THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

2017-UP-040 (S.C. Ct. App. filed January 25, 2017)
Appellate Case No. 2017-001160
Lower Court Case No. 2013-CP-40-1460

Jeffrey Kennedy..... Petitioner,

v.

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

BRIEF OF PETITIONER

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INTRODUCTION

On January 12, 2018, this Court issued a Writ of Certiorari to the Court of Appeals to review the Court's ruling in *Jeffrey Kennedy v. Richland County School District Two, Eric Barnes and Chuck Earles*, 2017-UP-040 (S.C. Ct. App. filed January 25, 2017). This week-long defamation case was tried before a jury, which heard from a dozen witnesses and considered numerous exhibits before arriving at their verdict. Because there was evidence in the record from which the jury could find evidence of defamation – and because the credibility of witnesses is for the jury – this Court should reverse the Court of Appeals and reinstate the jury's verdict.

QUESTIONS PRESENTED

I. Where there was evidence in the record that the Respondents defamed Mr. Kennedy through their words and conduct - and the jury specifically found that the Respondents exceeded any qualified privilege and acted with actual malice towards Mr. Kennedy - did the Court of Appeals err in reversing the jury's verdict?

A. The Court of Appeals' decision overlooks evidence in the record that supports the jury's verdict, regardless of the testimony of the Respondents, and therefore the Court acted outside its limited scope of review.

B. The Court of Appeals' decision is in direct contradiction to the prevailing law of defamation in South Carolina.

C. The Court of Appeals' decision, reversing the trial court's denial of Respondents' motions for directed verdict and JNOV, was the result of the Court improperly weighing the evidence in the case, substituting its view of one piece of evidence for that of the jury's view of an entire week's worth of evidence.

STATEMENT OF THE CASE

The Petitioner, Jeffrey Kennedy (hereafter "Kennedy" or "Mr. Kennedy"), filed suit against Respondents Richland County School District Two (hereafter "Richland Two"), Chuck Earles, Eric Barnes, and others on March 11, 2013 in Richland County Court of Common Pleas. Kennedy's complaint alleged claims for defamation, negligent supervision, and other causes of action arising out of Kennedy's employment as a security guard in Richland Two's security division. Respondents Chuck Earles and Eric Barnes were both employed in supervisory capacities within the security division.[1]

This case was tried before a jury, with the Honorable Alison R. Lee presiding, beginning on September 29, 2014. The named defendants at the trial were Respondents Richland Two, Eric Barnes, and Chuck Earles (collectively "Respondents").[2] The jury heard testimony from a dozen witnesses, including Mr. Kennedy, Mr. Earles, and Mr. Barnes. The trial court granted Richland Two's directed verdict motion on the claims for negligent supervision and intentional infliction of emotional distress. R. p. 599, l. 4-23; R. p. 937, l. 8 – p. 942, l. 2. Accordingly, the **sole** cause of action before the jury was a claim for defamation against Respondents Chuck Earles and Eric Barnes. The Respondents moved for a directed verdict as defamation at the close of Kennedy's case, and again at the conclusion of all of the evidence. The trial court denied the motions.

On October 3, 2014, the jury returned a verdict in favor of Mr. Kennedy. The jury found, by way of a special interrogatory on the verdict form, that Chuck Earles and Eric Barnes defamed Mr. Kennedy and that they acted with actual malice in doing so. The jury

[1] Kennedy dismissed other named defendants from the lawsuit prior to trial.

[2] Kim Jones, another Richland Two employee, was also a defendant at trial. However, the trial court granted Jones's directed verdict motion, thereby dismissing her from the case entirely. R. p. 599, l. 24 – p. 600, l. 13.

entered a verdict against Chuck Earles in the amount of $100,000 actual damages and $200,000 punitive damages. The jury found against Eric Barnes in the amount of $100,000 actual damages and $150,000 punitive damages. The trial court denied the Respondents' post-trial motions. A timely appeal was filed.

The Court of Appeals heard oral argument on November 17, 2016. On January 25, 2017, the Court of Appeals issued its unpublished opinion, which reversed the jury verdict and the trial court's rulings on the motions for directed verdict and judgment notwithstanding the verdict. On January 12, 2018, this Court granted Kennedy's petition for a writ of certiorari.

FACTS

Mr. Kennedy began working in the security division of Richland Two in May 2008, working third shift – essentially, the night shift. R. pp. 140-141. Mr. Kennedy, a married father and grandfather, was born in Columbia, South Carolina, graduated from Keenan High School, and is an Army veteran. R. pp. 139-140.

Upon hiring, Mr. Kennedy was trained by the then-Chief of Security, Chief Propst, and others on how to perform night watchman duties. R. p. 148, l. 21 – p. 149, l. 4; R. p. 893, l. 16 -19; R. pp. 894-896. As part of his on-the-job training, Mr. Kennedy was instructed not to sit in a running vehicle, in order to help the District save on gas expenses. R. p. 163, l. 17-25. Additionally, he was taught how to "space out" his duties so they were not completed too quickly. R. pp. 147 -148, l. 5; R. pp. 888, l. 6-13. Finally, Mr. Kennedy was instructed to change up his routine so that others could not predict his actions and location. R. p. 144, l. 12 – p.146, l. 16; R. pp. 559, l. 3-18. Part of Kennedy's duties were patrolling schools, responding to calls, setting alarms, checking windows and doors, and

generally observing the premises of Richland Two schools, including Spring Valley High School. R. p. 142, l. 16 – p. 143, l. 18. In order to work the night shift, Mr. Kennedy was given keys at the beginning of his shift to the buildings and offices of Spring Valley High School, among other schools.

In 2010, Chief Propst was fired by Richland Two and Respondent Chuck Earles assumed the position of Emergency Services Manager. R. p. 149, l. 5-16. Mr. Earles subsequently hired Respondent Eric Barnes as his Assistant Security Manager. R. p. 150, l. 22-25. Both Earles and Barnes were former employees of the Richland County Sheriff's Department and seasoned law enforcement professionals. The rank and file employees believed that Messrs. Earles and Barnes wanted to make Richland Two security more like law enforcement, R. p. 151, l. 1-23.

Respondent Earles believed that the Security Division had a rumor problem and a gossip problem, and that Chief Propst had allowed a lot of inappropriate conduct. R. p. 418, l. 15 – p. 419, l. 18; R. p. 423, l. 25 – p. 424, l. 9. As a result, Mr. Earles sought to "change the culture" of the Security Division by having employees, including Kennedy, read and sign a "Change of Culture" memorandum (R. p. 1008, Pl. Tr. Ex. 2) which provided, in part, that employees were to "mind their own business." R. pp. 149-150. Mr. Barnes was familiar with this memorandum, R. p. 304, l. 17-24, and also believed that gossip and rumor were a problem in the Security Division. R. p. 305, l. 17- p. 306, l. 2.

Spring Valley High School is a huge school, serving approximately 2,000 students. R. p. 700, l. 5-14. There are approximately 100+ thefts which occur every year; however, many of these thefts are never reported to the security division. R. p. 746, l. 4. – p. 747, l.

4. There have been instances of people breaking in through ceiling panels and through open windows. R. p. 713, l. 14 - p. 722, l. 2, R. p. 745, l. 18 - p. 747, l. 12.

Numerous witnesses testified that "everyone had keys" at Spring Valley and, in fact, Respondents did not even know who had keys to what – that decision was made by Spring Valley's principal, not by the security division. R. p. 154, l. 23 – p. 156, l. 25; R. p. 248; R. p. 419, l. 19 – p. 421, l. 1. Respondents, among others, testified that it was a challenge to maintain security when they did not know who possessed keys at Spring Valley. R. p. 243, l. 20 –p. 248, l. 17; R. p. 363, l. 15 –p. 364, l. 14. Kids, parents, and other staff were given or loaned keys from time to time. R. p. 227, l. 8-22; R. pp. 317-318.

In or around February 2011, Mr. Kennedy applied for a supervisor's job as a lieutenant within the security division. The position paid more and would allow him to work "second shift", allowing for more family - friendly hours. R. p. 151, l.24 – 152, l. 20. Respondents ultimately decided Mr. Kennedy was the best candidate for the job. R. p. 152, l. 20 – p. 153, l. 15. On February 28, 2011, Mr. Earles sent his hiring recommendation up to the human resources department, which would run background checks, etc. R. p. 153, l. 16 – p. 154, l. 10. Sometime after being recommended for the promotion (but before HR formally approved it), Mr. Kennedy was invited to the regular supervisor's meeting and introduced as the new lieutenant. R. p. 154, l. 12-22; R. p. 301, l. 3-24. It was known among the rank and file that Mr. Kennedy was getting the promotion.[3] R. p. 154, l. 12-22; R. p. 225, l. 25 – p. 226, l. 8; R. p. 268, l. 13-20.

On March 4, 2011, Spring Valley's athletic director, Tim Hunter, alleged that he left $1,000 in cash boxes under the desk in his office the night before, and discovered the

[3] Announcing a promotion before HR approval was against Earles's policy. R. p. 417, l. 6-23.

money was missing the next morning. R. p. 319, l. 21 – p. 320, l. 2; R. p. 608, l. 14 – p. 611, l. 18; R. p. 1025 (Def. Tr. Ex. 4). Hunter's office is located in the athletic department (AD) building, known as Bates Hall. None of the security cameras in Bates Hall were pointed at Mr. Hunter's office door. R. p. 349, l. 1-5; R. p. 442, l. 23 – p. 443, l. 5. As a result, there was no video of anyone entering or exiting Mr. Hunter's office on the night in question.

Mr. Hunter had a safe in his office where he usually locks up money received from tournaments; however, he alleged that he felt sick the evening of March 3rd and wanted to leave the cash boxes out, in case a staff member needed to access the cash the next day.[4] This was not his standard practice. R. p. 611, l. 19- p. 612, l. 6. Mr. Hunter testified that someone would have had to have physically gotten down on the ground to find the boxes – they were not visible to someone just walking through. R. p. 633, l. 2-9. Mr. Hunter's actions were deemed "odd" and "suspicious", especially since other employees had the combination to the safe, and could have retrieved the cash from the safe in the morning. R. p. 226, l. 14 – p. 227, l. 7; R. p. 362, l. 10- 18; R. pp. 434-435. However, Mr. Hunter was a longtime Spring Valley employee and was never considered a suspect by Respondents. R. p. 390, l. 6-16; R. p. 601, l. 1-2. Mr. Hunter's "right hand man," Sonny Uker, knew that Hunter had left the cash in his office; however Mr. Uker was also never considered a suspect by Respondents. R. p. 719, l. 7-11.

Mr. Kennedy was on duty the evening of March 3rd and, as part of his rounds, turned on the alarm in Bates Hall with another security officer, John Reid, around 11:00 p.m., and then came back to disarm it alone sometime around 5:55 a.m. on March 4th. R. p. 159, l.

[4] Obviously, Mr. Hunter did end up coming to work the following day.

1-14. At the time, and on other nights in question, Mr. Kennedy told Respondents that he sometimes spent time in the weight room there, playing on his phone and by his own admission "wasting time" and "killing time." R. p. 515, l. 15 – p. 517, l. l0. Eric Barnes admitted in his testimony that "boredom is a problem" on the job of the night watchman. R. p. 313, l. 12 – p. 315, l.9. During his time in the weight room on the night in question, Mr. Kennedy received a call from his shift supervisor, Lt. Gerome Young, informing him that he needed to go open a gate at another school. R. pp. 162, l. 13 – p. 163, l. 16.

Sometime between when the alarm was first set by Mr. Kennedy and John Reid late on March 3rd and when Kennedy returned around 5:55 a.m. on March 4th, the Spring Valley baseball team returned to campus after a late game and set off the alarm. Mr. Kennedy was instructed by Lt. Young to drive over to Bates Hall to check on things. R. p. 159, l. 17 – p. 161, l. 12. By the time Kennedy arrived, the baseball coach was already turning the alarm off himself and Kennedy did not re-enter the building. However, while sitting in his vehicle outside, Mr. Kennedy observed numerous players and coaches through the plate glass windows in the hallway by Mr. Hunter's office; additionally, there were players and coaches observed on the videotape from the security camera in Bates Hall. R. pp. 159 - 161; R. p. 243, l. 19 – p. 244, l.10.

Tim Hunter testified that in his review of security video, he did not recall seeing players near his office, nor did he recall whether the baseball coach came back down the hall to turn the alarm back on, so the alarm could have been off the rest of the night. R. p. 623, 1. 10-15. Tim Hunter testified that the video showed that only the baseball coach came up the hallway near his office and that the other players stayed down the hall, R. p. 615, l.

24-p. 618, l.19; however, Kennedy testified that he observed the baseball players up by Hunter's office. R. p. 159, l. 1 – p. 161, l. 12.[5]

Custodians had keys to the athletic department offices, as did athletic coaches. R. p. 227, l. 8-22; R. pp. 722-726. The video camera footage from Bates Hall was taped over by Richland Two, except for a few camera views. Earles testified he only saved 2 out of 16 camera views from Bates Hall from the night in question. R. p. 442, l. 3-14. While some witnesses testified that they saw the baseball team on the video footage from the evening in question, Chuck Earles did not recall seeing the team at all, R. p. 559, l. 24 – p. 560, l. 18; however, he admitted seeing Mr. Kennedy on the phone as Kennedy exited Bates Hall around 5:55 a.m.

Earles never followed up to see with whom Mr. Kennedy was speaking, or to confirm the length of the conversation, even though the school district provides phones to the security staff and could access that data. R. p. 543, l. 9 – p. 546, l. 2. Mr. Earles refused to testify as to whether "it would be highly unlikely that [Kennedy] would be in the process of robbing something while he is talking to somebody else." R. p. 545, l. 24 - p. 546, l. 2.

The Richland Two Human Resources department, which interviewed Kennedy as part of their investigation, found that others had "access and opportunity" to Mr. Hunter's office. R. p. 1011-1012 (Pl. Tr. Ex. 5). Kennedy himself testified he never went into Hunter's office that night or checked Hunter's office door. R. p. 164, l. 1-13.

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[5] Earles did not save any video from the night in question which showed Tim Hunter leaving Bates Hall or arriving the next morning, nor did Earles save the video from the period of time after Kennedy disabled the alarm around 5:55 a.m. R. p. 560, l. 19 – p. 561, l. 25. Spring Valley's Assistant Principal, Jim Childers, who also reviewed the video, also did not save it. R. p. 735, l. 5 – p. 737, l. 6. The District no longer uses the system from 2011 due to certain deficiencies in the software. R. p. 504, l. 19-24. There was evidence that the video would tape over itself. R. p. 570, l. 25 – p. 571, l. 10.

Despite no one ever observing Kennedy – during the three years he had been a night watchman - entering or exiting any office where he was not supposed to be,[6] and despite others having had "access and opportunity" and keys, Mr. Kennedy was the sole focus of the Respondents' investigation. R. p. 272, l. 11-17; R. p. 351, l. 15 – p. 352, l. 2; R. p. 565, l. 10 – 14. Earles admitted that he formed his opinion that Mr. Kennedy was the thief based on a "very limited set of facts." R. p. 569, l. 9-25. Earles never sought to learn what training Kennedy had received to perform the third shift duties. R. pp. 533-535. Respondents never interviewed the baseball team, baseball coach, the custodial staff or Sonny Uker, and never considered them to be suspects. R. pp. 323 -325, R. p. 184, l. 18 – p. 186, l.23 , R. p. 331, l. 13 – p. 332, l. 22.

Mr. Earles and Mr. Barnes alternately testified that they did not really perform an investigation, but merely handed it over to the Richland County Sheriff's Department for investigation and acted as "liasons." R. pp. 319-322, 329. However, Respondents reviewed videotape; met with human resources staff and with Mr. Kennedy; reviewed instances of other thefts at Spring Valley; and sought to "catch" the thief by placing "bait money" in a certain location. R. pp. 323-325; R. pp. 482 – 483.[7]

Against the backdrop of the alleged theft from Mr. Hunter's office, in February/March 2011, a check, some cash, and a ring were reported stolen by some staff in the administrative offices of Spring Valley. R. pp. 386 - 388; R. pp. 701 -704. However,

[6] Testimony was that security guards always know they may be recorded on camera at any given time, even if they don't know where the cameras are pointed. R. p. 273; R. p. 282, l. 3-11.

[7] Their investigation also included Mr. Barnes showing up with "carloads of police" from the Sheriff's Department at the home of Mr. Kennedy's elderly mother, in an effort to interview Mr. Kennedy about the theft. R. p. 157, l. 19 – p. 158, l. 9.

some of the staff members could actually not confirm when the items had gone missing, as they were kept in drawers and not checked on regularly. R. p. 701, l. 18 – p. 702, l. 113.

As a result, Mr. Kennedy was also questioned about his actions in the administration building, because he was deemed to have taken "excessive time" in the break room there and gone through a back door instead of a front door. Again, Respondents didn't save all of the video. Again, there was no video footage showing Kennedy entering locked offices, R. p. 400, l. 19-21; R. p. 551, l. 1-21; R. p. 565, l. 10 - 14. No one followed up to see if the stolen check had ever been cashed, and no fingerprints were collected from the offices. R. p. 738; R. p. 761, l. 12-19. Finally, neither Earles nor Barnes questioned Mr. Kennedy about what his training had been, or what his habits and routines were, or reviewed videotape from months past to find out what his habits or routines were. R. pp. 314-315; R. p. 406, l. 18 – p. 407, l. 6; R. p. 533, l. 10 – p. 535. Kennedy told them it was his habit to take breaks. R. p. 338. They also did not speak with his supervising lieutenants, who could presumably attest to the training Kennedy received and his habits. R. p. 564, l. 18-20.

During the period of investigation beginning with Tim Hunter's report on March 4th, Mr. Kennedy was placed on paid administrative leave. Mr. Kennedy was not surprised that he was investigated, given that security guards on duty are always questioned. However, from the very beginning, Kennedy vehemently denied stealing anything, R. p. 793, l. 6-8, and told them that he had been "doing the same things" on his shift for 4 years. He readily admitted to Tracy Batchelder, an HR director, that during the times when he was "off camera" in buildings, he was wasting time and taking breaks. Kennedy further

stated that he had a wife and mortgage and was up for a promotion – "why would I steal?" R. pp. 1029-1037; (Def. Tr. Ex. 7 & 8); R. p. 165; R. p. 786, l.2 – p. 789, l.11.

Roosevelt Garrick, the Chief Human Resources Officer of Richland Two, was extremely disappointed by Mr. Kennedy's admission of "wasting time" during his night shifts, as he did not consider that to be an appropriate use of district resources. R. p. 822, l. 21- p. 823, l.18, R. p. 825, l. 19 - p. 827, l.6. Garrick was also concerned that Mr. Kennedy's recollection of the nights in question revealed some inconsistencies. R. p. 170, l. 9 – p. 173, l. 4; R. p. 825, l. 19 - p. 827, l.6.

After conducting its investigation into the alleged $1,000 theft, the Richland County Sheriff's Department declined to charge anyone – including Kennedy.[8] Despite the Sheriff's Department decision not to charge anyone, Respondents both believed that Jeffery Kennedy was the thief, R. pp. 351-352, R. pp. 444-445, and withdrew the recommendation for the promotion. Mr. Garrick informed Mr. Kennedy that he would need to restore Richland Two's trust and confidence in him. R. p. 834; R. pp. 1011-1012 (Pl. Tr. Ex. 5). Despite acknowledging that others had "access and opportunity" to the money, R. p. 173, l. 5-23, neither Mr. Garrick (nor the Respondents) ever met with the other employees who had "access and opportunity." R. p. 255, l. 20 – p. 256, l. 6; R. p. 845, l. 17 – p. 847, l. 18. Mr. Barnes was "very frustrated" and simply could not believe that Mr. Kennedy was not fired, and characterized Richland Two, his voice dripping with sarcasm at trial, as a "beautiful place to work." R. p. 328, l. 21-23; R. p. 366, l. 9 – p. 367, l. 21; R. p. 847, l. 19-24.

[8] Ms. Batchelder in HR testified that she would have liked for the Sheriff's Department to have taken fingerprints from the administrative offices, and checked Mr. Kennedy's phone records from the night in question. R. p. 793, l. 23 – p. 794, l. 4.

Mr. Kennedy returned to work at the security division in June 2011; however, Chuck Earles, convinced of his guilt, decided that Mr. Kennedy was not to have keys and was to be assigned to desk duty only, with no access to keys. R. p. 422, l. 25 – p. 423, l. 12. Ultimately, the promotion to lieutenant was given to John Reid, a fellow Richland Two employee.

As part of implementing his decision to punish Mr. Kennedy, Mr. Earles sent out an e-mail, marked confidential, to the supervisors within the security division, including his deputy Mr. Barnes. The e-mail states that Mr. Kennedy is returning to work on desk duty and is "NOT to be given any assignment that involves having keys to any District facility." R. p. 1010 (Pl. Tr. Ex. 4). This supposedly "confidential" e-mail was printed out and left out for the rank & file employees to see in both the security division office and their vehicles. R. p. 168, l. 11 – p. 169, l.22; R. p. 229, l. 21 – p. 230, l. 11; R. p. 246, l. 7 – p. 247, l. 24. Current and former Richland Two security employees testified that they knew what it meant – that Earles and Barnes considered Kennedy to be the thief and that he could not be trusted. R. p. 227, l. 23 – p. 230, l. 20; R. p. 274, l. 7 – p. 276, l. 10. These same witnesses testified that you can "put two and two together", and that it was "obvious" that Respondents thought Jeffrey had stolen the $1,000 and could not be trusted. It was undisputed that a security guard without keys was worthless. R. p. 227, l. 23- p. 230, l. 25.

Respondents denied printing out the e-mail or leaving it out. R. p. 364, l. 21 – p. 365, l. 1; R. p. 519, l. 1-5. Despite acknowledging that the security division was a "rumor mill" and had a "gossip problem", Respondents did nothing to ensure the confidentiality of the email besides marking it as such, despite acknowledging that the contents of the e-mail would harm Mr. Kennedy if it got out. R. pp. 359 - 360; R. p. 423, l. 25 - p. 426, l. 8.

Respondents also communicated to employees their belief that Mr. Kennedy was a thief. Kennedy's fellow security guard, John Reid, recounted the following:

> Q. When did you first find out that Jeffrey was being investigated for the theft?
> A. Well, I mean, after [Eric Barnes] asked me about it, [Kennedy] didn't come to the shift to take the supervisor's position. They moved him into the office, and all he could do was answer the telephone, wasn't to have any keys, wasn't to drive any vehicles.
> Q. **How did you find out that he wasn't supposed to have keys or drive vehicles.**
> A. **It was told to us. Because he came in on third shift and he would relieve us, and sometimes he would beat the shift supervisor to work himself . . .**
> Q. **Who told you he was not supposed to have keys?**
> A. **It was put out by Mr. Barnes.**
> Q. What did you think of that?
> A. Well you know, it's pretty obvious. I mean, a guy supposed to get promoted; and all of a sudden, they move. He didn't get promoted, and then he is brought into the office. All he can do is answer telephones. Evidently he was under suspicion for something.
> Q. Was it clear to you that he was under suspicion for the thousand dollar theft?
> A. That's when it started. So, I mean, put one and two together.
> Q. So you ended up getting the job that Jeffrey had been promoted to and that was revoked?
> A. Yes, sir.
> Q. . . . Did Jeffrey's job overlap with what you thought your job was supposed to be as the second shift supervisor?
> A. I didn't get the job until later on.
>
> R. at p. 249, l. 14 – p. 251, l. 3.

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

> Q. **Based on your personal knowledge, going back to those days and months around March 2011, personally was it obvious to you that Mr. Earles and Mr. Barnes thought that Jeffrey was not to be trusted?**

A. **Yes, ma'am. Once they promoted him to lieutenant and then demoted him to a desk job, it was rather obvious that he was under investigation for it.**

. . .

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

. . .

Q. **And so the letter says [Kennedy] is not to have keys?**
A. **Yes, ma'am.**
Q. **And you interpreting that how?**
A. **He was not to be trusted.**
Q. A security guard without keys really isn't a security guard?

. . .

A. Is worthless, for what we do. If you can't use keys, you can't work.

R. p. 229, l. 13 – p. 231, l. 1.

Upon learning that the "confidential" e-mail had been printed out and left out for all to see, neither Barnes nor Earles followed up with their supervisory staff to find out who had left the memo out (if they themselves, in fact, had not) or why the confidentiality directive was ignored. R. p. 311, l. 10- p. 312, l. 4; R. p. 426, l. 9 – p. 428, l. 2. The Respondents did not call as witnesses at trial any of the supervisors that were listed as recipients of the e-mail.[9] *See Record* (Trial Transcript).

Mr. Kennedy testified that he heard that Respondents said he was a thief. R. p. 168, l. 5-23. Mr. Kennedy testified that as a result of the actions of Respondents, he was humiliated, embarrassed, and faced financial problems. R. p. 174, l. 11 – p. 175, l. 8. Additionally, he and his wife were put under significant stress and eventually split up. R.

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

p. 180, l. 16-21. He also testified that church members found out about the accusation and he lost his stature within the church community and was barred from assisting with the collection plate. Tr. p. 180, l. 22 – p. 182, l. 10. While he was at Wal-Mart, Mr. Kennedy overheard Spring Valley students snickering about him being a thief. R. p. 184, l. 3-13.

During the same time that the Athletic Department theft was reported in March 2011, the Spring Valley Assistant Principal, Jim Childers, took away the master key from the night shift custodian, Ms. Jackson, after a report of a theft on February 25th. R. p. 707, l. 15 – 25.[10] Mr. Childers took this action because he wanted to rule out Ms. Jackson as a suspect, as he had the utmost trust for her. R. p. 736, l. 4-13. In order to protect her reputation, Mr. Childers told her directly that he was taking her key away – he also told one or two other people on a "need to know" basis that he was taking away Ms. Jackson's key. R. p. 755, l. 16 –p. 756, l. 16. He did not send out an e-mail or other written correspondence; his communications were verbal. R. p. 708, l. 6 -23. He did not inform Earles or Barnes of his decision. R. p. 304, l. 8-13; R. p. 741, l. 9 - 21. Ms. Jackson's key was subsequently returned to her and she remains employed at Richland Two. There was no evidence that Mr. Childers's action was made known to Ms. Jackson's fellow employees, nor was there any evidence that fellow employees learned that she was under suspicion for theft.

Mr. Childers's treatment of Ms. Jackson was characterized as the "gold standard" by Richland Two's HR director, Roosevelt Garrick, because Richland Two strives for a "culture of excellence" and Mr. Childers met that standard when he discreetly dealt with

[10] Richland Two's cleaning crews are subcontracted out through Service Solutions and there is significant turnover of cleaning crew staff. R. p. 683, l. 8 – p. 684, l. 16. Richland Two relies upon Service Solutions to perform background checks and screen individuals. R. p. 732, l. 2 – 21.

Ms. Jackson. R. p. 849, l. 2 – p. 851, l. 24. Mr. Garrick testified that a confidential memo being left out about Mr. Kennedy did not reflect the "culture of excellence", nor does the dissemination of sensitive employee information to fellow employees. It is not indicative of "best practices" in the HR field. R. p. 851, l. 25 – p. 852, l. 19; R. p. 857, l. 8 – 24 .

In October 2012, Mr. Kennedy was accused of showing a security video to a fellow employee, Kim Jones. R. p. 177, l. 12-16. Ms. Jones was also a Richland Two parent, and she was concerned about certain allegations involving her son. R. p. 175, l. 9-22. If a video was shown to Ms. Jones, this would have violated District policy. R. p. 179, l. 8-11. Mr. Kennedy denied showing her the video or knowledge of the policy, and denied trying to influence Ms. Jones's version of events to the District. R. p. 175, l.9 - p. 176, l. 13; R. p. 898, l. 4-9. Richland Two did not find Mr. Kennedy credible, and terminated him after he refused to resign. R. p. 179, l. 8-25. Ms. Jones received only a letter of caution and remained employed by District Two. R. p. 770, l. 14 – p. 771, l. 2.

STANDARD OF REVIEW

"In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below. [The] Court will not disturb a trial court's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law." *Steinke v. S.C. Dep't of LLR*, 336 S.C. 373, 520 S.E.2d 142 (1999). "On appeal, the jury's verdict must be upheld unless

no evidence reasonably supports the jury's finding." *Bass v. SC DSS*, 414 S.C. 558, 780 S.E.2d 252 (2015). "A factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Erickson v. Jones Street Publishers,* 629 S.E.2d 653, 368 S.C. 444 (2006). The "any evidence" standard is the equivalent of a scintilla of evidence. *Hancock v. Mid-South Management,* 381 S.C. 326, 673 S.E.2d 801 (2008).

ARGUMENT

I. By Disregarding Evidence in the Record that Supports the Jury's Verdict, the Court of Appeals Erred in Reversing the Trial Court's Denial of the Motions for Directed Verdict and JNOV

The trial court properly denied Respondents' motions for directed verdict and JNOV because there was evidence that Respondents defamed Mr. Kennedy by directly telling rank and file employees that Mr. Kennedy was not to have keys. There was further evidence that Respondents communicated their belief that Mr. Kennedy was a thief through both words and conduct. Finally, there was evidence that Respondents had a motive to harm Mr. Kennedy because they personally believed he was a thief and were angry that the District refused to fire him, even though the Sheriff's Department brought no charges and the District itself found that others had "access and opportunity". Finally, there was evidence of maliciousness on the part of Respondents in their near-total lack of investigation into the alleged theft – or the printing out of an e-mail marked "confidential." In short, there was ample evidence from which the jury could find that the Respondents communicated their belief that Mr. Kennedy was a thief through both words and conduct, and the trial court properly denied the motions for JNOV and directed verdict.[11]

[11] The trial court expended significant time in considering the motions for directed verdict, and JNOV, on this same issue. R. pp. p. 575, l. 22 – p. 586, l. 5; R. p. 599, l. 24 – p. 601, l. 5; R. at pp. 908-913; R. p. 915,

In *Bass v. SC DSS, supra,* the Supreme Court reversed the Court of Appeals' reversal of a jury verdict, finding that the court erred in finding "no evidence" of gross negligence on the part of defendant DSS. The Supreme Court noted that the Court of Appeals "seems to have searched the record for evidence to corroborate [the defendant's] theory of the case", "rather than examining the record to discern whether there was any evidence put forward at trial to support the jury verdict." Id. at 260.

Mr. Kennedy's case presents a similar set of circumstances as the *Bass* case. Because the Court of Appeals' opinion overlooks evidence in the record that would support the jury's verdict, regardless of the Respondents' testimony denying they printed out the e-mail, the record is not devoid of evidence to support the jury's findings and reversal is necessary. *See, e.g., Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003) ("the trial judge is concerned with the existence of evidence, not the weight of the evidence or the credibility of the witnesses"). Rather than reviewing the record on appeal to determine whether the low bar of "any evidence" existed to support the trial court's ruling, the Court of Appeals' opinion solely considered the testimony of Respondents, and ignored the testimony of Messrs. Reid, Mitchell, and Kennedy, among others.

South Carolina law clearly provides that publication can be established by either direct or circumstantial evidence, and a trial court will properly deny directed verdict if there is even circumstantial evidence of defamation. *Duckworth v. First Nat. Bank*, 176 S.E.2d 297, 254 S.C. 563 (1970). "Publication . . . may be established by the positive testimony of a person to the effect that the slanderous remarks were heard by him or by

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l. 22 – p. 919, l.13; R. p. 923, l. 22 – p. 927; l. 13; p. 922, l. 24 – p. 928, l. 10; R. p. 929, l. 11 - p. 945, l. 7; R. pp. 48-74 (Def. Post-Trial Motion)

evidence tending to show that third persons were present and near enough at the time to hear the words spoken." Id.

The defamation claim in this lawsuit was predicated on both words and conduct. Sufficient evidence of defamation can be established by words or conduct or a combination of both. *See, e.g., Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (no error in denial of motion for directed verdict and JNOV when a jury could have found that "words or conduct or the combination of words and conduct can communicate defamation.") Furthermore, defamation need not be accomplished in a direct manner – mere insinuation is actionable. *See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987) (where city manager implied that employees were guilty of wrongdoing, even though he knew that SLED found no criminal wrongdoing, evidence was sufficient to submit the case to the jury); *See also Constant v. Spartanburg Steel*, 316 S.C. 86, 447 S.E.2d 194 (1994) (affirming denial of directed verdict where evidence that employer continued to convey its belief that an employee was a thief, despite having no evidence to support that belief, was sufficient to find that employer exceeded qualified privilege). Put another way, "[d]efamation need not be accomplished in a direct manner. To render the defamatory statement actionable, it is not necessary that the false charge be made in a direct, open and positive manner. A mere insinuation is as actionable as a positive assertion if it is false and malicious and the meaning is plain." *Tyler v. Macks Stores of S. Carolina, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980). Based on the entirety of the evidence before the court, the trial court did not err in submitting the defamation claim to the jury. Because evidence exists that supports the jury's findings, the verdict should be sustained. *See, e.g., Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984) (affirming verdict and noting that because

there was more than one reasonable reasonable inference that could be drawn from the evidence, there was no error on the part of the trial court in submitting issue to jury).

Credibility Issues Are for the Jury

"[N]either an appellate court nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *Bass v. SC DSS, supra*; *See also Cook v. Regions Bank*, 2016-UP-387 (*per curiam*) (Ct. App. July 27, 2016) (upholding trial court's denial of motions for directed verdict and JNOV in workplace defamation case because a reasonable jury could have believed the plaintiff's version of events, **even if contradicted by the defense**).[12] *See also Travelers Property Casualty Co. v. Senn Freight Lines, Inc.*, 2014-MO-022 (*per curiam)* (S.C. S. Ct.) (July 2, 2014) (reversing Court of Appeals' decision and reinstating jury verdict, finding that trial court's denial of JNOV motion was proper and, "in a jury trial, it is the jury's task to weigh the evidence presented and determine whether the plaintiff has adequately proven his claim").[13]

By solely relying on the Respondents' denial that they printed out and distributed the e-mail message (a denial the jury rejected), and ignoring testimony that showed the Respondents communicated their belief that Mr. Kennedy was the thief to rank and file employees and had motive to harm Kennedy and lie about it (testimony the jury believed), the Court of Appeals held that there was "no evidence" in the record to support the jury's

[12]Counsel is aware that citation to unpublished opinions is disfavored under the Appellate Court Rules; however, counsel respectfully believes that this opinion could aid in the Court's consideration of this matter, given that the opinion concerns workplace defamation and was rendered by the same panel of judges as the underlying unpublished opinion in this case.

[13]Counsel is mindful that citation to unpublished opinions is disfavored; however, counsel respectfully believes that this opinion could aid this Court, given that the issues in *Travelers* concerned whether there was "any evidence" to support the jury's verdict and, further, the issue of the credibility of the witnesses was central to the plaintiff's argument that there was sufficient evidence, if believed, to support the verdict.

verdict. This was clear error, as the credibility of the witnesses, and the belief or disbelief of their testimony, is solely the province of the jury.

"The fact that testimony is not contradicted directly does not render it undisputed. There remains the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation. If there is anything tending to create distrust in his or her truthfulness, the question must be left to the jury." *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991). A jury is "simply not required to believe [uncontradicted] evidence." *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997) (sustaining verdict for plaintiff). "Credibility determinations regarding testimony are a matter for the finder of fact, who has the opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal." *Okatie River v. Southeastern Site Prep*, 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003) (affirming award in favor of plaintiff where there was reason for disbelief of undisputed evidence which purported to establish "the truth"); *See also Graham v. Whitaker, supra* (affirming verdict and noting that the Court is "not at liberty to pass upon the veracity of the witnesses and determine this case according to what we think is the weight of the evidence.")

The Court of Appeals found that there was no evidence to support a claim for defamation because there was "no evidence that either Earles or Barnes was responsible for disseminating the defamatory e-mail beyond its intended recipients" and therefore "the jury could not have properly found that they exceeded the scope of their qualified privilege." *See* Opinion. This was error, as the Court overlooked the substantial evidence – or at least a *scintilla* of evidence – that the entirety of the Respondents' conduct could be found, by a reasonable jury, to have defamed Mr. Kennedy and further, that any qualified

privilege which attached to the e-mail was lost or abused when it was left out in the office and security vehicles for all to see. The evidence was that Respondents, either directly or through their conduct and insinuations, let the security staff know – specifically Messrs. Reid and Mitchell - that they believed Mr. Kennedy was the thief, by taking away his keys, withdrawing the promotion, and assigning him to desk duty. It was already known among the staff that Mr. Hunter had reported the money missing.[14]

There was evidence that, even after finding out the e-mail had been printed out and left out, Respondents never asked the recipients if they printed it out, nor if they left it out in the office or in the vehicles. The jury could have reasonably concluded that Respondents did not inquire because they themselves were the ones who printed it out; this is a logical inference, because you do not ask others if they posted it or left it in vehicles if you yourself did so. In short, the jury was free to disbelieve the Respondents. "Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left for the jury to decide." *Ross v. Paddy,* 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000) (upholding denial of directed verdict motion) (*citing Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165 (1952) (upholding denial of motion for directed verdict, even though appellant contended testimony was uncontradicted, because "if there is **anything** tending to create distrust in [a witness's] truthfulness, the question must be left to the jury") (emphasis added)).

It was entirely reasonable for the jury to find that the Respondents were not credible; for instance, Eric Barnes testified at trial that that there had been no thefts reported at Spring Valley since the Hunter theft in March 2014. R. p. 361, l. 1-7. The jury could

[14] See Record at. p. 226, l. 11 – p. 227, l. 7.; R. pp. 248, l. 18 – p. 249, l. 13; R. p. 271, l. 5-18 (Testimony of Richland Two employees Barry Mitchell, John Reid, and Anthony Permenter).

have found his testimony absurd, given that Assistant Principal Childers estimated that on average he sees 100+ thefts a year at the school. Likewise, the jury could have found Mr. Earles not credible, given that he did not recall seeing the baseball team on the video footage, nor would he admit that it would be highly unlikely that Mr. Kennedy would be robbing someone while simultaneously talking on his cell phone.

Because credibility determinations are entitled to great deference on appeal, the Court of Appeals erred in substituting its view of the evidence for that of the jury. The Court of Appeals appears to have overlooked some evidence of defamation under South Carolina law, or improperly weighed the evidence and decided which evidence was more important (i.e. the Respondents' denial that they printed and left out an e-mail). *See Brown v. Dick Smith Nissan,* 414 S.C. 101, 777 S.E.2d 208 (2015) (reversing Court of Appeals and reinstating damages award where there was evidence in the record to support the trial judge's findings of fact and the Court of Appeals had ignored those findings and substituted its own). This Court has previously held that when an employer or supervisor conveys their belief that an employee is guilty of a crime to others, despite having actual knowledge otherwise, the denial of a directed verdict motion as to a defamation claim is proper. *See, e.g., Constant v. Spartanburg Steel, supra.*

Direct or Circumstantial Evidence of Defamation is Sufficient

Publication can be established by either direct or circumstantial evidence, and a trial court will properly deny directed verdict if there is even circumstantial evidence of defamation. *Duckworth v. First Nat. Bank,* 176 S.E.2d 297, 254 S.C. 563 (1970). "Publication . . . may be established by the positive testimony of a person to the effect that

the slanderous remarks were heard by him or by evidence tending to show that third persons were present and near enough at the time to hear the words spoken." *Id.*

The Court of Appeals' opinion misapprehends the basis for the defamation claim in this lawsuit, which was predicated on both words and conduct. Long-standing South Carolina law has found sufficient evidence of defamation through words or conduct or a combination of both. *See, e.g., Mains v. K-Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (no error in denial of motion for directed verdict and JNOV where jury can find that "words or conduct or the combination of words and conduct can communicate defamation.") Furthermore, defamation need not be accomplished in a direct manner – mere insinuation is actionable. *See Eubanks v. Smith*, 292 S.C. 57, 354 S.E.2d 898 (1987) (where city manager implied that employees were guilty of wrongdoing, even though he knew that SLED found no criminal wrongdoing, evidence was sufficient to submit the case to the jury).

In defamation cases, the defendant may assert conditional or qualified privilege as an affirmative defense, and the court will determine as a matter of law whether such privilege attaches. *See Swinton Creek v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999). However, the question of whether the privilege has been abused is for the jury. *Id.* at 134-135. (finding error for trial court to grant motion for directed verdict on defamation claim because it was for the jury to decide whether the privilege was exceeded and further, there was evidence in the record suggesting reckless disregard which could constitute actual malice). For instance, publication to a co-worker may be the basis of a defamation action if a qualified privilege is abused. *Bell v. Bank of Abbeville*, 208 S.C. 490, 38 S.E.2d 641 (1946) (cited with approval in *Swinton Creek*) (overturning trial court's

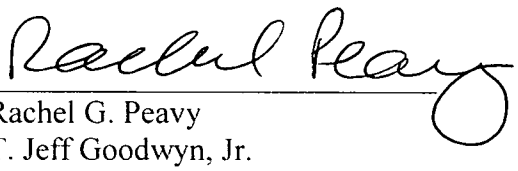
granting of the Bank's *demurrer* on defamation claim where the communication at issue was qualifiedly privileged, noting that the trial court had overlooked the principle that "**if actual malice is shown, the protection of the privilege is destroyed.**" Id. at 495 (emphasis added)).

In this case, the trial court properly denied the motion for directed verdict and submitted the issue of whether the privilege was abused based on the evidence that Earles and Barnes were not acting in good faith by attempting to let the greater Richland Two community know that they considered Kennedy a thief, even though the Sheriff's Department declined to charge anyone and the Human Resources Department refused to terminate him. Where there is some evidence tending to show abuse of the privilege – and evidence of improper motive - the trial court's denial of directed verdict and JNOV should be affirmed. *See Cook v. Regions Bank, supra.* The trial court's ruling is further supported by the jury's specific finding that Respondents acted with actual malice towards Mr. Kennedy. *See, e.g., Pridgen v. Ward*, 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2011) (denial of motions for directed verdict and JNOV held proper where the plaintiff alleged personal motives and bias on the part of the defendants, who were supervisors at the prison where plaintiff worked, because "there was at least circumstantial evidence that the defendants acted outside the scope of their employment and with the intent to harm the plaintiff . . . [and] [t]he jury could infer from . . . the nature of their actions that they intended to harm [the plaintiff].")

CONCLUSION

The opinion of the Court of Appeals requires reversal, as it improperly invades the jury's province as the sole finder of the facts. The Court of Appeals misapprehended the record before the Court, and improperly weighed the testimony of the witnesses; it simply cannot be said that there was no evidence to support the jury's verdict.

GOODWYN LAW FIRM, LLC



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Dated: February 8, 2018

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

2017-UP-040 (S.C. Ct. App. Filed January 25, 2017)
Appellate Case No. 2017-001160
Lower Court Case No. 2013-CP-40-1460

Jeffrey Kennedy.....Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the **Brief of Petitioner**, by depositing a copy of same in the United States Mail, postage prepaid, on **February 12, 2018**, addressed to counsel for Respondents, Thomas K. Barlow, Esquire and Kathryn Long Mahoney, Esquire, at the Law Firm of Halligan, Mahoney & Williams, PA to P.O. Box 11367, Columbia, SC 29211 and by filing the original and fifteen (15) copies of same, plus thirteen (13) copies of the Appendix, via hand delivery, to the South Carolina Supreme Court, 1231 Gervais Street, Columbia, South Carolina.

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February 12, 2018