THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

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S.C. SUPREME COURT

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 RESPONDENTS

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TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

PAGES

CASE LAW:

COURT RULES:

OTHER AUTHORITIES:

I. STATEMENT OF ISSUE ON APPEAL

Did the Court of Appeals Properly Reverse The Trial Court And Grant Respondents Directed Verdict/JNOV On Petitioner's Defamation Claim On The Ground That Respondents Were Entitled To A Qualified Privilege As A Matter Of Law?

II. STATEMENT OF THE CASE

Petitioner, Jeffrey Kennedy, is a former at-will employee of Richland School District Two ("Richland Two"). He originally filed this action on March 11, 2013, in the Richland County Court of Common Pleas alleging multiple causes of action against the following defendants: Richland School District Two ("Richland Two"), Dr. Katie Brochu, Roosevelt Garrick, Traci Batchelder, Kim Jones, Eric Bonds [sic], and Chuck Earles. (Appx. pp. 154-159.) Prior to trial, the parties stipulated to the dismissal of Dr. Brochu, Mr. Garrick, and Ms. Batchelder. (Appx. p. 167.) The case was called for trial during the September 29, 2014 Common Pleas term of court. A jury was empaneled and Mr. Kennedy's case proceeded against Richland Two, Chuck Earles, Eric Barnes, and Kim Jones.

Upon the close of Mr. Kennedy's case, the Court granted a directed verdict for all defendants on Mr. Kennedy's intentional infliction of emotional distress claim and his defamation claim against Ms. Jones. (Appx. 742 l. 22 - p. 745 l. 15.) After Respondents rested their case, the Trial Court directed a verdict on Mr. Kennedy's claim of negligent supervision and retention against Richland Two. (Appx. 1084 l. 8 - p. 1089 l. 2.) The Trial Court denied the directed verdict motion only as to Mr. Kennedy's defamation claim against Mr. Earles and Mr. Barnes with regard to alleged communications in June 2011, regarding Mr. Kennedy's reassignment to a desk-based position inside the School District's security office, following a theft investigation at Spring Valley High School

("SVHS"). The Trial Court granted the motion for directed verdict to the extent Mr. Kennedy contended that any communications surrounding or related to the termination of his employment with Richland Two in October 2012 were defamatory. (Appx. p. 1055 l. 20 – p. 1057 l. 2; p. 1069 ll. 18-23.)

On October 3, 2014, the jury returned a verdict against Mr. Barnes for $100,000 in actual damages and $150,000 in punitive damages, and a verdict against Mr. Earles for $100,000 in actual damages and $200,000 in punitive damages. The Trial Court allowed the parties ten days for post-trial motions and Appellants timely submitted their post-trial motions on October 13, 2014. (Appx. pp. 187-216.) The Trial Court denied Appellants' post-trial motions on February 24, 2015, and Appellants timely filed their Notice of Appeal on March 13, 2015. (Appx. pp. 241-249.) In its opinion dated January 25, 2017, the Court of Appeals held that the trial court erred in failing to direct a verdict or grant JNOV for Respondents on Mr. Kennedy's remaining defamation claim and reversed the verdict in his favor. (Appx. pp. 1-3.) The Court of Appeals declined to address the remaining issues on appeal. (*Id.*) By order dated April 17, 2017, the Court of Appeals denied Mr. Kennedy's motion for rehearing. This Court granted certiorari on January 12, 2018.

III. STATEMENT OF FACTS

Mr. Kennedy began working third shift as a security guard in Richland Two's security department in May 2008. (Appx. pp. 281-283.) His starting rate of pay was $11.77 per hour. (Appx. p. 282.) In his position, he was essentially the night watchman. (Appx. p. 285.) Spring Valley High School ("SVHS") was his base school. He was also responsible for security at seven other schools on nightly rounds. (Appx. p. 286.)

At relevant times, Mr. Earles was Richland Two's Emergency Services Manager. (Appx. p. 553 l. 22 – p. 554 l. 1.) Mr. Barnes was Richland Two's Assistant Security Manager. (Appx. p. 428 ll. 13-20; p. 554 ll. 2-5.)

In February 2011, Mr. Kennedy applied for a lieutenant position in the security department, which was essentially a patrol supervisor, shift leader job. (Appx. p. 293.) He was to move to the second shift and would have received an unspecified pay raise. (Appx. pp. 556-557, 1156.) Mr. Kennedy offered no evidence of the difference in pay he would have received as lieutenant. (*Id.*) Mr. Earles recommended Mr. Kennedy to Richland Two's Human Resources department for the position on or around February 28, 2011. (*Id.*) The position was scheduled to start March 7, 2011. (Appx. pp. 560, 1156.)

On the morning of March 4, 2011, SVHS Athletic Director Tim Hunter reported that $1000 in cash was missing from his office in the SVHS athletic department. (Appx. pp. 751, 1172.) Mr. Hunter left the money under his desk in a cash box after collecting it from a sporting event the previous night. (Appx. pp. 755, 1172.)

Mr. Kennedy became the focus of the investigation of the missing funds. Specifically, the money went missing during his shift and on his watch, there were some other thefts at SVHS on his watch in other parts of campus that were under investigation at that time, he had a key that would open any door on campus, and videotape surveillance showed him engaging in what school district administrators, including Mr. Barnes and Mr. Earles, considered unusual behavior in lingering off camera for five minutes in the SVHS athletic department where the theft occurred. (Appx. p. 654 l. 14 – p. 660 l. 20.) According to defense witnesses, this would have provided Mr. Kennedy an

opportunity to rifle through Mr. Hunter's office, which was not covered by a security camera. (Appx. pp. 635, 654-659, 763-765.)

Mr. Kennedy was placed on paid administrative leave during the investigation and the matter was referred to the Richland County Sheriff's Office. (Appx. p. 351 ll. 11-14.) Mr. Kennedy was not criminally charged for the theft. (Appx. p. 308 ll. 9-11; p. 351.) He was returned to full duty security work with Richland Two on or around June 16, 2011. (Appx. p. 910 l. 16 – p. 911 l. 9; pp. 1157-1159.) Roosevelt Garrick, who was then Richland Two's Chief Human Resource Officer, informed Mr. Kennedy that he would be permitted to return to work, but due to concerns with Mr. Kennedy's lack of candor during the investigation and insufficiently explained suspicious behavior, he would not be promoted to lieutenant at that time. (Appx. pp. 970-986, 1158-1159.)

Prior to Mr. Kennedy's return to work in June 2011, Mr. Earles sent an email with the reference line "**CONFIDENTIAL**" in bold, capital letters to security department supervisors that read as follows:

> THE INFORMATION CONTAINED IN THIS EMAIL IS CONFIDENTIAL AND WILL ONLY BE SHARED WITH OTHER DISTRICT SECURITY SUPERVISORS, AS NEEDED, WHEN THEY WILL BE SUPERVISING MR. KENNEDY.
>
> Mr. Kennedy will be reporting to work tomorrow night (Thursday, June 16) to work on third shift, weekdays. This will be his permanent assignment.
>
> I have told him that he will be assigned to work in the watch room answering phones and performing whatever other duties are necessary in the watch room.

He is NOT to be given any assignment that involves having keys to any District facility.

Thank you.

(Appx. pp. 568-572; p. 662 l. 15 – p. 664 l. 25; p. 1157.) Two of Mr. Kennedy's former coworkers testified that they saw Mr. Earles' confidential email printed out at the security office. (Appx p. 370 l. 21 – p. 372 l. 1; p. 415 l. 16 – p. 416, l. 17.) However, both of those co-workers testified that they first heard Mr. Kennedy was under investigation for the SVHS theft from Mr. Kennedy himself. (Appx. p. 376 ll. 6-23; p. 417 l. 23 – p. 418 l. 1.) Mr. Kennedy testified that he also saw the email "lying out" in security vehicles and in offices. (Appx. p. 309.) No evidence was presented at trial that Mr. Earles or Mr. Barnes had printed out the email or were aware that it had been printed out prior to the litigation. Both Mr. Earles and Mr. Barnes testified that they were not aware of any rumors or allegations that the email had been printed out until Mr. Kennedy alleged it by way of this action. (Appx. p. 449 l. 11 – p. 453 l. 4; p. 573 ll. 2-7; p. 663.) John Reid, who was promoted to the supervisory position for which Mr. Kennedy was originally recommended, testified that Mr. Barnes told him verbally that Mr. Kennedy was not to have keys. (Appx. p. 391.) Mr. Reid testified that Mr. Kennedy worked the shift immediately following Mr. Reid and relieved the latter of his duties on a daily basis. (Appx. p. 382 ll. 4-7; p. 390 l. 16- p. 391 l. 5.) According to Mr. Reid, "[I]t became an issue with him relieving us. We was [sic] turning over keys and stuff to him. So that's when we were informed." (Appx. p. 391 ll. 1–3.)

After returning to work in June 2011, Mr. Kennedy did not look for another job for the next fourteen months. (Appx. p. 354.) He testified that he continued to enjoy his job. (Appx. pp. 354-355.) Mr. Kennedy did not receive any reprimands or warnings

after reinstatement to his position in June 2011. (Appx. p. 355.) His at-will employment with Richland Two was ultimately terminated in October 2012. (Appx. p. 354.)

Mr. Kennedy contended that he was further defamed by way of his termination and by Kim Jones, a bus driver for Richland Two, who had reported Mr. Kennedy for intimidating behavior toward her during an investigation of whether Ms. Jones may have improperly reviewed a school video with Mr. Kennedy's assistance. (Compl. ¶¶ 13-17; Appx. p. 156.) However, the Trial Court's rulings granting Ms. Jones a directed verdict on that claim and holding that Mr. Kennedy did not prove any defamatory communication in connection with his termination have rendered the circumstances of his 2012 employment termination largely irrelevant to this appeal.

Mr. Kennedy offered evidence that after his termination in October 2012, he was evicted from his house, his car was repossessed, and ultimately he was divorced from his wife. (Appx. pp. 321-324, 1160-1161.) At the time of trial, he was working for GEO Care as a security officer, where he was eligible for stock and participation in its 401(k) program. (Appx. p. 324.) Between his employment at Richland Two and GEO Care, he worked for Allied Barton as a security guard at an hourly rate of $13.26. (Appx. p. 346 ll. 10-11.) His final hourly rate at Richland Two was $12.77 per hour. (Appx. p. 360.) Mr. Kennedy testified that he had no evidence that anyone at Richland Two had provided a negative reference or had attempted to keep him from securing subsequent employment. (Appx. p. 362.)

IV. ARGUMENTS

A. The Court of Appeals Properly Reversed The Trial Court And Granted Directed Verdict/JNOV Because No Evidence In The Record Supported A Finding That Respondents Made Any Defamatory Communication Regarding Mr. Kennedy That Exceeded Their Qualified Privilege.

The Circuit Court properly determined that a qualified privilege applied to Mr. Earles' email to the security supervisors as a matter of law. (Appx. p. 1128.) A statement made in connection with an employer's *bona fide* inquiry into possible employee misconduct is qualifiedly privileged. *Wright v. Sparrow*, 298 S.C. 469, 474, 381 S.E.2d 503, 507 (Ct. App. 1989). "Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001).

Where a defendant is entitled to a qualified privilege, a plaintiff can recover for defamation only if he or she can show that the defendant exceeded the scope of the privilege or was motivated by actual malice in the publication of the allegedly defamatory statements. *See Harris v. Tietex International Ltd.*, 417 S.C. 533, 541, 790 S.E.2d 411, 415-16 (Ct. App. 2016), *cert. denied*, (Sept. 8, 2017); *Richardson v. McGill*, 273 S.C. 142, 145, 255 S.E.2d 341, 342 (1979). To defeat the qualified privilege, it was Mr. Kennedy's burden to prove an abuse of the privilege by demonstrating either: (1) a statement made in good faith that went beyond the scope of what was reasonable under the duties and interests involved; or (2) a statement made in reckless disregard of the victim's rights. *See Fountain v. First Reliance Bank*, 398 S.C. 434, 444, 730 S.E.2d 305, 310 (2012). In the absence of a controversy as to the facts it is for the court to say in a given instance whether or not the privilege has been abused or exceeded. *Id.*; *Harris*, 417

S.C. at 541, 790 S.E.2d at 416; *Bell v. Bank of Abbeville*, 211 S.C. 167, 173, 44 S.E.2d 328, 330 (1947) ("*Bell II*"). The Court of Appeals properly found that no factual dispute existed in this case and that directed verdict/JNOV should have been granted to Respondents.

1. Mr. Kennedy did not Offer Evidence of any Communication by Respondents that Exceeded the Qualified Privilege.

Mr. Kennedy identifies the June 15, 2011 "Confidential" email from Mr. Earles to security supervisors as the sole potential defamatory communication in this case. (Pet. Brief, pp. 21-22.) While Mr. Kennedy gives lip service to legal authorities suggesting that a combination of "words and conduct" could be construed as defamatory, *see Mains v. K Mart Corp.*, 297 S.C. 142, 148, 375 S.E.2d 311, 314 (Ct. App. 1988), he has not identified any conduct of Mr. Barnes or Mr. Earles in the record that was understood by any witness to communicate a defamatory message. South Carolina appellate courts have recognized the possibility that a defendant's conduct may support a defamation claim when an insinuation "is false and malicious and the meaning is plain." *See Tyler v. Macks Stores of SC, Inc.*, 275 S.C. 456, 272 S.E.2d 633 (1980) (emphasis added). However, Mr. Kennedy has never identified any specific conduct that the jury reasonably could have found to communicate an insinuation with a plain meaning that was false, malicious, and unprivileged.[1] A plaintiff's failure to identify a specific defamatory statement or statements does not give the Court a basis to evaluate whether a genuine

[1] If the mere transfer of assignments or duties or denial of a promotion could support a defamation claim, every at-will employee who suffered any adverse employment action could assert a defamation claim, thus eviscerating the strong public policy favoring at-will employment in South Carolina. *See Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 243, 768 S.E.2d 385, 386 (2015) (citing *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 925 (1999)).

issue of material fact exists. *See Harris*, 417 S.C. at 541, 790 S.E.2d at 416 (citing *McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C. 546, 562-63, 698 S.E.2d 845, 853 (Ct. App. 2010)).

As such, the Court of Appeals' evaluation of Respondents' JNOV motion properly focused on the June 15, 2011 Confidential email Mr. Earles sent to the supervisors addressed in the email. It is undisputed that Mr. Barnes and Mr. Earles both denied circulating the Confidential email or re-sending it to anyone who was not an addressee of the email. (Appx. p. 449 l. 25 – p. 450 l. 23, p. 662 l. 15 – p. 663 l. 20.) Mr. Kennedy offered no testimony or other evidence that Mr. Barnes or Mr. Earles actually did so.

In an effort to support the verdict, Mr. Kennedy argues that the jury's mere disbelief of Mr. Barnes' and Mr. Earles' testimony was sufficient to carry his burden of proof.[2] However, a jury's mere disbelief of a witness's testimony, without affirmative facts, does not satisfy the plaintiff's burden of proof. The law is clear that affirmative evidence rather than a mere appeal to "credibility" is needed to survive a motion for directed verdict. *See Dyer v. MacDougall*, 201 F.2d 265, 269 (2d Cir. 1952); *Peeler v. Spartanburg Herald-Journal Div. of The New York Times Co.*, 681 F. Supp. 1144, 1147 (D.S.C. 1988) ("The Plaintiff cannot rely upon the hope that witness cross-examination will raise a credibility issue as regards actual malice."); *Jones v. Owens-Corning Fiberglass Corp.*, 69 F.3d 712, 718 (4th Cir. 1995) (party opposing summary judgment may not "merely recite the incantation, 'credibility,' and have a trial on the hope that a

[2] Petitioner conceded at oral argument before the Court of Appeals that affirmative evidence, not jury disbelief of defense witnesses, was required to satisfy Mr. Kennedy's burden of proof.

jury may disbelieve factually uncontested proof"); *McManus v. Taylor*, 756 S.E.2d 709, 716 (Ga. Ct. App. 2014).

> The party with the burden of proof does not make an issue for the jury's determination by relying on the hope that the jury will not trust the credibility of the witnesses. If all of the witnesses deny that an event essential to the plaintiff's case occurred, the plaintiff cannot get to the jury simply because the jury might disbelieve these denials. There must be some affirmative evidence that the event in question actually occurred.

§ 2527 Credibility of Witnesses, 9B Fed. Prac. & Proc. Civ. § 2527 (3d. ed.). To hold otherwise would impermissibly shift the burden of proof (making it a burden of "disproof") to the defendant, and otherwise read Rules 50 and 56 out of the South Carolina Rules of Civil Procedure.

The Trial Court implicitly recognized this in rejecting Mr. Kennedy's *ipso facto* argument that if non-supervisory co-workers saw the Confidential email in paper form, Mr. Barnes and/or Mr. Earles must have printed and left it out rather than one of the supervisors to whom it was addressed. (Appx. pp. 1073-1074.) The Court of Appeals properly found that the jury's apparent disbelief of Mr. Barnes' and Mr. Earles' testimony that they did not print out or further distribute the Confidential email, without affirmative evidence to the contrary, could not support its finding that Messrs. Barnes and Earles actually published the Confidential email to any non-supervisory employee.

For these reasons, Mr. Kennedy's proof is no different from that rejected in *Williams v. Lancaster Cnty. Sch. Dist.*, 369 S.C. 293, 302-03, 631 S.E.2d 286, 292 (Ct. App. 2006), in which the plaintiff urged a similar *ipso facto* theory of publication. The *Williams* plaintiff argued that because the school principal had asked him about his

alleged romantic relationship with the school secretary, the jury could find that the principal was responsible for publishing rumors of the affair outside the "need to know" group. Implicit in the *Williams* Court's rejection of the plaintiff's logic was that it was not enough for the jury to simply disbelieve the principal's testimony without affirmative evidence that the Principal started or repeated the rumor. *Id.*

As in *Williams*, any of the email recipients in the instant case could have been responsible for printing it out and failing to maintain its confidentiality. Accordingly, the jury's finding that Mr. Earles and Mr. Barnes published the Confidential email to individuals outside the supervisory group, based only on its presumed disbelief of or decision to ignore Mr. Earles' and Mr. Barnes' undisputed testimony on that issue, could not support the verdict and the Court of Appeals properly set it aside.

Further, the Court of Appeals properly found that Mr. Barnes' communication to John Reid, as set forth on page 13 of Mr. Kennedy's brief, was not a publication beyond the scope of what was reasonable under the duties and interests involved. Mr. Barnes' work directive communicates nothing false or defamatory about Mr. Kennedy, who worked the shift immediately following Mr. Reid, a supervisory employee, and relieved the latter of his duties on a daily basis. (Appx. p. 382 ll. 4-7; p. 390 l. 16- p. 391 l. 5.) According to Mr. Reid, "[I]t became an issue with him relieving us. We was [sic] turning over keys and stuff to him. So that's when we were informed." (Appx. p. 391 ll. 1–3.) Respondent offered no evidence from which a jury could find that Mr. Barnes' alleged communication was anything other than a limited and necessary relay of work duties and responsibilities to an employee with a direct need to know Mr. Earles' directive that Respondent was not to be assigned keys, delivered by a supervisor tasked with

effectuating Mr. Earles' directive. *See Harris*, 417 S.C. at 542 n. 4; 790 S.E.2d at 416 n. 4. The Court of Appeals thus properly found that no reasonable juror could have found this communication exceeded the scope of the qualified privilege.

Mr. Kennedy has simply failed to point to any factual evidence, as opposed to argument, speculation, and impermissible inference building, that would support a jury finding that either Mr. Barnes or Mr. Earles violated the latter's own directive that the June 15, 2011 email to supervisors was to remain confidential and for their eyes only. Further, no reasonable juror could have reviewed the evidence at trial and concluded that if Mr. Barnes or Mr. Earles did not print and leave out the email themselves, they possessed a secret, unexpressed and malicious intent that the email recipients should print it out for Mr. Kennedy and rank and file employees to see.

2. Mr. Kennedy did not Offer Sufficient Evidence to Support a Finding of Actual Malice.

In the defamation context in South Carolina, "actual malice" means that the defendant acted "with ill will toward the plaintiff or that [he] acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights." *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). South Carolina law also requires, in order to prove actual malice, that "at the time of his act or omission to act, the tortfeasor be conscious, or chargeable with consciousness of his wrongdoing." *Id.* Both ill will and consciousness of wrongdoing must be shown by more than a scintilla of evidence. *See Austin v. Torrington Co.*, 810 F.2d 416, 425 (4th Cir. 1987) (applying South Carolina law). Relevant factors may include whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited, and whether the statement was sent only to the proper parties. *See Swinton Creek Nursery v. Edisto Farm*

Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999). Actual malice must be proven and is not presumed. *Bell v. Bank of Abbeville*, 208 S.C. 490, 494-95, 38 S.E.2d 641, 643 (1946).

It is clear that the plaintiff must show that *the publication* was made with actual malice. *See Murray*, 344 S.C. at 143-44, 542 S.E.2d at 750-51. The South Carolina Supreme Court in *Bell II* framed the issue as follows:

> Assuming the statements in question to be slanderous in character, were they uttered in good faith in the pursuit of the business of the bank by and to persons who had a right to hear and consider such statements, at a time and place and in a manner and under circumstances which effectually negative the existence of a purpose to injure and defame the respondent; or were the statements made maliciously, or without any proper occasion for the making of the same, and in such manner or under such circumstances that it may be reasonably inferred that the object of the parties was not to bona fide act in the pursuit of the business of the appellant, but to use the excuse of a meeting of the officers and directors to injure and defame the respondent?

Bell II, 211 S.C. at 173, 44 S.E.2d at 330.

Bell II is apposite to this case. In *Bell II*, numerous customers of the bank complained about the actions of the plaintiff in the handling of their accounts, some of which amounted to accusations of criminal conduct by the plaintiff. Based on his duties as an employee, the cashier to whom the complaints were made repeated these complaints to two members of the bank's board of directors. Based on these reports, the board decided to terminate the plaintiff, and the plaintiff sued for defamation. The court determined that a qualified privilege existed because the cashier had an interest in advising the plaintiff's employer of the complaints he had heard about the plaintiff.

Because of the qualified privilege, the plaintiff had the burden of establishing malice, even though he was alleging defamation *per se*. *Bell II*, 211 S.C. at 171-72, 44 S.E.2d. at 329-30. After the case proceeded to a jury trial, the court then overturned the verdict and held that a directed verdict should have been granted because there was not sufficient evidence to create a question of fact on the issue of malice, even though the plaintiff alleged that the cashier disliked him and there were strained relations between the two of them. *Id.* at 333.

Likewise, Mr. Kennedy offered no evidence from which the jury could conclude that the Confidential email was sent to supervisors with the design to injure him, as opposed to a need to communicate operational instructions for supervisory employees in the security department and advise them of the conditions of Mr. Kennedy's return to full employment. Nothing in the email itself is false or would support a finding of malice. In addition to *Bell II*, numerous courts applying South Carolina law have granted summary judgment, directed verdict, or JNOV on qualified privilege grounds when evidence of actual malice was lacking. *See Harris*, 417 S.C. at 542, 79 S.E.2d at 416 (summary judgment upheld, no evidence of actual malice); *Wright*, 298 S.C. at 469, 381 S.E.2d at 503 (summary judgment granted for defendant; lack of evidence of actual malice); *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct. App. 1985) (directed verdict upheld for lack of evidence of actual malice); *Austin*, 810 F.2d at 416 (applying South Carolina law and reversing lower court's denial of directed verdict because evidence insufficient to demonstrate actual malice as a matter of law); *Cosby v. Legal Servs. Corp, Inc.*, 2006 WL 4781412 (D.S.C. 2006) (summary judgment on qualified privilege proper where no evidence of malice presented).

As in those cases, Mr. Kennedy offered no evidence that Mr. Earles, the drafter of the Confidential email, was motivated by ill will or a desire to injure him, in either drafting the email or sending it to the addressees, as opposed to being motivated by legitimate operational concerns regarding Mr. Kennedy's return to work from leave as directed by Human Resources. Mr. Earles' undisputed testimony was that he communicated to the supervisors by electronic mail because security runs three round-the-clock shifts, which made in-person communication too difficult. (Appx. pp. 570-571.) On its face, there is nothing false or malicious about the Confidential email. It is a directive from a manager to supervisors, limited in scope to address Mr. Kennedy's return to work following an investigation of theft at Spring Valley High School (SVHS). In fact, the Trial Court specifically found:

> [T]he testimony was, "When I send out something confidential, I would expect that those in a supervisory role would understand that importance and to show and demonstrate and respect the fact it's confidential and should not be shared with others." I think that's a reasonable expectation. I also believe that based upon the evidence and the case law that there is not a – that there has been no reason to believe that those individuals would therefore go out and do something contrary to what the expectation was in light of the fact that the memo clearly says it's confidential.

(Appx. p. 1086 l. 21 – p. 1087 l. 8.)

Even more tenuous is Mr. Kennedy's claim that Mr. Barnes was motivated by malice or ill will in making any communication, because Mr. Kennedy simply did not offer any evidence of any communication by Mr. Barnes regarding his job status or suspected involvement in the SVHS thefts to any non-supervisory employee. Even if he had, any such investigative communications would be privileged under *Wright*, 298 S.C.

at 474, 381 S.E.2d at 507, as a bona fide investigative inquiry, or under *Harris*, 417 S.C. at 543, 790 S.E.2d at 417 n. 4, as a work directive and true statement about Mr. Kennedy's access to keys.

In contrast, the great weight of evidence negated any suggestion of ill will or desire to harm Mr. Kennedy by way of the communication regarding his return to work. Prior to the SVHS thefts, it was undisputed that Mr. Kennedy had been recommended for promotion by Mr. Barnes and Mr. Earles. There was no evidence of prior animosity between Mr. Kennedy and any Richland Two supervisors. Mr. Barnes' and Mr. Earles' mere unexpressed belief that Mr. Kennedy had a role in the SVHS thefts and could not be trusted is insufficient to establish actual malice regarding the communications Mr. Kennedy contends are defamatory. *See Bell II*, 211 S.C. at 174, 44 S.E.2d at 330 ("in answering these questions we are not concerned with the guilt or innocence of the respondent in respect to the matters charged in the alleged slanderous statements quoted in the complaint and disclosed by the testimony.") It was further undisputed that upon his return to work at the same pay, same hours, and same benefits, Mr. Kennedy did not receive any warnings or reprimands for the next fourteen months and that the termination of Mr. Kennedy's employment was not a defamatory communication that could have been considered by the jury.

Further, no reasonable jury could have found that Mr. Earles' directive to the security department in August 2010 to stop engaging in rumors and gossip in the workplace was evidence that Mr. Earles or Mr. Barnes somehow believed or intended that department supervisors would release the Confidential email to their subordinates and injure Mr. Kennedy. (Appx. p. 1155.) Mr. Earles' prior directive negates, rather

than supports, any finding that he sent the Confidential email to supervisors with the intent that they do the exact opposite of what the email instructed them to do. Regardless, if Mr. Kennedy's theory is that Mr. Barnes or Mr. Earles failed to prevent a subordinate supervisor from further publishing the Confidential email, that at most would prove negligence and fall well short of the required showing that Mr. Earles or Mr. Barnes made a defamatory communication with actual malice.

In summary, Mr. Kennedy did not offer a scintilla of evidence that either Mr. Barnes or Mr. Earles acted with ill will or conscious indifference to his rights by way of Mr. Earles' very limited, confidential email communication to the supervisors to whom Mr. Kennedy would be reporting once he returned to work. The Court of Appeals correctly reversed the Trial Court's decision and granted Mr. Barnes and Mr. Earles a directed verdict/JNOV on Mr. Kennedy's defamation claim on qualified privilege grounds.

V. CONCLUSION

For the foregoing reasons, the Court of Appeals' opinion should be affirmed. If this Court determines that the Court of Appeals committed error, this case should be remanded to the Court of Appeals for consideration of the remaining issues on appeal from the Trial Court.

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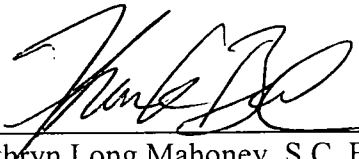

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March 14, 2018

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

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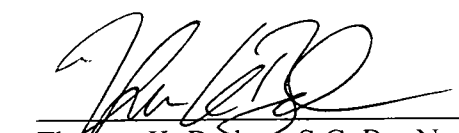
Jeffrey Kennedy ..... Petitioner,

v.

Richland County School District Two, Eric Barnes and Chuck Earles..... Respondent(s).

PROOF OF SERVICE

I certify that I have served the **Brief of Respondents** by depositing a copy of same in the United States Mail, postage prepaid, on **March 14, 2018**, addressed to counsel for Petitioner, Rachel G. Peavy, Esq. and T. Jeff Goodwyn, Jr., Esq., Goodwyn Law Firm, LLC, 2519 Devine Street, Suite A, Columbia, SC 29205 and by filing the original and fifteen (15) copies of same to the South Carolina Supreme Court, 1231 Gervais Street, Columbia, SC 29201



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