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

Case No. 2012-CP-26-03804

Mark Kelley, ... Respondent,

v.

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

[INITIAL] BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent adopts Appellants' Statement of the Case.

STATEMENT OF THE FACTS

Respondent, Mark Kelley (Kelley), became a lobbyist in 2003 (Tr. p. 77, lines 8-9), one year after retiring from the South Carolina House of Representatives in 2002 where he served from 1992 to 2002. (Tr. p. 77, lines 16-21). Kelley's retirement from the legislature was voluntary because he wanted to get back to his personal private life and spend more time with his family. (Tr. p. 78, line 22 to p. 79, line 15). In 2010, his clients were Coastal Carolina University, Horry County Schools, Grand Strand Business Alliance, Alltel, Progress Energy, Waste Management Systems, Greenville Hospital System, GlaxoSmithKline and others. (Tr. p. 80, lines 18-24). Kelley had worked

untiringly to establish an impeccable reputation as a lobbyist who legislators could consult and obtain a clear and unbiased view of proposed legislation – a lobbyist who a legislator could rely upon and trust to give the pro's and con's of a proposed bill. (Tr. p. 121, lines 6-20; Tr. p. 122, line 21 to p. 123, line 10).

While in the South Carolina House of Representatives, Kelley served on many committees, including being elected by his fellow legislators to the Ethics Committee. (Tr. p. 77, line 23 to p. 78, line 17). He was instrumental in the passage of the present ethics law (Tr. p. 60 lines 5-6; p. 78, lines 14-15; p. 92, lines 2-4) and, as such, was very familiar with its requirements. He was well respected among his peers and his constituency and was never defeated in any election for the House seat he held for 10 years.

After his retirement from the legislature, Kelley worked tirelessly for his clients as a lobbyist and kept out of the public light because he felt that to be an effective lobbyist, he had to avoid any publicity. (Tr. p. 79, lines 18-24).

Kelley was successful in avoiding any publicity for himself and his clients until 2010, an election year when four (4) candidates for Governor were running in the Republican primary: Gresham Barrett, Nikki Haley, Henry McMaster, and Andre Bauer.

In June 2009, Brad Dean, President of the Myrtle Beach Chamber of Commerce, arranged a luncheon with Gresham Barrett at Sid & Roy's Restaurant in Myrtle Beach for June 20, 2009. Brad Dean, being a friend of Kelley, knew that Barrett was a friend of Kelley and that they had served in the South Carolina House of Representatives together. Dean called Kelley and invited him to the luncheon which Kelley accepted because he wanted to see his friend.

Gresham Barrett, after receiving Dean's luncheon invitation, issued an email on June 15, 2009, to three (3) members of his campaign staff advising them where he would be on Saturday, June 20, 2009. (Pl. Ex. 10). One of Barrett's campaign staff members was a man named Justin Stokes (Stokes). Stokes later left the Barrett campaign after having two mental breakdowns and joined the Nikki Haley campaign as a campaign staffer. (Tr. p. 195, line 16 to p. 197, line 1). When Stokes left the Barrett Campaign, he took copies of emails with him from the Barrett campaign and gave them to Nikki Haley's campaign manager, Tim Pearson. While working for the Haley campaign, Stokes, along with Tim Pearson (Haley's campaign manager), began sending emails to the Appellant, David Wren (Wren), an investigative reporter for the Appellant, Sun Publishing Company, Inc. (The Sun News). (Pl. Exs. 10, 15).

Wren was working on a story concerning campaign donations from several LLC's in Myrtle Beach to various candidates for state office, including but not limited to Gresham Barrett and was trying to determine who was behind the donations.

When Kelley attended the luncheon on Saturday, June 20, 2009, in attendance were Gresham Barrett, Brad Dean and Drea Byers, a campaign consultant to Barrett. (Tr. p. 88, lines 13-16). Kelley was seated with Brad Dean to his left, Barrett to his right and Byers across the table. (Tr. p. 89, lines 2-7). During the luncheon, Brad Dean handed an envelope containing campaign donations across the table to Barrett who handed it to Byers. (Tr. p. 90, lines 3-5). Kelley had no prior knowledge that campaign donations would be given. (Tr. p. 87, lines 9-11). Kelley did not touch the envelope or look inside the envelope. (Tr. p. 89, line 21 to p. 90, line 7; p. 90, lines 9-10).

Moreover, Kelley had no knowledge as to the source of the donations or the amount. (Tr. p. 87, lines 12-14). After the envelope was passed from Dean to Barrett, the parties discussed their families and discussed what each had been doing since they had last seen each other. (Tr. p. 90, lines 14-21). They finished their lunch, said their goodbyes and departed Sid & Roy's. (Tr. p. 90, line 24 to 91, line 5). Kelley thought no more of the luncheon meeting with his friends until he began to read his name in several news articles, beginning almost a year later on May 21, 2010, shortly before the Republican Primary. The articles were written by Wren, several of which accused Kelley of a crime.

The first Article was Plaintiff's Exhibit 1. In that Friday, May 21, 2010 article, entitled "Dean handed over envelope of $84,000", Wren described the delivery of the money to Barrett during a meeting arranged by Dean "last year." In mentioning Kelley's name, the article specifically stated:

> 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 donation 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."

Kelley testified that he was not the lobbyist for the Myrtle Beach Chamber of Commerce. (Tr. p. 82, lines 14-20).

The next article was dated Sunday, May 23, 2010, and was entitled "Bad debt adds to donor mystery." (Pl. Ex. 2). Kelley complains that this article accuses him of a

crime in violation of the South Carolina Ethics Law, S.C. Code of Laws, § 2-17-80 which prohibits a lobbyist from offering, soliciting, facilitating, or providing to any statewide officer holder or candidate for said office any contributions, lodging, transportation, entertainment, food, meals, beverages, money or any other thing of value. The article, in mentioning Kelley, stated as follows:

> Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June.

The next article, which Kelley maintains defamed him, was an article dated Tuesday, May 25, 2010 (Pl. Ex. 4) and entitled "Donations Tied to MB Chamber Blasted". The language of the article quotes Robert Kelley, president of a political group called BOOST (Business Owners Organized to Support Tourism):

> 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.

The next article of which Kelley complained was actually an editorial entitled "Absence of Evidence" which was published Sunday, May 30, 2010. (Pl. Ex. 5). The entire editorial is a discussion of the absence of evidence the newspaper has against Kelley, Dean, Barrett and others. It tacitly admits accusations against Kelley, Dean, and Barrett were and are unsupported by any evidence but implies that they are guilty "no matter what the un-provable truth is". It also states that "there is no evidence disproving this statement [by Dean], but the circumstances make it difficult to believe." The language Kelley complains is as follows:

> As we now know based on David Wren's reporting, it was Myrtle Beach Area Chamber of Commerce President Brad Dean who personally handed the $84,000 in checks to Barrett with lobbyist Mark Kelley sitting by his side. (If Kelley handed the money over, the transaction would have been explicitly illegal – effectively forcing Barrett to say Kelley had no

> involvement and pinioning the donations on Dean no matter what the unprovable truth is.) (Pl. Ex. 5).

In order to prove Wren's subjective state of mind when writing the articles, Kelley introduced several of Wren's emails (Pl. Exs. 10, 11, 13A, 13B, 13C, 13D, 13E, 13F, 13G, 13H, 15) which showed that Wren sought evidence to show Kelley had violated the above-cited section of the South Carolina Ethics statute. The time line of the emails *vis a vis* the dates of the articles written by Wren is very revealing.

On May 3, 2010, at 2:14 p.m., Wren wrote an email to Tracy Edge with the subject line of "I called Trey Walker and he denied knowing anything about it." Trey Walker was identified as the campaign manager for Henry McMaster, candidate for governor. Evidently, Wren communicated with Edge about the donations from the LLC's and Edge told Wren to call Walker. After talking with Walker, Wren wrote Edge back:

> I told him we had talked about the chamber of commerce checks and he flat out denied ever saying anything to you and I asked him if he was working with John O'Connor at The State and he denied that as well. I wonder what's up? (Pl. Ex. 10, Bates stamp D. Wren 034).

After getting an email from Edge asking if Walker had mentioned Edge in the conversation, Wren wrote Edge another email at 2:30 p.m. on May 3, 2010, stating, in part, the following:

> Yeah, you told me it would be ok if I mentioned we had talked so I told him that we were talking about the checks earlier today and you had told me that Walker had some *e-mails from the Barrett campaign that would show Mark Kelley distributed donations to him.* ..... (Emphasis added). (Pl. Ex. 10, Bates stamp D. Wren 033).

The same email ended up with the following revealing verbiage:

> .....Walker flat out denied knowing anything about anything. Basically called you a liar.. Now I'm really confused. *I know campaign managers*

have little or no ethics, but to flat out lie about something that eventually will be shown to be true isn't going to help him. (Emphasis added). (Pl. Ex. 10, Bates stamp D. Wren 033).

Thereafter, Wren contacted Tim Pearson, Nikki Haley's campaign manager, concerning his investigation into the campaign donation to Barrett. Wren produced an email dated Wednesday, May 19, 2010, from Tim Pearson which forwarded the email of June 15, 2009, from Barrett to Stokes and other campaign staffers about the June 20, 2010, luncheon at Sid & Roy's. (Pl. Ex. 10, Bates stamp D. Wren 026-028). By May 19, 2010, Stokes had already left Barrett's campaign and gone to Nikki Haley's campaign and turned over emails he kept from the Barrett campaign to Haley's campaign manager, Tim Pearson.

On Thursday, May 20, 2010, at 9:02 a.m. (the day before the first article mentioning Kelley's name), Pearson emailed Wren and told him, "maybe go ask Gresham directly who gave him the money." (Pl. Ex. 10, Bates stamp D. Wren 026). Pearson also sent Wren a link to an internet site announcing that Barrett was to "make a major announcement in Myrtle Beach Thursday".

At 10:34 a.m., Thursday, May 19, 2010, Wren wrote Eddie Dyer, attorney for Coastal Carolina University, requesting the "lobbying contract" with Mark Kelley to lobby federal legislators as well as state legislators. (Pl. Ex. 13C). At 12:52 p.m., Mr. Dyer responded by stating, in part, that the Nelson Mullins Law Firm performed the federal lobbying for CCU and that Mark Kelley was actually paid as a CCU employee and there was no contract between CCU and Kelley or his firm, KSMO. This was confirmed by Martha Hunn, CCU's director of news and public affairs, by her email of 1:37 p.m. that same day. (Pl. Ex. 13C).

That same day, Wren received an email from Justin Stokes at 4:29 p.m. revealing that Wren was asking Stokes for either confirmation or documentation that Kelley had "set up the meeting":

> Any luck? Looking for any other emails now. *But I don't think I don't think I have anything documenting.* Will keep thinking *how else to document he set up the meeting.* (Emphasis added). (Pl. Ex. 15).

The above emails were one to two days before the first article of May 21, 2010, and show the subjective state of mind of Wren in his investigative reporting. Wren testified that he actually wrote the May 23, 2010 article on Thursday (May 20, 2010) or Friday (May 21, 2010). When asked if he had stated in his deposition if he had written the May 23rd article at the early part of the week, he said, "I don't recall". (Tr. p. 472, lines 7-17).

The subjective state of mind of Wren became crystal clear in the following email dated Sunday, May 23, 2010, at 10:15 a.m. from Wren to Stokes and Pearson in which he forwarded links to the May 21 and May 23, 2010 articles and stated, in pertinent part, as follows:

> I wanted to pass along links to a couple of articles that have been published in The Sun News over the past few days and see if you can help me unravel this mystery a little more.....Also, everyone seems to be bending over backward *to protect Mark Kelley regarding his involvement in setting up the meeting with Barrett and handing him the money.* I asked B.J. Boling *if Kelley had arranged the meeting* and he quickly said, "*No, that would have been illegal.*" Then he said he had to check and see who did arrange the meeting. A little while later he called back and said it was Brad Dean.
>
> I'm trying to piece together who raised all the money, how they were funneled through the various LLCs and why and why the chamber picked Barrett as the candidate they were going to endorse (could it be anything besides the fact that Kelley is the chamber lobbyist and a big supporter of Barrett?)

> Any help or insight you can give me would be appreciated. Also, if there are *any e-mails or documents that show ... Kelley's role in setting up the Barrett meeting* would be a great help. Thanks again. The links to the stories are below. (Emphasis added). (Pl. Ex. 11).

Four days later on Thursday, May 27, 2010, at 9:57 a.m., Wren again revealed his subjective mindset in the following email from Wren to Tim Pearson:

> I wanted to check back with you and see if there is any way that we can use the e-mails from Barrett's campaign that seem to *show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others.* I can definitely protect the source of the e-mails but would say something to the effect that they came from the Barrett campaign after the AP started asking questions in October. Recent events have overshadowed the campaign funding issue and I'm looking for ways to move that story forward. (Emphasis added). (Pl. Ex. 13E).

Finally, the following email from Wren to Brad Dean on Wednesday, July 28, 2010, at 5:38 p.m. shows that Wren knew he had no evidence that Kelley raised money for candidates or in Barrett's campaign when he wrote his articles of May 21, 23 and 25, 2010:

> Why would Mark Kelley be familiar with contributions and their funding source? *Did Mark Kelley play any role in raising money for candidates or in Barrett's campaign?* (Emphasis added). (Pl. Ex. 13A).

Wren testified that his articles were reviewed and approved by the editor of The Sun News before they are published and that he was acting as the agent for The Sun News and within the scope of his authority. (Tr. p. 456, lines 5-24 and p. 457, lines 6-19).

At trial, Wren admitted that his investigation revealed Kelley had nothing to do with the LLCs or the money allegedly coming from the LLCs (Tr. p. 459, lines, 19-23). Wren also admitted that he no evidence of Kelley setting up the meeting with Barrett. (Tr. p. 459, line 24 to p. 460, line 4).

Wren also admitted that no one told him by email, by telephone, by letter, or by whatever method that Kelley set up the meeting, raised the money or handed the campaign donations to either Barrett or anyone. (Tr. p. 474, line 23 to p. 475, line 13).

Kelley produced six (6) witnesses, all of whom testified that the complained of articles led them to believe that the Appellants accused Kelley of the crime of violating the South Carolina Ethics Law by setting up a meeting and delivering campaign contributions to Barrett. They also understood that the editorial of The Sun News on May 30, 2010, as stating that their reporter, Wren, had no evidence of Kelley committing the crime above stated but that Barrett and Dean were lying and stated that it was an "un-provable truth" that Kelley was guilty of violating the Ethics Law.

Kelley called an expert witness, William E. Lee, who taught and trained investigative journalist for many years (Tr. p. 322, lines 5-10) and co-authored a text book, which was in its ninth edition, used in the College of Journalism where he taught at the University of Georgia, as well as in a hundred other colleges and universities throughout the United States. (Tr. p. 322, lines 11-25). He had been an expert in about twenty-eight (28) cases and qualified as an expert in the Federal Courts of New York; Chicago, Illinois; St. Paul, Missouri; Kansas City, Missouri; Sacramento, California; and four courts in the state of Georgia. (Tr. p. 328, lines 14-25).

Lee testified that Wren had no evidence that Kelley set up the meeting with Barrett or handed him the campaign donations. (Tr. p. 353, lines 5-14) To the contrary, he had evidence from three sources that told him Kelley was not involved in setting up the meeting or giving the campaign donations. (Tr. p. 353, lines 5-15). He opined that the above information would give Wren knowledge that Kelley had nothing to do with

setting up the meeting or giving campaign donations to Barrett. (Tr. p. 353, lines 15-22). Lee asserted that Wren should have looked carefully and with skepticism at Stokes and Pearson as reliable sources because they were in an opposing campaign camp, especially since Wren wrote in his email that all campaign managers have no ethics. (Tr. p. 358, lines 1-14). He also stated that the articles accused Kelley of setting up the meeting and giving Barrett campaign donations and that Wren had no basis for making that claim because Wren's sources were suspect, Wren had no documentation to prove the accusation made against Kelley, and Wren knew that it was false. (Tr. p. 369, lines 1-19). Lee confirmed that the facts revealed that Wren knew there was no evidence from any source against Kelley, but Wren wrote the article of May 23rd anyway accusing him of a crime with a reckless disregard as to whether it was true of false. (Tr. p. 376, lines 2-8). Lee also stated that Wren's one call to Kelley was inadequate when accusing someone of a crime, i.e., Wren should have sent an email to Kelley, made a follow-up phone call, or met Kelley in person. Lee pointed out that Wren's editor, O'Conner, admitted in her deposition that one phone call by Wren to Kelley was probably inadequate. (Tr. p. 343, lines 1-7).

The only witnesses called by the Appellants were Wren, the reporter, and Patricia O'Connor, the editor. Appellants produced no witness to agree with their position that the articles written about Kelley meant that he was just sitting beside Dean when the donations were given to Barrett. None of the sources relied upon by the Appellants were called as witnesses.

The jury charges by Judge Hyman were thorough and the Plaintiff was required to prove *all elements of the tort of defamation/libel by clear and convincing evidence.* The

forms of verdict as to both actual and punitive damages required that the jury find for the Plaintiff only if he proved each element of his case by clear and convincing evidence. The form of the actual damage verdict also required that the jury find for the Plaintiff only if he proved by clear and convincing evidence that the "statement was published with actual malice, i.e., the statement was made with knowledge of its falsity or reckless disregard of its truth or falsity". (Court Ex. 5). The charges to the jury and the forms of the verdict complied with the requirement that the Plaintiff prove "constitutional actual malice" as set forth in New York Times v. Sullivan, 376 U.S. 293, 84 S.Ct. 733, and its progeny.

After approximately 4 hours of deliberation the jury returned a verdict for Kelley in the amount of $400,000 actual damages. The Trial Judge then charged the jury on the issue of punitive damages and the jury brought in a verdict of $250,000 punitive damages. Implicit in the jury's verdict was the fact that the jury did not believe Wren's and O'Connor's explanation that the news articles did not accuse Kelley of a crime – a question of Appellants' credibility was decided adverse to them. Also implicit in the jury's verdict was the fact that they determined Kelley had met his burden of proof on all elements by clear and convincing evidence and that the articles were printed with "constitutional actual malice", i.e., that the articles were printed with knowledge of their falsity or with a reckless disregard as to whether they were true or false.

STANDARD OF REVIEW

Appellants' statement of the standard of review set forth in Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) and cited in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) is

correct, as far as it goes; however, "the constitutionally based rule of independent review" does not mean that the appellate court disregard credibility determinations of the trier of fact. Bose Corp., *supra. at* 499–500, 104 S.Ct. 1949; Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562 (1989) (appellate court should not disregard a jury's opportunity to observe live testimony and assess witness credibility). Deference to factual determinations that turn on credibility assessment is essential to jurisprudence because of the fact finder's unique opportunity to observe and weigh witness testimony. Harte–Hanks, 491 U.S. 688, 109 S.Ct. 2678; Newton v. Nat'l Broad. Co., 930 F.2d 662, 670–71 (9th Cir.1990).

Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenbaltt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), Curtis Publishing Co. v. The Associated Press, 388 U.S. 130, 87 S.Ct. (1975), Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). The First Amendment does not accord absolute privilege to editorial process of a media defendant in a libel case brought by a public figure or public official who has burden of proving that damaging falsehood was published with "actual malice." Herbert v. Lando, *supra.* Spreading false information in and of itself carries no First Amendment credentials. Herbert v. Lando, *supra.*

Although affirming the doctrine announced in New York Times v. Sullivan, *supra.* and its progeny, the U.S. Supreme Court stated in Herbert v. Lando, *supra.*, "At the same time, however, the Court has reiterated its conviction - reflected in the laws of defamation of all of the States - that the individual's interest in his reputation is also a basic concern." *Id.*, at 455-457, 96 S.Ct., at 966; Gertz v. Robert Welch, Inc., 418 U.S.

348-349, 94 S.Ct. 3011. Therefore, the Plaintiff in Herbert was entitled to obtain evidence which showed the subjective state of mind of the reporter and publisher.

This is exactly what Respondent did in this case by obtaining through discovery emails from and to the reporter, Wren, which (to Wren's dismay) revealed that the phrase which he now claims is an innocuous misprint or mistake was intended to accuse Respondent of a crime. His emails proved his state of mind that he sought evidence to accuse Respondent of a crime and they also proved that he knew the accusations were false and/or he wrote them with a reckless disregard for its truth or falsity because he never obtained the evidence. It also proved he had substantial doubts as the accusations truthfulness.

In determining the issue of actual malice within context of libel case involving public figure, de novo review conducted to ensure that district court applied properly governing constitutional law and that plaintiff did indeed satisfy burden of proof did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations, but rather was limited to review of ultimate conclusion of clear and convincing proof of actual malice. Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S. 907, 109 S. Ct. 257, 102 L. Ed. 2d 245 (1988) and judgment aff'd, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

The jury was in the best position to determine which testimony to believe and whether to accept Appellants' claims of good faith. The appellate court should defer to the jury's determination that Appellants were not credible when they claimed to have made their accusations in good faith. This, together with the Appellate Court's

independent review of the record should lead it to conclude that the jury was correct in finding there was clear and convincing evidence to support the inference of actual malice.

The Court in Harte-Hanks, *supra,* made the following statement which is particularly appropriate and germane to this case and the issue of appellate review:

> Here, the issue of malice turns largely on the credibility of the witnesses, particularly of defendants. The jury was properly instructed on the requirement of actual malice and the ways in which it could be satisfied. The jury was told it may only find defamation in this case if the actual malice requirement was met. The question that the jury was required to answer was whether defendants were credible when they claimed they acted in good faith when they published the articles about the Plaintiff. Having had the opportunity to assess each witness' credibility, the jury was ideally suited to answer this question, and even when conducting an independent review, the appellate court must strongly defer to the jury's determinations of credibility. *See* Harte–Hanks, 491 U.S. at 688–89, 109 S.Ct. 2678; Newton, 930 F.2d at 670–71.[1]

Therefore, in preparing to prove his case in light of the requirement on the Respondent to prove constitutional actual malice, Respondent deposed Wren at length and obtained his emails relating to the subject news articles. Respondent sought evidence which would reveal the state of mind of Wren because "the defendant's state of mind was of 'central importance' to the issue of malice in the case" and whether Wren "had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another."

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[1] Recognizing the difficult position in which an Appellate Court is placed, the Ninth Circuit has noted the reviewing Court faces the "daunting task of reconciling our duty to respect the jury's fact-finding role with our duty to protect the values enshrined in the First Amendment" because the independent review standard and the clearly erroneous standard are in tension. Newton, 930 F.2d at 666. "[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact." *Id.* at 670.

Apparently, Appellants are urging this Court to reverse the jury verdict and disregard the credibility issues in this case. To do so would usurp the Respondent's constitutional right to a jury trial which New York Times v. Sullivan, *supra,* and its progeny never intended.

Also the wide disparity between the proof of the Respondent and the Appellants in this case demonstrated with clarity that the jury verdict was firmly, if not exclusively, anchored in credibility evaluations and assessments.

From the jury's written answers to the special interrogatories attached to the verdict, the jury obviously elected to assign greater credibility to the Respondent and his witnesses and proof. In sum, the jury simply did not believe the Appellants' witnesses, its evidentiary presentations, or its arguments.

ARGUMENTS

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOV BECAUSE THERE WAS EVIDENCE THAT THE APPELLANTS PUBLISHED A FALSE AND DEFAMATORY STATEMENT OF FACT OF AND CONCERNING THE RESPONDENT.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); *see* Bell v. Evening Post Pub. Co., 318 S.C. 558, 459 S.E.2d 315 (Ct.App. 1995). If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper. *See* Swinton, 334 S.C. at 476, 514 S.E.2d at 130. On the other hand, a directed verdict

motion on liability for libel is properly denied where evidence exists justifying submitting the issue to the jury. *See* Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998).

The Appellants' assertion that the articles did not accuse Respondent of a crime was found to be incredible by the jury. When considering the alternatives facing the Appellants after the publications of Wren's articles, the Appellants took the only position it could in their attempt to escape liability for the defamatory articles -- a position which asserted that only the Appellants could interpret the meaning of what was said in the articles. (Tr. p. 487, line 21 to p. 488, line 5) The absurdity of their explanation was obviously rejected by the jury and their asserted "English lesson" attempted in the courtroom was found to be laughable by the jury which obviously disregarded their explanation.

Since the jury obviously found that one or more of the articles accused Respondent of a crime, they had an easy "next step" to decide that the accusation was false since the Appellants testified they had no evidence showing Kelley either set up the meeting or delivered the donations to Barrett and its own editorial entitled "Absence of Evidence" shows that Appellants lacked proof. The next logical step in the jury's deliberation was to determine whether the defamatory statement was made by the Appellants. It was obviously published in The Sun News (which Appellants could not deny because the newspapers were in evidence).

The Appellants attempted to escape liability with its assertions that the Respondent took the articles out of context or singled out one paragraph of the entire

article. However, all articles read together, with the interpretation placed thereon by the editors, refute the Appellants' argument.

The entire thrust of Wren's investigative reporting was his veiled assertion that the donations coming from the LLCs did not accurately show who was making the donations and implied that the money came from the Chamber of Commerce from the one cent sales tax recently passed and that it was a kickback to legislators who supported the passage of the sales tax. It was obviously important for Wren to keep incorrectly stating that Respondent was the "Chamber" lobbyist when that was untrue. It was also important to Wren that his audience believe that Respondent was involved in the "donation" meeting in his capacity as the "Chamber" lobbyist because it shed light on his conspiracy theory of dark political donations, the kickback and money laundering referred to in The Sun News Editorial. Reading the articles as a whole, the jury did reasonably concluded that Wren accused Kelley of a crime in violation of the S.C. Ethics Law so he could, as he so conveniently stated to Haley's campaign manager, "keep his story moving forward." (Pl. Ex. 13E). It was a question of fact for the jury, which prevented the trial judge from either directing a verdict for the Appellants or granting a judgment notwithstanding the verdict. Therefore, there was no error on the part of the trial judge in denying the Appellants' motions.

The jury found that at least one the above articles accused Respondent of a crime which made the statement libelous *per se* and consequently actionable *per se.* Since the jury found that Kelley was accused of a crime, it only had to determine whether the accusation of the crime was false. It obviously did so as shown in the jury's verdict. Wren testified several times during his testimony that he had no evidence that Kelley

either set up the meeting or gave the donations to Barrett. (Pl. Exs. 21 and 22; Tr. p. 451, lines 5-20; p. 459, line 23 to p. 460, line 4).

Additionally, Wren's editor acknowledged by its editorial that they had no evidence that Kelley violated the ethics statute. The Sun News editor gave himself away in his editorial when he made the statement: "*As we now know,* based on David Wren's reporting....." If Wren's editor believed that Wren had not accused Respondent of a crime, he would most likely have said, "*As we have known all along*, based on David Wren's reporting." However, the editor gave himself away a second time in his editorial when he said: "(If Kelley handed the money over, the transaction would have been explicitly illegal – effectively *forcing Barrett to say* Kelley had no involvement and pinioning the donations on Dean *no matter what the un-provable truth is.)*" (Emphasis added). The only logical explanation for the parenthetical phrase is that The Sun News and its reporter, Wren, were telling the public that Dean *and Kelley gave the donations to Barrett,* that Barrett is a liar because he is protecting Kelley when he says that only Dean gave him the donations, and that Kelley is therefore guilty of a crime ..... but the Appellants don't have any evidence or proof. (Pl. Exs. 21, 22; Tr. p. 451, lines 5-20; p. 459, line 23 to p. 460, line 4). The next paragraph attempts to refute Dean's statement that the donations came from LLCs and not from the Chamber of Commerce and effectively calls Dean a liar. Again, the Appellants say they have no proof but they certainly don't hesitate to call someone a liar when *they don't believe the people they interview.*

This is the exact type of journalistic tactics which defamation laws were enacted to prevent. The Appellants engaged in "bulverism" which is defined by competent

journalists as the method of assuming something to be true (even though it is not) and explaining how it happened or what should be done about it. Such journalist tactics was heavily criticized in Carson v Allied News Company, 529 F2d 206 (7th Cir 1976). The critical statement in Carson may be paraphrased and applied to the facts of this case as follows:

> In the catalogue of responsibilities of journalists, right next to plagiarism . . . . . .must be a canon that a journalist does not invent evidence and attribute it innocent persons. If a writer can sit down in the quiet of his cubicle and create such evidence as 'a logical extension of what must have gone on' and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. In any event, St. Amant expressly gives as another example of reckless disregard for the truth any 'product of (one's) imagination.' 390 U.S. at 732, 88 S.Ct. 1323.
>
> Because of both the completely fabricated accusations and the wholly imagined but supposedly precise evidence quoted by the Appellants, the Respondent was entitled to a jury's determination of whether actual malice existed.

Moreover, Appellants' argument overlooks the fact that the Trial Court only submitted three articles to the jury to determine whether one or more of the articles defamed Respondent. They were the article of May 21, 2010 (Pl. Ex. 1); the article of May 23, 2010 (Pl. Ex. 2), and the article of May 25, 2010. (Pl. Ex. 4). Additionally, the forms of verdict submitted to the jury stated that the jury could return a verdict for the Plaintiff as to one or more of the three articles. (Court Ex. 5). Therefore, there is no way the Court can determine whether the verdict is based upon one, two, or all three articles. Since the Appellants agreed to the forms of the verdict, they cannot now complain for the first time on appeal.

This then brings us to the issues in Appellants' argument referring to articles which were not submitted to the jury. Articles in Plaintiff's Exhibits 6, 7, 8, and 9 were not a part of the verdict form and therefore not considered by the jury in its deliberation. The trial judge in submitting only the above three articles and the editorial to the jury in the form of the verdict, tacitly excluded all other articles from the jury's consideration. As such, Appellants' argument that the judge erred in failing to direct a verdict based on the contents of Plaintiff's Exhibits 6, 7, 8, 9 would be an argument *dehors* the record and consequently improper.

Wren had numerous emails that evidence he had been told that Kelley was not involved with organizing, facilitating, calling, or arranging the meeting, or raising donations or handing the donations to Barrett. (Pl. Exs. 11, 15, 21 and 22; Tr. p. 421, line 16, to p. 425, line 24; p. 451, lines 5-20; p. 459, line 23 to p. 460 line 4). Yet he refused to accept the fact that there was no evidence to "document he set up the meeting" (Pl. Ex. 11, 15) and created his own evidence of innuendo and unsupported implications. That is

an impermissible violation of proper and professional journalism and one which New York Times v. Sullivan, *supra.* and St. Amant v. Thompson, *supra,* and their progeny provide no First Amendment protection.

For the above reasons, the trial court was correct in denying the Appellants' motions for directed verdict and judgment nov.

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOV BECAUSE THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

Appellants' entire argument is that only Wren knew what he meant when he published: "Dean, along with chamber lobbyist Mark Kelley, delivered those contributions to Barrett in June". (Tr. p. 487, line 21 to p. 488, line 5). That argument is what Wren arrogantly asserted in his testimony at trial. (Tr. p. 487, line 21 to p. 488, line 5). After conceding that Appellants' witnesses, Alan Clemmons, Nelson Hardwick, George Hearn and William Lee, all understood that Wren's statement above accused Kelley of a crime, the following testimony took place during cross examination of Wren:

> Q. Okay. Have you got anybody to come up here and testify besides yourself and your editor that you didn't accuse Mark Kelley of a crime when you wrote the articles?
>
> A. I guess the best person to testify to that would be me and I can tell you I did not.
>
> Q. The best person to testify to that is you?
>
> A.. And I can tell you I did not accuse him of a crime. (Tr. p. 487, line 24 to p. 488, line 5).

This is also the argument of the Appellants in their brief. The fallacy of this type argument is obvious. If the only evidence to be considered on the subjective state of mind of the writer is the writer himself, there would never be a need for the jury and credibility issues would "fly out the window". The credibility of a publisher's reporter has always been of prime importance in a defamation case, even in a case of defamation against a public official or public figure – otherwise, the victim of the defamation would be deprived of his constitutional right to a trial by jury.

> Logic and reason dictate that the *Bose* directed de novo review did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but rather was limited to a review of the ultimate conclusion of clear and convincing proof of actual malice. A contrary conclusion would usurp the role of the jury and burden the appellate courts with original jurisdiction in libel actions impinging a plaintiff's constitutional right to a jury trial. Connaughton v. Harte-Hanks Communications, Inc., *supra,* at 842.

Proof of actual malice requires the plaintiff to demonstrate, by clear and convincing evidence, that the publisher made the statements either knowingly or with reckless disregard for their truth or falsity. George v. Fabri, 345 S.C. at 456, 548 S.E.2d at 876; Elder v. Gaffney Ledger, 341 S.C. at 114, 533 S.E.2d at 902. Clear and convincing evidence may be defined as " 'that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established' ". Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 269 n. 4, 478 S.E.2d 282, 286 n. 4 (1996) (citation omitted). It is an intermediate measure of proof, i.e., " 'more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal' ". *Id.*

Actual malice is "a *subjective* standard which tests the defendant's good faith belief in the truth of [its] statements." George, 345 S.C. at 456, 548 S.E.2d at 876; *see*

Peeler, 324 S.C. at 266, 478 S.E.2d at 284. Hence, absent proof of a knowing falsehood, the plaintiff must establish a defendant " 'in fact entertained serious doubts as to the truth of his publication' " or possessed a " 'high degree of awareness' " of probable falsity. George, 345 S.C. at 456, 548 S.E.2d at 876 (citations omitted); *see* Holtzscheiter, 332 S.C. at 512-13, 506 S.E.2d 503 (proving constitutional actual malice requires a showing that the publisher either "realized the statement was false" or "had serious reservations about its truth"). Recklessness presupposes "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Peeler, 324 S.C. at 266, 478 S.E.2d at 284.

It was obvious that Wren had serious doubts about Kelley facilitating, raising, or handing campaign donations to Barrett because all of Wren's so-called sources, even the obviously biased ones who worked for Haley's campaign, told Wren that Kelley did nothing or they knew nothing about Kelley having anything to do with the donations or setting up the meeting. "Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant." Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653 (S.C. 2008). Substantive evidence of Wren's subjective state of mind is clearly revealed in his emails between himself and his sources when he makes such statements as follows:

> *"I called Trey Walker and he denied knowing anything about it."* (Pl. Ex. 10).
>
> *"Walker had some e-mails from the Barrett campaign that would show Mark Kelley distributed donations to him."* (Pl. Ex.10).
>
> *"I know campaign managers have little or no ethics, but to flat out lie about something that eventually will be shown to be true isn't going to help him."* (Pl. Ex. 10).

> *"Also, everyone seems to be bending over backward to protect Mark Kelley regarding his involvement in setting up the meeting with Barrett and handing him the money."* (Pl. Ex. 11).
>
> *"I asked B.J. Boling if Kelley had arranged the meeting and he quickly said, "No, that would have been illegal."* (Pl. Ex. 11).
>
> *"if there are any e-mails or documents that show ... Kelley's role in setting up the Barrett meeting would be a great help."* (Pl. Ex. 11).
>
> *"I wanted to check back with you and see if there is any way that we can use the e-mails from Barrett's campaign that seem to show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others."* (Pl. Ex. 13E).

These emails were between Wren and a campaign manager and campaign staff worker of Haley and the campaign manager for McMaster, who Wren identified as his sources. They were obviously biased sources, all of whom advised Wren that they had no evidence that Kelley had anything to do with the campaign donations or setting up the meeting. Therefore, Wren could not have had a "good faith belief" that Kelley did anything illegal. In fact, Wren had no evidence whatsoever that Kelley had anything to do with the LLCs, the origin or acquisition of the donations, facilitating the donations or any meeting concerning any political donations. In short, Kelley was completely outside of the subject of Wren's investigative reporting.

"The right of a free press is not absolute in a society that demands social responsibility and personal integrity..... In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information-the very concern our forefathers sought to eliminate in demanding the press be free." Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653 (S.C. 2008), *citing* Anderson, 365 S.C. 599-600, 619 S.E.2d at 433 (Burnett, J., concurring).

The First Amendment does not afford defamatory political speech absolute immunity. *See* George v. Fabri, 345 S.C. 440, 445, 548 S.E.2d 868, 876 (2001); Stevens v. Sun Publ'g Co., 270 S.C. 65, 71, 240 S.E.2d 812, 815 (1978) ("An individual's status as a public figure does not immunize a publisher from liability when it prints defamatory articles with malice."); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) ("We have not gone so far ... as to accord the press absolute immunity in its coverage of public figures or elections."). As the Supreme Court has stated:

> That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas..... Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (citation omitted); *see* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) ("[T]hat dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean ....that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others.").

As stated above, the trial court was correct in denying the Appellants' motions because, taking the evidence in a light most favorable to the Respondent (which the trial judge was required to do) and applying the standard of proof of actual malice by clear and convincing evidence, the court found that there was sufficient evidence thereof to submit to the jury.

There were also credibility issues which the court could not decide and which had to be submitted to the jury. As the Court stated in Anderson, *supra.* "Moreover, since '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict,' the evidence presented by Anderson is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.").

Whether a plaintiff has presented evidence sufficient to constitute actual malice is, in the first instance, a question of law for the trial court. *See* Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899 (2000). That decision was made by the Trial Court at summary judgment, directed verdict, and judgment nov stages of the trial and each time it was decided in the Respondent's favor. The only thing left for determination was who was telling the truth and the Appellants lost on that ground. Since credibility issues are not subject to appellate review under New York Times v. Sullivan, *supra,* this Court should affirm the Trial Court's denial of Appellants' motions for directed verdict and Judgment nov.

The issue of "self-help" briefed by Appellants and citing Gertz is misplaced on the issue of constitutional actual malice. In the first place, the issue of self-help was only

dicta and would only go to mitigation of damages if applicable. Moreover, Appellants fail to state the full test of the "self-help" issue discussed in Gertz which stated,

> Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task.... *See* Mathers v. Bailey, 31 Media L. Rep. 2575 (2003) n.3.

All public figures are not the same and all public figures do not have the same access to public media to refute defamatory publications. There is no holding cited by the Appellants which make the issue of self-help a defense to a case of defamation.

Moreover, Respondent testified that he would not return Wren's calls because of past experiences with Wren who would not remedy incorrect publications. Respondent had experience with Wren for 10 years while he served in the House of Representatives and felt that Wren would not print his responses correctly. (Tr. p. 99, line 10 to p. 100, line 7). Moreover, Respondent had been out of the public life for approximately 8 years at the time of Wren's articles and didn't feel he had the ability to convince the media to print his response to Wren's articles.

For the foregoing reasons, the Trial Court was correct in denying Appellants' motions for directed verdict and judgment nov.

III. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY OF AN EXPERT WITNESS BECAUSE HIS TESTIMONY WENT TO THE ISSUE OF ACTUAL MALICE.

After going over the qualifications of Dr. William E. Lee, Respondents' counsel moved to admit Dr. Lee as an expert in "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 false." (Tr. p. 310, lines 21 to p. 311, line 7).

The Sixth Circuit Court in Connaughton v. Harte Hanks Communications, Inc., *supra,* stated that the "First Amendment protections do not imply a license to publish known falsehoods or to ignore elementary precautions which are demonstrative of *highly unreasonable conduct that constitutes extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers* even under circumstances involving public officials or public figures. U.S.C.A. Const.Amend. 1." Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S. 907, 109 S.Ct. 257, 102 L.Ed.2d 245 (1988) and judgment aff'd, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). (Emphasis added). The emphasized language referring to extreme departures from standards of investigation and reporting ordinarily adhered to by responsible publishers allows a plaintiff to introduce evidence of those "standards" which an ordinary lay jury would not possess knowledge. As such, Dr. Lee was called by Respondent to testify as to those standards and how those standards would apply to the issue of actual malice.

Dr. Lee also reviewed the publications and the emails from and to Wren to determine if there was evidence of Wren's knowledge of Kelley's involvement with the luncheon and whether Wren knew Kelley did not set up the meeting or deliver the donations. These facts went straight to the heart of whether the publications were published with a knowledge of its falsity or a reckless disregard of its truth or falsity.

The extreme departure of Wren from the journalistic standards was only part of

the evidence testified to by the expert. He also testified as to the emails and how they related to Wren's knowledge that what he was printing was false and/or that he printed the defamatory material with a reckless disregard as to whether it was true or false. (Tr p. 343, line 8; p. 345, lines 20 to p. 353, line 14).

He testified as to the emails showing the subjective state of mind of Wren and the editor and how it applied to the issue of actual malice. (Tr. p. 353, lines 15-23; p. 354, line 7 to p. 357, line 3; p. 357, line 16 to p. 358, line 23; p. 364, line 17 to p. 365, line 3; p. 368, line 10 to p. 370, line 6).

"Realistically,....some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in New York Times, Butts, Gertz, and 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." Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984), Herbert v. Lando, 441 U.S. 153, 171–172, 99 S.Ct. 1635, 1646–1647, 60 L.Ed.2d 115 (1979).

It was this "culpability" to which the Plaintiff's expert testified. Wren had numerous emails warning him that Kelley was not involved with organizing, facilitating, calling, or arranging the meeting, or raising donations or handing the donations to Barrett. Yet he refused to accept that fact and created his own evidence.

Contrary to Appellants' belief, the "[m]edia is not immunized from liability for intentionally or recklessly publishing falsehoods merely because they happen to be reporting about election campaigns or potential political misconduct." Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S.

907, 109 S. Ct. 257, 102 L. Ed. 2d 245 (1988) and judgment aff'd, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

"[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports," such as relying on an opponent's campaign manager. *See,* St. Amant v. Thompson, 390 U.S. at 732, 88 S.Ct. 1323. Evidence of intent to avoid the truth may also be sufficient to show actual malice such as where a reporter is told by many witnesses that a person didn't do anything illegal. See, Harte–Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 693, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Professions of good faith are unpersuasive when a publisher's allegations are so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation. Margoles, 111 Wash.2d at 201, 760 P.2d 324; St. Amant, 390 U.S. at 732, 88 S.Ct. 1323.

Although a publisher's "[f]ailure to investigate does not in itself establish bad faith," *id.* at 733, 88 S.Ct. 1323, the Court has articulated several instances where recklessness might be shown. One of these is "where there are obvious reasons to doubt the veracity of [an] informant *or the accuracy of his reports.*" St. Amant, 390 U.S. at 732-33, 88 S.Ct. 1323 (emphasis added); *see Herbert,* 441 U.S. at 156, 99 S.Ct. 1635 (stating a court may find " 'subjective awareness of probable falsity' " if " 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' ") (citations omitted); Harte-Hanks, 491 U.S. at 688, 109 S.Ct. 2678 (same). Respondent's expert established that Wren's sources in the Haley campaign should have been recognized as "obviously biased sources".

The South Carolina Supreme Court has declared that "actual malice may be

present where the defendant fails to investigate *and there are obvious reasons to doubt the veracity* of the *statement* or informant." George, 345 S.C. at 459, 548 S.E.2d at 878 (additional emphasis added); *see* Zerangue, 814 F.2d at 1070 ("[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by ... apparently reliable contrary information."). The facts of this case amply demonstrate "obvious reasons to doubt" the truth of what Wren printed in the complained of articles and it was these reasons which the expert pointed out to the jury. *see also* Pep v. Newsweek, Inc., 553 F.Supp. 1000, 1003 (S.D.N.Y.1983) (Failure to investigate or reliance on a questionable source "may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source."). The media is not granted "absolute immunity to espouse and concur in the most unwarranted attacks ... made by persons known to be of scant reliability." Cianci v. New Times Publishing Co., 639 F.2d 54, 69-70 (2nd Cir.1980).

The Supreme Court in Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) charted the court's course to resolution of its quest in the following passage:

> Spreading false information in and of itself carries no First Amendment credentials. "[T]here is no constitutional value in false statements of fact."
>
> Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Lando, 441 U.S. at 171-72, 99 S.Ct. at 1646 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974)).

Apparent from the above language, a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence. It was this "cumulation of evidence" to which the Respondent's expert testified and the Trial Court properly admitted his testimony.

IV. BECAUSE AMPLE TRIAL EVIDENCE SUPPORTED THE JURY VERDICT AWARD THE TRIAL COURT DID NOT ERR OR ABUSE HIS DISCRETION IN DENYING APPELLANTS' NEW TRIAL ABSOLUTE.

The court, in ruling on the Appellants' Motion for a New Trial Absolute[2], must view the damages deduced at the trial in the light most favorable to the Respondent. In so doing, the court would and should have considered the issues and facts discussed below. The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).

The lower court has considerable discretion regarding the amount of damages, both actual and punitive. Collins Entm't. Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct.App. 2003); Kuznik v. Bees Ferry Assocs., 342 S.C. 579,

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[2] The Appellants also moved for a new trial *nisi remittitur* but failed to give the court the range of the *remittitur*. The Appellants have obviously abandoned its motion for a new trial *nisi remittitur* because it is not briefed.

538 S.E.2d 15 (Ct.App.2000). Due to such discretion, the appellate court is limited to correction of errors at law. Kuznik, 342 S.C. at 611, 538 S.E.2d at 32; 311; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). The appellate court is tasked with review of the evidence to see if any evidence exists to support the finding - not the task of weighing the evidence. *See* Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19(Ct.App. 1984).

Courts also have considered that reputation is priceless. "When considering that a person's *reputation is invaluable*, we conclude that [Defendant] has failed to establish that the verdict in this matter was grossly excessive." (*emphasis added*) Miller v. City of W. Columbia, 322 S.C. 224, 230-31, 471 S.E.2d 683, 687 (1996). "Because a person's reputation is invaluable, those who publish defamatory falsehoods with requisite culpability are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation." Anderson v. The Augusta Chronicle, 355 S.C. 461, 461, 585 S.E.2d 506 (Ct. App. 2003) *aff'd sub nom.* Anderson v. Augusta Chronicle, 365 S.C. 589, 619 S.E.2d 428 (2005).

The loss of an "excellent" reputation is a tremendous damage to which it is difficult to set a value. Plaintiff presented ample testimony of his stellar reputation prior to the defamatory articles. (See Transcript including, but not limited to, the following: p. 82, lines 20-25; p. 89, lines 8–15; p. 95, lines 13-16; p. 101, lines 14–18; p. 106, lines 2–6; p. 121, lines 6-10, lines 19-20; p. 122, lines 15-23; p. 123, lines 2-7; p. 127, lines 15-18; p. 129, lines 18-22; p. 134, lines 9-13; p. 135, line 9 to p. 136, line 21; p. 198, line 4

to p. 199, line 4; p. 212, lines 5–22; p. 213, line 20 to p. 214, line 1; p. 220, lines 9–13; p. 230, lines 22 to p. 231, line 1; p. 232, line 18 to p. 236, line 2;)

Testimony of several witnesses and Plaintiff's Exhibit 14 provided sufficient evidence supporting the verdict award for the Respondents actual damages. Appellant incorrectly attempts to blame Plaintiff's damages upon witness Alan Clemmons' (Clemmons') "recommendation" to a potential client that inquired about the Plaintiff. Clemmons testified he informed said potential client that the Plaintiff was toxic "at that time because of everything that had been in The Sun News" (Tr. p. 136, lines 20-21). However, Appellants ignore that Clemmons testified that he, knowing Plaintiff for approximately 20 years, believed Plaintiff had "an excellent reputation" (Tr. p. 121, lines 6-10) and prior to 2010 had never heard anything bad about the Plaintiff (Tr. p. 121, lines 19-20). Clemmons also testified Plaintiff's professional lobbyist company enjoyed a good reputation among Representatives and Senators (Tr. p. 122, lines 15-23) and that "[I]t's . . . important if you're gonna be a successful lobbyist to have a good reputation." (Tr. p. 123, lines 2-7). Appellants fail to acknowledge the logical conclusion that had the Appellants *not* published defamation in 2010, Clemmons could and would have highly recommended Plaintiff for the lobbyist job. Clemmons also testified that the publication had an influence on Respondent's effectiveness as a lobbyist, "I know for a fact, I had legislators approach me in the Chamber in very hushed tones, what's going on with Mark Kelley, what, what's this all about. So, it was on everybody's radar screen." (Tr. p. 127, lines 15-18). The poor "recommendation" was *one* sequelae of Appellants' defamation and but for the defamation would have been a recommendation to hire the Respondent.

Moreover, Plaintiff introduced Exhibit 14 which showed how much Plaintiff earned from one client annually. At the time of the trial, Plaintiff earned $99,500 per annum from one client. Evidence also showed that Plaintiff likely lost a potential client inquiring about the Plaintiff around the time the articles were published. In considering whether that said potential client may have continued Plaintiff's employment, the verdict awarded is not grossly disproportionate.

In addition, the finder of fact should also consider the intangible damages, which are the value of his reputation and injury to that reputation and Appellants' exposing him to public hatred, contempt, ridicule, and impeachment his honesty, integrity, and virtue. Evidence of ridicule on account of the publication was held to be admissible to show mortification of feelings in Foster-Milburn Co. v. Chinn, (1909) 134 Ky. 424, 120 S.W. 364, 34 L.R.A. (N.S.) 1137, 135 Am. St. Rep. 417. There was ample testimony of such evidence in this case. Therefore, the $400,000 actual damage awarded by the jury is not solely for loss of income but also for the intangible damages caused to Respondent's character and reputation.

> The award of actual and punitive damages remains within the discretion of the jury, as reviewed by the trial judge. *See* Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991); 231 Fennell v. Littlejohn, 240 S.C. 189, 125 S.E.2d 408 (1962). Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of the appellate court to set aside the award. *Id.* Moreover, when considering whether or not the verdict is excessive, if there is substantial evidence to sustain the verdict, it will not be disturbed. The appellate court will intervene only where the verdict is so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence. Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville, 285 S.C. 348, 329 S.E.2d 753 (1985); Brabham v. Southern Asphalt Haulers, Inc., 223 S.C. 421, 76 S.E.2d 301 (1953).

Also, Testimony by Alan Clemmons and David DeCenzo provided evidence that Plaintiff also suffered economical loss either by way of loss of future opportunity and loss of a raise. Additionally, defamation of one's reputation often makes it difficult and sometimes impossible for the injured victim to produce all the evidence of damage because of the likelihood that doors of opportunity close so silently the injured victim never knew they were opened at all. There was evidence of that likelihood as testified to by Clemmons; however, there most certainly were more that Respondent never realized or will realize were ever open and then closed because of the Appellants' defamation

Plaintiff's Exhibits 11 and 13E, among other evidence, shows David Wren was informed numerous times by numerous persons that Plaintiff had not set up, facilitated the meeting, or delivered the campaign contributions. The editor of The Sun News testified that she had not taken the time to review the emails and/or investigative evidence that David Wren conducted on the subject for which defendants published said articles. Defendant Wren's own words in his email above mentioned evidences his disregard of his own investigation, which revealed nothing but the fact that Plaintiff was a mere guest at a lunch and he did not "deliver" the campaign contribution and had not committed the crime of which Defendants accused him. Said emails are subjective proof of his relentless attempt to tie Mark Kelley into a conspiracy story that he so desired to publish regardless of the "truth" because he says "everyone" was bending over backwards to protect Mark Kelley. (Pl. Ex. 11). Such evidence supports a finding that Appellants were relentless and reckless in their efforts to link Respondent to and accuse him of being criminally involved in campaign contributions regardless of "The Unprovable Truth".

Based on the forgoing case law and evidence, the trial court did not err in failing to grant Appellants' new trial because the jury verdict was supported by evidence and was not so grossly excessive to indicate that the jury was motivated by passion, caprice, prejudice or other consideration not founded in the evidence.

In order for this court to find that the trial court erred in failing to grant a new trial absolute, it would have to find the trial court abused its discretion in failing to grant the Appellants' motion for a new trial absolute. The Appellants have failed to point out any abuse of discretion on the part of the trial judge, and therefore the trial court's ruling should be affirmed.

V. THE PUNITIVE DAMAGE AWARD WAS NOT A VIOLATION OF THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION REQUIRING A NEW TRIAL BECAUSE THERE IS NO BAR TO AWARDING PUNITIVE DAMAGES AGAINST A MEDIA DEFENDANT IF THE REQUISITE CONSTITUTIONAL STANDARD FOR PUBLIC OFFICIALS OR FIGURES ARE MET.

Contrary to Appellants' argument, neither Gertz nor New York Times gives a media defendant *carte blanche* protection from punitive damages. Prior to its decision in Gertz in 1974, the Supreme Court had provided several indications that there was no general bar to the awarding of punitive damages against media defendants if the requisite constitutional standard for public persons was met. Specifically, in the Curtis Pub. Co. v Butts decision the Court majority upheld an award of $400,000 against a First Amendment attack,[3] with Justice Harlan concluding that the state could act to protect the

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[3] Curtis Pub. Co. v. Butts, 388 U.S. 130, 138, 156, 159-62, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)

specific plaintiff and "safeguard all those similarly situated against like abuse"[4] so long as the traditional common law controls on punitive damages were met.[5] Warren, C.J., concurring in the result stated that Gertz applied a "highly unreasonable conduct standard while Butts applied New York Times. The Court affirmed the appropriateness of the Butts conclusion under a constitutional actual malice standard in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692-93, 109 S. Ct. 2678, 105 L.Ed.2d 562 (1989).

The Court subsequently repeatedly reiterated its Gertz view that punitive damages remain available if the New York Times threshold standard—knowing or reckless falsity by clear and convincing evidence—is met, and the Court has declined to draw any distinction with regard thereto based on plaintiff's status.[6] One decision has provided an

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[4] Butts, 388 US at 161 (Harlan, J.). He continued: "To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." 388 US at 160.

[5] 388 US at 160-61. Justice Harlan notes that the free expression guarantees were "adequately served" by judicial control over excessive verdicts."

[6] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); Herbert v. Lando, 441 U.S. 153, 162, 99 S. Ct. 1635, 60 L. Ed. 2d 115, (1979); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756, 760, 763, 105 S. Ct. 2939, 86 L. Ed 2d 593 (1985); Milkovich v. Lorain Journal Co., 497 U.S. 1, 15-16, 110 S. Ct. 2704, 111 L. Ed. 2d 1, 60 Ed. Law Rep. 1061 (1990); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661-63, 689-93, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) [affirming an award of which $195,000 were punitive damages]. For other decisions affirming the availability of punitive damages under the Gertz standard without distinction as to status see Brown v. Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142-43 (7th Cir. 1987) [upholding a $2,050,000 award]; Maheu v. Hughes Tool Co., 569 F.2d 459, 478-80 (9th Cir. 1977); Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706, 728 (1986), appeal granted, 514 Pa. 648, 524 A.2d 495

additional rationale for punitive damages in a libel context involving opposing candidates: "Such (outrageous) conduct, if it goes unpunished, would deter good people from participating in the political process." Newman v. Delahunty, 293 N.J. Super. 491, 681 A.2d 671, 686 (Law Div. 1994), aff'd, 293 N.J. Super. 469, 681 A.2d 659 (App. Div. 1996). Another decision even suggested that a contention that *Gertz* and its progeny render punitive damages unconstitutional is "completely without merit" and may warrant Rule 11 sanctions. Continental Cablevision, Inc. v. Storer Broadcasting Co., 653 F. Supp. 451, 461 (D. Mass. 1986).

In a well-reasoned Second Circuit opinion, Goldwater v. Ginzburg,[7] the court followed time-honored state practice[8] and upheld an award of $1.00 nominal damages and $75,000 in punitive damages.[9] Holding that a constitutional actual malice finding put the defendants "beyond the pale of the First Amendment," the court found that the award served the vindicatory function of protecting individual reputation and protected all

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(1987), aff'd, 518 Pa. 425, 543 A.2d 1078 (1988); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462, 470-71 (1982); Healey v. New England Newspapers, Inc., 555 A.2d 321, 327 (R.I. 1989); Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 495-96 (Mo. Ct. App. E.D. 1980); Sprague v. Walter, 441 Pa. Super. 1, 656 A.2d 890, 921-22 (1995) [upholding a remitted award of $21.5 million in punitive damages]; Paul v. Hearst Corp., 261 F. Supp. 2d 303, 309 (M.D. Pa. 2002) [since punitive damages were available under the constitutional malice standard as to public persons without compensatory damages, clearly they were available as to private plaintiffs].

[7] Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) and see Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 171-72 (2d Cir. 2000).

[8] Goldwater, 414 F.2d at 340.

[9] 414 F.2d at 324.

others similarly situated against like misconduct in futuro. Where other defendants would thus be liable, a media defendant "may not then avoid any additional liability, which a libeller in a different occupation normally might incur, by claiming a special status or an entitlement to special protection under the First Amendment."[10] For other cases rejecting the requirement of substantial actual damages as a precondition to punitive damages, see Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397, 398, 400 (Ct. App. 1987). And see Ayala v. Washington, 679 A.2d 1057, 1069-70 (D.C. 1996); New Jersey Steel Corp. v. Lutin, 297 A.D.2d 557, 747 N.Y.S.2d 89, 90-91 (1st Dep't. 2002) [remitting all but $1 in nominal damages and $2 million in punitive damages]; Joseph v. Scranton Times, L.P., 2014 PA Super 49, 2014 WL 930812 (2014).

In the case of Celle v. Filipino Reporter Enterprises, Inc., 209 F.2d 163 (2nd Cir 2000), the Court mirrored the protection which the requirement of proof of actual malice gives a media defendant:

> Whatever evidence is relied upon, actual malice must be supported by clear and convincing proof. *See, e.g.,* Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 511 n. 30, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("clear and convincing 184 evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement"); New York Times, 376 U.S. at 285–86, 84 S.Ct. 710 (must be established by "the convincing clarity which the constitutional standard demands"); *see also* Gertz, 418 U.S. at

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[10] 414 F.2d at 340. For other cases rejecting the requirement of substantial actual damages as a precondition to punitive damages, see Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397, 398, 400 (Ct. App. 1987). And see Ayala v. Washington, 679 A.2d 1057, 1069-70 (D.C. 1996); New Jersey Steel Corp. v. Lutin, 297 A.D.2d 557, 747 N.Y.S.2d 89, 90-91 (1st Dep't. 2002) [remitting all but $1 in nominal damages and $2 million in punitive damages]; Joseph v. Scranton Times, L.P., 2014 PA Super 49, 2014 WL 930812 (2014).

> 342, 94 S.Ct. 2997 ("This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander.").

An erudite statement surrounding the reasoning for denying media defendants absolute immunity from punitive damages was succinctly stated in Sharon v. Time, Inc., 599 F.Supp. 538 (S.D. NY 1984), "Nothing in the first amendment requires that the press have absolute freedom to pass rumors off as fact..... The Supreme Court has rested its denial of absolute immunity on the fundamental premise that the constitutional value of free speech does not in all circumstances outweigh the states' interests in protecting the reputations of their citizens. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), the Court stated that:"

> The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See New York Times Co. v. Sullivan, *supra,* 376 U.S. 293, 84 S.Ct. 733 (Black, J., concurring); Garrison v. Louisiana, 379 U.S. [64], at 80, 85 S.Ct. 209 at 218, 13 L.Ed.2d 125 (Douglas, J., concurring); Curtis Publishing Co. v. Butts, 388 U.S. [130], at 170, 87 S.Ct. 1975 at 1999, 18 L.Ed.2d 1094 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

Although it may be that issues of "self-censorship" or "punishing free speech" may ultimately lead the U.S. Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure, to date the Court has not so held. See Buckley v. Little, 539 F.2d at 897. However, as the Buckley Court pointed out -- "absent clear word from the Court to the contrary, or an en banc, we are bound to abide by our own controlling decision in Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir.1969) (allowing award of punitive damages to a high public official), and therefore must permit

such an award in the appropriate case." Sharon v. Time, Inc, *supra,* 587. *See also* Buckley v. Little, 539 F.2d at 897.

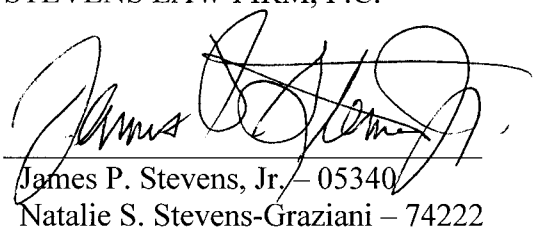
For the above reasons, the Trial Court was correct in denying Appellants' motions and the jury's verdict for punitive damages should be affirmed.

CONCLUSION

For the foregoing reasons stated, this Court should affirm the verdict of the jury and the post verdict rulings of the trial court denying Appellants' motions.

Respectfully submitted,

STEVENS LAW FIRM, P.C.



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Attorneys for Respondent

December 12, 2014,

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

Case No. 2012-CP-26-03804

Mark Kelley, ... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on December 13, 2014, addressed to the attorney of record, Jay Bender, Baker Ravenel Bender, Post Office Box 8057, Columbia, South Carolina 29202.

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December 13, 2014

Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: *Mark S. Kelley v. David Wren and Sun Publishing Company, Inc., d/b/a The Sun News*
Civil Action No. 2012-CP-26-03804 - Appellate Case No. 2014-001249

Dear Ms. Kitchins:

Enclosed please find the following:

- Initial Brief of Respondent
- Designation of Matter to be Included in the Record on Appeal
- Proof of Service

Sincerely yours,

James P. Stevens, Jr.

JPSjr/pk

enclosure

cc: Mr. Jay Bender

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