

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, Jr., Circuit Court Judge

Case No. 2014-001249

MARK KELLEY,

Respondent,

vs.

DAVID WREN AND SUN PUBLISHING COMPANY, INC., D/B/A THE SUN NEWS,

Appellants.

**BRIEF *AMICUS CURIAE* OF GANNETT COMPANY, INC.,
IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL**

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Interest of the *Amicus Curiae*

Gannett Company, Inc. ("Gannett") is an international news media holding company headquartered in Tyson's Corner, Virginia. It is the largest U.S. newspaper publisher as measured by total daily circulation, and the largest and most geographically diverse provider of local news content in the United States. It is the publisher of the award-winning publication, *USA Today*, and in South Carolina it publishes *The Greenville News*. Other Gannett publications include *The Arizona Republic* in Phoenix, Arizona, *The Indianapolis Star*, *The Cincinnati Enquirer*, *The Tennessean* in Nashville, Tennessee, *The Courier-Journal* in Louisville, Kentucky, the *Democrat and Chronicle* in Rochester, NY, *The Des Moines Register*, the *Detroit Free Press*, and *The News-Press* in Fort Myers.

Gannett also owns or operates 46 television stations through Gannett Broadcasting, Inc., and is the largest group owner of stations affiliated with NBC and CBS. In South Carolina it broadcasts over WLTX-TV in Columbia.

Gannett's mission is to provide trusted news and information and to actively support the people and businesses in the communities it serves. To this end, Gannett's newspapers and TV stations strive to meet the highest standards of journalistic excellence, accuracy, and fairness in their reporting. Nonetheless, because of the geographic breadth and diversity of their businesses, Gannett companies sometimes find themselves the targets of defamation lawsuits, including litigation, like this one, brought by public figures or public officials who did not like something that had been reported about them. Accordingly, Gannett has a vital interest in the correct and rigorous application of the constitutional protections for freedom of speech and of the press.

The importance of this appeal to Gannett stems from the Circuit Court's admission of the purported "expert testimony" of the Respondent's witness on journalistic standards. Over Appellants' objection, the Circuit Court allowed testimony from a Professor of the Grady College of Journalism in Georgia, opining as an expert on standards of journalism, the application of the law of defamation to this case, and his conclusions that the Appellants did not act "in accordance with standards that would be followed by a responsible publisher" and that "the reporter knew or should have known that the reporting was false." (R. p. 282, lines 18-19; p. 283, lines 11-12)

The Circuit Court's decision to allow such testimony creates a real and serious threat to the protection of freedom of speech and of the press provided by the "actual malice" standard set out by the United States Supreme Court in *New York Times v. Sullivan* and elaborated upon in the many ensuing cases amplifying and applying that standard. In effect, the admission of such "expert" testimony allows public figure plaintiffs to circumvent the intentionally demanding burden of proof inherent in the "actual malice" standard. It enables the plaintiff to confuse the jury as to whether "actual malice" may be based on the testimony of a journalism professor that a defendant deviated from "standards that would be followed by a responsible publisher" and that the defendant "should have known" that a false statement was being published. In effect, it converts actual malice into gross negligence or even simple negligence. That is exactly what happened in the trial below.

As shown in this brief, courts across the country have rejected such testimony in actual malice cases. The issue, however, has yet to be addressed in South Carolina. Reversal of the Circuit Court's judgment on this ground would bring clarity to this area

of the law in South Carolina and prevent the circumvention of the *New York Times* rule in this state by the use of expert testimony on journalistic standards in public figure and public official cases.

ARGUMENT

Summary of Argument

Expert testimony on standards of journalism and whether or not the defendant “should have known” that a falsehood was being reported is irrelevant and inadmissible where the plaintiff is a public figure or public official and must show that the defendant acted with “actual malice.” The definition of actual malice, as a matter of First Amendment jurisprudence, is that the defendant either knew the statement at issue was false or in fact harbored serious doubts about its truth. Actual malice is determined exclusively by reference to the defendant’s subjective beliefs about the truthfulness of the statement at the time of publication, not by any purported failure to comply with professional standards of conduct. And whether the defendant “should have known” that a statement was false has nothing to do with actual malice.

Because Respondent’s expert testimony on journalistic standards did not address the Appellants’ actual subjective beliefs, such testimony was irrelevant and should have been excluded. To the extent the expert purported to opine on the knowledge of the reporter, Appellant David Wren, such testimony is not a proper subject of expert opinion by a journalism professor. At best, this testimony confused the jury as to the proper standard to apply in determining actual malice; at worst it led the jury to find actual malice based on a negligence standard.

The actual malice standard is deliberately intended to set a high burden of proof for public official and public figure plaintiffs, in order to encourage reporting on the actions of such persons. *See, e.g., Carr v. Forbes*, 259 F.3d 273, 282 (4th Cir. 2001) (“Establishing actual malice is no easy task.”). It is a vital part of our constitutional protection for freedom of speech and of the press. If such plaintiffs are able to evade this burden of proof through the use of testimony such as that allowed in this case, this important protection will be watered down significantly. This Court should make it clear that such testimony is inadmissible in actual malice cases, and the Circuit Court’s judgment should be reversed.¹

1. Journalistic Standards Are Irrelevant in Actual Malice Cases

It is well settled that defamation plaintiffs who are public figures or public officials must prove that media defendants published the alleged defamation with “actual malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964). Unlike negligence or professional malpractice, actual malice is not determined by comparing the defendant’s conduct to some objective standard of due care. *See St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968). Instead, public figure plaintiffs must establish either that the defendant (1) actually knew the statement was false, or (2) acted with reckless disregard of falsity, which is defined as “in fact entertain[ing] serious doubts” about the

¹ Gannett agrees with Appellants that they are entitled to judgment as a matter of law, for the reasons set forth in their briefs. If the Court does not accept that position, however, it should still reverse and remand for a new trial with directions to exclude the expert testimony at issue. In any event, the Court should clarify that trial judges should not allow such expert testimony in public figure and public official defamation cases.

truth of the statement, *id.* at 731, or publishing the statement with a “high degree of awareness of [its] probable falsity.” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *see also Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

Put simply, the dispositive issue in the actual malice inquiry is not whether the reporter met some alleged objective standard of conduct, or even the reporter’s attitude toward the subject of the article or the interview. Instead, the inquiry is concerned only with the reporter’s subjective beliefs regarding the truth of the statement at the time of publication. “There must be sufficient evidence to conclude either that the defendant made the statements with a ‘high degree of awareness of ... probable falsity,’ or that the defendant ‘in fact entertained serious doubts as to the truth of his publication.’” *George v. Fabri*, 345 S.C. 440, 456, 548 S.E.2d 868, 876 (2001) (quoting *Garrison v. Louisiana* and *St. Amant, supra*); *accord Fleming v. Rose*, 350 S.C. 488, 494-95, 567 S.E.2d 857, 860-61 (2002).

For precisely this reason, the United States Supreme Court explicitly rejected the sole legal authority for Respondent’s argument on this issue, holding squarely that even evidence of “extreme departure from professional standards” is insufficient to prove actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989) (expressly rejecting 6th Circuit reasoning on this point, on which Respondents’ argument is based); *see* Appellants’ Reply Brief at 6 (quoting *Connaughton* at length).

The critical distinction between actual malice and professional due care was emphasized by the Fourth Circuit Court of Appeals in *Reuber v. Food Chem. News, Inc.*, 923 F.2d 703 (4th Cir. 1991), *cert. denied*, 501 U.S. 1212 (1991). The appellate court there held that the district court committed reversible error by instructing the jury that a

publication's departure from professional standards was evidence of reckless disregard and actual malice. The Fourth Circuit stated that the actual malice standard is wholly subjective – determined solely by the defendant's actual beliefs about the truthfulness of the statements – and not by whether or how the defendant measured up to "professional norms." *Id.* at 711-12 (emphasis added).

In short, standards of professional journalism, and whether or not the defendant met them, are totally irrelevant in a case like this one.

2. Therefore, Expert Testimony on Journalistic Standards Is Inadmissible

For the above reasons, numerous courts across the country have held that expert testimony cannot speak to constitutional actual malice, and is therefore inadmissible. For example, in *Carr v. Forbes*, 121 F. Supp. 2d 485 (D.S.C. 2000), *aff'd*, 259 F.3d 273 (4th Cir. 2001), the district court for the District of South Carolina held that the opinions of "journalism experts" that the defendant departed from journalism standards did not constitute evidence of actual malice. 121 F. Supp. 2d at 495-96. The district court's conclusion was affirmed on appeal by the Fourth Circuit. 259 F.3d at 283.

Similarly, in *Harris v. Quadracci*, 856 F. Supp. 513 (E.D. Wis. 1994), *aff'd*, 48 F.3d 247 (7th Cir. 1995), a public figure proposed to introduce the testimony of an "expert journalist" to show that the writer of a magazine article "appears to have recklessly believed" the statements of an unreliable source used in preparing the story. The district court explained that the proffered testimony was, at best, an opinion that the writer's reporting did not conform to professional standards. The court concluded that such

testimony was “not helpful when determining actual malice against a subjective standard,” and therefore would not allow it. 856 F. Supp. at 519.

The Supreme Court of Texas has likewise held that the testimony of an “expert journalist” that a newspaper had exhibited a pattern of “biased reporting” about the plaintiff was no evidence of the defendants’ actual state of mind regarding the truth of the statements in question. *Freedom Newspapers v. Cantu*, 168 S.W.2d 847, 858-59 (Tex. 2005).

And in *Khan v. The New York Times Co.*, 269 A.D. 2d 74 (N.Y. App. Div. 2000), the New York Appellate Division reversed the trial court’s denial of the defendants’ motion for summary judgment, ruling that the trial court’s reliance on plaintiff’s expert testimony that the defendants “ignored the basic tenants of journalism” and “acted with reckless disregard for the truth” indicated that the court “mistakenly applied an objective standard of gross irresponsibility ... rather than applying the subjective actual malice standard.” *Id.* at 76.

The above cases are just a sample. Many courts across the United States have rejected expert testimony of this nature in actual malice cases, finding that it is irrelevant to the issue of the defendant’s state of mind, not helpful to the jury, and outweighed by the potential confusion as to the appropriate legal standard. *See generally* R. SACK & S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS*, 302-03 (2d ed. 1994) (“[T]he courts ... have most commonly rejected proffered expert testimony ... about journalistic standards [on the ground that it] does not assist the jury in determining the ultimate issue of actual malice and because the possible prejudice arising from such testimony far

outweighs any probative value.”) (quoting Leatherbury, *Use of Expert Witnesses in Defamation Cases*, 11 COMMUNICATIONS LAWYER No. 2, at 16 (Summer 1993)).

The Circuit Court should have done the same in the instant case.

3. Admission of the Georgia Professor's Testimony Is Reversible Error

In this case, the Georgia professor's testimony was clearly based on an erroneous legal standard – i.e., what the defendants “should have” known and done. In cross-examination on voir dire, the professor responded as follows:

Q: Now, as I understood what you said you would testify to is whether The Sun News acted in accordance with standards a responsible news organization would follow; did I get that down correctly?

A: Yes.

Q: And you were asked if you would testify as to whether or not The Sun News knew or should have known its reporting was false?

A: Yes.

...

Q: And knew or should've known, now that's not the actual malice standard, is it?

A: You're incorrect. Should've known is an important part of reckless disregard of the truth.

(R. p. 285, lines 3-11; p. 286, lines 2-5)

The Georgia professor's last statement is blatantly wrong as a matter of law, and yet this misunderstanding of the legal standard pervades all of his opinion testimony.

Based on his legally erroneous view of the actual malice standard, the professor testified to the jury as follows:

Q: Have you reached an opinion in this case?

A: Yes.

Q: And would you state that opinion?

A: In my opinion, there were indications to Mr. Wren that should have been paid attention to, which he did not. ... I believe also that there is a problem in the way the information was processed at The Sun News. All of this leads me to conclude that The Sun News did not act the way professional news organizations act in these circumstances.

(R. p. 321, lines 12-23) (emphasis added)

A: ... Mr Wren and his editor should have paid the greatest attention to the sourcing of the story and the way it was written.

(R. p. 322, lines 18-29) (emphasis added)

Q: Does the reporter – is the reporter supposed to look at the source and determine whether the source is biased and take that into consideration in writing an article?

A: Clearly ...

(R. p. 337, lines 16-19) (emphasis added)

Q: Was he careful?

A: I don't believe so.

(R. p. 338, lines 13-14) (emphasis added)

This testimony espouses a standard of simple negligence. It was completely irrelevant to the issue of whether the Appellants acted with actual malice, and could not have had any effect other than to confuse or prejudice the jury. The prejudicial effect of this and other similar testimony from the Georgia professor was exacerbated by the fact that he presented himself as not simply an expert on journalistic standards, but also on the application of the law to journalism:

Q: And do you – the area of your expertise, is what?

A: Freedom of expression, the practice of journalism and the interplay between the law and the practice of journalism.

(R. p. 309, lines 19-21) (emphasis added)

The Georgia professor also went on to opine about what was in David Wren's mind – an area in which he clearly had no expertise or specialized knowledge that would be helpful to the jury:

Q: Does it show that he was conscious of the fact that he didn't have the evidence?

A: He would have to be.

(R. p. 355, lines 12-14)

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

A: Yes.

(R. p. 356, lines 2-4)

The Georgia professor did not purport to be a psychic mind reader, or even a psychologist. There is nothing in his background or experience that gives him special skill in psychoanalyzing the mind of David Wren, or that would make his speculation about what the reporter knew or believed helpful to the jury. Such expert testimony should not be allowed, as the subject matter of the proffered testimony is within the ordinary understanding of the jury. *E.g., Brawn v. Heavy Indust., Ltd.*, 817 F. Supp. 184, 186 (D. Me. 1993).

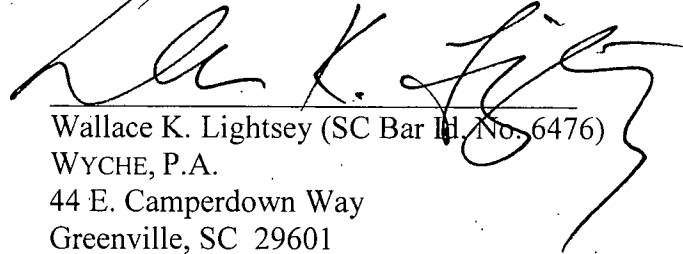
It should have been excluded here.

CONCLUSION

Gannett agrees with Appellants that they are entitled to judgment as a matter of law. If, however, this Court should disagree, it should clarify that expert testimony on “standards of journalism” and what a reporter “knew or should have known” is inadmissible in a defamation case brought by a public figure or public official, reverse

the judgment below, and remand for a new trial with the "expert" testimony excluded.
And even if the Court affirms, it should take the opportunity in its opinion to clarify that
such testimony is irrelevant and inadmissible in actual malice cases.

Respectfully submitted,



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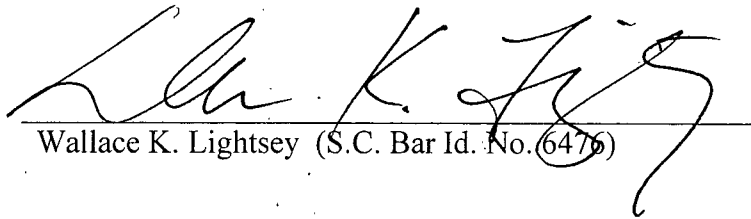
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