THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED
OCT 15 2014
SC Court of Appeals

Court of Appeals No. 2014-001249
Civil Case No. 2012-CP-26-3804

David Wren and Sun Publishing Company Inc.,
d/b/a The Sun News,..Appellants,

v.

Mark Kelley,...Respondents.

INITIAL BRIEF OF APPELLANTS

Jay Bender
BAKER, RAVENEL & BENDER, L.L.P.
Post Office Box 8057
3710 Landmark Dr., Suite 400
Columbia, SC 29202
803.799.9091 (telephone)
803.779.3423 (facsimile)
ATTORNEYS FOR APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 10

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT OF FACT WAS PUBLISHED BY APPELLANTS CONCERNING THE PLAINTIFF 11

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE 13

III. THE TRIAL COURT'S ADMISSION OF TESTIMONY FROM AN EXPERT WITNESS RELATING TO THE STANDARDS OF PROFESSIONAL JOURNALISM CONSTITUTED PREJUDICIAL ERROR REQUIRING A NEW TRIAL 18

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS A NEW TRIAL IN THAT THE AWARD OF DAMAGES IS SO GROSSLY EXCESSIVE THAT IT INDICATES THE JURY WAS MOTIVATED BY PASSION, CAPRICE, PREJUDICE OR OTHER CONSIDERATION NOT FOUNDED IN THE EVIDENCE 19

V. THE PUNITIVE DAMAGE AWARD IS IN VIOLATION OF THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING A NEW TRIAL 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508, 104 S.Ct. 1949, 1964, 80 L.Ed.2d 502 (1984) (1986) 10,11 16

Botchie v. O'Dowd, 315 S.C. 126, 432 S.E.2d 458 (1993) (1986) 14

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (1986) .... 14,16, ... 19

Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed2d 697 (1963) (1986) 10

Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899, 902 (2000) (1986) 11,14

Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) 14

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 78 (1974) (1986) .... 14,16, ... 17,18, ... 20

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989) (1986) 19

Herbert v. Lando, 441 U.S. 153, 171-172, 99 S.Ct. 1635, 1646-1647, 60 L.Ed2d 115 (1979) (1986) 16

Holtzschieter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) (1986) 21

Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968) (1986) 12

Madison by Bryant v. Babcock Center, Inc., 371 S.C. 123, 638 S.E.2d 650 (2006) (1986) 19

Miller v. City of West Columbia, 322 S.C. 224, 471 S.E.2d 683 (1996) 11

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 1 (1990) (1986) 11

Newton v. National Broadcasting Co., 930 F.2d 662 (9th Cir. 1990), cert. denied, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 152 (1991) (1986) 17

New York Times Co. v. Sullivan, 376 U.S. 254, 259, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (1986) .... 13,14, ... 16

Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 478 S.E.2d 282 (1996) 14,18

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783(1986) 11

Ross v. Columbia Newspapers, Inc., 266 S.C. 75, 221 S.E.2d 770 (1976) (1986) 12

Sanders v. Prince, 304 S.C. 236, 403 S.E.2d 640 (1990) (1986) 20

Small v. Springs Industries, Inc. 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987) (1986) 20

St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (1986) (1986) 14

Time, Inc. v. Pape, 401 U.S., at 285, 91 S.Ct., at 637 [citation omitted] (1986) 16

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT OF FACT WAS PUBLISHED BY APPELLANT CONCERNING THE PLAINTIFF?

II. DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE?

III. DID THE TRIAL COURT'S ADMISSION OF TESTIMONY FROM AN EXPERT WITNESS RELATING TO THE STANDARDS OF PROFESSIONAL JOURNALISM CONSTITUTE PREJUDICIAL ERROR, REQUIRING A NEW TRIAL?

IV. DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANTS A NEW TRIAL IN THAT THE AWARD OF DAMAGES IS SO GROSSLY EXCESSIVE THAT IT INDICATES THE JURY WAS MOTIVATED BY PASSION, CAPRICE, PREJUDICE OR OTHER CONSIDERATION NOT FOUNDED IN THE EVIDENCE?

V. IS THE PUNITIVE DAMAGE AWARD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTON, REQUIRING A NEW TRIAL?

STATEMENT OF THE CASE

Respondent, Mark Kelley (Kelley), a registered lobbyist, initiated a libel action against McClatchy Newspapers, Inc., d/b/a *The Sun News* (newspaper) and reporter David Wren (Wren). The Sun Publishing Co., Inc., the publisher of the newspaper was ultimately substituted as a defendant in place of McClatchy Newspapers, Inc., and in his Second Amended Complaint Kelley alleged that the newspaper and Wren had accused, insinuated or "inferred" [sic] that he had violated South Carolina law by delivering or being involved in the delivery of $84,000 in campaign contributions to a gubernatorial candidate. (Second Am. Compl. Paras. 5, 17, 29, and 41) Wren and the newspaper answered the allegations of the Second Amended Complaint and discovery was undertaken.

Wren and the newspaper moved for summary judgment before the honorable Lee S. Alford, who ruled that Kelley was a public figure for purposes of his libel action, but denied the motion with leave to renew it upon Kelley's objection that he had not been able to complete the recessed deposition of Wren. Kelley moved for reconsideration of Judge Alford's order, and in response Judge Alford withdrew the determination that Kelley was a public figure. Wren and the newspaper renewed their motion for summary judgment. A hearing was held on February 24, 2014 before the honorable Larry B. Hyman, Jr. When the case was called for trial on May 5, 2014, Judge Hyman, without issuing a written order, advised the parties that he was denying the motion for summary judgment, but ruling that Kelley was a public figure for purposes of this action.

Trial was held before a jury from May 5 through May 8, 2014. Wren and the newspaper moved for a directed verdict at the close of Kelley's evidence and at the close of all evidence. These motions were denied. The jury returned a verdict for Kelley in the amount of $400,000 actual damages and $250,000 punitive damages relating to news reports written by Wren and published by the newspaper. The Second Amended Complaint also sought damages for an editorial published by the newspaper, but not written by Wren. The jury found that the plaintiff had failed to meet his burden of proof with respect to the editorial. Wren and the newspaper moved for judgment notwithstanding the verdict or a new trial on May 12, 2014. These motions were denied without written order. It is from the matters and rulings described above that this appeal was taken. No appeal has been taken by plaintiff with respect to his status as a public figure or the determination that he failed to meet his burden of proof with respect to the editorial.

STATEMENT OF FACTS

Commencing in August or September 2009, Wren and the newspaper began reporting on political campaign contributions for the 2010 elections that had been drawn on bank accounts of limited liability companies that apparently had no resources other than beach real estate. (Tr. p. 418 line 4 to p. 419 line 13) A group calling itself BOOST had made public accusations that the money for these contributions had come from the Myrtle Beach Area Chamber of Commerce. The limited liability companies identified as having made the contributions had a common registered agent who was a former chairman of the board of directors of the Myrtle Beach Area Chamber of Commerce, and some members of the limited liability companies had said they did not know of the contributions or the source of funds for the contributions. (Tr. p. 418 line 4 to p. 419 line 13)

In May of 2010, Wren was in communication with Tracy Edge, a member of the South Carolina General Assembly, who suggested that Wren contact a campaign worker for the state's Attorney General, then a candidate in the Republican primary for governor, who was thought to have information about a meeting involving Kelley, Brad Dean (Dean), president of the Myrtle Beach Area Chamber of Commerce, and Gresham Barrett (Barrett), a Member of Congress and a candidate in the Republican primary for governor, at which campaign contributions from the limited liability companies had been given to Barrett. The campaign aide contacted by Wren denied having knowledge of the meeting, but ultimately Wren received emails from a former campaign aide to Barrett, who had moved to the campaign of Rep. Nikki Haley. These emails provided details of the meeting involving Dean, Barrett and Kelley. Based on these leads, Wren had a face-to-face conversation with Barrett. Barrett confirmed the luncheon with Dean and Kelley and acknowledged that Dean had delivered campaign contributions at the luncheon.

Wren then called Dean who, having previously denied involvement in the delivery of campaign contributions, for the first time confirmed that he had delivered campaign contributions to Barrett at the luncheon attended by Kelley, Dean and Barrett. (Tr. p. 419 line 14 to p. 425 line 24) In response to confirmation from Barrett and Dean about the luncheon and the delivery of campaign contributions, Wren wrote, and the newspaper published a news report under the headline "Dean handed over envelope of $84,000" that described the luncheon and stated with respect to Kelley:

> Mark Kelley, a lobbyist for the chamber of commerce, also attended that meeting, according to Barrett. Kelley did not return a telephone call Thursday.
>
> There are strict rules that forbid lobbyists from facilitating campaign donations for statewide candidates; however, a spokeswoman for the S.C. Ethics Commission said it does not appear any laws were violated in this case.
>
> "Just being in the same room is not a violation, it happens all the time," said Cathy Hazelwood, the commission's general counsel. "He [Kelley] is not supposed to touch the envelope or hand over the envelope." (Pl. Ex. 1)

Wren testified that he identified Kelley as the lobbyist for the Myrtle Beach Area Chamber of Commerce based on his understanding of the relationship between the Chamber of Commerce and the Grand Strand Business Alliance, an entity for which Kelley was registered to lobby. Wren said he had been told by the president of the Grand Strand Business Alliance that it was the lobbying arm of the Chamber of Commerce, and Dean, the president of the Chamber of Commerce, had told Wren that the Grand Strand Business Alliance received funds from the Chamber of Commerce to pay Kelley's lobbying fee. (Tr. p. 426 line 17 to p. 427 line 8)

In continuing to report on the campaign contributions from the limited liability companies, Wren wrote and the newspaper published a news report under the headline "Bad debt adds to donor mystery" which reported that one of the limited liability companies, Garden City Partners, that had been identified as the source of funds for $20,500 in campaign contributions,

was the owner of a beach house that was in foreclosure. That limited liability company was identified as the source of funds for a cashier check in the amount of $3,500 that was part of the $84,000 delivered to Barrett at the luncheon with Dean and Kelley. With reference to that check and the contributions, the news report stated:

> Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June. Those contributions included a $3,500 cashier's check from Garden City Partners. (Pl. Ex. 2)

The news report identified above also reiterated that Dean had delivered contributions to Barrett, stating:

> Last week, Dean said he delivered contributions to Barrett and state Sen. Ray Cleary, R-Murrells Inlet. Dean previously has distanced himself from the political donations. (Pl. Ex. 2)

The president of the group questioning the source of funds used to purchase sequentially numbered cashier checks used for campaign contributions, Robert Kelley, said in a news conference with respect to the contributions to Barrett:

> Kelley also said Dean has changed his story about the chamber's involvement in the campaign donations.
>
> "In the past, the chamber has denied any involvement in this scandal, but now Brad Dean admits he set up the lunch with [chamber] lobbyist Mark Kelley and he handed Mr. Barrett the envelope full of checks," said Robert Kelley, who is not related to the lobbyist.
>
> A Barrett spokesman told The Sun News last week that Dean arranged the meeting in which the corporations' donations were given to the politician. (Pl. Exs. 3 and 4)

Continuing to report on the campaign contributions story, Wren wrote and the newspaper published a news report under the headline "FBI, IRS probe donors" that the federal agencies had initiated investigations into the source of funds for campaign contributions made to

candidates, including Barrett. With respect to the cashier checks contributed to Barrett, the news report stated:

> U.S. Rep. Barrett, R-3rd District—who lost the gubernatorial bid to Nikki Haley in last month's primary election—received $49,000 in cashier's checks from Guyton's corporations.
>
> Those checks were among campaign donations that Brad Dean, the president of the chamber of commerce, delivered to Barrett during a lunch meeting last summer.
>
> Mark Kelley, the chamber's lobbyist, also attended that meeting. (Pl. Exs. 6 and 7)

In further reporting on the campaign contribution issue, Wren wrote and the newspaper published a news report relying on Barrett campaign emails showing Dean's role in connection with the contributions from the limited liability companies. The news report described emails from Barrett campaign staff members trying to ascertain why the Associated Press would be making an inquiry about the contributions from the limited liability companies. The news report stated with respect to the emails:

> The e-mails, obtained by The Sun News, show Barrett's staff attempting to pin down the source of the campaign donations after an Associated Press reporter raised questions about them in an Oct. 14 e-mail to B. J. Boling. Boling was communications director for Barrett during the Republican's failed gubernatorial run.
>
> "There may be an issue with these donations," AP reporter Jim Davenport wrote in the e-mail to Boling. "Want to get your head around the sources and get back to me?"
>
> Boling forwarded Davenport's e-mail to other campaign staffers, including Justin Stokes, Barrett's deputy campaign manager.
>
> "These guys are tied to the Myrtle Beach Chamber of Commerce," Stokes said in an e-mail to Boling and two of Barrett's political consultants—Warren Tompkins and Heath Thompson.
>
> "Brad Dean, the chamber's president, worked behind the scenes to pull these together last quarter," Stokes said in the e-mail.
>
> Tompkins, in another e-mail, told staff members that he "cannot figure what the issue would be" with the donations.
>
> "Try Mark Kelley, our Horry expert, or perhaps Allen [sic] Clemmons," Tompkins wrote in the e-mail, suggesting that those two could answer questions about the donations.

> "Talk to Mark Kelley," Stokes told Tompkins and the others in another e-mail. "He would be familiar with these contributions and the connection" between the corporations and the chamber of commerce.
>
> Kelley is a former legislator who is now the chamber's lobbyist.
>
> The e-mails do not make clear why Barrett's staff thought Kelley would be familiar with the contributions. The S.C. Ethics Commission has strict rules that prohibit lobbyists from participating in campaign fundraising for state politicians.
>
> Kelley and state Rep. Alan Clemmons, R-Myrtle Beach, did not respond to requests for comments. (Pl. Ex. 8)

The news report concluded by stating that Barrett had told the newspaper in May that Dean during a lunch meeting had delivered an envelope with $84,000 in contributions, including those from the limited liability companies. (Pl. Ex. 8)

When more of the limited liability companies identified as the source of campaign contributions faced foreclosure actions, Wren wrote and the newspaper published a news report under the headline "Campaign donors face foreclosures" that included a reference to the contributions to Barrett, stating, "Barrett accepted the money last year during a luncheon with chamber President Brad Dean and Mark Kelley, the chamber's lobbyist. (Pl. Ex. 9)

Plaintiff called as a witness Cathy Hazelwood (Hazelwood), General Counsel and Deputy Director of the South Carolina Ethics Commission. Hazelwood had been quoted in several of the news reports, and testified that Wren had called her to inquire if the presence of a lobbyist at a meeting where campaign contributions were passed to a candidate would be a violation of the law. Hazelwood described the call and stated that it was her opinion that the presence of a lobbyist at a meeting where contributions were passed would not be a violation of the law. (Tr. p. 204 line 13 to p. 205 line 1) Hazelwood was also asked about a quote attributed to her that it would have been illegal for Kelley to have touched the envelope with campaign contributions being delivered to Barrett, and she stated that it was her opinion that had Kelley touched the

envelope he would have been facilitating a campaign contribution, an illegal act. (Tr. p 205 lines 6 to 11) Hazelwood testified that she had been accurately quoted by Wren in his news reports. (Tr. p. 206 lines 10 to 24)

Hazelwood testified that it is illegal under South Carolina law for a lobbyist to send a request to someone asking directly or indirectly for a campaign contribution. (Tr. p. 206 line 25 to p. 207 line 5) Shown plaintiff's exhibit 17, an email forwarded by Kelley to a long list of recipients, reporting on a Republican straw poll, Hazelwood testified that the email contained a solicitation by a lobbyist for campaign contributions and was unlawful. (Tr. p. 207 lines 6 to 18; Pl. Ex. 17) On re-direct Hazelwood stated that the solicitation of funds was included in the email reporting on the straw poll, and the inclusion of the solicitation of funds made the action illegal for a lobbyist. (Tr. p. 208 lines 8 to 12) Kelley testified that he did not notice the solicitation for contributions to Barrett contained in the email he forwarded. (Tr. p. 277 line 24 to p. 278 line 3)

Kelley testified that he remained a registered lobbyist for numerous public and private clients, that one of his business partners, also a lobbyist, had died, and that the firm had lost three clients since 2010, but no client told him why annual contracts with his company had not been renewed. (Tr. p. 274 line 11 to p. 275 line 14) Asked if he could apportion the loss of lobbying clients due to his partner's death, Kelley could testify only that some of the clients that had been shared with his deceased partner did not renew their annual contracts. (Tr. p. 285 lines 11 to 22) Kelley, before the publications on which his action is based, was a registered lobbyist for Coastal Carolina University, and was at the time of trial continuing as the lobbyist for the school. The president of the school testified that Kelley was so successful as a lobbyist after the publications that he was ultimately given an increase in pay of $18,000 as "the full compression salary relief." (Tr. p. 233 line 15 to p. 235 line 24)

Wren testified that when he wrote the sentence, " Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June" he was not saying Dean and Kelley delivered the contributions. Wren testified that had he wished to say that the contributions were jointly delivered, he would have written "Dean and Kelley delivered" the contributions. (Tr. p. 428 lines 15 to 23)

Wren testified that when he was quoting Robert Kelley in the news report having the headline, "Donations tied to MB chamber blasted," it was Robert Kelley who used the term "scandal" in describing the campaign contribution issue and that the reference to "he" in the statement "he handed Mr. Barrett the envelope full of checks" was to Dean and not Kelley. (Tr. p. 430 line 17 to p. 433 line 22, P. Exs. 3 and 4)

Wren testified that his interest in reporting on the campaign contribution story was to learn the source of the political contributions (Tr. p. 435 lines 9 to 110), that he did not report that Kelley delivered the envelope or touched the envelope with contributions (Tr. p. 437 lines 8 to 18), that he had no bias or prejudice against Kelley (Tr. p. 467 lines 12 to 16), and that he did not believe anything he wrote had been false. Wren testified that had he doubted the accuracy of what he was reporting he would not have written it. (Tr. p. 440 lines 5 to 14) Significantly, Wren testified that he had never received a call from Kelley or heard from him in any way prior to the initiation of the suit. (Tr. p. 437 line 22 to p. 439 line 2) Wren also testified that he had not received any communication from anyone complaining that anything in the news reports was inaccurate. (Tr. p. 438 line 7 to p. 439 line 3) Kelley testified that he did not return Wren's call because does not return Wren's telephone calls. Kelley did not deny that Wren had called him in connection with the news reports on the campaign contributions. (Tr. p. 99 lines 10 to 240 In contrast, Kelley's witness Alan Clemmons, a member of the General Assembly, said that if he

saw something about him in a newspaper that he didn't like his first call would be to the person who wrote the article "to make sure they understood the facts." (Tr. p. 126 lines 8 to 14)

Over the objection of Wren and the newspaper, Dr. William E. Lee was qualified as an expert witness to testify to the following:

> Investigative reporting dealing with the standard of care that's supposed to be used by a news reporter that reports on crime and as to his knowledge and training investigative reporters as to how they are to avoid getting—going past the line put down by the U. S. Supreme Court in New York Times v. Sullivan. If you report something with knowledge that it is false or with a reckless disregard as to whether it is true or not. (Tr. p. 310 line 24 to p. 311 line 7)

Notwithstanding the objection that this testimony would introduce irrelevant standard of care issues into an actual malice case, the expert was allowed to testify that "the Sun News did not act the way professional news organizations act in these circumstances," (Tr. p. 341 lines 21 to 23) that Wren wasn't careful, (Tr. p. 358 lines 13 and 14) and that the newspaper deviated from standards. (Tr. p. 371 line 18 to p. 372 line 4)

STANDARD OF REVIEW

In this case, where the constitutional guarantee of a free press found in the First and Fourteenth Amendments to the United States Constitution is asserted, this court must undertake an independent review of the entire record "to assure...that the judgment does not constitute a forbidden intrusion on the field of free expression." *Edwards v. South Carolina,* 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed2d 697 (1963), cited in *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 508, 104 S.Ct. 1949, 1964, 80 L.Ed.2d 502 (1984). This independent, plenary review is conducted "to preserve the precious liberties established and ordained by the Constitution." *Bose Corp., supra* 466 U.S. 485, 511.

As the United States Supreme Court explained in *Bose Corp., supra,* the determination of constitutional malice in a public plaintiff libel case is not solely a question for the trier of fact, stating:

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp., supra, 466 U.S. 485, 511.

The Supreme Court of South Carolina has applied the standard demanded of the Constitution requiring a full and independent review of the record on the issue of actual malice, stating:

> When reviewing an actual malice determination, this Court is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice. *Miller v. City of West Columbia,* 322 S.C. 224, 471 S.E.2d 683 (1996).

Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899, 902 (2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT OF FACT WAS PUBLISHED BY APPELLANTS CONCERNING THE PLAINTIFF.

In order to recover in this action, Kelley had the burden of proving publication by Wren and the newspaper of a false and defamatory statement of fact concerning him. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 1 (1990); *Philadelphia Newspapers,*

Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). The evidence introduced in this action was plainly insufficient with respect to this basic element of Kelley's libel claim.

Kelley's Second Amended Complaint alleges that the defamation consisted of the accusation that Kelley delivered $84,000 of campaign contributions to Barrett. (Second Am. Compl. Paras. 5, 17, 29 and 41) The specific language objected to by Kelley is found in the news report under the headline "Bad debt adds to donor mystery" which states:

> Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June. Those contributions included a $3,500 cashier's check from Garden City Partners.

(P. Ex. 2)

Under South Carolina law, falsity of a publication cannot be established with reference to isolated passages in a publication, but must be established by reference to the entire publication. *Ross v. Columbia Newspapers, Inc.,* 266 S.C. 75, 221 S.E.2d 770 (1976); *Jones v. Garner,* 250 S.C. 479, 158 S.E.2d 909 (1968). The language complained of by Kelley is followed by language in the same news report which states that it was Dean who delivered the contributions to Barrett:

> Last week, Dean said he delivered contributions to Barrett and state Sen. Ray Cleary, R-Murrells Inlet. Dean previously has distanced himself from the political donations.

(P. ex. 2)

Kelley's effort to establish the falsity of one paragraph in Exhibit 2 is further undermined by other publications introduced into evidence by Kelley. Exhibit 1 is a news report with the headline, "Dean handed over envelope of $84,000." That same publication quoted Hazelwood saying Kelley's presence when the contributions were passed was not illegal. (P. Ex. 2) Plaintiff's Exhibit 7, a news report with the headline, "FBI, IRS probe donors" states:

> Those checks were among campaign donations that Brad Dean, the president of the chamber of commerce, delivered to Barrett during a lunch meeting last summer.
>
> Mark Kelley, the chamber's lobbyist, also attended that meeting.

(P. Ex. 7)

Kelley did not meet his burden of proving the falsity of the publications of which he complains, to wit: that he delivered $84,000 in campaign contributions, because the publications taken as a whole state clearly and accurately that while Kelley attended the luncheon with Dean and Barrett, it was Dean who delivered the contributions.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

Even if it could be assumed, *arguendo,* that the statement, "Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June" contained a false and defamatory statement of fact of and concerning Kelley, as a matter of law, he was not entitled to recovery of damages since there was no clear and convincing evidence that the false and defamatory statement of fact was made with constitutional actual malice.

The claim in this case rests upon a contention of defamation arising from a news report on the conduct of Kelley as a public figure and is thus subject to the protection of the free press under the First and Fourteenth Amendments of the United States Constitution as set forth in *New York Times Co. v. Sullivan,* 376 U.S. 254, 259, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964):

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not....

This "federal rule" prohibiting recovery of damages for a defamatory falsehood has been extended beyond public officials to public figures, with public figures required to prove "actual malice" as defined in *New York Times Co. v. Sullivan, supra. Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The court ruled Kelley was a public figure; therefore, his proof was required to meet the constitutional actual malice threshold, and this he failed to do.

The Supreme Court of South Carolina has explained fully the actual malice requirement in *Elder v. Gaffney Ledger,* 341 S.C. 108, 533 S.E.2d 899 (2000), by describing what must be shown and what is irrelevant:

> Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. *Peeler v. Spartan Radiocasting, Inc.,* 324 S.C. 261, 478 S.E.2d 282 (1996). The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. *New York Time Co. v. Sullivan, supra; Botchie v. O'Dowd,* 315 S.C. 126, 432 S.E.2d 458 (1993). A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant **in fact entertained serious doubts as to the truth** of his publication." *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968) (emphasis supplied [by court]). There must be evidence the defendant had a "**high degree of awareness of ... probable falsity.**" *Garrison v. Louisiana,* 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (emphasis supplied [by court]).

Elder v. Gaffney Ledger, supra, 533 S.E.2d 899, 902.

Kelley and his witnesses testified that the sentence "Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June" meant that Dean and Kelley had delivered the money. (Tr. p. 102 lines 5 through 10; p. 125 lines 17 to 24; 166 lines 20 to 24; 191 lines 23 to 25; p 217 lines 8 to 12) Wren testified that the prepositional

phrase, set off from the subject of the sentence and the verb by commas, was to indicate that Kelley was "along with Dean when Dean delivered the contributions." (Tr. p. 428 line 15 to p. 429 line 13) Wren's explanation of the structure of the sentence was corroborated by Patricia O'Connor who was Wren's editor at the time of the publications. Her testimony was that the parenthetical, "along with" meant that Kelley was in the company of Dean when Dean transferred the money to Barrett, not that Dean and Kelley passed the money. (Tr. p. 504 line 15 to p. 505 line 6)

Kelley, who acknowledged in an email to the superintendent of Horry County Schools that "Spelling and grammar are some of my weak points," (D. Ex. 1, Tr. p. 284 lines 19 to 25) was not deterred from testifying as to what he thought Wren meant when he wrote, "Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions…." Kelley's witnesses also said Wren said Dean and Kelley delivered the contributions. This testimony does not constitute clear and convincing proof of actual malice because it does not establish that Wren had substantial doubt about the accuracy of what he wrote as compared to what Kelley and his witness thought had been written. The Supreme Court of the United States explained the distinction in discussing the choice of language by a writer whose choice of "about the room" rather than "along the wall" in a product review of a speaker was the basis of a libel claim by a plaintiff which was required to prove actual malice:

> Aside from Seligson's [the author] vain attempt to defend his statement as a precise description of the nature of the sound movement, the only evidence of actual malice on which the District Court relied was the fact that the statement was an inaccurate description of what Seligson had actually perceived. Seligson of course had insisted "I know what I heard." The trial court took him at his word, and reasoned that since he did know what he had heard, and he knew the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it.

> "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves." Time, Inc. v. Pape,* 401 U.S., at 285, 91 S.Ct., at 637 [citation omitted]. Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. *Time, Inc. v. Pape, supra,* 401 U.S., at 290, 91 S.Ct., at 639. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984).

The evidence established beyond any doubt that Dean, Kelley and Barrett were at a luncheon meeting, sitting at the same table, when Dean passed an envelope with $84,000 in campaign contributions to Barrett. Even if "along with" was an inaccurate choice of phrase by Wren, it is not an inaccuracy that establishes actual malice as the United States Supreme Court has stated on many occasions and forcefully in *Bose*:

> The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. 401 U.S., at 292, 91 S.Ct., at 640. "Realistically,...some error is inevitable; and the difficulties of separating fact from fiction convinced the court in *New York Times, Butts, Gertz,* and other similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material. *Herbert v. Lando,* 441 U.S. 153, 171-172, 99 S.Ct. 1635, 1646-1647, 60 L.Ed2d 115 (1979). "[E]rroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" *New York Times Co. v. Sullivan,* 376 U.S., at 271-272, 84 S.Ct., at 721-722 (citation omitted).

Kelley offered no proof that Wren and the newspaper shared his and his witnesses' interpretation of the language chosen by Wren to reflect that Kelley was sitting with Dean when money was passed, and without such proof the trial court allowed liability to be imposed not for what was written, but for what was not intended to be written by Wren. *Newton v. National Broadcasting Co.,* 930 F.2d 662 (9th Cir. 1990), cert. denied, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 152 (1991). Since the actual malice rule required Kelley to demonstrate by clear and convincing evidence that Wren had a "high degree of awareness of ... probable falsity" in what he wrote, and since the record establishes without challenge that Wren had no doubt about the choice of language reflecting in his mind that Kelley was accompanying Dean when the money was delivered, and not that Kelley was involved in the delivery of the money, Kelley failed to meet his burden of proof on actual malice.

If there was error in what Wren had written, and as discussed above, that was not proven by Kelley, Kelley's first remedy was self-help as the United States Supreme Court explained in *Gertz, supra,* 418 U.S. 323, 344, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974):

> The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Kelley, as he testified, never contacted Wren to challenge the publications until he filed his suit nearly two years after the publications. The actual malice rule was adopted to make it more difficult for public plaintiffs to recover in libel actions because such plaintiffs had greater opportunities for self-help, and the United States Supreme Court has stated because of this greater opportunity, "[T]he communications media are entitled to act on the assumption that

public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Gertz, supra,* 418 U.S. 323, 345, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974). This assumption presupposes that a public plaintiff would act as Kelley's witness Alan Clemmons said he would act, by calling the person responsible for the publication he considered in error. (Tr. p. 126 lines 8 to 14) Kelley chose not to avail himself of the opportunity the Supreme Court has identified as the substitute for damages.

III. THE TRIAL COURT'S ADMISSION OF TESTIMONY FROM AN EXPERT WITNESS RELATING TO THE STANDARDS OF PROFESSIONAL JOURNALISM CONSTITUTED PREJUDICIAL ERROR REQUIRING A NEW TRIAL.

Over the objection of Wren and the newspaper, the trial court qualified Dr. William Lee as an expert witness to give testimony on standards of journalism to be followed by responsible publishers:

> Q: With regards to your expected testimony so His Honor will be able to make a correct ruling, what is the area you intend to testify to?
>
> A: The testimony would focus on whether The Sun News, David Wren and the editor acted in accordance with standards that would be followed by a responsible publisher.

(Tr. p. 302 lines 14-19)

The Supreme Court of South Carolina in its opinion in *Peeler v. Spartan Radiocasting, Inc.,* 324 S.C. 211, 478 S.E.2d 282 (1996), cert. denied, 520 U.S. 1275, 117 S.Ct. 2455, 138 L.Ed.2d 212 (1997), involving an action for defamation by a public figure, included a statement of the "professional standards rule," stating that "to establish recklessness, there must be an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers," but departure from professional standards has never been the measure of actual malice established by the United States Supreme Court. The language in *Peeler* is taken

from a plurality opinion of the United States Supreme Court in *Curtis Publishing Co. v. Butts, supra;* however, "this proposed standard was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule." *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 666, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989). More than an extreme departure from professional standards or an examination of the motivation of the publisher must be shown to establish actual malice as the United States Supreme Court said in *Harte-Hanks, supra:*

> [A] public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice.

Harte-Hanks, supra, 491 U.S. 657, 665, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562.

Clearly, the admission of expert testimony on professional standards of journalism was in error as it provided testimony that did not constitute a part of the actual malice standard. The policies of the newspaper were offered to demonstrate that a departure from those policies constituted actual malice, when, if the policies would ever be relevant, it would be to establish negligence, not actual malice. *Madison by Bryant v. Babcock Center, Inc.,* 371 S.C. 123, 638 S.E.2d 650 (2006). The admission of this expert testimony allowed Kelley to recover on a showing much less rigorous than the constitutional actual malice standard required for public figure plaintiffs.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS A NEW TRIAL IN THAT THE AWARD OF DAMAGES IS SO GROSSLY EXCESSIVE THAT IT INDICATES THE JURY WAS MOTIVATED BY PASSION, CAPRICE, PREJUDICE OR OTHER CONSIDERATION NOT FOUNDED IN THE EVIDENCE.

Kelley's evidence established that he remained a lobbyist for numerous public and private clients, that an $18,000 pay raise had been delayed two years, but was awarded in full in

recognition of his outstanding lobbying work for Coastal Carolina University. (Tr. p. 233 line 15 to p. 235 line 24) Kelley testified that his lobbying firm had fewer clients following the death of one of his partners and the publications of which he complains, but he could not apportion the cause of the loss of clients or attribute it to the publications. (Tr. p. 274 line 11 to p. 275 line 14, p. 285 lines 11-12) Significantly, no dollar value was assigned to the loss of clients. One of Kelley's witnesses testified that he told a firm that had inquired about using Kelley as a lobbyist that Kelley was "toxic." (Tr. p. 135 line 9 to p. 136 line 24) Kelley chooses to blame his not being hired by that firm on the publications rather than the "recommendation" provided by a friend. For these injuries the jury awarded Kelley $400,000 actual damages and $250,000 punitive damages. These awards are so grossly excessive and so disproportionate to Kelley's injuries that they indicate the jury acted arbitrarily and out of passion, caprice, prejudice or some other considerations not founded on the evidence. In such circumstances, it is the duty of the trial court to set aside the verdict and grant a new trial. *Sanders v. Prince,* 304 S.C. 236, 403 S.E.2d 640 (1990), citing *Small v. Springs Industries, Inc.* 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987).

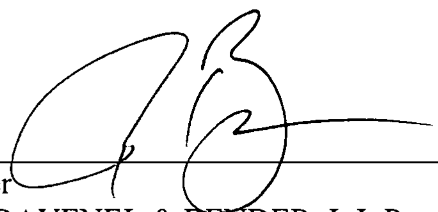
V. THE PUNITIVE DAMAGE AWARD IS IN VIOLATION OF THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING A NEW TRIAL.

The award of punitive damages against Wren and the newspaper is inconsistent with the First and Fourteenth Amendment protection for a free press in that such awards serve only to punish speech the jury does not like which will promote self-censorship and diminish the flow of information to the public on matters of public interest such as the campaign financing activities disclosed by Wren and the newspaper. *Gertz v. Robert Welch, Inc., supra; New York Times v.*

Sullivan, supra. A new trial should have been ordered. *Holtzschieter v. Thomson Newspapers, Inc.,* 332 S.C. 502, 506 S.E.2d 497 (1998).

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Wren and the newspaper submit that the judgment of the circuit court should be reversed and judgment entered for them or the case remanded for a new trial.



Jay Bender
BAKER, RAVENEL & BENDER, L.L.P.
3600 Landmark Dr., Suite 400
Post Office Box 8057
Columbia, SC 29202
803.799.9091 (telephone)
803.779.3423 (facsimile)
ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

October 15, 2014