

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

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

Mark Kelley,.....Respondent,

v.

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

**BRIEF OF *AMICI CURIAE* THE ASSOCIATED PRESS; GANNETT CO., INC.
AND GANNETT GP MEDIA, INC. d/b/a *THE GREENVILLE NEWS*; TEGNA
INC. AND PACIFIC AND SOUTHERN, LLC d/b/a *WLTX-TV*; AND OSTEEN
PUBLISHING COMPANY d/b/a *THE SUMTER ITEM*
IN SUPPORT OF APPELLANTS**

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STATEMENT OF ISSUE ON APPEAL

Whether expert testimony is admissible to prove constitutional actual malice in a public-figure libel action.

STATEMENT OF THE CASE

This case presents a critical issue of libel law: May a public-figure libel plaintiff introduce expert witness testimony to prove that a defendant published a defamatory statement with constitutional actual malice—that is, with knowledge of its falsity or with reckless disregard for the truth? And, if such expert witness testimony may be admitted on that issue, may the expert witness offer his opinion as to the subjective “state of mind” of the statement’s publisher? The South Carolina courts have yet to decide these fundamental questions.

In May 2010, David Wren, a reporter for *The Sun News*, a division of Sun Publishing Company, Inc., wrote several articles published in *The Sun News* regarding fundraising for U.S. Representative Gresham Barrett, then a candidate in the 2010 South Carolina Republican gubernatorial primary. Wren’s articles focused specifically on a lunch attended by Brad Dean, president of the Myrtle Beach Chamber of Commerce, at which Dean gave Barrett an envelope containing checks totaling \$84,000 in campaign donations. (R. pp. 21–22, 27.) The articles noted that Mark Kelley, a former state legislator who had been a registered lobbyist since 2003, also attended this lunch. (R. pp. 22, 28.) Kelley brought this action for defamation asserting that the articles were false and defamatory in various respects. The court below found as a matter of law that Kelley was a “public figure” and therefore had to prove by clear and convincing evidence that any false and defamatory statements about him were published with knowing falsity or with reckless disregard for the truth. (R. p. 565, line 20–p. 567, line 13.)

At trial, the court admitted, over the objections of Wren and the Sun Publishing Company, the testimony of Kelley's expert witness on journalism standards, Dr. William E. Lee.

On May 13, 2014, the jury found that the articles published May 21, May 23, and May 24, 2010, contained false and defamatory statements about Kelley and were published with actual malice. (R. p. 9.) The jury awarded Kelley \$400,000 in actual damages and \$250,000 in punitive damages. (R. pp. 9–12.) Upon entry of judgment by the trial court, Wren and the Sun Publishing Company appealed.

STANDARD OF REVIEW

The admission of expert testimony is within the discretion of the trial court. *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). The trial court abuses its discretion whenever its rulings “either lack evidentiary support or are controlled by an error of law.” *Id.* (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). Questions of law are reviewed *de novo*. *Ex parte TLC Laser Eye Centers (Piedmont/Atlanta), LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013).

To warrant vacating a judgment, improperly admitted expert testimony must have been prejudicial to the party that sought its exclusion. *Watson v. Ford Motor Co.*, 389 S.C. 434, 448, 699 S.E.2d 169, 176 (2010). “Prejudice is a reasonable probability that the jury’s verdict was influenced by the challenged evidence.” *Id.*

ARGUMENT

A public figure must prove constitutional actual malice to prevail on a libel claim. Constitutional actual malice is a subjective standard that focuses on the defendant’s state

of mind at the time the defendant published the statement at issue. *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000).

In seeking to prove actual malice, Kelley offered expert testimony from Dr. Lee that fell into two categories: (1) testimony about the state of mind of news reporter David Wren and (2) testimony about objective standards of journalism. Because the testimony on Wren's state of mind fails to meet the requirements of Rule 702, SCRE, and the testimony about objective standards of journalism fails to meet the requirements of Rule 403, SCRE, none of Dr. Lee's testimony should have been admitted.

First, a journalism expert witness is not qualified to testify about a defendant's subjective state of mind because this testimony fails to meet the three requirements of Rule 702. That rule requires an expert (1) be qualified to testify on that subject, (2) offer testimony that is reliable, and (3) testify on a subject warranting specialized testimony. *Graves*, 401 S.C. at 74, 735 S.E.2d at 655. With regard to a libel defendant's state of mind, an expert on journalism standards can meet none of these requirements: a journalism expert is trained in issues of news reporting, not in interpreting another person's state of mind; a journalism expert's testimony on a subject outside of his area of knowledge is not reliable; and a defendant's state of mind is not an area requiring expert testimony because determining a defendant's state of mind is precisely the type of question juries are regularly asked to decide.

Second, any expert testimony on objective journalism standards should be excluded under Rule 403, which permits the exclusion of evidence when its probative value is substantially outweighed by its prejudicial effect. Any value of expert testimony on objective standards is substantially outweighed by the risks of confusing the jury.

about the appropriate legal rule in a public-figure libel case. Admitting such testimony threatens to have a jury turn a defendant's alleged departure from accepted journalism practices into a proxy for constitutional actual malice, thereby exchanging the required subjective standard for a more lenient objective one.

In this case, none of the testimony offered by Dr. Lee should have been admitted. But even if Dr. Lee could have testified about objective standards under Rule 403, his testimony went far beyond that subject and ultimately focused directly on Wren's state of mind and how, according to Dr. Lee, Wren knew the articles were false. No case law supports the proposition that an expert witness can be qualified to testify about a libel defendant's state of mind. Therefore, the admission of Dr. Lee's expert testimony necessitates vacating the trial court's judgment and remanding this case for a new trial.

I. The First Amendment Requires a Public Figure to Prove Constitutional Actual Malice.

A. Actual Malice Focuses on a Defendant's Subjective State of Mind.

The United States Supreme Court, in its landmark First Amendment decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), established that, to succeed on a libel claim, a public-official plaintiff must prove by clear and convincing evidence that a defendant published a false and defamatory statement about the plaintiff with knowledge of its falsity or with reckless disregard for its truth. That standard was subsequently applied to public-figure libel plaintiffs as well.¹ See *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). The Supreme Court's protection of even false speech about such public plaintiffs was based on the Court's recognition that "erroneous statement is inevitable in

¹ A public figure is a person who either has achieved sufficient fame and notoriety to be a public figure for all purposes (an "all-purpose public figure") or has injected himself into a particular public matter (a "limited-purpose public figure"). See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974).

free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Sullivan*, 376 U.S. at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

Applying these rules, the South Carolina Supreme Court has explained that "[a]ctual malice is a *subjective* standard testing the publisher's good faith belief in the truth of his or her statements." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (emphasis added); *see also Anderson v. Augusta Chronicle*, 365 S.C. 589, 595, 619 S.E.2d 428, 431 (2005). This standard requires a public-figure plaintiff "to prove by clear and convincing evidence that the defamatory falsehood was made [1] with the knowledge of its falsity or [2] with reckless disregard for its truth." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. A public-figure plaintiff who seeks to rely on the reckless-disregard prong of this test must demonstrate by clear and convincing evidence that the defendant "**in fact entertained serious doubts as to the truth of his publication.**" There must be evidence the defendant had a "**high degree of awareness of probable falsity.**" *Id.* (emphasis in original) (internal alteration and citation omitted) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)).

As *Elder*'s explanation of actual malice made clear, whether a defendant acted with reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing" the article. *St. Amant*, 390 U.S. at 731. Thus, "[i]t is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. Even proof of "an extreme departure from professional standards" is insufficient on its own to meet this standard. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S.

657, 665 (1989). Indeed, both the United States Supreme Court and the South Carolina Supreme Court have set a high bar for public-figure libel plaintiffs: only a *subjective* knowledge of falsity or high degree of awareness of probable falsity will satisfy the actual malice element of a libel claim.

B. This High Standard of Actual Malice Protects One of the Core Foundations of a Democratic Society.

The importance of free and open dialogue in a democratic society, particularly on political issues, warrants imposing the high bar of constitutional actual malice on public-figure plaintiffs. As the U.S. Supreme Court explained in *Sullivan*, libel cases are decided “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *Sullivan*, 376 U.S. at 270. Indeed, the U.S. Supreme Court has repeatedly stressed the centrality of this national commitment in cases involving elections and politics—what is known as “core political speech.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in the judgment) (“Core political speech occupies the highest, most protected position [in First Amendment jurisprudence]”); *EU v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (“[T]he First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). In the context of reporting on campaigns, the Court has explained that “[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.” *Harte-Hanks Commc’ns, Inc.*, 491 U.S. at 687.

This case is a quintessential example of core political speech that requires the highest level of First Amendment protection. The articles at issue involved reports about a registered South Carolina legislative lobbyist (and former legislator) participating in a lunch with a high-ranking Chamber of Commerce official and a United States Congressman who was running for Governor of South Carolina, at which the Chamber of Commerce official delivered to the candidate \$84,000 in campaign donations raised from various businesses. If ever a set of facts called for a court to provide the breathing space that the First Amendment guarantees for allegedly erroneous speech in this country's debate about public affairs and elections, this is it.

II. Dr. Lee Testified About Wren's State of Mind and Objective Journalism Standards at Trial.

Specific to the issue addressed in this *amici curiae* brief, Kelley moved during the trial to qualify Dr. William E. Lee as an expert witness 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 . . . going past the line put down by the U.S. Supreme Court in *New York Times v. Sullivan*." (R. p. 290, line 22–p. 291, line 7.) The defendants objected on various bases, including that Dr. Lee's testimony would not be relevant to actual malice, (R. p. 293, line 24–p. 294, line 3), and that the testimony would improperly introduce negligence into the case, (R. p. 295, lines 10–19). The trial court ultimately qualified Dr. Lee as an expert. (R. p. 296, lines 2–9.)

Dr. Lee testified at length about journalism standards. He discussed, for example, the limited circumstances in which anonymous sources should be used, (R. p. 334, line 15–p. 336, line 2), the need to examine a source's motive for providing information to a

reporter, (R. p. 337, line 19–p. 338, line 1), and the need for “[p]recision in writing,” (R. p. 351, lines 20).

Dr. Lee then took the next step, offering his opinion whether Wren and *The Sun News* followed these standards. He stated that his review of the evidence “leads me to conclude that *The Sun News* did not act the way professional news organizations act in these circumstances.” (R. p. 321, lines 21–23.) Dr. Lee went so far as to testify that he did not believe that Wren was careful in his reporting, (R. p. 338, lines 13–14), and that “accuracy [was] sacrificed for style, structure and drama,” (R. p. 353, lines 7–9). He told the jury that Wren was “blowing smoke.” (R. p. 354, line 3.)²

Dr. Lee then moved from testifying about whether Wren and *The Sun News* had met objective journalism statements to testifying about Wren’s state of mind. For example, Dr. Lee stated that based on his review of Wren’s deposition, “[t]here are contradictions in [Wren’s] deposition . . . that I think undercut the claim that they published information believing that it was true.” (R. p. 321, lines 16–19.) He testified that, based on his reading of one of Wren’s emails, Wren doubted one of his sources. (R. p. 328, lines 20–23.)

Dr. Lee also testified directly on the question of actual malice: “[Wren] knew that it was false.” (R. p. 349, lines 11–12.) He later answered questions on actual malice this way:

Q: Does it show that [Wren] was conscious of the fact that he didn’t have the evidence?

² As part of this testimony, Dr. Lee spent considerable time reviewing emails that Wren sent and received during his investigation. (See R. p. 322, line 3–p. 333, line 4.) Dr. Lee testified about emails with Tim Pearson, Nikki Haley’s campaign manager; Trey Walker, Henry McMaster’s campaign manager; and Representative Tracy Edge, all of which sought information about allegations that Mark Kelley had facilitated the lunch at which Dean delivered the campaign donations to Barrett.

A: He would have to be.

Q: Would that be disregarding the truth or the falsity of what he was writing?

A: Yes.

...

Q: So, if he knew that he didn't have evidence and he printed it, that would be intentional on his part?

A: Yes.

Q: And if he knew he had no evidence and he printed it regardless of whether it was true or false, that would be a reckless disregard whether it was true or false?

A: Yes.

(R. p. 355, lines 12–17; p. 356, lines 2–8.)

III. Expert Testimony Must Meet the Requirements of Rule of Evidence 702 and Rule of Evidence 403 to be Admitted.

Expert testimony must meet two separate tests before it may be admitted. First, it must meet the threshold test of Rule 702. Second, it must also satisfy the balancing test of Rule 403.

A. All Expert Testimony Must Meet the Standards of Rule 702.

For any expert testimony to be admitted in the courts of this State, that “expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise.” *Graves*, 401 S.C. at 74, 735 S.E.2d at 655. Rule 702 provides, “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE.

The purpose of expert testimony is to help the jury decide factual matters that turn on “scientific, technical, or any other specialized knowledge.” *Watson*, 389 S.C. at 445, 699 S.E.2d at 175. In determining whether expert testimony would help the jury, Rule 702 “imposes on the trial courts an affirmative and meaningful gatekeeping duty.” *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). This gatekeeping duty requires a court make three inquiries in determining whether to admit expert testimony:

First, the court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular branch of the field. Finally, the substance of the testimony must be reliable.

Graves, 401 S.C. at 74, 735 S.E.2d at 655 (internal quotation marks and citations omitted). The South Carolina Supreme Court has instructed that an expert’s testimony is admissible only if “it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability.” *Watson*, 389 S.C. at 446, 699 S.E.2d at 175.

B. All Expert Testimony Must also Pass the Balancing Test of Rule 403.

In addition to Rule 702, the admission of expert testimony must also meet the requirements of Rule 403. *See Todd v. Joyner*, 385 S.C. 509, 514, 685 S.E.2d 613, 616 (Ct. App. 2008) *aff’d*, 385 S.C. 421, 685 S.E.2d 595 (2009). This rule states, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Rule 403, SCRE. The South Carolina Supreme Court has recognized that whenever testimony is substantially more likely to mislead the jury or to confuse the

issues in the trial than to offer helpful evidence, a trial court may exclude that testimony. See, e.g., *Richardson v. Donald Hawkins Constr., Inc.*, 381 S.C. 347, 353, 673 S.E.2d 808, 811 (2009).

IV. A Journalism Expert's Testimony on a Defendant's Subjective State of Mind Does Not Meet The Requirements of Rule 702.

A journalism expert—like Dr. Lee—cannot meet any of Rule 702's three requirements for expert testimony on a defendant's state of mind in publishing an allegedly defamatory statement. Therefore, expert testimony is not admissible on this subject.

A. A Journalism Expert Lacks the Knowledge or Skill to Testify About a Defendant's State of Mind.

A journalism expert lacks the requisite knowledge or skill to testify about another person's state of mind and therefore fails the first prong of Rule 702's admissibility test. See *Graves*, 401 S.C. at 74, 735 S.E.2d at 655 (holding that "the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter" (internal quotation mark omitted)); cf. *State v. Ellis*, 345 S.C. 175, 177–78, 547 S.E.2d 490, 491 (2001) (holding that a police officer qualified to testify as an expert in crime-scene processing exceeded the scope of his expertise by testifying about crime-scene reconstruction). The knowledge required to be an expert on journalism standards is completely unrelated to the knowledge required to analyze another person's state of mind.

The expert in this case, Dr. Lee, illustrates this contrast in the types of knowledge involved. Dr. Lee has a Ph.D. in Mass Communication from the University of Wisconsin, (R. p. 272, lines 17–18), and he has been on the faculty at the Grady College

of Journalism and Mass Communication at the University of Georgia since 1977, (R. p. 272, lines 9–12). But at no point during the examination of his qualifications did Dr. Lee state that he had any training in any field other than journalism. (See R. pp. 271–290.) Without any specialized knowledge or skill to analyze Wren’s state of mind in publishing the articles, Dr. Lee was not qualified to offer his opinion that Wren was “disregarding the truth or the falsity of what [Wren] was writing,” (R. p. 355, lines 15–17; see also R. p. 349, lines 8–14; R. p. 354, lines 14–24), or that Wren “knew that [the publication] was false,” (R. p. 349, line 11).

This distinction between testimony about journalism standards and testimony about a defendant’s state of mind has been recognized by courts around the country, which have refused to let experts opine on a defendant’s mental state in publishing an article. See, e.g., *Lohrenz v. Donnelly*, 223 F. Supp. 2d 25, 36 (D.D.C. 2002) (observing that “courts have generally disfavored expert testimony in determining actual malice, which is essentially a determination of defendants’ subjective state of mind”); *Wang v. Tang*, 260 S.W.3d 149, 160 (Tex. App. 2008) (“[A]ctual malice inquires only into the mental state of the defendant, and [the expert] claimed no expertise in that field.”); *Freedom Newspapers v. Cantu*, 168 S.W.3d 847, 858–59 (Tex. 2005) (“But actual malice inquires only into the mental state of the defendant, and the expert claimed no particular expertise in that field. Nor was his opinion based on anything other than the articles themselves and the circumstantial evidence already discussed. Even assuming this evidence was competent, his opinions cannot show that the [defendant] knew its articles were not a rational interpretation of [plaintiff’s] remarks.” (internal footnotes omitted)); cf. *Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994) (“Actual malice focuses

on knowledge of falsity and serious doubts as to the truth of the statement. The [expert's] affidavit is not probative of actual malice because [the expert's] opinion relates to a reckless disregard for a standard of objectivity, not for the truth.”); *Brueggemeyer v. Am. Broad. Cos., Inc.*, 684 F. Supp. 452, 466 (N.D. Tex. 1988) (“Actual malice focuses on knowledge of falsity, a high degree of awareness of probable falsity, or serious doubts as to the truth of a publication. By contrast, the opinions of plaintiff’s expert do not. Her opinion that ABC demonstrated a ‘reckless disregard’ does not pertain to a reckless disregard for the truth but, instead, relates to a reckless disregard for a standard of objectivity.”).

B. A Journalism Expert’s Testimony on a Defendant’s State of Mind Is Not Reliable.

Relatedly, a journalism expert’s testimony on a defendant’s state of mind is not reliable. Reliability is, of course, “a central feature of Rule 702 admissibility.” *White*, 382 S.C. at 270, 676 S.E.2d at 686. Although nonscientific expert testimony has “no formulaic approach” for determining its reliability, *id.* at 274, 676 S.E.2d at 688, the simple fact that a proposed expert has no specialized skill or training on a subject must mean that the proposed expert’s testimony on that subject cannot be reliable. Otherwise, there would be no meaningful limit on expert testimony, and expert testimony would become untethered from the language of Rule 702, which requires an expert to have “knowledge, skill, experience, training, or education” in the subject matter of the testimony. Rule 702, SCRE. Thus, because Dr. Lee has no specialized skill or training in divining another person’s mental state, his testimony on that subject could not be reliable and should not have been admitted. *See Wang*, 260 S.W.3d at 160. And in any event, the trial court never made any determination that Dr. Lee’s testimony would be

reliable with regard to Wren's state of mind. (See R. p. 290, line 22–p. 297, line 15.)

Thus, this testimony also fails the second part of Rule 702's admissibility test.

C. A Journalism Expert's Testimony on a Defendant's State of Mind Is Not on a Subject Requiring Testimony Based on Specialized Knowledge.

Dr. Lee's testimony on Wren's state of mind falls far short of the third requirement of Rule 702's admissibility test because a defendant's state of mind is not a subject on which expert testimony is needed. The purpose of expert testimony is "to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *Watson*, 389 S.C. at 445, 699 S.E.2d at 175. A person's state of mind, however, is not "a factual issue which must be resolved with scientific, technical, or any other specialized knowledge." *Id.* Rather it is the type of issue that a jury is frequently asked to resolve, based on the evidence presented at trial. Because a journalism expert is in no better position to determine a defendant's state of mind than the jury, no expert testimony is necessary. As one federal district court explained, such expert testimony should be excluded because it "would not assist the jury in performing its task of determining what Defendants' subjective state of mind was in making the subject broadcasts." *Tilton v. Capital Cities/ABC, Inc.*, 938 F. Supp. 751, 753 (N.D. Okla. 1995). In the same manner, the jury in this case did not need Dr. Lee to give an opinion as to Wren's state of mind. (See, e.g., R. p. 355, lines 15–17.) Here, the jury had before it Wren's emails and news articles and had the opportunity to observe him on direct and cross-examination during the trial. The jury was just as capable as Dr. Lee of making its own determination as to whether Wren harbored serious doubts about the truth

of the statements or possessed a high degree of awareness of the statements' probable falsity. *See St. Amant*, 390 U.S. at 731; *Elder*, 341 S.C. at 114, 533 S.E.2d at 902.

* * *

Expert testimony on a defendant's state of mind fails all three parts of the Rule 702 test established by the South Carolina Supreme Court. *See Graves*, 401 S.C. at 74, 735 S.E.2d at 655. Thus, Dr. Lee's testimony about what Wren knew or thought in publishing the articles should not have been admitted. (*See* R. p. 329, lines 2–6; p. 349, line 11; p. 355, lines 15–16.) Given the impact that expert testimony can have on a jury, *see State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013), and the centrality of Dr. Lee's testimony to the critical issue in this case, there is a "reasonable probability that the jury's verdict was influenced by" Dr. Lee's testimony, *Watson*, 389 S.C. at 448, 699 S.E.2d at 176. The judgment therefore should be vacated, and this case should be remanded for a new trial.

V. A Journalism Expert's Testimony About Objective Journalism Standards Should Be Excluded Under Rule 403.

In actual malice cases, the danger against which Rule 403 protects is particularly acute. Although the fact that a plaintiff may rely on circumstantial evidence in proving actual malice suggests that evidence regarding journalism standards may be relevant under the broad definition of relevance, *see* Rule 401, SCRE,³ "relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair

³ Given this broad definition and the Supreme Court's decision in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989), courts have permitted libel plaintiffs to rely on circumstantial evidence, *see Anderson v. Augusta Chronicle*, 365 S.C. 589, 596, 619 S.E.2d 428, 431 (2005). But a plaintiff's circumstantial evidence must include more than a departure from journalism standards. *See, e.g., Carr v. Forbes, Inc.*, 121 F. Supp. 2d 485, 495 (D.S.C. 2000) *aff'd*, 259 F.3d 273 (4th Cir. 2001); *see also Tucker v. Fischbein*, 237 F.3d 275, 286 (3d Cir. 2001); *Murphy v. Bos. Herald, Inc.*, 865 N.E.2d 746, 766 (Mass. 2007).

prejudice, confusion of the issues, or misleading the jury,” *Kennedy v. Griffin*, 358 S.C. 122, 127, 595 S.E.2d 248, 250 (Ct. App. 2004) (quoting Rule 403, SCRE). Rule 403 admittedly imposes a high bar for excluding evidence: its prejudicial effect must substantially outweigh its probative value. *See* Rule 403, SCRE. The admission of expert testimony in an actual malice case, however, clears this bar and should therefore be excluded.⁴

A. Expert Testimony Is of Little Probative Value.

On one side of the Rule 403 balancing test, the probative value of an expert’s testimony is limited. As a starting point, expert testimony is not, by itself, sufficient to prove actual malice. *See, e.g., Lohrenz*, 223 F. Supp. 2d at 36 (“It is clear that the plaintiff may not establish malice, a subjective state of mind, solely through expert testimony”); *Russell v. Am. Broad. Cos., Inc.*, No. 94 C 5768, 1997 WL 598115, at *6 (N.D. Ill. Sept. 19, 1997) (“Standing alone, [expert testimony] is simply not enough to demonstrate [the defendant’s] subjective state of mind.”). A plaintiff must therefore offer some evidence in addition to journalism standards, so precluding expert testimony could not remove the cornerstone of any plaintiff’s case. *Cf. Harte-Hanks Commc’ns, Inc.*, 491 U.S. at 668 (instructing that “courts must be careful not to place too much reliance on such factors [as departure from journalistic standards]”).

Moreover, a plaintiff has other options for introducing journalism standards. The Society of Professional Journalists (a professional organization founded in 1909), for example, has published its Code of Ethics for journalists. *See* Soc’y of Professional

⁴ Some courts, however, have held that expert witness testimony on journalism standards is admissible on the issue of actual malice. *See, e.g., Ky. Kingdom Amusement Co. v. Belo Ky., Inc.*, 179 S.W.3d 785, 792 (Ky. 2006); *Murphy*, 865 N.E.2d at 766. But as a careful balancing under Rule 403 shows, excluding this testimony is the better rule.

Journalists, *Code of Ethics*, <https://www.spj.org/pdf/ethicscode.pdf> (last visited July 20, 2015). Similarly, various textbooks and guidebooks offer explanations of the standards that should govern journalists. See, e.g., Fred Brown, *Journalism Ethics* (4th ed. 2011); *The Associated Press Stylebook* (Darrell Christian, et al. eds. 2014 ed.).⁵ Any witnesses involved with journalism could be asked about the role that such publications play in that industry, including how those publications guide the work of journalists.

B. Expert Testimony Is Highly Prejudicial and Likely to Confuse the Jury.

On the other side of the Rule 403 balancing test, the risk of prejudice and confusion is great when an expert witness testifies about objective journalism standards. Actual malice is a subjective test, a point that courts have repeatedly emphasized. See, e.g., *Anderson*, 365 S.C. at 595, 619 S.E.2d at 431; *Elder*, 341 S.C. at 114, 533 S.E.2d at 902; *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266, 478 S.E.2d 282, 284 (1996). Allowing an expert to testify about a defendant's departure from journalism standards opens the door for a jury to erroneously equate this objectively measured departure with the subjectively determined reckless disregard for the truth that actual malice requires. Even if a court carefully instructs the jury that the expert is testifying only as to objective standards, this instruction is unlikely to provide the necessary protection to prevent the jury from wrongly holding a defendant liable and the resulting chilling of speech. As the South Carolina Supreme Court has recognized, "although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." *Kromah*, 401 S.C. at 357, 737 S.E.2d at 499.

⁵ Dr. Lee actually noted that this book "is frequently referred to as the Bible in the news industry." (R. p. 321, lines 7-8.)

Thus, an expert testifying that a defendant “did not act the way professional news organizations act,” (R. p. 321, lines 22–23), “was [not] careful,” (R. p. 338, lines 13–14), and was “blowing smoke,” (R. p. 354, line 3), as Dr. Lee did here, is very likely to lead the jury to conclude that the defendant actually seriously doubted the truth of the publication, rather than that the defendant simply failed to follow certain objective journalism standards.

This danger is even greater when it is paired with the expert’s testimony about the defendant’s state of mind, as happened here when Dr. Lee opined that “[Wren] knew it was false,” (R. p. 349, lines 11–12), and that Wren was “disregarding the truth or the falsity of what he was writing,” (R. p. 355, lines 12–17). By connecting the departure from journalism standards with this subjective knowledge of falsity, Dr. Lee blurred the critical objective-subjective distinction for the jury.

Determining that a journalism expert’s testimony is substantially more prejudicial than probative comports with decisions from other courts that have excluded expert testimony in actual malice cases under Rule 403. *See, e.g., Tilton*, 938 F. Supp. at 753 (excluding expert testimony under Rule 403 because that “testimony would be confusing to the jury, would be a waste of time and would be unfairly prejudice to [the] defendants”); *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1264–65 (S.D.N.Y. 1989) (excluding expert testimony under Rule 403); *Brueggemeyer*, 684 F. Supp. at 465 (holding that even if an expert affidavit was otherwise admissible, the affidavit should be excluded under Rule 403 because “the probative value of the opinions is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”). These courts were rightly concerned with expert testimony taking the jury’s focus

away from the subjective actual malice standard while putting too much emphasis on an expert's own opinions and interpretation of journalism standards.

Given a plaintiff's variety of other methods to prove actual malice, excluding expert testimony altogether ensures that the actual malice test is not subtly and improperly replaced by an objective standard that would undermine the protection of free speech by lowering the bar for proving actual malice. *Cf. Kromah*, 401 S.C. at 357, 737 S.E.2d at 499 (noting a jury's tendency to give more weight to expert testimony than other evidence). Therefore, all expert testimony on objective journalism standards should be excluded from an actual malice case under Rule 403. The admission of this testimony requires the judgment be vacated and the case remanded for a new trial.⁶

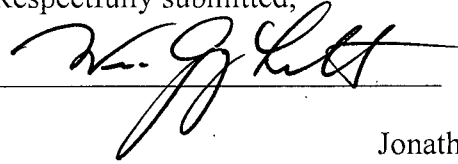
CONCLUSION

The judgment of the trial court should be vacated, and this case should be remanded for a new trial.

⁶ If the Court holds that the admission of either the testimony (1) about Wren's state of mind or (2) about objective journalism standards was an abuse of discretion based on an error of law about the permissible scope of expert testimony, this case should be remanded for a new trial. Holding that the admission of both types of testimony was an abuse of discretion is not necessary to remand this case for a new trial.

This the 20th day of July, 2015.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

Larry B. Hyman, Circuit Court Judge

Court of Appeal No. 2014-001249

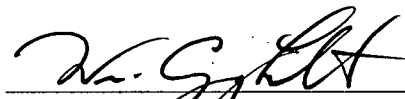
Mark Kelley,.....Respondent,

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief of *Amici Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.



Wm. Grayson Lambert

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CERTIFICATE OF SERVICE

The undersigned certifies that this Brief of *Amici Curiae* was served on counsel for the Appellants and Respondent by depositing a copy thereof in the United States

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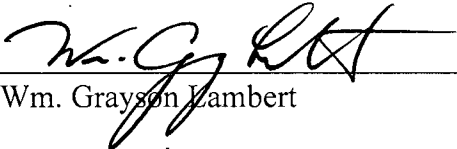
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