THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Supreme Court Case No.: 2017-001404

Unpublished Opinion No. 2017-UP-067 (S.C. Ct. App. filed Feb.1, 2017)

Lower Court Case No.: 2013-CP-18-00735

William McFarland and Jennifer McFarland.....Petitioners,

v.

Mansour Rashtchian and Amy Rashtchian.....Respondents

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT WHERE A) THE TRIAL COURT'S JURY CHARGE ON SELF-DEFENSE WAS PROPER WHEN READ IN ITS ENTIRETY AND B) THE FACTS OF THE CASE WARRANTED CHARGING THE SAME?**

II. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT WHERE THE JURY FOUND THE STATEMENT ALLEGEDLY REFERRING TO MRS. MCFARLAND IS NOT DEFAMATORY ON ITS FACE; THE STATEMENT WAS NOT ACTIONABLE PER SE; DID NOT DAMAGE MRS. MCFARLAND'S REPUTATION; WAS NOT MADE IN REFERENCE TO MRS. MCFARLAND; WAS TRUE; WAS UNAFFECTED BY THE CHALLENGED JURY INSTRUCTIONS; AND THE JURY FOUND MRS. MCFARLAND FAILED IN HER BURDEN OF PROOF?**

III. **WAS THE COURT OF APPEALS' ORDER IMPROPERLY DRAFTED UNDER RULE 220(B) OF THE SCACR?**

STATEMENT OF THE CASE

This case arises from alleged defamatory statements made on April 26, 2011. At all times relevant, Respondents Mansour and Amy Rashtchian lived on Flud Street in Summerville, South Carolina. Petitioners Bill and Jennifer McFarland reside in a private gated community ("the Live Oak Community") and the rear of their house has a gate onto Flud Street. Petitioners Bill and Jennifer McFarland have been and are currently involved in similar disputes with several other neighbors within the Live Oak Community. See, R. pp. 551-561, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583; Sofia Mazell, et. al. v. William McFarland, 2013-CP-18-0546; William McFarland, et. al. v. David K. Hannemann, et. al., 2015-CP-18-1524 (another defamation suit by the McFarlands); David Hanneman, as President of the Live Oak Village Homeowners Association, Inc. v. William McFarland, 2016-CP-18-1812. Since the inception of this lawsuit and the filing of a second nearly identical suit by Petitioners, William McFarland, et. al v. Mansour Rashtchian, et. al., 2016-CP-18-00574, the Rashtchians have moved to a new residence and hope to distance

themselves from this toxic neighborhood.

The incident on April 26, 2011 is a culmination of events that began nine years before and continued well past the trial in this matter. Petitioners moved to the area in 2002 and shortly thereafter began causing trouble in the neighborhood. R. p. 69, lines 15-17. Petitioner Bill McFarland testified that on New Years Eve "there was an incident with some fireworks that were hitting my house" and "it was not a big deal." R. p. 77, lines 5-6&9. Despite the fact that it was "no big deal," police were called to the scene. Respondent Mansour Rashtchian testified that the event had a different tone. Mr. Rashtchian testified that he was setting off fireworks with his two boys, sixteen and ten at the time. R. p. 432, lines 5-6. Mr. McFarland came out of his house yelling, "What the hell are you all doing? You are targeting my home. You all need to stop." R. p. 432, lines 12-13. The interaction escalated from there and as Mr. McFarland was leaving, he told Mr. Rashtchian, "Why don't you go where you came from." R. p. 431, lines 17-18. This statement was particularly offensive to Mr. Rashtchian because he is a proud, naturalized US citizen and this altercation occurred in front of his two boys. R. p. 434, lines 5-6. Mr. Rashtchian was born and raised in Iran and has a heavy accent and dark complexion. He was attending The Citadel Military College in Charleston, South Carolina when the Shah of Iran was overthrown by Ayatollah Khomeini and did not feel safe returning to Iran. He became a U.S. citizen in 1988.

The McFarlands continued to cause trouble in the neighborhood and in 2009, a conflict arose with the Mazells, the McFarlands' next door neighbors. Mr. McFarland, as HOA president for the Live Oak Community, decided to install a drainage line for and at the expense of the community on an easement on the Mazells' property. R. p. 82, lines 4-6. The drainage line could have been installed in the McFarlands' yard or directly on the property line, but Mr. McFarland had built a fence along that line and did not want to damage his fence or yard. R. p.

84, lines 23-24. During the course of the drainage project, landscapers for the Mazells cut survey lines requiring a survey crew to reinstall those lines. R. p. 204, lines 14-15. Mr. McFarland believed the accidental cutting of a survey line warranted yet another call to the Summerville police department. R. p. 204, lines 17-19. Shortly thereafter, Petitioner Bill McFarland filed a notice of trespass against Mr. Mazell. R. p. 297, lines 8-21.

During this conflict over the boundary line, the Mazells asked Respondent Mansour Rashtchian, who is a contractor, for assistance in having their own survey done to determine the actual location of the drainage easement and boundary line. R. p. 295, lines 21-22. Mr. Rashtchian delivered the survey to the Mazells and observed Mrs. Mazell speaking with Mrs. McFarland at their fence line. R. p. 262, lines 5-16. As he approached, he noticed Mrs. Mazell was crying and upset. R. p. 436, lines 3-9. He put his arm around her and led her away and attempted to comfort her. Id. After that, Mrs. McFarland followed him back to his home and complained that the Rashtchians' floodlight shined into their bedroom window. R. 262, lines 17-25; p. 436, line 19- p. 438, line 4. Mr. Rashtchian was admittedly perturbed, but later adjusted the floodlights. R. p. 438, lines 5-6.

After the incident in 2009, Petitioner Bill McFarland actively harassed Mr. Rashtchian because he "took a side" with the Mazells in the property line dispute. R. p. 438, line 23. Whenever Mr. Rashtchian left his house and Mr. McFarland was in his yard, Mr. McFarland would openly display his middle finger towards Mr. Rashtchian and call him the "sand N-word." R. p. 440, lines 13-17 (during trial the term "N-word" was substituted for the real word that was actually used). Between 2009 and April 26, 2011, Petitioner Bill McFarland either said or mouthed the word "sand N-word" approximately ten times to Mr. Rashtchian. R. p. 441, lines 7-8.

On April 26, 2011, the McFarlands and Rashtchians spent the day working in their

respective yards. During a brief respite from work, Mr. Rashtchian observed landscapers delivering mulch to Petitioners' back gate on Flud Street. He also saw Mr. McFarland direct two cars over his grass and a plastic drainage culvert he had installed. R. p. 467, lines 7-11; p. 468, lines 4-7; p. 404, lines 11-15. The landscapers, Stephon and Lance Johnson, were spreading the mulch from the back of a sixteen foot trailer and their truck blocked Flud Street for a period of time. R. p. 92, lines 19-21. While offloading, the landscapers did not pull into the McFarlands' yard because they knew Mr. McFarland gets upset when people drive onto the "town grass" on his side of the road. R. p. 236, lines 13-16; p. 364, lines 7-10.[1] Mr. McFarland claims they were only there briefly, and he did not direct cars into the Rashtchian yard; but Lance Johnson testified Mr. McFarland "said that Mr. Rashtchian shouldn't have been angry because the grass was not even his property" and it was "town grass." R. p. 363, lines 12-16. A document prepared by Mrs. McFarland two years after the event indicates that a red car went onto the grass in front of the Rashtchians' property. R. p. 384, lines 17-25.

The initial confrontation that followed occurred between Mr. McFarland and Mr. Rashtchian. Mr. Rashtchian confronted Mr. McFarland in the road and said, "Why are you so inconsiderate? These are [sic] the kind of crap you do. Nobody likes you around here." R. p. 446, lines 22-23. Mr. Rashtchian asked the landscapers to move their vehicle and Mr. McFarland told him, "They're not going to move their trucks until they have finished their work." R. p. 404, lines 22-23. The two continued to argue and Mr. McFarland said "I know all about you. I know all about you." R. p. 448, line 2. In response, Mr. Rashtchian said, "Look, I have seen you videotaping me, you doing this, you using binoculars, telescope." R. p. 448, lines 3-5. Mr. McFarland replied, "Why don't you go get your green card?" R. p. 448, lines 7-8. Mr.

[1] There is a fifty foot wide right of way that extends into both yards thirteen or fourteen feet which Mr. McFarland refers to as "town grass."

Rashtchian then told Mr. McFarland that "he's an F'ing racist" to which Mr. McFarland replied, "I know what kind of shoddy contractor you are." R. p. 448, line 24; p. 499, lines 5-7. Mr. Rashtchian was understandably angry and responded in the heat of the moment, "I'm a self-made person. I came to this country with one suitcase and I didn't steal my in-laws' business." R. p. 450, lines 8-10. Mr. Rashtchian understands the he showed poor judgment at the time and is sorry for what he said. R. p. 450, lines 11-15. The two then went their separate ways. Mr. Rashtchian testified that he never said anything about anyone coming to the McFarland house. R. p. 457, lines 12-15.

Mr. McFarland admits to yelling and cursing the Rashtchians, including using the "F-word." R. p. 178, lines 7-13. He specifically admits to calling Mr. Rashtchian a "fucking asshole." R. p. 179, lines 7-14. Although, Mr. McFarland admits that he used profanity, he claims that he was simply trying to get Mr. Rashtchian to calm down and told him the landscapers were about to move the truck. R. p. 93, lines 19-23. Mr. McFarland testified that Mr. Rashtchian "tore into him," and Mr. Rashtchian said "I know who comes to your home when you're out of town" and "I could tell you about the people that come to your home when you're not there." R. p. 93, lines 23-24; p. 94, line 4; p. 95, lines 24- p. 96, line 1. Mr. McFarland testified that he asked Mr. Rashtchian, "'Who the hell would tell you that, such a thing?' Mr. McFarland testified that Mr. Rashtchian pointed at the Mazells' home on Lot 4 and said, 'That woman.'" R. p. 94, lines 7-10. Mr. McFarland testified he calmly "retreated" and told his wife "You've got to hear this guy. He's claiming somebody's sneaking into our home when I'm out of town." R. p. 94, line 23; p. 95, lines 3-4. He later testified Mr. Rashtchian made a comment about his wife cheating. R. p. 97, lines 13. He also testified that Mr. Rashtchian said he stole from his wife's family and that he is a racist. R. p. 95, lines 8-11. Mrs. McFarland testified that no one else has ever claimed that she is unfaithful to her husband. But see, R. pp. 551-561, Live

Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583 (In this lawsuit, Mrs. McFarland claims the Mazells slandered her by calling her unchaste.).

The second confrontation occurred about 30-35 minutes later. After Mr. McFarland ran home to tell his wife about what Mr. Rashtchian said, Mr. Rashtchian was in his yard moving a water hose. Mrs. McFarland approached Mr. Rashtchian and challenged him, "Where did you hear about my parents' business?" and "Where have you heard it?" R. p. 452, lines 3-6. She kept pointing her finger in Mr. Rashtchian's face. Mrs. Rashtchian saw this and responded by coming to the aid of her husband. R. p. 453, lines 1-2. The argument moved into the street, and there was profanity and raised voices on all sides. R. p. 456, lines 12-17. Mrs. McFarland and Mrs. Rashtchian continued to argue and Mrs. Rashtchian said, "Here you are worried about your own grass and yard, and you're doing this to us." R. p. 488, lines 4-5. She told Mrs. McFarland, "You really need to be worried, you know, about yourselves and your own affairs," and "Instead of worrying about us, you both ought to be worried about who comes over to your house when you're both not home." R. p. 488, lines 6-10. The last statement from Mr. McFarland was directed towards Mr. Rashtchian and he asked, "Why don't you go back where you came from?" R. p. 478, lines 4-5. This was heard and confirmed through testimony from the landscapers. R. p. 239, line 17.

Throughout this whole incident, the audience was the landscapers. They were all sitting back, watching, and laughing because it was amusing and the group "was making a big deal out of nothing." R. p. 237, lines 10-16; p. 241, lines 1-3. Mr. Stephon Johnson testified no one said anything about cheating and his opinions of the Petitioners did not change as a result of this incident. R. p. 242, lines 16-23.

The McFarlands did not call the police on the date of the incident. R. p. 189, lines 11-19. Instead, they spoke to an attorney the day after the incident and then called the police two weeks

later when the landscapers were at their home. R. p. 189, lines 11-19. The officers obtained statements from Ms. McFarland, Lance Johnson, Stephen Johnson and Mr. and Mrs. Rashtchian. Lance Johnson prepared a hand written one-half page statement. Ms. McFarland decided to file suit by May 10, 2011, when the police were called to her house. R. p. 191, lines 3-13; p. 192, lines 4-6.

Two years after the incident, Mrs. McFarland prepared a three page typed document titled "Confidential and Privileged Information for Lance Johnson." which she provided to Lance Johnson in June, 2013. R. p. 277, line 21- p. 278, line 3; see also, R. 562-564, "Confidential and Privileged Information for Lance Johnson." This document was prepared in the third person and contains numerous inaccuracies and untrue statements. R. p. 383, line 18- p. 392, line 20; see also, R. pp. 562-564, "Confidential and Privileged Information for Lance Johnson." It is also missing a page and key details such as the fact that the landscapers were laughing the entire time. R. p. 385, lines 19-20; p. 392, lines 16-19; see also, R. pp. 562-564, "Confidential and Privileged Information for Lance Johnson." Lance Johnson testified to the inaccuracies and felt like he was being used. R. p. 393, lines 11-17.

Lance Johnson testified to the inaccuracies in the statement prepared by Mrs. McFarland and felt like he was being used. R. p. 393, lines 11-17. He testified that the McFarlands called him two years after the incident to put some rocks in their yard. R. p. 380, lines 11-24. He had stopped working for them at that time. R. p. 380, lines 11-24. He believed that they really wanted to talk to him about their lawsuit. R. p. 453, lines 15-17. After they asked about an estimate for rock for their yard, the McFarlands gave Mr. Johnson the document they had already prepared. R. p. 381, lines 2-5.

In contrast, Ms. McFarland testified that she met with Lance Johnson on June 11, 2013 at her house and met with Mr. Johnson for 25 minutes before preparing the document titled

"Confidential and Privileged Information for Lance Johnson." R. p. 313, line 10- p. 314, line 20. Mr. McFarland testified that Ms. McFarland prepared the document at Mr. Johnson's request. R. p. 192, lines 7-10. Mr. and Mrs. McFarland did not identify the June 11, 2013 "statement" of Mr. Johnson in their responses to the Rashtchians' Interrogatories or Requests for Production dated November 8, 2013. R. p. 319, line 12- p. 320, line 12. Ms. McFarland was deposed the first time on November 25, 2013, five months after she prepared the document for Mr. Johnson.[2] Mrs. McFarland admitted at trial that she did not disclose her 25-30 minute meeting with Lance Johnson or preparing the document for him in her November 25, 2013 deposition. R. p. 316, lines 4-9. However, she claimed she produced the document to her former attorney, Richard Burke. R. p. 320, lines 6-12.[3]

Much has happened since the incident in April 26, 2011. Mr. Rashtchian's brother visited in Summer of 2011. At trial, his deposition testimony was proffered and excluded. He testified that he and Mansour were walking down Flud Street when Mr. McFarland was performing yard work and called them "sand N-word." R. p. 250, lines 2-11; see also, R. p. 573, line 10- p. 574, line 9; p. 594, lines 2-23, Majid Rashtchian Dep, 8:10-9:9; 19:2-19:23, Aug. 29, 2014. In October, 2012, Mr. Rashtchian's sister who resides in Manchester, England was visiting. At trial, her deposition was proffered and excluded. She testified that Mr. McFarland called her and her brother "sand N-word." R. p. 250, lines 12-20; see also, R. p. 608, lines 11-p. 609, lines 25, Farima Rashtchian Dep, 9:11-10:25, Oct. 27, 2014.

In 2014, another incident occurred where Mr. McFarland is alleged to have intentionally

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[2] The Rashtchians were allowed to reopen Mr. and Ms. McFarland's depositions by Order of Judge Goodstein filed December 10, 2014 due to the McFarlands failure to produce the document previously. R. 1-3, Order Granting Def.'s Mot. To Reopen Pls.' Dep.

[3] The McFarlands filed suit *pro se*. They then hired Richard Burke, Esq. to represent them once their depositions were noticed. Mr. Burke was relived as counsel and James Stuckey, Esq. was substituted by Order dated June 2, 2014. Mr. Stuckey was the McFarlands' attorney at trial. Respondents have not received an Order relieving Mr. Stuckey as attorney for the McFarlands. However, Steven Brown and Russell Hines entered a Notice of Appearance for the McFarlands on February 19, 2015.

driven on the Rashtchian's lawn. R. p. 211, lines 19-18. When the police were questioning him about the event, Mr. McFarland referred to Mr. Rashtchian as a "GD Iranian." R. p. 211, lines 7-10. The audio recording from the police car was proffered and excluded. Mr. McFarland admits to calling Mr. Rashtchian a "goddamn Iranian" in (sic) 2013. R. p. 177, lines 8-10. Ms. McFarland was present for that incident and admits her husband's statement as well. R. p. 301, lines 3-6.

The McFarlands filed their suit *pro se,* on April 24, 2013. R. pp. 10-12. In their Complaint, Petitioners allege there were three defamatory statements made against them. Petitioners allege Respondents slandered them by claiming 1) that Mrs. McFarland was having an extra-marital affair; 2) that Mr. McFarland stole his father in law's business; and 3) that both the McFarlands are racists. R. p. 12 ¶ 3. During the trial, after Mr. McFarland testified that he is not a racist, Petitioners withdrew the allegation relating to racism. R. p. 159, line 20- p. 162, line 23.

Respondents denied that either of them made a statement referencing Mrs. McFarland's chastity. Respondents admit that Mr. Rashtchian said "I'm a self-made person. I came to this country with one suitcase and I didn't steal my in-laws' business," but assert the affirmative defense of self-defense and/or provocation because Mr. Rashtchian responded in the heat of the moment to Mr. McFarland's statement, "I know what kind of shoddy contractor you are." R. p. 450, lines 8-10; p. 499, lines 6-7.

Mr. McFarland testified that he is not a racist and has a good reputation in the community. R. p. 179, lines 20-23; p. 180, line 5- p. 181, line 5. However, he admitted that he and his wife are accused of "converting funds" of the neighborhood HOA, which he equates to "stealing." R. p. 180, line 5- p. 181, line 5.

Respondents proffered an email from Mr. McFarland in which he states that others,

David Hanneman and Tom Morris, have defamed him. R. p. 251, line 8- p. 252, line 6; R. pp. 543-544. Also proffered was an email from Mr. McFarland in which he indicated that others had likened him to Hitler. R. p. 252, lines 7-18; R. pp. 543-544. Further, a letter from Mr. Hanneman and Mr. Morris was proffered, which is the partial basis of another defamation lawsuit. R. pp. 549-550.

Mrs. McFarland identified a verified lawsuit and testified that she has sued her current and former neighbors (Michael Mazell, Sofia Mazell, David Hanneman and Tom Morris). R. p. 293, line 1- p. 294, line 17; R. pp. 551-561, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583. She alleges that the Mazells defamed her by saying that she was unchaste, stole her father's business and is a racist. R. p. 294, lines 2-13.

The trial court concluded by charging the jury on defamation law as follows:

> Ladies and gentlemen, I have made a determination as a matter of law, and that has to do with one of the statements. It is the statement regarding Mr. McFarland, and I have made a determination that that statement is a statement which is -- would meet the definition of slander per se.
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> Now, you do not have to concern yourself with whether or not Mr. McFarland has made out that claim for slander per se. There is an affirmative defense, which is a complete defense, and it is the -- it's referred to in the law as self-defense, provocation or justification, and they're used interchangeably, depending on the case that you look at, sometimes depending on the state that you're looking at. It's maybe called more often justification, provocation. South Carolina, we call it justification or self-defense or provocation. We've called it that as well.
>
> So you will consider that defense, because it is an absolute defense to slander per se. The defendants have the burden of proving self-defense. I'm going to talk about those elements in just a moment.
>
> Now, as to the claim involving Mr. McFarland, again, don't worry about the defamation, his defamation action. You do, though -- would determine whether or not the defendants have met their burden regarding their affirmative defense of self-defense.

* * *

In order to recover in this case Ms. McFarland, if you will, must prove that defamatory language was communicated by a defendant about the plaintiff. A defamatory statement is one which tends to attack the honesty, integrity, virtue or reputation of a person and exposes the person to disgrace, public hatred, avoidance, contempt or ridicule.

* * *

In deciding whether the statement was defamatory, you must give the words used their ordinary and popular meaning. The intent and meaning of the words must be determined from the words themselves and the context in which they were used. All parts of the statement public considered together to determine the statement's true meaning.

* * *

Now, ladies and gentlemen, the plaintiff must prove that the statement was not true, was not true. A statement is not defamatory if it is substantially true. I'll talk about that in just a little bit.

Now, even if a defendant made a statement for no good purpose, or even if it was inspired by ill will towards a plaintiff, and even if the statement made by a defendant was made solely for the purpose of harming a plaintiff, the statement is not defamation if it is true or substantially true.

Ladies and gentlemen, there is another kind of -- encompassed within the heading of slander is slander per se. Slander per se. There are certain statements that are considered to be what is called slanderous per se. If a statement is slanderous per se, injury to the plaintiff is presumed, and the plaintiff does not have to prove special damages. And we'll talk about that in just a little bit.

What do we mean by these general damages that are -- would be presumed? Statements which charge the plaintiff with a commission of a crime of moral turpitude, contraction of a sexually transmitted disease, adultery, unchastity or unfitness in the plaintiff's business or profession are slanderous per se.

In deciding whether a crime is one of moral turpitude, you should focus on the duty to society which is breached by the

commission of the crime. If you find that the statement was slanderous per se and that the defendants have failed to prove self-defense, then you -- or self-defense or truth, then you should return a verdict for the plaintiff and must award the plaintiff at least nominal damages.

Nominal damages may be only a small or trivial sum, and nominal damages are required because the law presumes that some actual damage to the plaintiff's reputation and character directly and proximately resulted from the defendant's defamatory statement.

Now, ladies and gentlemen, I want to talk about self-defense. I want to talk about self-defense, which is an affirmative defense. Then I'm going to talk to you regarding truth. When you speak in terms of defenses to slander or slander per se, you talk about truth as an absolute defense is the term that's used.

Going to first talk about self-defense, then we're going to talk about truth as an absolute defense, and these are defenses that the defendants have pled to the defamation alleged by and shown by Mr. McFarland. Now, the defendants must maintain the burden of proof regarding these defenses. That burden of proof is by the greater weight or the preponderance of the evidence.

Self-defense, the defendants claim the defense of self-defense. Even if the statement was defamatory or statements were defamatory, the statement or statements will not support an action for defamation if the statement or statements were invited or brought about by the plaintiff that you are considering. And of course you do this for both plaintiffs.

If the plaintiff verbally attacked the defendant, the defendant is allowed to reply to that attack as long as the reply is made in good faith and without malice. However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

Self-defense, which is also referred to as provocation or justification, must have been so recent as to induce a fair presumption that the injury complained of, the slander, the slander per se, was inflicted during the continuance of feeling and passions, excited by the provocation. The cause and manner of speaking the slander and all the circumstances then and there existing ought to be considered by you, the jury, in determining whether or not the defense of self-defense exists.

Now, ladies and gentlemen, truth as an absolute defense. Ladies and gentlemen, the defendants have raised the defense of truth. Truth is an affirmative defense in the law. The defendants must prove this defense by the greater weight or the preponderance of the evidence. A sufficient defense is made out where the evidence establishes the statements were substantially true.

* * *

Now, the defense of truth is a complete defense. And what that means is it is an absolute or a complete defense to an action for slander if you believe that the statement made is founded in truth, meaning that if the statement itself is true or substantially true, then with regards to that statement, that would not be a defamatory statement.

Now I want to talk to you about damages. Ladies and gentlemen, when you consider the plaintiffs' claims and what I have informed you regarding Mr. McFarland having established the slander per se and the defendants' defenses, if you determine that one or both of these plaintiffs is entitled to a verdict, then your next consideration for that plaintiff or those plaintiffs would be that of damages, how much in monetary damages would you award.

* * *

Now, ladies and gentlemen, I would tell you that the very essence of an action for defamation is that the plaintiff or plaintiffs has or have suffered damage as a result of the injurious effect of the defamation upon his or her or their reputation. Actual proof of damages is not required, ladies and gentlemen, when the defamation is actionable per se, meaning slander per se.

Ladies and gentlemen, when there is slander per se, the damages are presumed. Presumed.

Ladies and gentlemen, if you find that the defendant has failed to meet the burden of proof regarding self-defense as it relates to Mr. McFarland, then you would award some amount of damage. And I'm going to talk to you about aggravating and mitigating circumstances in a moment, but if you find that the defendants have failed to meet their burden of proof regarding self-defense, provocation, justification, then you must award some amount of damages.

Now, ladies and gentlemen, if you find that Ms. McFarland

> has sustained her burden with regards to her claim for slander per se, and if you find that the defendants failed to meet their burden with regards to either truth or either self-defense, then, again, damages would be presumed and you would award some amount of damage. You would consider mitigation that I'm going to talk about in just a moment, but you would award some amount of damage.
>
> Now, ladies and gentlemen, if a defamation is actionable per se, then the law presumes the defendant acted with common law, actual malice and that the plaintiff or plaintiffs suffered general damages. Such defamation is actionable without proof of special damages. Words actionable per se carry with them the presumption that actual damage to reputation and character directly and proximately resulted therefrom, and it is not necessary to allege or prove any actual or special damages.
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> * * *
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> Now, ladies and gentlemen, with regards to damages, there can be mitigation or aggravation. Depending on the facts and circumstances, the manner of the speaking, these matters, either the mitigation, which would lessen the damage, the aggravation, which perhaps would increase the damages.

R. 512-522. The jury found in favor of the Respondents on both statements. The Petitioners appealed asserting the jury instruction related to self-defense was improper.

STANDARD OF REVIEW

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by a jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's finding." Parrish v. Allison, 376 S.C. 308, 318, 656 S.E.2d 382, 387 (Ct. App. 2007). Additionally, where a jury makes findings of fact unaffected by a jury instruction, the error is harmless. Gordon v. Busbee, 397 S.C. 119, 138 (Ct. App. 2012) (citing Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 484, 18 S.E.2d 331, 335 (1942) (holding the giving of erroneous charge was harmless error when it could not have affected the action of the jury)).

Also, "[a]n alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells v. Halyard, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000).

Jury charges are also within the sound discretion of the trial court. "A trial court must charge the current and correct law." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 495-96, 514, S.E.2d 570, 475 (1999) (citations omitted). "However, when reviewing a jury charge for alleged error, the appellate court must consider the charge as a whole in light of the evidence and issues presented at trial." Dixon v. Ford, 362 S.C. 614, 619, 688 S.E.2d 879, 882 (Ct. App. 2005). The trial court will only be reversed for improper jury charges where an Petitioner can show error and prejudice. Arkwright Mills v. Clearwater Mfg. Co., 217 S.C. 530, 553 61 S.E.2d 165, 175 (1950). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497-98, 514 S.E.2d 570, 575 (1999). A jury charge that is substantially correct and covers the law does not require reversal. Id. at 496, 514 S.E.2d at 574.

ARGUMENT

The tort of Defamation is unique in that it "allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." Erickson v. Jones St. Publrs., LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006).

> In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of

> special harm or the existence of special harm caused by the publication.

Id. at 465, 629 S.E.2d at 664. "A statement is (1) either defamatory per se or defamatory per quod, and (2) actionable per se or not actionable per se." Parrish, 376 S.C. at 320, 656 S.E.2d at 388.

> If the defamatory meaning of a message or statement is obvious on the face of the statement, the statement is defamatory per se. If the defamatory meaning is not clear unless the hearer knows the facts or circumstances not contained in the statement itself, then the statement is defamatory per quod. In cases involving defamation per quod, the plaintiff must introduce facts extrinsic to the statement itself in order to prove a defamatory meaning.

Id. (citations omitted). Slander, which was alleged in the case at bar, "is actionable *per se* when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct. App. 2001).[4] If a defamatory statement is actionable *per se*, there is some measure of general damages that is presumed unless justification or privilege is proven. See Erickson, 368 S.C. at 465, 629 S.E.2d at 664.

Respondents concede that, "you stole your father-in-law's business" is defamatory *per se* and is actionable *per se*. R. p. 507, lines 15-17. As to the statement Petitioners allege related to Mrs. McFarland chastity, the evidence indicates that the statement made was "You need to be looking about who's coming in your house when you're not here," or some derivation thereof. R. p. 498, lines 4-10. Both sides have presented competing accounts as to the wording and meaning of this statement. Petitioners contend that the additional phrase, "and your wife cheats," was included and the statement is both defamatory *per se* and actionable *per se*. R. p.

[4] Respondents/Petitioners deny that the statement that the McFarlands are racists falls within this category.

97, lines 12-13. However, it is clear from the testimony of the Petitioners' own witnesses that the word "cheat" was never used. R. p. 362, line 25- p. 636, line 2; p. 371, lines 1-4; p. 390, lines 3-12. Therefore, the statement as to Mrs. McFarland is not clear on its face and the trial court correctly ruled that it is a question of fact for the jury to determine the true meaning of this statement based on the evidence. R. p. 498, lines 4-21. Respondents contend this statement referred to the McFarlands' teenage daughter and was a true statement; therefore, it is neither defamatory *per se* nor actionable *per se*. R. p. 488, lines 3-10. The trial court properly left that question to the jury as well.

1. A)THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT BECAUSE THE JURY INSTRUCTION GIVEN BY THE TRIAL JUDGE WAS NOT ERRONEOUS[5]

Petitioners concede self-defense is a defense to defamation, but argue the Jury was improperly instructed on the nature of that privilege. Respondents disagree the charge, as a whole, fails to explain the qualified privilege of self-defense as described in Duncan v. Record Pub. Co., 145 S.C. 196, 280, 143 S.E. 31, 58 (1927) and Cartwright v. Herald Pub. Co., 220 S.C. 492, 68 S.E.2d 415 (1951).

Defamatory publications can be classified as either actionable *per se* or not. Libel and certain forms of slander are actionable *per se*. Goodwin, 347 S.C. at 36, 552 S.E.2d at 322-23. Under South Carolina law, self-defense is available as a complete bar or a mitigating factor regardless of the statement's classification. Stated differently, a statement that may be otherwise defamatory is privileged where made in response to another's statement. Two South Carolina cases are directly on point: Cartwright., 220 S.C. 492, 68 S.E.2d 415 (1951), and Duncan, 145 S.C. 196, 143 S.E. 31 (1927), both of which involve publications that were actionable *per se*.

[5] The relevant portions of the charges as stated in the Respondent's brief is incorporated as if restated fully herein.

Cartwright involved a libelous publication and the appeal of a Defense verdict. 220 S.C. at 496, 68 S.E.2d at 416. Much like the instant matter, the statement in Cartwright, was actionable *per se* and fell "within the well established rule of self-defense from libel or slander." Id. at 498, 68 S.E.2d at 417. The Cartwright jury was instructed:

> If a party's good name is assailed by letters published in a newspaper, he may reply defending himself, and if his reply is made in good faith without malice, and it is not unnecessarily defamatory of his assailant, it is privileged even though false ... *and is not actionable....*

Id. at 503, 68 S.E.2d at 419 (emphasis added). By using the phrase, "is not actionable" the lower court clearly indicated that the jury could find in favor of the Defendant even where the publication was actionable *per se*. In affirming the lower court's defense verdict, the South Carolina Supreme Court found "instructions were sound in their setting as applied to the facts of this case." Id.

Duncan also involved a libelous publication, which again, is actionable *per se*. Duncan is distinguishable from Cartwright in that the jury found for the Plaintiff after being instructed on self-defense. Defendants appealed complaining that the judge had improperly instructed the jury that self-defense was only a mitigating factor for the determination of damages. Defendants took exception to the following charge:

> [T]he defense of self-defense and privilege, as I have heretofore set them forth, would apply in this case in mitigation or reduction of damages if the publication by defendants was libelous, even though plaintiff's (defendants') publication resulted from a speech made by plaintiff during a session of the Senate, of which he was a member, and in the Senate chamber...

145 S.C. at 272-273, 143 S.E. at 55. While Defendants' contentions were correct with regard to the isolated portion of the charge, the Supreme Court stated that the charge must be read as a

whole. Id. at 273, 143 S.E. at 55. The Court cited the following additional portions of charge made by the trial court:

> In an honest endeavor to vindicate himself and his own interests, a defendant is often privileged to make statements which would otherwise be regarded as defamatory. If a party's good name is assailed in a newspaper, he may reply, defending himself, and, if his reply is made in good faith, without malice, and is not unnecessarily defamatory of his assailant, it is privileged. Even though false, a publication which is fairly in answer to a libel, if published without malice and in good faith, for the purpose of repelling a charge, is privileged, *and is not actionable.*

Id. at 273-274, 143 at 56 (emphasis added)

> An action for libel is not to be encouraged for publication made while parties are mutually engaged in making publications about each other. A publication made in the course of a newspaper war, and bearing some reasonable relation to the subject-matter of the controversy, is qualifiedly privileged, and it is for you to determine from the evidence applying to the evidence the rules of law stated by me, whether or not, under the circumstances of this case, the publication made by defendants was qualifiedly privileged, and, if it was privileged, then you cannot award the plaintiff a verdict, unless you find that the defendants were actuated by express or actual malice in making the publication, and have abused their privilege.

Id. at 274, 143 S.E. at 56.

> If from a defendant's point of view strong words seem to be justified, he should not be held liable for using them, unless the jury find from the evidence that what he published was malicious and inconsistent with good faith.

Id. The Supreme Court upheld the lower court's ruling, stating that, "In view of the foregoing instructions it cannot be said that the trial court limited the scope and sufficiency of the defense of 'self-defense and privilege' to mitigation of damages." Id. at 274-275 143 S.E. at 56. Thus, the Supreme Court has made it clear that self-defense can be complete defense or a mitigating factor, and the two are not mutually exclusive. Based on the two above-referenced cases, it is clear that self-defense can be a complete defense to defamation that is actionable *per se*.

The trial court properly and completely instructed the jury on the Respondents' burden to prove their affirmative defenses. The court further charged:

> If the plaintiff verbally attacked the defendant, the defendant is allowed to reply to that attack *as long as the reply is made in good faith and without malice.* However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

R. p. 517, lines 9-15 (emphasis added). The court also instructed:

> Now, ladies and gentlemen, if a defamation is actionable per se, then *the law presumes the defendant acted with common law, actual malice and that the plaintiff or plaintiffs suffered general damages. Such defamation is actionable without proof of special damages.* Words actionable per se carry with them the presumption that actual damage to reputation and character directly and proximately resulted therefrom, and it is not necessary to allege or prove any actual or special damages.

R. p. 520, line 22- p. 521, line 5 (emphasis added).

The charge, read in its entirety, is a correct statement of the law and sufficiently explains to the jury that 1) the Respondents have to prove their affirmative defense and 2) this defense is only available when the reply is made in good faith and without malice. Therefore, the charge, read as a whole, is proper and does not constitute reversible error. Once this issue was submitted to the jury after being properly charged, the jury verdict should not be disturbed. Therefore, the Court of Appeals properly affirmed the trial court.

1. B)THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT BECAUSE THE TRIAL COURT'S DECISION TO CHARGE THE JURY ON SELF-DEFENSE WAS WELL WITHIN THE TRIAL COURT'S DISCRETION AND WAS WARRANTED BY THE FACTS OF THIS CASE

Petitioners assert that Respondents cannot avail themselves to the affirmative defense of self-defense where they initiated the events leading to the defamatory statement. Despite being an inaccurate statement of the facts, this Court should not "disturb the jury's factual findings

unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." Small v. Pioneer Mach., 329 S.C. 448, 461, 494 S.E.2d 835, 841 (Ct. App. 1997). Without giving too much credence to this portion of the argument, we will address the position that Mr. Rashtchian "sparked the whole defamatory episode."

The record is clear that the incident on April 26, 2011 was precipitated by years of racially charged insults towards Mr. Rashtchian, as well as Mr. McFarland's inconsiderate actions immediately prior to their interaction where Mr. McFarland directed two cars around his landscaper's truck and onto the Rashtchian property. Mr. McFarland would surely agree that homeowners, including he and his wife, take great pride in the maintenance of their lawn and that he would take offense to someone driving on his grass.[6] Petitioners attempt to explain Mr. McFarland's actions by arguing Flud Street is "not a thoroughfare" and only "two vehicles" drove onto the "right-of-way' grass." As such, they have essentially admitted that their own actions started the sequence of events leading up to the defamatory publication. Additionally, the record is similarly clear that the two had been arguing with each other and Mr. McFarland escalated the level of the altercation by making his own defamatory statement, "I know what kind of shoddy contractor you are." R. p. 448, line 24; p. 499, lines 5-7. Mr. Rashtchian's response was proportional.

The charge, which is an accurate one, clearly instructs a jury:

> *If the plaintiff verbally attacked the defendant*, the defendant is allowed to reply to that attack as long as the reply is made in good faith and without malice. However, the defendant is responsible or the defendants are responsible if the statement in response to the plaintiff's attack goes beyond the plaintiff's attack or uses language that is unnecessarily defamatory.

[6] "[N]othing is more pleasant to the eye than green grass kept finely shorn...." FRANCIS BACON, OF GARDENS (1625) reprinted in THE ESSAYS OF LORD BACON: WITH CRITICAL AND ILLUSTRATIVE NOTES, 185 (John Hunter ed., 1873).

R. p. 517, lines 9-15 (emphasis added).

More specifically, the use of the conditional word "if" requires a jury to first find the Plaintiff initiated the event or escalated the level of the event. Stated in the negative the jury charge reads: "If the plaintiff did not verbally attack the defendant, the defendant is not allow to reply to that attack...." By its verdict, the jury here necessarily found the Petitioners initiated the action and Mr. Rashtchian's reaction was justified. The jury's finding supports the charge. Petitioners are now asking this Court to look into the minds of the jurors and to question their interpretation of the evidence as presented. As the verdict is supported by evidence in the record, the jury's verdict should not be overturned. Therefore, The Court of Appeals properly affirmed the trial court because the trial court's decision to charge the jury on self-defense was well within the trial court's discretion and was warranted by the facts of this case.

2. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT WHERE THE JURY FOUND THE STATEMENT ALLEGEDLY REFERRING TO MRS. MCFARLAND IS NOT DEFAMATORY ON ITS FACE; THE STATEMENT WAS NOT ACTIONABLE PER SE; DID NOT DAMAGE MRS. MCFARLAND'S REPUTATION; WAS NOT MADE IN REFERENCE TO MRS. MCFARLAND; WAS TRUE; WAS UNAFFECTED BY THE CHALLENGED JURY INSTRUCTIONS; AND THE JURY FOUND MRS. MCFARLAND FAILED IN HER BURDEN OF PROOF.

As shown above, there was no error in the jury instruction. However, in the case of Mrs. McFarland, a change in the jury instructions would not result in a change in the verdict. Under South Carolina law, it is well-settled that, "[a]n erroneous jury instruction...is not grounds for reversal unless the Petitioner can show prejudice from the erroneous instruction." Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). Stated similarly, "[a]n alleged error is harmless if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." Wells, 341 S.C. at 237, 533 S.E.2d at 343. In the instant case, it is clear the verdict as to Mrs. McFarland was unaffected by the challenged portion of the jury instruction

because there was an abundance of evidence to show the comment was not even referring to Mrs. McFarland and Mrs. McFarland failed in her burden of proof. The trial court correctly determined that the statement allegedly referring to Mrs. McFarland fell into the *per quod* category, that is, the jury must interpret the meaning of the statement. The trial court also correctly ruled that the jury must decide whether the statement referred to Mrs. McFarland or her daughter. Petitioners again ask this court to inquire into the minds of the jurors to divine the reason for their verdict.

The evidence supports that the alleged defamatory statement was not referring to Mrs. McFarland. At the time of this incident the Petitioners had a teenage daughter whose friends and boyfriends came to visit. See R. 195, lines 18-23; p. 322, lines 17-20; & p. 362, lines 22-24. Mr. Rashtchian testified, in great detail, about a specific instance a couple of weeks prior to the 2011 incident where he saw a teenage boy driving a "silver sport utility" visit the McFarland home when neither parent was present. R. p. 458, line 4. Respondents both testified that the statement made to Mrs. McFarland was in reference to the teenage boys visiting the McFarlands' daughter and not Mrs. McFarland. The jury found this evidence credible and clearly found the statement was not defamatory *per se*, was not referring to Mrs. McFarland, and was true. These findings do not depend on whether or not the Respondents proved the affirmative defense of self-defense. Therefore, the jury's verdict as to Mrs. McFarland should not be disturbed.

The McFarlands also have significant credibility issues and their testimony was riddled with inconsistencies. Mrs. McFarland testified that no one else has ever claimed she stole money or was unfaithful, yet she filed a nearly identical defamation lawsuit against the Mazells in 2009. R. p. 322, lines 6-13; p. 293, line 18- p. 294, line 8; see also, R. pp. 551-561, Live Oak Village Homeowners Association, et. al. v. Thomas Morris, et. al., 2012-CP-18-2583. Additionally, Mrs. McFarland manufactured evidence in an attempt to bolster her case. Two weeks after the

incident, the McFarlands called police and had the landscapers provide written statements to the police. R. p. 189, lines 11-19; p. 307, line 23- p. 309, line 25. This occurred after they spoke with their attorney and after they had already decided they would file the lawsuit. Id. Two years later, Mrs. McFarland created a document that was purported to be a statement by Lance Johnson, but was really a wholly biased and inaccurate fabrication depicting the McFarlands as innocent saints and the Rashtchians as aggressive bullies. R. p. 383, line 18- p. 392, line 20; see also R. pp. 562-564, "Confidential and Privileged Information for Lance Johnson." Mrs. McFarland omitted any mention of this document or her meeting with Mr. Johnson during her deposition. R. p. 316, lines 4-9. Mrs. McFarland also testified Mrs. Rashtchian made physical contact with Mr. McFarland, but her own witness denied this occurred. R. p. 270, lines 1-6; p. 391, lines 8-10.

In the same vein, Mr. McFarland attempted to enhance the farcical account by painting both he and his wife as being the calm, level-headed voices of reason throughout all their interactions with the Rashtchians. Mr. McFarland discussed his actions in 2003 where he calmly "informed [the Rashtchians] that fireworks were hitting the house [and politely asked them to] be careful." R. p. 78, lines 3-6. Mr. McFarland was the innocent victim in 2011 and testified that he "retreated" from the encounter and was just "trying to, you know, stop this event, if I can." R. p. 94, line 23; p. 96, line 25- p. 97, line 1. And, even in the face of eyewitness testimony and the statement manufactured by his wife, Mr. McFarland maintains that no cars ever drove in the Rashtchians' yard and denies the landscapers were laughing at the group. R. p. 183, line 25- p. 184, line 8; p. 170, lines 4-6. He also told the jury he is not a racist, but later admits to calling Mr. Rashtchian a "goddamn Iranian" in a "normal" or "distressed" voice. R. p. 98, lines 13-14; p. 177, lines 8-14.

The verdict proves the jurors did not believe the McFarlands and Mrs. McFarland failed in her burden of proof. This finding is similarly unaffected by the challenged jury instruction and should be affirmed upon appeal.

3. THE COURT OF APPEALS' ORDER WAS PROPERLY DRAFTED IN COMPLIANCE WITH RULE 220(B) OF THE SCACR.

Rule 220(b) SCACR states:

> Decision by the Court. In every decision rendered by an appellate court, every point distinctly stated in the case *which is necessary to the decision of the appeal* and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. This rule does not apply to the following:
>
> ***
>
> *(2) The Court of Appeals need not address a point which is manifestly without merit.*

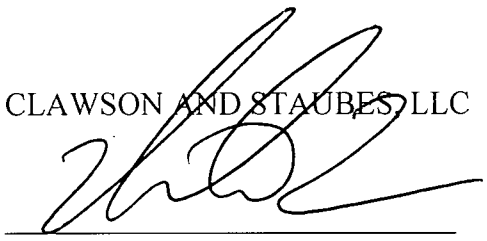
(emphasis added). Rule 220(b) only requires that the Court of Appeals address points, which are necessary to the decision of the appeal and are not manifestly without merit. In the instant matter, the Court of Appeals' Order dated February 1, 2017 fairly addressed all points necessary to the appeal that had merit. Therefore, the Court of Appeals' Order was not drafted improperly under Rule 220(b) of the SCACR.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask that this Court reject Petitioners' petition.

[Signature page to follow]

CLAWSON AND STAUBES, LLC



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March 30, 2018

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Supreme Court Case No.: 2017-001404

Unpublished Opinion No. 2017-UP-067 (S.C. Ct. App. filed Feb.1, 2017)

Lower Court Case No.: 2013-CP-18-00735

William McFarland and Jennifer McFarland.....Petitioners,

v.

Mansour Rashtchian and Amy Rashtchian.....Respondents

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served all counsel of record with a copy of the Brief of Respondents by mailing a copy of the same by United States Mail with first class postage prepaid to the following:

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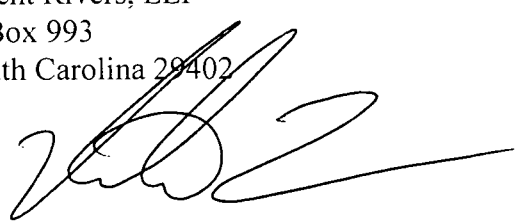

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March 30, 2018
Charleston, South Carolina