidence was prejudicial to Appellants' defense<sup>56</sup> and requires a remand for a new trial. State v. Williams, 285 S.C. 544, 552, 331 S.E.2d 354, 359 (Ct. App. 1985), *citing* Cooper Corp. v. Jeffcoat, 217 S.C. 489, 495, 61 S.E.2d 53, 56 (1950) (where hearsay is erroneously admitted, prejudice is presumed if the hearsay had some probative value on a material fact in the case").

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<sup>56</sup> For example, Judge Coffey testified to statements made by Mr. Hulbert when she asked him to help her respond to the Letter filed with the Commission, (Tr. 213, line 11 – 214, line 14), purportedly to show that Mr. Breed had shown the Letter around to various people. She similarly was allowed to testify to what Mr. DeLoach told her as part of her theory that he shared the Letter with Mr. Coltrane. (Tr. 217, line 8 – 226, line 23). She later admitted that the only evidence she had that Mr. Breed or CSA made any unprivileged publication of his Letter was based on hearsay. (Tr. 413, line 20 – 414, line 5).

F. The Circuit Court erred by refusing to admit relevant evidence.

The Circuit Court committed reversible error in barring relevant evidence proffered by Appellants. For instance, Appellants sought to introduce a Complaint filed by attorney Russ Keep with the Commission in order to demonstrate that part of the stress Judge Coffey claims was caused by unprivileged publication of the Letter instead was caused, at least in part, by a subsequent complaint filed against her with the Commission. (Tr. 116, line 11 – 118, line 22). The fact that the Keep Complaint resulted in a letter of caution to Judge Coffey strongly suggests it caused her stress and anxiety. The Circuit Court omitted the Keep Complaint apparently, at least in part, due to its own view of the validity of the Complaint, which was improper.<sup>57</sup> The Circuit Court indicated that evidence of the Keep Complaint would be allowed if, on cross examination, the Defense “need[ed] to say is it true that [you had these other stressors] ... but we’re not going to see it as you’re a bad judge ... because you’ve had two grievances filed against you.” (Tr. 126, line 23 – 127, line 6). Nonetheless, after Judge Coffey denied the existence of other major stressors in her life, and Defense counsel attempted to introduce the Keep Complaint, the Circuit Court refused to admit it. (Tr. 447, line 22 – 451, line 22) (DEX #5, marked for identification only). This refusal prejudiced Appellants’ case and is grounds for reversal.

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<sup>57</sup> The trial judge opined, “I do not see how a grievance filed after the occurrence of all this relates in any way. Quite frankly, -- oh, I can’t even say this on the record. A grievance by Russ Keep, I don’t think, is indicative or probative of anything, other than he read it in a newspaper and he filed something.” (Tr. 120, line 19 – 121, line 6). She further characterized the Keep Complaint as “worth literally the paper it’s written on ...,” (Tr. 126, lines 4-22), and stated her belief that Mr. Keep did not know what he was talking about when he filed his grievance. (Tr. 137, lines 13-14).

**IV. The Circuit Court committed reversible error by giving an erroneous and prejudicial spoliation charge.**

A trial court must charge the current and correct law. Failure to do so requires that the verdict be reversed where the erroneous jury charge prejudiced the opposing party's case. Stokes v. Spartanburg Reg. Med. Ctr., 368 S.C. 515, 520, 629 S.E.2d 675, 678 (Ct. App. 2006).

In this case, the Circuit Court erroneously gave a spoliation charge,<sup>58</sup> even though Judge Coffey failed to prove that the evidence she alleged was lost or destroyed even existed in the first place. In every South Carolina case where a spoliation instruction was given or required, the moving party established that the evidence had been in the possession of a party at the relevant time. *See*, Kershaw Cnty. Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 394-395, 296 S.E.2d 369, 371-372 (1990) (asbestos clearly in the school board's possession prior to suit); Welsh v. Gibbons, 211 S.C. 516, 517, 46 S.E.2d 147, 148 (1948) (Coca-Cola bottle in plaintiff's possession but not made available to defendants for testing); 5 Star, Inc. v. Ford Motor Co., 395 S.C. 392, 393, 718 S.E.2d 220, 221 (Ct. App. 2011) (allegedly defective truck in the possession of plaintiff but destroyed before the suit was filed); Stokes, 368 S.C. at 520, 629 S.E.2d at 678 (medical files in possession of defendant but unavailable at trial); *see also* Silvestri v. General Motors Corp., 271 F.3d 583 (4<sup>th</sup> Cir. 2001) (case dismissed where wrecked automobile held for plaintiff's own experts to test but sold before defendants had a chance to inspect). Here, there was nothing beyond Judge Coffey's unsupported insinuations that tapes were made of various incidents. For example, despite Judge Coffey's suggestion that a tape of the May 20, 2008 incident was destroyed, Mr. Jolin testified that it was not videotaped because he was outside of his patrol vehicle. (Tr. 579, lines 21-24). Judge Coffey acknowledged that she only "assumed" her conversation with Officer Wright would have been taped. (Tr. 396, line 18 – 397, line 14).

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<sup>58</sup> Defense counsel objected to this charge. (Tr. 1836, line 12 – 1838, line 16) (Tr. 1906, lines 2-5).

Mr. Jolin could not state for certain which calls, other than the dispatch line, were routinely recorded. (Tr. 565, line 21 – 570, line 13). Furthermore, the testimony establishes that, to the extent they existed in 2008, audiotapes were routinely taped over in the normal course of business. (Tr. 566, lines 3-5) (Tr. 1095, line 1 – 1100, line 18) (Tr. 1108, line 7 – 1111, line 4) (Tr. 1239, line 22 – 1241, line 9) (Tr. 1367, line 9 – 1369, line 7). Videotapes from the cruisers were the responsibility of the individual officers. (Tr. 1109, line 2 – 1110, line 6).<sup>59</sup>

Furthermore, in order to be entitled to a spoliation charge, “the party seeking the inference must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder.” Pringle v. SLR, Inc. of Summerton, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009). At no point did Judge Coffey offer up what she believed the allegedly missing tapes would have proven or how they would have supported her defamation claim. She merely suggested that, “[i]t would be helpful if we could have that tape, that audio tape” that she assumed existed. (Tr. 393, lines 10-16). “Erasure of a tape recording when done as part of a routine practice is not evidence of actual malice.” Elder, 341 S.C. at 114, 533 S.E.2d at 902; *see also* Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 267, 478 S.E.2d 282, 285 (1996) (erasure of tape is not evidence of actual malice where there is “no evidence the erasure was anything other than a routine practice”).

In the end, the improperly given spoliation instruction implied some sort of wrong-doing on Mr. Breed’s part, and compounded the Circuit Court’s erroneous allowance of character and prior bad acts testimony. The suggestion that Mr. Breed destroyed tapes in order to conceal

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<sup>59</sup> In fact, to the extent any of the tapes at issue were in Mr. Jolin’s possession when he worked for CSA, they were destroyed by Mr. Jolin himself. (Tr. 574, lines 5-24).

“what really happened” allowed the jury to conclude that the tapes were potent evidence of actual malice. This erroneous jury charge requires, at a minimum, reversal and a new trial.

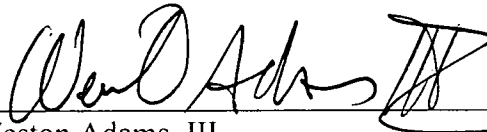
### CONCLUSION

The Circuit Court committed reversible error when it failed to rule that Judge Coffey did not meet her burden of proving actual malice, falsity and/or damages. The Circuit Court also committed reversible error when it failed to rule, as a matter of law, that Mr. Breed’s publication of the Letter was privileged and that there was no evidence that the privilege was exceeded or abused. This Court should correct these errors by reversing the verdict and dismissing Judge Coffey’s case.

In addition, the Circuit Court committed numerous evidentiary errors and gave an erroneous jury charge which also require reversal. In the event this Court does not dismiss this case entirely, it must be remanded for a new trial.

Respectfully submitted,

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April 18, 2013