**THE STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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**APPEAL FROM BEAUFORT COUNTY**
**Court of Common Pleas**

**The Honorable Carmen T. Mullen, Circuit Court Judge**

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**Case No. 2011-CP-07-00013**

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

**v.**

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

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# APPELLANT COMMUNITY SERVICES ASSOCIATES, INC.'S INITIAL BRIEF

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## STATEMENT OF THE CASE

This defamation case, initiated by the Municipal Judge for the City of Hilton Head, Maureen Coffey, arose from a conflict between Ms. Coffey and Mr. George Breed, who was the Director of Security for Community Services Associates ("CSA"). CSA runs the security and maintenance infrastructure for Sea Pines Plantation.

Ms. Coffey did not personally live in Sea Pines, but her mother, father and one or more of her siblings lived in that Plantation. One of the people who resided in her parents' home periodically was Otis Coffey, an adopted brother. Otis Coffey had a criminal record, including three convictions for possession of marijuana and one for trespassing. During a rash of burglaries in Sea Pines in 2004, Otis Coffey came to be considered a primary suspect by Sea Pines security. He was arrested when his car was discovered backed into the driveway of another person's house. He later appeared at the

scene in an automobile driven by his father. During the course of Otis Coffey's apprehension, her father called Judge Coffey who was put on the phone with the arresting officer, which was interpreted by Sea Pines security as an attempt by the father in inject himself into the arrest process. Tr. 1130, lines 14-19; R.___. It was also considered untoward that a judge would get on the phone with the arresting officer as her brother was being arrested. Tr. 1131, lines 1-16; R.___.

Also in 2004, Judge Coffey had a meeting with Captain Toby McSwain of the Beaufort County Sheriff's Department. When Judge Coffey's brother became a suspect in the burglaries, Captain McSwain went to see the Judge inasmuch as his patrolmen and officers appeared frequently in her courtroom. He wanted simply to give her a "heads-up" that Otis was a suspect. Ms. Coffey told McSwain that she felt Sea Pines security was harassing her brother, a report that McSwain relayed to the Beaufort County Sheriff. During the course of the conversation, Ms. Coffey informed McSwain that she was going to remove Otis from Sea Pines. Tr. 1578, line 15 – 1580, line 5; R.___.

The seminal sequence of events leading to this lawsuit occurred in May, 2008. Early in the morning of May 20, a Sea Pines security officer, John Jolin, was parked on South Beach Lane. He was outside his vehicle when he saw a bicycle approaching with an African-American male on it. Jolin spoke to the bicyclist, saying, "I'm Sergeant Jolin with Sea Pines Security." Tr. 474, line 3 – 475, line 9; R.___. The bicycle rider "made a quick right-hand turn down the beach access" and Jolin immediately started chasing him. Tr. 475, lines 10-12; R.___. He radioed dispatch, but lost the fleeing man when he quickly turned left behind a residence. Tr. 475, line 13 – 476, line 8; R.___. Jolin told dispatch to call the Beaufort County Sheriff's Office and instructed Corporal Fryman of Sea Pines Security to go to Gadwall Street, the street on which the Coffey family resided, and set up

a perimeter. Tr. 477, lines 15-19; R.___. Jolin did this because he was 80 percent sure that the black bicyclist was Otis Coffey. Tr. 478, lines 13-17; R.___. Corporal Fryman reported to Jolin that he had seen a man on foot coming onto Gadwell Street and "right up the steps to Number 4," the Coffey's residence. Tr. 478, lines 20-24; R.___.

The officers subsequently knocked on the door of the Coffey residence and Mrs. Coffey – the Judge's mother – opened the door. After the Beaufort County Sheriff's Deputy explained the situation to Mrs. Coffey, the latter said that Otis was not there, adding that "Sea Pines Security was always trying...to get Otis." Tr. 481, lines 7-25; R.___.

On May 21, 2008, Sea Pines security found a vehicle improperly parked. It was registered to Ms. Coffey's father, Michael Coffey. The security officers attempted several times by phone and going to the Coffey house to have the vehicle moved. Finally, Judge Coffey's mother, Ann, and Otis Coffey appeared at the door and the security officer issued a parking citation to Ann Coffey. Mrs. Coffey asked the patrol officer if he had been with Sea Pines security long, and then added: "you do know who the judge is, don't you? My daughter." Tr. 1137, lines 1-21; R.___. Sea Pines security saw this as another attempt to exercise influence in the law enforcement process.

Sometime thereafter, a security officer new to Sea Pines security spoke to Judge Coffey as she was walking outside her family's residence. She replied that Sea Pines security "needed to quit harassing him [inferably Otis]" to which the officer said that he did not know "what she was referring to." She replied that "she was the judge for the Town of Hilton Head." Tr. 1138, line 15 – 1139, line 2; R.___. Ms. Coffey also said that she would go see Mr. Breed and that she did not know whether Otis was guilty or innocent, but would have him move out. Tr. 1139, lines 3-10; R.___. Sea

Pines saw this as another attempt to inject herself into a law enforcement situation to benefit her brother.

Shortly after this incident, George Breed telephoned Greg DeLoach, the assistant town manager for the Town of Hilton Head Island, Tr. 743, lines 20-21; R.___, to complain about Judge Coffey. DeLoach told him that she worked for the town council, not for him. Breed then asked DeLoach about anyone else to whom he could complain. DeLoach, an attorney, told him that he could file a complaint with the Commission on Judicial Conduct. Tr. 746, lines 8-15; R.___.

Breed did not show a draft of the letter to DeLoach, Tr. 746, lines 3-5; R.___, or the Board of Sea Pines. Tr. 1288, line 25 – 1289, line 12; R.___. Mr. Breed did show a draft to his supervisor, Cary Kelley. Tr. 1288, lines 3-8; R.___. On June 6, 2008, Mr. Breed mailed the letter to the Commission on Judicial Conduct.

A copy was provided, as a professional courtesy, to Mr. DeLoach after it was sent to the Commission. Tr. 1353, lines 5-10; R.___.

On November 20, 2008, Respondent initiated this action by filing her complaint in the Court of Common Pleas for Beaufort County. Appellants answered on December 22, 2008. On January 12, 2010, by consent, the case was dismissed under Rule 40(j), SCRCP. Based on a motion to restore the case filed on December 20, 2010, the Court ordered the case restored on January 4, 2011. At the same time an order substituting counsel was issued. On February 8, 2011, the Respondent filed and served an Amended Complaint, R. ___, which Appellant answered on March 4, 2011, R. ___. On April 25, 2011, Respondent served its only answer to interrogatories that listed witnesses; it stated that Respondent had no expert witnesses. R. ___. An original consent scheduling order had been

issued on January 20, 2011, R. ___, and there were subsequent consent amended scheduling orders issued on October 18, 2011; December 11, 2011; and March 3, 2012.R. _____.

This case went to trial on Tuesday, May 29, 2012. The verdict was reached on June 6, 2012. The jury returned a verdict of Six Thousand Fifty Dollars ($6,050.00) for special damages. Tr. 1921, lines 1-2; R. ___. Two million dollars were awarded on the defamation claim and four million dollars in punitive damages were awarded. On June 15, 2012, Appellants filed and served a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, a New Trial and a Motion to Vacate or Remit the Punitive Damages Award on Constitutional grounds. R.___. A memorandum was submitted in support of Appellant's motions. R.___. By Order of October 10, 2012, the Trial Court denied Appellant's motions. R. ____. On October 24, 2012 Appellants filed a Notice of Appeal.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THE LIBEL CLAIM.

#### A. The Standard of Review

The standard of review "for an appeal of an action at law tried by a jury is restricted to corrections of errors of law." Magnolia North Property Owner's Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 350, 725 S.E.2d 112, 117 (Ct. App. 2012) quoting Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989). *De Novo* review is applied to a court's "interpretation of court rules and statutes," as such interpretation "presents an issue of law." Fairchild v. South Carolina Dep't. of Transp., 398 S.C. 90, 108, 727 S.E.2d 407, 416 (2012) *quoting* Muci v. State Farm Mut. Auto Ins. Co., 732 N.W. 2d 88, 93 (Mich. 2007).

### B. Rule 13 of Rule 502, SCACR, Provides an Absolute Privilege to Communications made to the Commission on Judicial Conduct

The text of the referenced rule is:

**RULE 13. IMMUNITY FROM CIVIL SUITS**

> Communications to the Commission, Commission counsel, disciplinary counsel, or their staffs relating to misconduct or incapacity and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witness. Members of the Commission, Commission counsel and staff, and disciplinary counsel and staff shall be absolutely immune from civil suit for all conduct in the course of their official duties.

The use of the imperative, "shall," in the phrase, "shall be absolutely privileged," plainly granted an absolute privilege to documents sent to the Commission. Our Supreme Court has held, regarding the interpretation of a court rule, that, "we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule." Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) *quoted* in Stark Truss Co., Inc. v. Superior Constr. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004). *See also* Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.").

Rule 13 should, therefore, be construed to provide an absolute privilege to documents sent to the Commission. If that Rule is not construed to provide an absolute privilege, it will have created "a trap for the unwary... party," which is contrary to interpretative principles espoused by our Supreme Court. In Re November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 641 and

n.4, 686 S.E.2d 683, 688 and n.4 (2009). When a rule says that a communication, which includes a letter, is "absolutely privileged," it should not be construed as failing to provide that absolute privilege.

South Carolina has recognized an absolute privilege, or immunity in other judicial and *quasi*-judicial situations. *See e.g.*, Fleming v. Asbill, 326 S.C. 49, 55, 483 S.E.2d 751, 754-55 (1997) (absolute *quasi*-judicial immunity granted to guardians *ad litem* in private custody actions); Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (recognizes "absolute privilege exists as to any utterance arising out of" a judicial proceeding, which includes a VFW court-martial); Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 398 (D.S.C. 1968) (principle that, "the public interest in freedom of expression by participants in judicial proceedings, uninhibited by any risk of resultant suits for defamation, outweighs the interest of the individual in the protection of his reputation," applies in private arbitration proceedings).

Rule 13 is obviously written to allay the fears of, and remove a barrier for, people who believe that they have observed or experienced misconduct or incapacity on the part of a judge. Providing an absolute privilege is a necessary element of the assurance to the public that adverse consequences – especially defamation lawsuits – will not fall upon them if they make such reports. As the Supreme Court of Connecticut has held:

> [I]f citizen complaints such as those involved in the present case were not absolutely privileged, "the possibility of incurring the costs and inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate grievance from filing a complaint." *Miner v. Novotny*, *supra*, 304 Md. at 176, 498 A.2d 269. Put differently, as the Appellate Court in the present case noted, "[the policy of affording absolute immunity] reflects the unspoken reality that, if there were no absolute immunity, good faith criticism of governmental misconduct might be

deterred by concerns about unwarranted litigation." *Craig v. Stafford Construction, Inc.*, *supra*, 78 Conn. App. at 557, 827 A.2d 793.

Craig v. Stafford Constr., Inc., 856 A.2d 372, 382 (Conn. 2004)

As Chief Justice Toal recently stated,[1] an appellate brief should outline what happens "down the road" if the appellate court takes one position or another. In this case, if the Court fails to hold that Rule 13 conveys an absolute privilege, the chances of that Rule fulfilling its intention – to ensure that our State judicial system reflects honesty and integrity – will be substantially diminished. Given the holding in this case, with the accompanying huge verdict, many people who observe dishonest or abusive actions by judges will be very reluctant to report them. A verdict of the dimension here would ruin all but a few families in this State, likely depriving their younger children of educations and lowering the standard of living for the family. Even diligent, conscientious citizens will be reluctant to take the risk of investigating or looking into the particulars of what they have observed. If they speak to an attorney, the attorney will, as an obligation, warn them about this case and will very likely discourage their filing a complaint against a judge, particularly if they have spoken with anyone else about their observations, or had someone else prepare the complaint, or have sent a draft to someone whom they believe has a need to know about the substance of the complaint.

If Rule 13 loses its teeth because of citizens' fear of using it, it is predictable that our judicial structure will gradually slide into something of which the State cannot be proud. Systems without accountability can fall into corruption, and historically have done so. Following the plain words of

1. CLE, "Keep Calm and Appeal On: Appellate Practice in South Carolina," January 16, 2013

the Rule to hold that such communications are absolutely privileged could prevent this slide for South Carolina down the road.

### C. The Trial Court Erred in Holding that the Privilege Provided by Rule 13 was *De Facto* a Hybrid, Part Absolute and Part Qualified.

As pointed out *supra*, p.5, the interpretation of court rules is an issue of law, Fairchild, 398 S.C. at 108, 727 S.E.2d at 416, which belongs exclusively to the court. Collier v. Green, 244 S.C. 367, 373, 137 S.E.2d 277, 281 (1964) ("[t]o the court belong all issues of law....").

In this case, the Trial Court did not exercise its exclusive authority to construe Rule 13, specifically to determine whether the rule granted an absolute privilege to Mr. Breed's letter to the Commission or whether the privilege was qualified. She told the attorneys, prior to charging the jury, that, "the two portions of Anderson [jury charges] that I have in mind ... are fair comment and criticism, and the absolute and qualified privilege charges." Tr.1826,1ines 4-6; R. ____. She did, in fact, charge both absolute and qualified privileges to the jury. Tr.1884,1ine 13-1886, line 8; R. ____.

The Trial Court's words to the attorneys make plain that she believed that Mr. Breed's letter had an absolute privilege only for the copy sent to The Commission on Judicial Conduct. During the course of the trial, the court, speaking to the attorneys, said the following:

> I think there's a real argument as to whether or not Mr. Breed telling his employers, the Board, what he has done or what he has complained, I mean, you know, their guys are charging qualified privilege, and there certainly can be a qualified privilege.
>
> The problem he has in this case is giving it to DeLoach. I mean, I think we all clearly know that. That's where the problem lies.

Tr. p. 879, lines 6-13; R. ____.

> I think there is a very good argument that there is qualified privilege in publications. Again, I'm back to the problem is in publishing it to her employers. And that is a big problem.

Tr. p. 1005, lines13-16; R. ____.

The words of the Trial Court and her charge to the jury establish that she believed that Mr. Breed's letter had an absolute privilege for the copy sent to the Commission, perhaps a qualified privilege for the copy shown to the Board of Directors, and likely no privilege for the copy sent to Mr. DeLoach. A hybrid-type privilege was assumed to exist.

Such a hybrid privilege is contrary to precedent in the law of South Carolina. Our courts have held as follows:

> Privileged communications in the law of libel and slander are *either* Absolute or Qualified. **"When the communication is absolutely privileged, no action will lie for its publication, no matter what the circumstances under which it is published**. When qualified, however, the plaintiff may recover if he shows that it was actuated by malice." *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641.

> While the court stated in *Fulton v. Atlantic Coast Line Railroad Co.*, 220 S.C. 287, 67 S.E.2d 425. that "the class of absolutely privileged communications is narrow, and practically limited to legislative and judicial proceedings and acts of State," our decisions show that application of the absolute privilege has not been so narrowly restricted. Judge Russell, in *Corbin v. Washington Fire and Marine Insurance Co.*, 278 F. Supp. 393, citing a decision and review of our cases by the late Judge Wyche in *Johnson v. Independent Life & Accident Ins. Co.*, 94 F. Supp. 959, stated the general principle that privilege in libel or slander is based on considerations of public policy and correctly set forth the general rule governing the application of the absolute privilege in this State, as follows:
>
> > While there has been some tendency in the decisions to narrow the absolute privilege, restricting it generally 'to legislative and judicial proceedings and acts of State,' the courts of South Carolina have recognized 'occasions other than those comprising strictly legislative or judicial proceedings,' where, under considerations of public policy, absolute privilege has been upheld.

> It is thus clear that unqualified privilege does not depend on the rigid requirement of a strictly legislative or judicial proceeding; its limits are fixed rather by considerations of public policy.

Richardson v. McGill, 273 S.C. 142, 145-46, 255 S.E.2d 341,342-43 (1979) (emphasis added).

> **Privileged communications are either absolute or qualified. When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice.** *Richardson v. McGill,* 273 S.C. 142, 255 S.E.2d 341 (1979); *Wright v. Sparrow,* 298 S.C. 469, 381 S.E.2d 503 (Ct. App.1989); *Crowell v. Herring,* 301 S.C. 424, 392 S.E.2d 464 (Ct. App.1990).

Hainer v. American Medical Intern., Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997) (emphasis added)

Under this law, Mr. Breed's presentation of the letter to the Board of Sea Pines or sending it to Mr. DeLoach[2] would be absolutely privileged. Even if Mr. Breed's letter had been sent with actual malice, which is denied, it should be privileged under our binding law. It is the *communication itself* that is privileged, not dependent on the audience to which it is published, according to the law of South Carolina.

The public policy of the State, moreover, as reflected in Rule 13, is to provide a path for a citizen to communicate information about judges' misconduct or incapacity without fear of subsequent defamation lawsuits. The Rule, adopted on January 1, 1997, certainly took cognizance of the precedent espoused in the previously-cited Richardson v. McGill. As this Court has held:

> The General Assembly is presumed to be aware of the common law, *see Caughman v. Columbia YMCA,* 212 S.C. 337, 344, 47 S.E.2d 788, 791 (1948), and where a

2. The evidence at trial is that when Mr. Breed telephoned Mr. DeLoach asking who he could complain to about his perceptions, Mr. DeLoach told Breed that he could complain to the Commission on Judicial Conduct. Tr., p. 746, lines 8-15; p. 748, lines 18-23; R.___. After sending it to the Commission, Mr. Breed delivered, or had delivered, a copy of the letter. Tr. 1124, line 21-1125, line 2; R.___.

> statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense. *See Coakley v. Tidewater Constr. Corp.,* 194 S.C. 284, 288, 9 S.E.2d 724, 726 (1940).

State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997). By virtue of S.C. CODE ANN. §40-5-50 (Supp. 2012), Rule 13 has the tacit approval of the legislature and has the force of law.

**D. Rule 13 states unequivocally that "No civil lawsuit predicated [on a document communicated to the Commission] May be Instituted Against Any Complainant or Witness," so the George F. Breed, Jr. or any of the other entities who were witnesses to Mr. Breed's Complaint should have Judicial Immunity..**

Rule 13, quoted *supra.*, says in the pertinent part that, "no civil lawsuit predicated thereon [i.e., on a communication to the Commission on Judicial Conduct] may be instituted against any complainant or witness." The plain words of this provision should have precluded the appealed lawsuit against George Breed and all of the other entities who are alleged to have witnessed and affirmed Mr. Breed's Complaint. The cited provision, under S.C.CODE ANN. §40-5-50, has the effect of depriving the Trial Court of the legislative authority it would otherwise have to try this case. Common law judicial immunity should be applicable. O"Laughlin v. Windham, 330 S.C. 379, 382-83, 498 S.E.2d 689, 691(Ct. App. 1998) ("...judicial immunity, if applicable, acts as a bar to suit, not just as an ultimate bar to relief").

Here, neither Mr. Breed – the Complainant – nor anyone who received or saw a copy of his complaint – the witnesses – were subject to a lawsuit based on the absolutely-privileged Complaint submitted by Mr. Breed to the Commission. The Trial Court erred either in not considering whether it had jurisdiction to adjudicate matters arising from the Complaint, or alternatively in making the wrong decision about whether it had jurisdiction of the particular category of case before her – a defamation claim based on a written complaint to the Commission on Judicial Conduct.

The Trial Court's judgment should be reversed because it lacked subject matter jurisdiction, because it failed to accord Mr. Breed's Complaint the absolute privilege granted by Rule 13, because it erred in holding that publication to Mr. DeLoach and the Advisory Board had only a qualified privilege, and because the public policy of South Carolina is to provide a risk-free opportunity for citizens to complain about judicial misconduct or incapacity.

## II. THE TRIAL COURT ERRED IN FAILING TO ENFORCE THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO APPELLANTS' GREAT PREJUDICE.

### A. Respondent Egregiously Violated Rules 33(b) (1) and (6), SCRCP.

Rule 1, SCRCP, states as the first-listed purpose for our rules of procedure, that "[The Rules] shall be construed to secure the just ... determination of every action." Such purpose is achieved best, and perhaps only, by the Rules' consistent enforcement. As the United States Supreme Court has held, "[r]egular adherence to published rules of procedure best promotes the principles of fairness, stability, and uniformity that those rules are designed to advance." Missouri v. Jenkins, 495 U.S. 33, 50, 110 S. Ct. 1651, 1662 (1990). The Court of Appeals for the Fourth Circuit has held that:

> One of the primary purposes of modern systems of civil procedure, a purpose which has its roots in notions of fundamental **fairness** and due process, is to **prevent** the use of **surprise** and procedural ambush and so enable all litigants "to make the same realistic appraisal of the case." *Id.* (emphasis supplied).

Atlantic Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 717 n. 6 (4th Cir. 1983) (quoting notes to 1970 Amendment to Rule 26, Fed. R. Civ. Proc, §(b)(2)). Specifically regarding Rule 33, SCRCP's requirement to designate witnesses prior to trial, our Supreme Court has held 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. *Reed v. Clark,* 277 S.C. 310, 286 S.E.2d 384 (1982). When it appears a violation of Rule 33 has occurred, it lies within the discretion of the trial court to decide what sanction, if any, should be imposed. *Jackson v. H & S Oil Co., Inc.,* 263 S.C. 407, 211 S.E.2d 223 (1975) (case decided under former Circuit Court Rule 90). The sanction of excluding a witness should never be lightly invoked. *Kirkland v. Peoples Gas Co.,* 269 S.C. 431, 237 S.E.2d 772 (1977). Before so ruling, the trial court should ascertain 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. *Laney v. Hefley,* 262 S.C. 54, 202 S.E.2d 12 (1974).

Bensch v. Davidson, 354 S.C. 173,182, 580 S.E.2d 128, 132-33 (2003).

This Court has likewise emphasized the importance of compliance with the discovery rules to allow parties to make adequate preparation for trial. It held as follows:

> The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party." *State Highway Dep't v. Booker,* 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973) (quoting *Hodge v. Myers,* 255 S.C. 542, 545, 180 S.E.2d 203, 205 (1971)). Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, **prejudice must be presumed.** *Downey v. Dixon,* 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct.App.1987). **Unless the party who has failed to submit to discovery can show lack of prejudice, reversal is required.** *Id.* at 46, 362 S.E.2d at 319.

Samples v. Mitchell, 329 S.C. 105, 113-14, 495 S.E.2d 213, 217 (Ct. App. 1997) (emphasis added).

In this case, the Defendants – Appellants here – suffered severe prejudice arising from Respondent failing to comply with the discovery rules regarding the naming of fact witnesses and an expert witness. The Trial Court made an error of law in not following precedent regarding allowing seven witnesses to testify who had not been designated as such – including one expert – without making the requisite determination regarding the prejudice – by surprise – that such admission would necessarily entail to Appellants.

A plaintiff's naming of fact and expert witnesses is the central event in planning and developing a defense to allegations in a complaint. It is nearly always only the named witnesses who are deposed, as deposing people who are not going to testify can be a waste of time and money. The purposes of the SCRCP – including the discovery rule – include the intention of achieving the "speedy and inexpensive determination of every action." Rule 1, SCRCP. If the result in this case is allowed to stand, parties are going to have to depose anyone who *could be named as a witness on the day trial begins.*

Respondent's sole interrogatory response[3], R. ___ - ___, provides the names of 14 individuals as fact witnesses, R. ___, and five *groups* of people as such witnesses: CSA Employees, R.___; CSA Board Members, R.___; ASPPPO Board of Directors, R.___; Beaufort County Sheriff's Officers, R.___; and Physicians, R.___. Respondent said, in response to the query regarding the identity of expert witnesses, that she "had not retained an expert, and thus, at present she has no information that is responsive," R.___. With this response never being supplemented – or being made more specific for the group designations – Appellants reasonably prepared for trial based on the cited designations. As is normally the case in trial preparation, money was not spent to depose many people other than those designated by Plaintiff as witnesses.

During the course of this litigation – after it was restored following the Rule 40(j) dismissal – four scheduling orders were issued: a Consent Scheduling Order entered January 31, 2011 which established a discovery cut-off date of October 1, 2011, R.___; a First Amended Consent Scheduling

3. Respondent's Interrogatory response, dated April 25, 2011 was never supplemented. In response to Interrogatory No. 6, requesting the identity of expert witnesses, Ms. Coffey stated that "she will supplement the response as may be necessary." R.___. The response was never supplemented.

Order of October 12, 2011, setting January 15, 2012 as the date for completion of discovery, R.___; a Second Amended Scheduling Order of December 1, 2011, setting the termination of discovery of March 1, 2012, R.___; and a Third Amended Scheduling Order of March 12, 2012, setting April 16, 2012 as the last day of discovery, R.___. An Order of the court to compel discovery was entered against respondent on June 23, 2011, but Respondent still did not provide a complete list of witnesses. Tr. 636, line 10 - 639, line 22; R. ____. Respondent's conduct represents an egregious, very prejudicial, violation of Rule 26(e), SCRCP, which specifically mandates seasoned updates of interrogatory responses.

As mentioned above, Respondent's sole interrogatory response, R.___, listed 14 witnesses and no experts. At trial she presented testimony from seven of those witnesses and read deposition extracts from two others. However, at the trial, Respondent was allowed to present the testimony of seven individuals, including one expert, who had *never* been named as witnesses despite the issuance of four scheduling orders directing that discovery be concluded by specific dates and a court order to compel discovery. The seven individuals, none of whose names appear in Respondent's interrogatory responses, are: Meredith Florencio, Tr. 593, R.___; Richard Sonberg, Tr. 734, R. ___; Barbara Ann Martin, Tr. 812, R. ___; William Waxel, Tr. 847, R. ___; Randall Woods, Tr. 853, R. ___; Lynn Geiger (expert),Tr. 931, R.___; and Todd McNeil, Tr. 1056, R.___. In fact, almost half of Respondent's witnesses at trial were unnamed in discovery, thereby severely prejudicing Appellants' preparation for the trial.

### B. The Trial Court Made Errors of Law in Allowing Respondent to Introduce the Testimony of People who had not been Designated Witnesses.

### 1. The Trial Court did not Consider and Evaluate the Factors that this Court has held to be Required in such a Situation.

In Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), this Court established five factors that a trial court is required to consider when the addressing the question of whether to allow or disallow the testimony of a witness who has not been named by the party intending to call the witness. Those factors are:

(1) The type of witness involved;

(2) The content of the evidence emanating from the proffered witness;

(3) The nature of the failure to furnish the witness' name;

(4) The degree of surprise to the other party, including the prior knowledge of the name of the witness; and

(5) The prejudice to the opposing party.

348 S.C. at 152, 558 S.E.2d at 916. The Jumper Court held that, because the cited factors had not been "adequately considered," it reversed the holding of the lower court. In Bryson v. Bryson, 378 S.C. 502, 509, 662 S.E.2d 611, 614 (Ct. App. 2008), the Court held that the trial court had "properly considered" all [the Jumper] factors "so the exclusion of a witness was not an abuse of discretion."

In the case at hand, the Trial Court did not adequately consider the factors that Jumper and Bryson held as necessary to be considered when witnesses are presented at trial without having been previously designated. The requirement is even greater in the present case than in the two cited cases, as there are six fact witnesses and one expert involved here, rather than the *one* witness involved in Jumper (Dr. Jackel, a psychologist), and Bryson (Brian Lloyd Smith). The sheer number

of unnamed witnesses here exacerbates the surprise to Appellants and should have made even more imperative that the Trial Court conduct a strict examination of the Jumper factors. The record reflects no indication that the Trial Court was even aware of, much less following, the precedent of Jumper and Bryson.

Considering the Trial Court's actions in light of several of the Jumper factors yields the following, with attention focused especially on two witnesses,[4] Dr. Lynn E. Geiger and William Waxel, neither of whom had Coffey listed as a witness.

**(1.) The type of witness involved.**

**(a.) Dr. Lynn E. Geiger, PhD.**

The Trial Court *de facto* inserted Dr. Geiger into the trial as an expert witness. It was the Court who determined, after Dr. Dorsner could not testify to a medical certainty that Coffey needed treatment for stress caused by publication of Breed's letter, Tr. 694, lines 5-9; R.___, that Coffey's case needed an expert witness. She suggested the witness, saying "I think what we need is Dr. Geiger." Tr. 693, lines 20-21; R.___. After the Court said that, on Thursday, May 31 – the third day of trial – Respondent's counsel issued a subpoena to Dr. Geiger. Tr. 693, lines 23-25; R.___. The Court added the weight of its authority to require the undesignated expert to come to trial, telling Coffey's counsel:

> THE COURT:.... Mr. Mathison, you can also tell Dr. Geiger that if she really does have a problem with this, I understand what her policy is, from what you've just told me; you might want to explain to her that as far as the subpoena, she is required to come and the judge will have to set it up if you need to go get her or

4. Appellant Community Services Associates does not waive its objections regarding the other six witnesses.

him or whatever if she doesn't come. I'd maybe suggest your client call her, as well.

Tr. 695, lines 7-14; R.___.

Dr. Geiger testified as an expert on Friday, June 1, the fourth day of trial, over Appellant's strenuous objection. R. 927, lines 10-19; R.___. The Court responded, *inter alia*, that "You're not entitled to a report. Okay. It would be nice to have one, a little notice, and have her listed as an expert witness," Tr. 927, lines 21-23, but allowed Geiger to testify apparently because Geiger was listed as "a part of the catchall" in "Respondent's answers to interrogatories." Tr. 928, lines 5-7; R.___. Geiger had not provided any indication of the substance or basis of her testimony. Tr. 927, line 24-928, line 4; R. ___. In her "catchall," Respondent had said "that any one or more" of the 11 medical practices or doctors listed in his interrogatories "may be called to testify." As mentioned *supra.,* the Respondent included several such catchalls. The Court affirmed that procedure. Tr. 157, lines 4-15; R.___. Appellants deny that such catchalls provide sufficient notice to prevent surprise. Without Geiger's testimony, as the Trial Court realized, Coffey could not establish the causation of any claimed medical damages. Appellants, not having deposed Geiger, were tremendously prejudiced.

**(b.) William A. Waxel**

The Court ascertained that Mr. Waxel, a security officer for Community Services Association, was a fact witness who was going to testify "that he heard one or more of the officers at CSA say that Mr. Jolin and Maureen Coffey were involved in a sexual relationship." Tr. 152, Lines 9-19; R.___. Appellants objected specifically to Mr. Waxel's being allowed to testify as he was not a named witness. Tr.152, line 5 – 154, line 10; R. ___. Despite her assessment that Waxel's testimony

was hearsay, the Court allowed him to testify, apparently on two grounds. First, because he was an employee of CSA and "they're within your control," he was allowed to testify. Tr. 154, lines 2-4, 10; R.___.

The second reason is that he was present ostensibly to "overcome hearsay objections," Tr. 153, lines 6-19; R.___, and as a rebuttal witness, Tr. 153, lines 17-19; 154, lines 19-22; Tr. 214, lines 2-14; Tr. 219, lines 9-16; R.___. Given the Court's definitive decision, further objection to Waxel's testifying would obviously have been futile. The Trial Court allowed several of the unlisted witnesses in as rebuttal witnesses, stating that rebuttal witnesses did not have to be named in interrogatories. Tr. 154, lines 19-20; R.___; 155, lines 2-4; R.___; and 159, lines 17-19; R.___. The Trial Court erred in holding that rebuttal witnesses were not required to be named in discovery. Reed v. Clark, 277 S.C. 310, 317, 286 S.E.2d 384, 388 (1982) *citing* Martin v. Dunlap, 266 S.C. 230, 222 S.E.2d 8 (1976); *see also* Briggs v. Richardson, 288 S.C. 537, 539-40, 343 S.E.2d 653, 655 (Ct. App. 1986) ("Rule 33(b), S.C.R.C.P., *inter alia*, requires disclosure to opposing counsel of the names and addresses of known witnesses as to the facts of the case; this is a continuing duty....Defendants contended that the rule did not apply to witnesses used for impeachment purposes only. Impeachment witnesses are subject to the rule. *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982)" (Citation and footnote omitted)).

Waxel was the *only* witness who corroborated Jolin's testimony that a rumor was circulating among Sea Pines security officers that Jolin was having an affair with Coffey. He was thereby the linchpin of Respondent's slander claim. Appellants were very much surprised, and thereby

prejudiced, by his being allowed to testify, even though he could not testify that he ever heard Mr. Breed or Mr. Kelley repeat the rumor.

The Trial Court appears to have believed that mention of a person's name in the deposition of another person is sufficient notice to merit the former's admission as a witness. Tr. 159, lines 19-25; R.___. Appellant submits that such mention in a deposition does not comport with the letter or spirit of the SCRCP in that it in no way ameliorates the surprise of having such a person – undesignated in interrogatory responses – presented as a witness on the day of trial. It cannot reasonably be held that a party has an obligation to depose every person whose name is mentioned in deposition. The purpose of Rule 33(b) (1) and (6) is to narrow the scope of inquiry to a reasonable field – i.e., the knowledge and likely testimony of fact and expert witnesses named in response to interrogatories. To allow otherwise, as the trial court did in this case, is to allow trial-by-ambush, despite the Court's stated intention. Tr. 158, lines 1-4; R.___.

The Trial Court, in these two examples, did know the type – and critical nature – of witnesses involved, the first of the Jumper factors, but it appeared to lack an understanding of how such witnesses need to be designated or why, as reflected in its considering people generally included in "catch-all" groups of witnesses to be deemed as "designated witnesses"; people "under the control" of a defendant to be exempted from any requirement that they be designated by a party; that anyone mentioned in a deposition need not be further designated; and that rebuttal witnesses need not be designated, though required by our binding law. The "types" of designation relied upon by the Court do not comply with Rule 33, SCACR.

**(2.) The nature of the failure or neglect or refusal to furnish witness' names.**

The third Jumper factor is whether the Court determined the reason why the Respondent did not comply with Rule 33(b) (1) and (4). In this case, the Court made an extremely cursory investigation of Appellants' objections that many of Respondent's named witnesses had not been designated in discovery. On the first day of trial, Tuesday, May 29, 2012, the Appellants objected to Respondent's naming several witnesses that had not been designated as witnesses in her interrogatory responses. Respondent's witness list, copy at R.___, reflected 19[5] witnesses whose "names and addresses," Rule 33(b) (1), had not been previously provided. The list included no designated experts. Appellants objected to the last-minute designations and requested that the Court not allow *any* witness whose name had not been produced in discovery be allowed to testify. Tr. 138, line 18-139, line 2; R.___. This objection was denied.

The Court, as reflected in the colloquy with Respondent's counsel, Tr. 139, line 4-160, line 1; R.___, did virtually nothing to probe the issue of why Respondent had not timely supplemented her discovery responses, which had been served over a year previously, on April 25, 2011. Respondent's counsel volunteered the lame excuse that, "I should have amended last week, but quite frankly, didn't have the time." Tr. 142, lines 9-10; R.___. After not supplementing Respondent's interrogatory responses for over a year, this is thin gruel that would not be acceptable even in less important situations.

Instead of attempting to determine why Respondent's counsel had failed to fulfill his duty under Rules 33(b) (1) and (4), the Trial Court attempted to impose a truncated opportunity for Appellants to at least speak to one undisclosed witness, Mr. Sonberg, before trial. Even if it had been

successful, it would not have been even close to a deposition in terms of preparing for trial. The interchange was:

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|---|---|
| THE COURT: | All right. I'm going to give Defense an opportunity to talk to him. And if there's anything of any great surprise at that point, we will take up whether or not he can testify. If I don't let him testify, we'll do a proffer just for the record. But let's make him available to the Defense so they can know what he's going to say. |
| MR. MATHISON: | I don't have any ability to do that until he arrives here tomorrow, your Honor, I mean, realistically. But I have no problem doing that. |
| MR. HALIO: | So essentially, we got nothing. We got no interrogatory answer, we got no opportunity; we got nothing. |
| THE COURT: | Do you not have a phone number for him? Do you have a phone number for Mr. Sonberg? |
| MR. MATHISON: | Yes, I do, actually. |
| THE COURT: | Well, why don't you give it to him. |

Tr. 150, lines 7-23; R.___.

Defendants submit that a cold phone call to an adverse witness is not a reasonable substitute for a sworn deposition, under subpoena, with relevant documents, in preparation for trial. As addressed below, significant prejudice to the Appellants is a reasonable – and presumed – inference from such a mandated trade-off. Respondent certainly did not meet her burden of showing that Appellants would *not* be prejudiced by the testimony of these out-of-the-stands free-throw shooters. Samples, 329 S.C. at 114, 495 S.E.2d at 217.

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5. Of these 19, seven actually testified at trial, including one – Geiger – as an expert.

In summary, the Trial Court did not require any accountability from Respondent's counsel for failing adequately and reasonably to supplement his interrogatory responses. He never provided any reasonable explanation for his failure, though he provided such false reasons as naming a group is sufficient notice that a member of the group is to be called as a witness, or that rebuttal witnesses do not need to be designated, or that mention of a person's name in a deposition is the equivalent of actually designating them as a witness. The Court appeared to, or actually did, concur with these erroneous positions of law. In any event, the Court did not correct these erroneous positions.

**(3.) The Degree of Surprise to the Other Party**

The fourth of the Jumper factors addresses the degree of surprise to the other party, the Appellants here, to include prior knowledge of the name of "the witness."

In this case, the factor – the wording of which suggests one witness – needs to be addressed in the context of a defendant facing trial *that day* with 19 undisclosed witnesses. The scenario allows insufficient time to notice any of them for deposition, so the defendant has no firm idea of what any of the 19 will testify. It was impossible at the time to do adequate preparation even of the seven undisclosed witnesses who did testify in the case. Without being able to examine witnesses in detail before trial, there is no way to prepare adequately for a trial. Even if they are a company's own employees, there is no time to notice and take a deposition. As this Court has held:

> We reject the argument that the judgment should not be reversed because it does not appear Ms. Downey was surprised by the fact Mr. Dixon testified at trial. Of course, Ms. Downey could have anticipated that Mr. Dixon was going to testify at trial. (This was undoubtedly why she propounded the interrogatories and sought to take his deposition.) However, there is no indication she knew what he was going to say when he testified. An abiding maxim of the successful trial lawyer, like the motto of the Boy Scouts, is "Be Prepared." *See* I. Younger, *The Art of Cross-Examination* 23 (A.B.A. Section of Litigation Monograph Series No. 1, 1976) ("The fourth

> commandment is that you must be prepared. On cross-examination, you should *never* ask a question to which you do not already know the answer."). The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.

Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987) (footnote omitted).

Here the violation by Respondent was far more egregious than that committed by Dixon in Downey v. Dixon. The fact is that there are seven witnesses for whom Appellants could not prepare cross-examination. Specifically, Appellants *could not know* the answer to virtually any substantial question they might have posed to these seven witnesses. Following the adage to "never ask a question to which you don't know the answer," which any competent trial lawyer follows, tied the hands of Appellants' counsel in this trial.

To the extent Respondent asserts that Dixon's failure was more serious because he did not appear for a noticed deposition, it should be remembered that the failure of Respondent to *designate* these seven individuals as witnesses *de facto* **prevented deposition notices from being sent**. It is a rare person who is deposed unless he or she has been previously designated as a witness.

Entering a trial where the Court is allowing seven people, who are not designated as witnesses, to testify goes beyond being a surprise. It would be, and was, shocking to Appellants.

**(4.) The Prejudice to Appellants**

The fifth Jumper factor is "the prejudice to the opposing party" occasioned by a party's presenting people to testify who are not designated as witnesses. This is the most egregious of the Court's failings to evaluate whether the unnamed witnesses should be allowed to testify and it is the most important. The Court's lack of consideration of prejudice to the Appellants is demonstrated by

the Record. The index to the Record, R.___,[6] cites 58 separate lines in which the words "prejudice," "prejudiced" or "prejudicial" are used. Not one of those references pertains to an occasion when the Court was determining whether to allow Respondent's unnamed witnesses to testify. Six uses by the Court of one of these terms are in two questions to the jury, Tr. 70, lines 9, 24; R.___; in addressing the admissibility of evidence of the second complaint against Coffey to the Commission, Tr. 122, line 4; R.___; in preliminary instructions to the jury, Tr. 177, line 19; R.___; in addressing whether evidence to which Appellant's objected was admissible, Tr. 702, line 22; R.___; and in analyzing whether an indemnification agreement was admissible under Rule 403, Tr. 1015, line 7; R.___.

The complete lack of any reference to "prejudice" in any of its forms in the Court's discussion of admitting the undesignated people as witnesses reflects a complete lack of analysis of this crucial Jumper factor.

The prejudice to Appellants in this case is easily inferred from the prior discussion. The inability to cross-examine the undesignated witnesses in accordance with the practice of competent, experienced trial attorneys deprived defense counsel of a major weapon in the search for truth. Our appellate courts – among many others – have recognized the prime importance of cross examination. In State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009), our Supreme Court quoted the United States Supreme Court for the proposition that cross-examination was "the greatest legal engine ever invented for the discovery of truth" (quoting California v. Green, 399 U.S. 149, 158, 90 S. Ct. 130 (1970)). Our Court of Appeals has quoted the Second Circuit as follows:

> The importance of cross-examination in our jurisprudence has been well stated by Professor Wigmore: "It is beyond any doubt the greatest legal engine ever invented

6. All pages reflecting the use of "prejudice," "prejudiced" or "prejudicial" are listed in the index to the Record.

> for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this in the mind of a lawyer of experience."

State v. Hill, 382 S.C. 360, 366, 675 S.E.2d 764, 767 (Ct. App. 2009) *quoting* U.S. v. Cardillo, 316 F.2d 606, 610-11 (2nd Cir.1963).

The United States Supreme Court has additionally addressed cross-examination as follows:

> "'The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law.'" 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1974). ...
>
> "The Court has consistently acknowledged the vital role of cross-examination in the search for truth...."
>
> > Cf. ...4 J. Weinstein, Evidence ¶ 800[01] (1988) (cross-examination, a "'vital feature' of the Anglo-American system," " 'sheds light on the witness' perception, memory and narration,'" and "can expose inconsistencies, incompletenesses, and inaccuracies in his testimony").

Perry v. Leeke, 488 U.S. 272, 283, 109 S. Ct. 594, 601 (1989) *quoting United States v. DiLapi*, 651 F.2d 140, 149-151 (2d Cir. 1981) (Mishler, J., concurring), *cert. denied*, 455 U.S. 938, 102 S. Ct. 1427, 1428, 71 L.Ed.2d 648 (1982).

The Court did not, by order or instruction, directly preclude Appellants' cross-examination of the seven surprise witnesses, and some – though necessarily limited – cross-examination of these witnesses was conducted. The lack of information that would have been obtained through depositions did, however, seriously inhibit and limit the cross-examinations, as the number of questions to which Appellants' attorneys did not know the answer exceeded the questions to which they did know the answer. The Court did not consider, investigate or exercise any discretion regarding the limitations that Respondent's failure to name witnesses placed on Appellants' cross-examination. She simply let it proceed with the hindrances caused by the lack of notice and the

consequent inability of Appellants' counsel to prepare to cross-examine the seven undisclosed witnesses.

In summary, the Trial Court failed to make the inquiry required by our law in determining whether to admit, or not admit, the testimony of people who had not been designated in an interrogatory response as witnesses. In a similar case, our Supreme Court held as follows:

> ... Page allegedly violated Rules 26(e) and 33(b) of the South Carolina Rules of Civil Procedure by failing to supplement her answers to interrogatories in a timely fashion. After Sean objected to the admission of the testimonies at issue, the family court's duty to inquire arose. The family court failed to make the inquiry required under *Laney* and *Jumper* and therefore failed to exercise its discretion. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz,* 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987); *see also In re Robert M.,* 294 S.C. 69, 70-71, 362 S.E.2d 639, 640-41 (1987); *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). Sean was prejudiced by the family court's ruling, requiring reversal and a new hearing.

Callen v. Callen, 365 S.C. 618, 627, 620 S.E.2d 59, 64 (2005) (footnote omitted).

The same result should be ordered here. The failure to find out why Respondent did not supplement her interrogatory responses despite having a year to do so; allowing witnesses to be considered "designated" without doing the requisite research in the law; and the failure to consider the surprise and consequent prejudice to Appellants, are indicia that no discretion, as in Callen, was exercised. *See also* Arthur v. Sexton Dental Clinic, 368 S.C. 326, 338, 628 S.E.2d 894, 900 (Ct. App. 2006) (affirming trial court's exclusion of three late-named witnesses, not only because of the "failure to comply with the time requirements of the scheduling order," but also "the judge made the appropriate inquiry and considered the requisite factors"). The Court here, with many more undesignated witnesses and the time requirement being missed by a larger period of time, failed egregiously to make adequate inquiry or consider the requisite Jumper factors.

## III. THE ACTUAL AND PUNITIVE DAMAGES WERE NOT SUPPORTED BY THE EVIDENCE AND WERE NOT PROPERLY REVIEWED BY THE TRIAL COURT.

Our Law requires that, for a plaintiff to recover damages, "the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. The existence, causation and amount of damages cannot be left to conjecture, guess or speculation." E. Moïse and J. Nichols, The South Carolina Law of Torts (4th ed., 2012 Cumulative Supplement, p.33), *citing* Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011). In the case at hand that standard was not met with respect to actual damages or punitive damages.

### A. Insufficient Evidence was presented to Support a Damage Award of Two Million Dollars for Loss of Reputation.

At the trial of this case, the jury held that the plaintiff had proved by a preponderance of the evidence that Coffey "sustained damage to her reputation/general damages as a consequence of the defendant's publication" in the amount of two million dollars. Tr. 1921, lines 3-7; R.___. Ms. Coffey, however, is the only person who provided direct testimony[7] that her reputation had been harmed. Tr. 281, lines 6-14; 365, lines 20-25; R.___. It is noteworthy that the primary implication of her testimony is that articles in the Island Packet newspaper were the major source of any reputational damage. Her attorney's question and her answer were:

Q Tell me in what respect your reputation has been injured.

7. Witness Geiger, who, as addressed above, should not have been permitted to testify, testified about Coffey's alleged stress from concerns about her reputation. The source of that information was Coffey. Tr. 944, lines 12-15; 949, lines 22-25; R.___.

A If you – if you look at the articles in the *Packet*, of which I did not seek out, people who read this, and even though the articles say the complaint was dismissed, they still form a negative opinion of me.

Tr. 281, lines 9-14; R.___.[8]

Ms. Coffey's unsupported testimony about damage to her reputation is, therefore, necessarily based on speculation or conjecture. Coffey does not name one person who informed her that he or she thought any less of her. Her only colleague who testified, Mr. DeLoach – the person to whom Breed provided a courtesy copy of the letter of complaint to the Commission – testified that he *would* recommend that her contract as municipal judge be renewed. Tr. 801, lines 10-15; R.___.

The jury's award of two million dollars as actual damages, therefore, rests solely on a foundation of speculation and conjecture. It should not be allowed to stand. Courts in other jurisdictions have held that a plaintiff's own testimony about his or her loss of reputation is insufficient to support a substantial amount of actual damages. Worsham v. City of Pasadena, 881 F.2d 1336, 1338 (5th Cir. 1989) ("The only evidence of any actual damages upon which an award could have been based was Worsham's own highly speculative and unsupported testimony regarding his … and ruined reputation"; trial judge held that such testimony "could not support a $400,000 award of actual damages"); Stolberg v. Members of Board of Trustees for State College of Connecticut, 474 F.2d 485, 489 (2d Cir.1972) ("[No] evidence of damage to Stolberg's reputation in his community was introduced, save Stolberg's own testimony of being upset over the whole course

8. It is a reasonable inference that the Packet got its information from Coffey's publicly-filed complaint in the Beaufort County Courthouse. Tr. 419, lines 11-25; R.___. The article quotes that complaint. The article was published December 8, 2008, over two years before the Complaint was filed in 2011-CP-07-13,1/4/2011; R. ___..

of events. Although he testified that he had encountered public damage to his reputation...other factors...tended to negate or minimize any such harm.... It is obvious that some of the alleged injury was too speculative to be compensable...." Case depended upon by Appellant did not hold that damages caused by loss of a public job are "to be presumed or found solely on the basis of plaintiff's testimony"); Riccardi v. Vanderbilt Univ. Med. Cntr., 2008 WL 60507, * 4, 5 (M.D. Tenn. 2008) (No evidence other than Dr. Kessler's "own testimony that he perceived his reputation to have been diminished." Court found award of $1.5 million to be "beyond the range supported by the proof and is so clearly excessive as to shock the conscience."); Rodick v. City of Schenectady, 856 F. Supp. 105, 108 (N.D.N.Y., 1994) ("...malicious prosecution is presumed to be harmful to the individual's reputation.... The plaintiff's own testimony that he had lost a certain respect due to the prosecution is not enough without other objective evidence of such loss.")

**B. Respondent did not present Sufficient Evidence of Actual Malice.**

This Court has recently addressed the review that is to be accorded a jury's finding of actual malice – which was necessary in this case as Judge Coffey was determined to be a public figure, Tr. 186, lines 1-8; R.___, – in a defamation case as follows:

> Unlike our review of the other factual findings of the jury, we review the jury's determination of actual malice as a question of law. *Elder[ v. Gaffney Ledger], 341 S.C. 108, 113, 533 S.E.2d 899, 901-902 (2000).*
>
> Whether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury. **When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice.** This review is necessary due to the "unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out

> an area of 'breathing space' so that protected speech is not discouraged."*Erickson [ v. Jones St. Publishers, LLC], 368 S.C. 444 ,477, 629 S.E.2d 653, 670-71 (2006);* (citing *Elder,* 341 S.C. at 113, 533 S.E.2d at 901–02, and quoting *Harte–Hanks Commc'ns, Inc. v. Connaughton,* 491 U.S. 657, 686, 109 S. Ct. 2678, 105 L.Ed.2d 562 (1989)).

West v. Morehead, 396 S.C. 1, 10-11, 720 S.E.2d 495, 500 (Ct. App. 2011) (emphasis added).

As the latest supplement to The South Carolina Law of Torts, (4th ed. 2012 Supp. p.30) summarizes our law regarding an appellate court's function after such a finding, "when the jury makes...a finding of actual malice, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice."

Our Supreme Court has addressed what constitutes, and what does not constitute, constitutional "actual malice." It held:

> In addition to the common law elements of defamation, a public figure has the constitutional burden of proving that the defendant published the alleged defamatory material with "actual malice." *Anderson v. Augusta Chronicle,* 365 S.C. 589, 594–595, 619 S.E.2d 428, 431(2005) (citing *New York Times v. Sullivan,* 376 U.S. 254, 269, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964)). To establish "actual malice," the plaintiff must show the defendant published the defamatory material with the knowledge it was false or with reckless disregard of whether or not it was false. *George v. Fabri,* 345 S.C. at 451, 548 S.E.2d at 874 (citing *New York Times, supra).*
>
> **"[T]he reckless conduct contemplated by the *New York Times* standard is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing."** *Id.* at 456, 548 S.E.2d at 876. Instead, the actual malice standard "is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of ... probable falsity.'" *Harte-Hanks Comm., Inc. v. Connaughton,* 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) (citation omitted).

Metts v. Mims, 384 S.C. 491, 500-01, 682 S.E.2d 813, 818 (2009) (emphasis added).

It is under this standard that George Breed's letter of complaint to the Commission on Judicial Conduct should be evaluated if it is not accorded the absolute privilege strongly suggested by the actual words of Rule 13. Justice Hearn, then Judge Hearn, addressed the particulars of this standard, under our precedent, in Anderson v. The Augusta Chronicle:

> Actual malice is the subjective standard testing the publisher's good faith belief in the truth of his or her statements. *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1996). Therefore, in order to prevail, Anderson must present clear and convincing evidence establishing *The Chronicle* had **no** good faith belief in the truth of its statements, and thus acted with reckless disregard for the truth when publishing "Let the Liar Run." "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct." *Elder,* 341 S.C. at 114, 533 S.E.2d at 902. Instead, the plaintiff must present "sufficient evidence that the defendant **in fact entertained serious doubts as to the truth** of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (emphasis in original). "There must 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 (quoting *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L.Ed.2d 125 (1964)) (emphasis in original). To prove such, Anderson must present evidence, from a subjective standpoint, which demonstrates what *The Chronicle* knew with regard to the alleged falsity of its statements. **It is insufficient to show the defendant made an editorial choice or merely failed to investigate; there must be evidence at least that the defendant purposefully avoided the truth.** Id. (citations omitted) (emphasis added).

Anderson v. The Augusta Chronicle, 355 S.C. 461, 490-91, 585 S.E.2d 506, 522 (Ct. App. 2003)(Hearn, J. dissenting)(some emphasis in case)

A thorough perusal of Mr. Breed's letter reasonably leads to the conclusion that it is a good faith result of a "serious, sober and deliberate" examination of a situation that was bothering him professionally. His letter is not even close to the situation in West v. Morehead, *supra.*, in which Plaintiff West was publicly called a "two-bit" lawyer who would betray her clients for money and was a "corruptible attorney." The tone of Breed's letter in its entirety conveys the fact that Mr. Breed, as chief of security at Sea Pines, is genuinely concerned that Judge Coffey and her family were

interfering with his officers in the performance of their duties and discouraging officers from performing those duties. The letter has the ring of truth about what Breed's concerns are. There is not a hint that the letter *per se* is false or "written in reckless disregard of whether it is true or false."

Respondent does not contest that Mr. Breed is expressing what he believes to be true in the whole letter. Breed testified in deposition, which was read at trial, that he "believed ... [Judge Coffey was biased, partial and prejudiced] to be the truth as reflected in [the] letter [he sent to the Commission]." Tr. 1126, lines 2-11, R.___. Respondent does not allege that Breed was speaking falsely in stating his deposition assessment.[9]

Instead of addressing the whole letter and its intended purpose, Respondent focused on some of the particulars of the examples Mr. Breed used to assert his opinion and his conclusion.

The penultimate paragraph of the letter, which expresses Mr. Breed's conclusion, reads as follows:

> I believe that Judge Coffey's inability to remove and insulate herself from personal relationships and overt involvement both past and present have caused her to insert herself in these scenarios to the detriment of the community at large. Further, it has manifested itself and caused her to engage in conduct prejudicial to the effective and expeditious administration of the business of the courts and criminal justice process. 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.

The first two words, "I believe," obviously signal that what follows is not an assertion of fact, but an account of what Mr. Breed thinks about Judge Coffey's actions. The phrase "she has given the distinct and transparent *appearance*" also indicates that Mr. Breed is merely expressing his

9. Ms. Coffey, however, testified, prior to Breed's deposition being read, that the "entire document was full of lies." Tr. 212, lines 14-15; R.___. This constitutes a preemptive strike on Mr. Breed's character.

perception of what the Judge's actions suggest. The latter half of that sentence, "is not able to be a neutral and detached arbiter," flows from his earlier observation about the appearance of her actions. A reasonable paraphrase of that sentence would be, "I believe that Judge Coffey's actions suggest the presence of bias and partiality, which would render her unable to fulfill the obligation of neutrality and detachment in the cases that appear before her." The sentence is inelegantly phrased, but it conveys Breed's honest opinion. It does not purport to be, and is not, a statement of fact but a general impression of Judge Coffey's conduct and its possible ramifications.

Even if the final phrase of the third sentence is considered a statement of fact, not qualified by the prior word, "appearance," that is not sufficient to hold Appellants liable for publication of the letter. Respondent has not proved that the statement was false,[10] so she has not met her burden under our law, which provides:

> The United States Supreme Court has held that a defamed public official or public figure must prove the falsity of the allegedly libelous publication. *Cox Broadcasting Corporation v. Cohn,* 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). This requirement follows necessarily from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish the statement was, in fact, false. *Bee Publications, Inc. v. Cheektowaga Times, Inc.*, 107 A.D.2d 382, 485 N.Y.S.2d 885 (4th Dept.1985). See also, *News Publishing Company v. DeBerry,* 171 Ga.App. 787, 321 S.E.2d 112 (1984). **Since the public official or public figure plaintiff has the burden of proving falsity**, it is error to instruct the jury that the defendant has the burden of establishing truth. *Colson v. Stieg,* 89 Ill.2d 205, 60 Ill. Dec. 449, 433 N.E.2d 246 (1982). See also, *Nash v. Keene Publishing Corp.,* 498 A.2d 348 (N.H.1985).

Beckham v. Sun News, 289 S.C. 28, 31, 344 S.E.2d 603, 604-05 (1986) (emphasis added).

Respondent also contests the account in the paragraph 1 in the 6/6/2008 letter to the

10. Respondent has established only that Appellants are unaware of any specific cases in which Judge Coffey was biased or prejudiced. That does not disprove the general statement, which would require investigation regarding all of her cases.

Commission, arguing that it was "hyperbole." Tr. 1765, lines 5-18; R.___. Respondent admits that the account was "not necessarily untrue." Id., line 13; R.___. Respondent's counsel argued that it contained "bad facts," but cited none.

Respondent made much of the statement in Mr. Breed's letter, still in paragraph number 1, that Captain McSwain of the Beaufort County Sheriff's Office met with Ms. Coffey. Tr. 239, line 4 - 240, line 5; R.___. In placing that sentence in his letter, Mr. Breed was stating what he had been told by Captain McSwain and Master Sergeant Brian Baird. Tr. 837, lines 9-12; 1578, line 9 -1580, line 5; R.___. Baird testified that McSwain had had a conversation with Coffey and thereafter the Sheriff had sent him to visit Judge Coffey. Tr. 874, lines 17-24; R.___. The substance of Baird's conversation with Coffey was substantially similar to what Breed wrote in his letter four years later. Tr. 840, line 19 - 841, line 5; R.___. Captain McSwain also testified that he had a meeting with Coffey in 2004. Tr. 1578, line 9 - 1580, line 5; R.___. McSwain told Coffey that her brother, Otis, was a suspect in criminal cases in Sea Pines. Coffey told McSwain that she was going to move Otis out of the area. Thus both Baird and McSwain corroborate the essence of what Breed said in his Complaint to the Commission. In any event, there is no way this is defamatory to Judge Coffey.

Respondent attempts to attribute untruthfulness to Breed in the latter's saying that Otis was "the prime suspect." Tr. 1601, lines 8-24; R.___. As Captain McSwain testified, "a suspect is a suspect," so the term "prime" is basically meaningless from the point of view of the Sheriff's Office. Tr. 1603, line 24-1604, line 2; R.___. It is reasonably inferable that Mr. Breed believed that Otis was, in fact, the BCSO's "prime suspect."

Respondent has, therefore, failed to provide adequate evidence to disprove any of the statements in the paragraph numbered 1 in Breed's letter. Respondent also challenged the veracity of the paragraph numbered 2 in Mr. Breed's letter, initially through the testimony of her witness, John Jolin. Officer Jolin described the event very much as described in the first part of paragraph 2. Tr. 474, line 3-476, line 8; 477, line 4-478, line 24; R.___. The "Number 4" [4 Gadwall] referenced at Tr. 478, line 24 is the Coffey residence. Ms. Coffey told Jolin and the officer who had arrived from the Beaufort County Sheriff's Office, Deputy Murphy, that Otis Coffey was not there and that "Sea Pines Security was always trying to...get Otis." Tr. 481, lines 8 - 25; R.___.

Respondent *de facto* challenges Mr. Breed's statement that, "the suspect was...identified by our officer," (in Paragraph 2 of Complaint), based on Jolin's trial testimony that he did not make a "positive identification" of Otis Coffey. Tr. 483, lines 9-14; R.___. However, Jolin had told Breed that he was 80% positive of his identification of Otis. Tr. 478, lines 11-15; R.___. Jolin's initial report, moreover, identified Otis Coffey as the "suspect." Tr. 559, line14 – 560, line 6; R. ___. It is a reasonable inference that Breed, with substantially more experience than Jolin, realized that in the dark situation that prevailed,[11] an identification that is 80 percent certain is the best one can reasonably expect. For practical purposes, it is a "positive" identification. Arguably, in fact, any identification that exceeds 50 percent certainty is a "positive" identification. Jolin's own testimony, moreover, is that he sent Cpl. Fryman to Gadwall Street, the specific street where the Coffey family lived, to set up a "perimeter," Tr. 477, lines 15-19; R. ___, which indicates that Jolin was quite sure

11. The situation was that Jolin, on foot, at about midnight, and apparently without a flashlight, "observed the suspect dressed in black traveling on a bike (our community does not offer any type of bike path or roadway lighting, nor is it permitted.") Letter, paragraph 2.

of the identification. There is also evidence that Jolin told his colleague, Todd McNeill, that "he [Jolin] had caught Otis Coffey," based on the incident of May 20, 2008. Tr. 1068, lines 3-4; R. __.

The second part of paragraph 2 of the complaint recounts an encounter between Ms. Coffey and a new officer in Sea Pines Security. The upshot of that account is that Ms. Coffey identified herself as the Judge for the Town of Hilton Head and told the new officer that Sea Pines Security needed to stop harassing her family. Coffey's own testimony by-and-large corroborates Breed's account. Tr. 391, line 24 - 393, line 24; R.___. In that testimony she stated that in raising the issue of her being the judge, she "was not using her position," Tr. 393, lines 21-22; R.___, which betrays a lack of understanding as to the effect of such a response ("Do you know who I am?") by an authority figure like a judge. The new officer, Stephen Wright, in his testimony at trial also corroborated Breed's account. His testimony was as follows:

> I was in routine patrol at Sea Pines, down on Gadwall, Street, and I had my window down. And I patrol 2:00 to 10:00. That's what I do.
> And I was rolling through Gadwall, and I seen a lady out there, and I rode down, and I said, "Hi. How are you?" I said, "How are you today?"
> And then, all the – the response I get back was, "Well, I wish you – you guys quit harassing us."
>
> I says, "Well, ma'am, how do I harass you if I don't even know you?"
> I've never met the judge. She said she's Judge Coffey. And I says, Well, I've never met you before.
>
> And so, I – I left. And she said she's going to have to get her brother out of town. Get her brother out, that's what she said.
>
> So I was kind of upset. I went down to – I told my lieutenant, Lieutenant Woods. And then, I told the Chief just what happened. And then I wrote a statement.

Tr. 1455, line 16-1456, line 9; R.___. This report from his officer would certainly get Mr. Breed's attention.

There is, therefore, nothing in paragraph 2 of Breed's complaint to the Commission that provides any ground for Respondent's claim for "actual malice." Respondent has not disproved any of the material statements in that paragraph of the complaint.

Paragraph 3 of Breed's complaint likewise provides no basis upon which to assert that Breed had "actual malice" in preparing his complaint to judicial authorities. Respondent does not, in fact, challenge the truth of this paragraph in any respect, which establishes the point that Otis Coffey was likely the person who entered the Coffey house on the night of May 20th and that Judge Coffey was not effectively discouraging her family members from attempting to use her influence. There is no indication that Judge Coffey ever called anyone at Sea Pines Security to apologize for her mother's attempt to use her judgeship to influence the security officers. Having learned about it at least by June, 2008, and not having done anything to correct the situation, she *de facto* ratified it.

This Court's independent review of whether the evidence at trial, to a clear and convincing standard, supports Respondent's claim for "actual malice" should result in a holding that there is insufficient evidence of such malice. Respondent failed to prove any material fact was false, and she likewise did not establish that Mr. Breed acted recklessly or with disregard fpr the facts' truth or falsity. There is consequently no basis for an award of actual damages for loss of reputation. Even if there were such evidence, an award of two million dollars should shock the conscience.

### B. The Award of Punitive Damages is Unconstitutionally Excessive and Should be Struck or Reduced

### 1. This Court must conduct a *De Novo* Review of the Trial Court's Determination of the Constitutionality.

In Hollis v. Stonington Development, LLC, 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011), this Court held that an appellate court, when the constitutionality of a punitive damages award is challenged, must conduct a *de novo* review of the Trial Court's determination of the constitutionality of such an award. 394 S.C. at 396, 714 S.E.2d at 911, *citing* Mitchell v. Fortis Ins. Co., 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009). The review is to determine whether the award is consistent with due process. Determining whether the punished conduct is reprehensible is an integral part of the *de novo* review.

The reprehensibility analysis requires that the Court determine the degree of reprehensibility. This Court has explained the basis and rationale for such a determination as follows:

> In order to evaluate the reasonableness of the amount of the award, however, we must determine the degree of reprehensibility. *Austin,* 387 S.C. at 53, 691 S.E.2d at 151; *see also State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) ("[P]unitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence."); *Gore,* 517 U.S. at 575, 116 S. Ct. 1589 (describing reprehensible conduct sufficient for an award of punitive damages as reflecting "'the enormity of [the] offense' " and "the accepted view that some wrongs are more blameworthy than others" (quoting *Day v. Woodworth,* 54 U.S. (13 How.) 363, 371 (1852))). In doing so, we must consider whether
>
> > (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident. *Mitchell,* 385 S.C. at 587, 686 S.E.2d at 185.

Hollis, 394 S.C. at 396, 714 S.E.2d at 911.

The Trial Court provided very cursory analysis of the reprehensibility factors in her Order denying Appellant's post-trial motions. R.___. She found that the conduct was the result of "intentional malice" and that "the Plaintiff argued that [Appellants] extended the duration of the conduct by not telling anyone that the Commission had dismissed Mr. Breed's complaint." R.___. This last claim was not included in Respondent's Amended Complaint and should not be relevant.

A more thorough analysis of the five reprehensibility factors leads to a different assessment of whether Appellant's conduct was as reprehensible as the Trial Court implicitly held.

**a. Coffey Considered Her Primary Harm Economic.**

First, any injury from the defamation would be financial, not physical. Coffey testified that two of her major concerns were that she would not be selected to be family court judge, Tr. 282, line 9 – 284, line 13; R.___, and that she lost a year on her contract as municipal judge. Tr. 279, lines 9-22; R.___. Coffey complained of stress from the situation, but the $6050 damage award for that element is dwarfed by the two million dollar award for defamation and the four million dollar award for punitive damages. There were, moreover, other causes of serious stress in her life, including the separation from and trouble with, her husband. Tr. 947, line 24 – 956, line 14; R.___. Her testimony regarding loss of reputation points primarily toward financial loss and the huge jury award likewise points to financial loss, as she pointed out that her reputation had not been harmed among her friends, but was with her colleagues, Tr. 365, lines 20-25; R.___, who are the people who determine her financial future. Her psychologist testified that "when she's talking about the litigation, professional reputation issues, the stress increases." Tr. 967, lines 21-22; R.___.

**b. Rather than Reflecting Indifference to or a Reckless Disregard for Anyone's Health or Safety, Mr. Breed's Preparing and**

**Sending the Complaint to the Commission was, in fact, done with the Intention of Enhancing the Safety of People in Sea Pines, whose Safety was his Duty.**

Mr. Breed, in his complaint, outlines the scope of his responsibilities, as follows:

> My present position oversees a staff of approximately 50 officers and support staff whose primary concern is the public safety, security and law enforcement for community of 25,000 to 75,000 residents and visitors. This responsibility includes not only the public at large but extends to the certified officers charged with this enforcement.

There is absolutely no evidence that he did not take his duty seriously. Virtually his entire adult life had been spent in military or police organizations. Tr. 1080, line 7-1086, line 21; R.___. A devotion to duty is the hallmark, stated or unstated, of many, if not all, of these organizations, reflecting "Duty, Honor, Country."

In his position as the chief of security for Sea Pines, his duty was to the residents and guests in that community. He perceived that Otis Coffey was a threat to the safety and security of those residents and that someone was interfering with efforts to gain evidence about and perhaps apprehend Mr. Coffey. Given the reports from his officers that she repetitively told them to "stop harassing Otis" or "stop harassing my family," Mr. Breed considered that the interfering person was Judge Coffey, who directly – or through her family – threw the weight of her title at the officers. It would have been reprehensible for Mr. Breed not to fulfill his duty to the homeowners and guests in Sea Pines. Breed called Greg DeLoach, the assistant town manager, to complain about Judge Coffey's words and actions. Tr. 746, lines 8-9; R.___. The most reasonable inference is that he simply wanted the actions to stop, and he thought DeLoach could, as her boss, cause that to happen. Tr. 1125, lines 16-20; R.___. DeLoach told Breed that Ms. Coffey did not work for him. Breed

asked DeLoach who else he could complain to and Mr. DeLoach told him that he could file a complaint with the Commission on Judicial Conduct. Tr. 746, lines 10-14; R.___; Tr. 1122, lines 3-5; R.___. A reasonable inference may be drawn that it was not Breed's original intention to write anything about Ms. Coffey; he simply wanted her to refrain from conduct that he, as the man responsible for security in Sea Pines, considered harmful to his mission. The complaint would never have been sent if Judge Coffey's words and actions had not provoked it. It can hardly be reprehensible for an officer to do what he perceives to be his duty to others. The wording and punctuation could be improved in two or three places in his Complaint, but that hardly makes his words and actions reprehensible.

**c. Judge Coffey was not in a Position of Financial Vulnerability.**

Ms. Coffey's annual salary was $87,000 with two years on her contract. Tr. 766, lines 11-14; R.___. The average annual salary reflected on the official website for the Social Security Administration; www.ssa.gov., for 2011 – the last year reflected – was $42,979.61. Along with her salary Judge Coffey gets health benefits, paid vacation time, and a 401(k). Tr. 788, lines 13-18; R.___. She additionally has job security, based on Greg DeLoach's testimony that he would recommend that her contract be renewed. Tr. 801, lines 14-15; R.___.

It is, therefore, readily apparent that Ms. Coffey was not, and is not, in a position of financial vulnerability.

**d. While the greater part of Coffey's alleged injury resulted from the publication in the Island Packet of information from her own Complaint, there were two isolated incidents of Appellants' Publishing Mr. Breed's Complaint.**

Mr. Breed provided a copy of his complaint to Greg DeLoach. Tr. 749, lines 2-10; R.___. There is no evidence that DeLoach published the complaint to anyone else. Tr. 755, lines 9-20; R.___ or that he took any adverse action toward Coffey. Cary Kelley provided a copy of the complaint to the Board of Sea Pines. Tr. 1288, lines 12-20; R.__. There is no evidence that either Mr. Kelley or any member of the Board disseminated the complaint to anyone else.

On the other hand, Judge Coffey filed a complaint in the Court of Common Pleas on November 20, 2008, against Appellants. R.___. On Monday, December 8, 2008, the Island Packet newspaper published an article entitled, "Judge files lawsuit against Sea Pines PoA." R.___. It obviously is based on Coffey's complaint and provides quotations from that publicly-filed document. Ms. Coffey is directly quoted in the article. R.___. It is unequivocal that many more people came to know of Appellants' statements about Ms. Coffey via this newspaper than were made aware through Mr. Breed's letter, as there is no evidence that Mr. Breed, Mr. DeLoach or Mr. Kelley distributed it to anyone other than the people specified.

For purposes of the reprehensibility analysis, the fact that the alleged defamatory material reached more people through the Respondent's own action than through the actions of the Appellants should be taken into account. If the Respondent is willing to publicly expose allegations against herself by making a public filing of a document and by cooperating with and providing a quotation to the people who are going to greatly expand the public's knowledge of the allegations, she cannot reasonably consider Appellant's actions to be reprehensible. Appellants should certainly not be punished with punitive damages for injury caused primarily by Respondent's own actions.

**e. Any offense caused by Mr. Breed's Words was not caused by malice, trickery or deceit.**

When reading the entirety of Mr. Breed's Complaint to the Commission, one does not come away with the impression that he was being malicious, but simply that he was concerned with a course of conduct that he wanted to have stopped, one that was hindering his officers in the course of their work. The words are, in fact, quite temperate, not evincing an evil intent but reflecting an intention of modifying a circumstance that he genuinely believed was hindering his ability to fulfill his duty to the residents and guests of Sea Pines. The next-to-last sentence in the letter would more precisely state what was intended if the "and is" was removed, yielding "...given the distinct and transparent appearance of bias and partiality, not able to be a neutral and detached..." This makes clear that the "appearance" is meant to apply to everything that follows in the sentence.

To the extent that there is error in Mr. Breed's approach to this situation, it is an excess of zeal to do his job well, rather any maliciousness regarding Judge Coffey. Punishment via a draconian punitive damages award does not seem appropriate for someone who is trying hard simply to support his security police and do a good job. It would be more reprehensible if he were indifferent toward the safety and security of the people in Sea Pines whose safety and security is his responsibility. Punishing and deterring someone from endeavoring to do his job well does not seem to be an appropriate remedy..

The reprehensibility analysis yields no independent basis in the evidence for an award of punitive damages against CSA. The corporation did not publish the complaint externally at all, so none of the five reprehensibility factors are applicable.

**2. If the Defamation Award of Two Million Dollars is vacated, as it should be, the Amount of the Punitive Award should be Reduced to a Single-Digit Ratio.**

The United States Supreme Court has held that it would be very rare for an award of punitive damages to comport with Due Process if the ratio of punitive to actual damages exceeded a single-digit number. State Farm Mut. Auto. Ins. Co. v. Campell, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003) ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24, 111 S. Ct. 1032.")

If the special damage award stands, punitive damages should not exceed, but should be less than, $54,450.

## IV. THE EVIDENCE AGAINST COMMUNITY SERVICES ASSOCIATES, INC. FOR LIBEL AND SLANDER IS INSUFFICIENT AS A MATTER OF LAW, AS IT IS BASED ON SPECULATION.

Respondent alleged slander and libel against Community Services Associates, Inc. ("CSA"). The jury held that the corporation, by clear and convincing evidence, had published a false statement of fact about Ms. Coffey, that it had published a statement concerning Ms. Coffey with knowledge that it was false or with reckless disregard of its falsity and that Ms. Coffey was entitled to punitive damages from CSA. Tr. 1920, line 10 – 1921, line 12; R.___. The jury erred in making this determination. There is insufficient evidence, even under a preponderance of the evidence standard, to affirm the jury's verdict. The evidence relied upon to support the slander claim is speculative and is completely lacking in evidence that anyone who said anything was in the course and scope of his employment with the corporation or was in any sense speaking for the corporation. There is no

evidence regarding the libel claim that any publication was made by or on behalf of the corporation. If any publication was made, which is denied, it was within the parameters of the absolute, or at least qualified, privilege.

### A. The Evidence Adduced Regarding the Slander Claim is Insufficient to Support the Verdict against CSA.

Respondent's slander claim against CSA is based on the allegation that employees of CSA were saying that John Jolin was in a sexual relationship with Ms. Coffey. It is based on the testimony of John Jolin and one of the undesignated people allowed to testify, Mr. Waxel. Mr. Jolin provided hearsay testimony that Bobbie Martin, Tr. 516, line 14 – 517, line 5; R.___; Randy Woods, Tr. 518, line 15 – 519, line 12; R.___; and Mike Ryan, Tr. 519, lines 15-24; R.___, told him that a rumor was circulating the Jolin was involved in a sexual relationship with Ms. Coffey. Jolin did not mention Randy Woods in connection with this rumor, but another security officer at CSA, William Waxel, testified, again with hearsay, that Woods described a "general affair" between Jolin and Coffey. Tr. 847, line 22 – 848, line 11; R.___, which Waxel then testified that he passed on to Jolin. Tr. 848, lines 12-19; R.___.

Bobbie Martin (Tr. 819, line 20 – 820, line 5; R.___) testified, contrary to Jolin, that it was he who told her that other people were circulating the rumor and it was from Jolin himself that she first heard it. She testified that Jolin "likes to embellish a lot." Tr. 817, lines 10-13; R.___. Lieutenant Randy Woods (Tr. 854, lines 8-22; R.___) testified that he had never heard the rumor that Jolin and Coffey were having a sexual relationship. Despite issuing subpoenas for the trial to a plethora of people, Respondent did not subpoena Mike Ryan, the other man who Jolin said told him about the

affair and ostensibly told Jolin's wife about it. Tr. 519, lines 15-24; R.___; Tr. 624, lines 17-21; R.___.

There is no evidence in the record that any of these people were in the course or scope of their employment with CSA in making any comments about the rumored affair, whether they were serious or made in jest. There is, therefore, no basis for imposing vicarious liability on CSA for the circulation of the rumor. The basic rule of law is that an employer is liable for the torts of its employees only "if the tort is committed within the scope of his employment." Hubbard and Felix, *South Carolina Law of Torts* (3d ed., 2004), p. 660. Specifically, regarding defamation, the employer may be held liable for publication of defamatory statements by employees only if the publication was made within the scope of the employee's employment. Abofreka v. Alstan Tobacco Co., 288 S.C. 122, 127, 341 S.E.2d 622, 625 (1986); Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001) citing Restatement (Second) of Agency, § 247 (2006) in the following: "A master is subject to liability for defamatory statements made by a servant **acting within the scope of his employment**, or, as to those hearing or reading the statement, within his apparent authority" (emphasis added).

There is no evidence in this case that trafficking in such unsubstantiated reports or rumor was within the scope of employment of anyone who is alleged to have circulated them. There is, moreover, no evidence that either George Breed or Cary Kelley, both of whom hold supervisory positions at CSA, ever heard the alleged scandalous rumor. Mr. Jolin testified that he heard the rumor from three people: Bobbie Martin, Tr. 517, lines 4-5; R.___; Randy Woods, Tr. 518, lines 16-21; R.___; and Mike Ryan, Tr. 519, lines 15-16; R.___. He specifically did not mention Breed or

Kelley having heard the rumor or publishing it to anyone else, despite the Court having said that Respondent *had* to have testimony that Breed said it. Tr. 354, lines 1-7; 355, lines16-23; 356, lines 13-18.

Bobbie Martin specifically denied that Mr. Breed told her of the rumor. Tr. 814, lines 17-24; R.___. Jolin's supporting witness, William Waxel, denied that he heard the rumor from either Breed or Kelley. Tr. 852, lines 6-11; R.___. Randy Woods, in addition to testifying that he never heard the rumor from anyone at Sea Pines, also directly testified in particular that he had never "heard George Breed talk about a personal relationship between Mr. Jolin and Ms. Coffey." Tr. 854, lines 23-25; R.___.

There is, therefore, nothing that ties CSA to the slander charge – which is based entirely on the rumor of a Jolin-Coffey relationship. Nothing ties any CSA management employee, Breed or Kelley, to having heard, much less having published, the rumor. There is no evidence that any of the other employees of the corporation published the rumor within the scope of their employment. There is, therefore, no basis for CSA to be liable for slander. The Trial Court erred in denying CSA's motion for a direct verdict. Tr. 1386, lines 1-2; R.___; 1407, line 13 – 1408, line 3; R.___; 1424, lines 10-15; R.___.

### A. There is no Admissible Evidence to Support Respondent's Claim that CSA should be Liable for Libel.

Ms. Coffey alleges that CSA is liable to her for libel based on involvement in publication of George Breed's letter to the Commission on Judicial Discipline. There is no evidence that the sending of the letter to the Commission was an act of CSA, as the board never approved it, Tr. 1285, lines 8-11; R.___, but saw the letter after it had been sent. Tr. 995, lines 5-7; R.___.

The sending of the letter to the Judicial Commission, moreover, was privileged, either by an absolute privilege – as argued above – or a qualified privilege. Showing it to the Board clearly falls within the purview of a qualified privilege under the law. Here, as reflected in the testimony of Cary Kelley, showing the letter to the Board was done as a normal matter of business on a subject of mutual concern. Mr. Kelley's relevant testimony was:

> Q All right. Now, we've touched on ... the fact that you work for the board of directors right?
>
> A Yes, sir.
>
> Q Now, does CSA – CSA, obviously, has a security division, right?
>
> A Yes, we do.
>
> Q Private security business.
>
> A Yes.
>
> Q And what is the – I'm going to ask you an obvious question. What's the goal of CSA security?
>
> A Keeping the plantation safe and secure, for our residents, our owners, and all the visitors, tourists that we received on an annual basis.
>
> Q Is that an interest that you share?
>
> A Absolutely.
>
> Q Is that an interest that your board of directors shares?
>
> A Absolutely.
>
> Q And is that why you informed the board of directors of what was happening in 2008, with regard to the Coffey matter?

A Yes. I – I showed them – essentially shared with them the – the complaint that Mr. Breed had filed.

Tr. 1641, line 13 – 1642, line 11; R.___. Our law holds that such a communication has a qualified privilege if certain conditions are met. This Court has held as follows:

> When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion. *The statement, however, must be such as the occasion warrants, and must be made in good faith to protect an interest of the one who makes it and the persons to whom it is addressed.*

McBride v. School Dist. Of Greenville County, 389 S.C. 546, 562, 698 S.E.2d 845, 853 (Ct. App. 2010) *quoting* Bell v. Bank of Abbeville, 208 S.C. 490, 493-94, 38 S.E.2d 641, 643 (1946). Citing South Carolina law, the Fourth Circuit has held that, "when a communication is made by an officer or agent to an associate or agent of a corporation in the ordinary course of business, there is no publication and no actionable libel." Western Union Tel. Co. v. Lesesne, 198 F.2d 154, 157 (4th Cir. 1952) (citation omitted).

No reasonable juror could hold that showing Mr. Breed's letter to the Board was unwarranted or that the disclosure by Mr. Kelley was anything other than a good faith effort to protect his and the Board's common interest in the security of Sea Pines. There is no evidence in the record from which they could draw any contrary inference.

Finally, there is no evidence that the Board knew about or participated in Mr. Breed's sending the judicial complaint to Mr. DeLoach. To the contrary, Mr. Kelley testified that the Board played no part in relaying the letter to Mr. DeLoach. Tr. 1645, line 15 – 1646, line 3; R.___. There is no evidence to the contrary.

Given the above, there was no potentially libelous publication either to, or by, CSA regarding the letter to the Commission on Judicial Discipline. Because there is no admissible evidence either of slander or of libel, the Trial Court erred in denying Respondent's Motion for a Directed Verdict. Tr. 1424, lines 10-15; R.___.

## CONCLUSION

This Court should reverse the trial court's judgment. The libel case against Appellants should be dismissed because courts lack subject matter jurisdiction to adjudicate defamation claims arising from complaints to the Commission on Judicial Conduct. An absolute privilege, under South Carolina law, obtains for such communications regardless of the circumstances of their publication.

The slander claim should be reversed and remanded for a new trial at which only witnesses specifically designated in interrogatory responses are allowed to testify.

The awards for special damages,[12] actual damages for defamation and punitive damages should be struck as unsupported by sufficient admissible evidence and are manifestly the product of passion, caprice or prejudice.

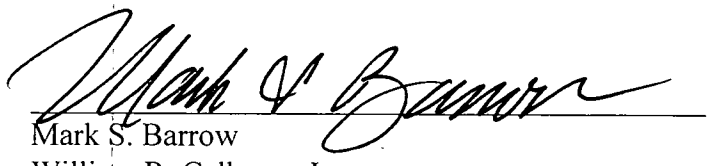
The claims against Community Services Associates should be dismissed and not retried, as both the libel and slander claims against CSA are based solely on speculation and conjecture. The libel claim, moreover, is either absolutely or qualifiedly privileged as a matter of law.

12. The testimony about causation came only from Dr. Geiger, who was not a designated witness.

The trial and verdict in this case should be extirpated.

Respectfully submitted,

**SWEENY, WINGATE & BARROW, P.A.**



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