THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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

Mark Kelley, ...Respondent,

v.

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

BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THREE OTHER MEDIA ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS DAVID WREN AND SUN PUBLISHING COMPANY INC., D/B/A THE SUN NEWS

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STATEMENTS OF INTEREST

The interests of the proposed *amici* in this appeal are discussed below.

The Reporters Committee for Freedom of the Press is a voluntary, not-for-profit, unincorporated association of reporters and editors. Founded in 1970, the Reporters Committee is dedicated to preserving the freedom of the press guaranteed by the First Amendment and defending the public's right to be informed, through the media, of the activities of their government and elected representatives.

National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Columbia, Missouri.

Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

INTRODUCTION

The case pending before this Court presents an issue of critical importance to journalists — what proof is required to show that a journalist acted with "actual malice," and thus not entitled to the protections of the First Amendment when covering public affairs. A finding of actual malice requires clear and convincing evidence that he made the statement with knowledge that it was false or with reckless disregard of the truth. This high standard for liability, particularly the requirement that the defendant have subjectively known that the statement was false or had serious doubts as to its truth, serves an important purpose. In order to preserve the strong public discourse that is so important to the flourishing of ideas, it is necessary to protect a wide range of speech, even some speech that is inaccurate, as long as the speakers were not in fact acting intentionally or recklessly in making those mistakes.

The Court of Common Pleas erred in denying the motion of Defendants David Wren and the Sun News for a directed verdict and judgment notwithstanding the verdict, thereby allowing the jury's defamation verdict to stand, even though there was insufficient evidence that Wren possessed actual malice when writing about Plaintiff Mark Kelley. The only way to effectuate the strong public policies behind the actual malice standard is to ensure that its strict requirements are followed. For the reasons set forth herein, *amici* urge this Court to reverse the decision of the court below and grant the motions for a directed verdict or for judgment N.O.V.

SUMMARY OF ARGUMENT

In evaluating the Plaintiff's defamation claim, the trial court was required by South Carolina and U.S. Supreme Court precedent to apply the actual malice standard.

The U.S. Supreme Court has defined the standard for liability for defamation of a public figure as "actual malice," meaning a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 280, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964). There must be evidence that the defendant either knew of the falsity or "in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262, 267 (1968). South Carolina has incorporated the actual malice standard into state case law based on these U.S. Supreme Court cases.

There must be clear and convincing evidence of actual malice to support a finding of liability, as shown by a specific state of mind of the defendant. The trial court erred here in not granting the Defendants' motions for a directed verdict or for judgment N.O.V. even though according to the testimony at trial there was insufficient evidence that Wren had subjective knowledge of falsity or actually entertained serious doubts as to the meaning of the words he used. Under the United States Supreme Court's decision in *Bose Corp. v. Consumers Union*, a writer's subjective belief that he is portraying a scene accurately, with no doubts or knowledge of falsity, is enough to overcome an argument of actual malice. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 513, 104 S. Ct. 1949, 1966, 80 L. Ed. 2d 502, 525 (1984). Even if the words seem objectively to mean something else, therefore making the writer's description inaccurate, the lack of evidence of actual malice is fatal to the claim. Wren testified that, in writing that Brad Dean delivered the money "along with chamber lobbyist Mark Kelley," he had not thought that he was saying that Kelley also delivered the money, and was in fact trying only to state that Kelley was with Dean at a lunch with a congressman. While others may well

interpret his words to mean that Kelley also delivered the money, his apparent lack of subjective doubts or knowledge of falsity mean that, according to his testimony, he did not possess the requisite state of mind to be found liable.

The specific requirements of the actual malice standard are demanding because of the important protections they provide for journalists and all others who contribute to the public debate and exchange of ideas, both in South Carolina and nationwide. As the Supreme Court discussed in *Bose Corp.*, some inaccurate speech must nonetheless be protected in order to avoid chilling other important speech. *Bose Corp.*, 466 U.S. 485, 513, 104 S. Ct. 1949, 1966, 80 L. Ed. 2d 502, 525 (1984). If the law is misapplied to punish speech when there is no evidence of actual malice, that chilling effect will occur.

ARGUMENT

I. IN FINDING A PUBLIC FIGURE LIABLE FOR DEFAMATION, THE SPECIFIC, STRINGENT REQUIREMENTS OF THE ACTUAL MALICE STANDARD MUST BE MET

U.S. Supreme Court and South Carolina jurisprudence are unequivocal in requiring application of the actual malice standard when evaluating defamation claims by public figures. Key to the application of the standard is the presence of clear and convincing evidence of actual malice. When there is insufficient evidence of actual malice, as Defendants have testified to here, the defamation claim must fail. The U.S. Supreme Court has recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270, 84 S. Ct. at 721, 11 L. Ed. 2d at 701. Only if courts adhere to the intentionally demanding requirements for finding actual malice as a necessary element of defamation of a public figure can that debate be sustained.

A. A Finding Of Liability For Defamation Of A Public Figure Under The Actual Malice Standard Requires Evidence Of Actual Malice, Not Merely An Assumption

Under U.S. Supreme Court precedent, to find a party guilty of defaming a public figure or official, that party must have acted with "actual malice." The U.S. Supreme Court first articulated the actual malice standard in 1964 in *New York Times v. Sullivan*, defining it as a statement made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Sullivan*, 376 U.S. at 280, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. The Supreme Court expounded on the requirements for a finding of actual malice in *St. Amant v. Thompson*, stating, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. Similarly, the 1989 *Harte-Hanks v. Connaughton* decision defined actual malice as occurring when a defendant made the false publication with a high degree of awareness of probable falsity or entertained serious doubts as to the truth of his publication. *Harte-Hanks v. Connaughton*, 491 U.S. 657, 667, 109 S. Ct. 2678, 2687, 105 L. Ed. 2d 562, 576 (1989). The requirements of a "high degree of awareness" and "in fact entertain[ing] serious doubts" demonstrate that it is the state of mind of the speaker that is the ultimate determining factor — these requirements demand proof and cannot merely be assumed based on an objective standard. *Id.*

The Supreme Court of South Carolina has followed the actual malice standard based on U.S. Supreme Court precedent. *Elder v. Gaffney Ledger* relied on *New York Times v. Sullivan*, *St. Amant v. Thompson*, and numerous other cases to show that "a reckless disregard for the truth ... requires more than a departure from reasonably

prudent conduct," with the publisher in fact entertaining "serious doubts as to the truth of his publication" and possessing a "high degree of awareness of . . . probable falsity." *Elder*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000), quoting *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267, and *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964)(internal citations omitted). The Court in *Elder* also emphasized that there must be real evidence of actual malice in order to support liability. *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. In proving actual malice, "[i]t is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information; there must be evidence at least that the defendant purposefully avoided the truth." *Id.* at 114, 533 S.E.2d at 902 (internal citations omitted).

Thus, in evaluating the plaintiff's defamation claim, the trial court was required by South Carolina and U.S. Supreme Court precedent to consider under the actual malice standard whether there was evidence that the defendant subjectively possessed a knowledge of falsity or a reckless disregard for the truth, which includes serious doubts as to the truth of the publication and a high degree of awareness of probable falsity. Proof is required to show that a state of mind consisting of serious doubts or awareness exists. An objective standard merely positing that a statement is so inaccurate that the defendant must have known that it was inaccurate is unavailing. The "clear and convincing" standard requires more than an assumption based on perceived falsity — it requires a very high threshold of evidence to establish proof.

B. The Defendant Must Subjectively Possess The Necessary State Of Mind In Order To Find Clear And Convincing Evidence Of Actual Malice

There can be no finding of liability for defamation of a public figure without clear and convincing evidence of actual malice, shown by the defendant's subjective

knowledge of falsity or reckless disregard for the truth. In this case, if the Defendants' assertions are to be believed, no proof was offered showing that Wren either knew that he was making a false statement or that he harbored serious doubts as to its truth or had a high degree of awareness of probable falsity. Without such evidence, the defamation claim must fail. The 1984 U.S. Supreme Court decision in *Bose Corp. v. Consumers Union* is illustrative in its discussion of how inaccurate wording, if the defendant does not know, believe, or suspect that it is inaccurate at the time, does not provide clear and convincing evidence of actual malice.

In *Bose Corp.*, the defendant wrote in his review of speakers that the sound wandered "about the room," while the trial court found that, based on his later descriptions of what he heard, he had actually heard the sound wandering "along the wall," and that therefore the defendant's review was false. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 490, 104 S. Ct. 1949, 1954, 80 L. Ed. 2d 502, 510 (1984). In its ruling for the defendant, the U.S. Supreme Court emphasized the "significant difference between proof of actual malice and mere proof of falsity," holding that there was no additional proof of the former. *Id.* at 511, 104 S. Ct. at 1965, 80 L. Ed. 2d at 523-524 . Even if the language seemed inaccurate on its face, if the writer did not realize the inaccuracy at the time of publication, there was no evidence of actual malice:

> The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.

Id. at 513, 104 S. Ct. at 1966, 80 L.E.2d at 525.

The lower court in *Bose Corp.* had made the same mistake as the lower court in this case. In the initial *Bose Corp.* trial, the District Court found that because no "reasonable reader" would understand the phrase "about the room" to describe the sound phenomenon that actually took place, the statement was false. *Id.* at 496, 104 S. Ct. at 1957, 80 L.E.2d at 514. The District Court also found that because the speaker was an intelligent person who understood the English language, he must have known the statement was not accurate when he published it and thus had actual malice. *Bose Corp.*, 466 U.S. at 497, 104 S. Ct. at 1958, 80 L. Ed. 2d at 514. Such reasoning is akin to that of the Court of Common Pleas in the instant case, where the motions for a directed verdict or for judgment N.O.V. was denied on the basis of Wren's possession of actual malice due to the ambiguous wording of his description, in spite of his testimony that he believed at the time that he had accurately described what took place. But the District Court's holding in the Bose case was soundly rebuffed by the U.S. Supreme Court on appeal in *Bose Corp.*, just as the rulings against Wren's motions should be overturned here.

Wren testified that he believed at the time of writing that his statement about Brad Dean's delivery of the money to the congressman "along with chamber lobbyist Mark Kelley" did *not* mean that Kelley also delivered the money, but instead was only stating that Kelley was with Dean at a lunch with the congressman. (R. p. 408, line15 to p. 409, line 13). Wren testified that he did not actually believe that he was stating that Kelley was delivering the money illegally, and a previous article had statements to that effect, including commentary from a South Carolina ethics expert, saying that nothing illegal had transpired, thus reflecting that belief. (R. p. 27, Plaintiff's Exhibit 4). Despite the

possibility that Wren would testify self-servingly as to his beliefs at the time of writing, the context bears out his assertion that he was not accusing Kelley of anything illegal. Even if the court believed that a reasonable person writing "along with" would think it implied that Kelley was also delivering the contributions, that determination does not show actual malice, as illustrated in *Bose Corp.*

The subjectivity of the actual malice standard provides a significant level of protection to defamation defendants. The defendant must have "in fact entertained serious doubts." *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325, 20 L. Ed. 2d at 267. The many South Carolina Supreme Court cases embracing *St. Amant* and other U.S. Supreme Court precedent on defamation have likewise emphasized the subjectivity of the actual malice standard. *See, e.g., George v. Fabri*, 345 S.C. 440, 456, 548 S.E.2d 868, 876 (2001) ("actual malice is governed by a *subjective* standard which tests the defendant's good faith belief in the truth of her statements"); *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266-267, 478 S.E.2d 282, 285 (1996) (holding that, under the subjective standard, "sloppy journalism" and inaccurate wording did not constitute evidence that the writer possessed actual malice). Wren testified that he subjectively believed that he was making a true statement, a statement that was different from that attributed to him by the Plaintiff. He would have had serious doubts about stating that the Plaintiff had delivered the money because he did not in fact believe that that is what happened. But since he did not believe he was stating that Plaintiff had delivered the money, a statement he would have known to be false, he did not in fact entertain serious doubts or have subjective awareness of probable falsity. Without such a belief, under the definitions articulated by

the U.S. Supreme Court and followed in South Carolina, there was no actual malice and thus no liability for defamation of a public figure.

II. HOLDING A DEFENDANT LIABLE FOR DEFAMATION WITH NO EVIDENCE OF ACTUAL MALICE CONTRADICTS THE PRINCIPLES BEHIND DEFAMATION CASE LAW

The values supporting the actual malice standard, articulated in U.S. Supreme Court precedent and in South Carolina, illustrate why the law bestows great protection on speech. As the Court in *Gertz v. Robert Welch* explained, over-punishing speech results in a chilling effect on all expression, and as a result, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch*, 418 U.S. 323, 341, 94 S. Ct. 2997, 3007, 41 L. Ed. 2d 789, 806 (1974). The Court further emphasized in *Bose Corp.* the value of protecting a broad range of speech, even speech that is imprecise or completely wrong:

> The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. 401 U.S. at 292. "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." *Herbert v. Lando*, 441 U.S. 153, 171-172 (1979). "[Erroneous] statement is inevitable in free debate, and...must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" *New York Times Co. v. Sullivan*, 376 U.S. at 271-72 (citation omitted).

Bose Corp., 466 U.S. at 513, 104 S. Ct. at 1966, 80 L. Ed. 2d at 525.

These foundational principles provide context for the high threshold for defamation of public figures, with its requirement that the defendant subjectively possess actual knowledge of falsity or recklessness. Without standards that generously protect speakers in most circumstances, most people would find it far too risky to engage in the public discourse and debate that are at the heart of the First Amendment. A central

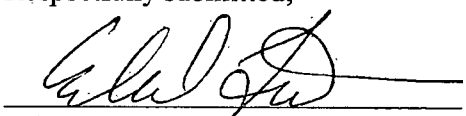
function of that marketplace of ideas is the ability to examine the conduct of our government officials and hold them accountable to their constituents. The present case, which involved reporting on the source of campaign contributions that accurately reported that a lobbyist and donor had lunch with a member of Congress, is an example of valuable speech that must not be suppressed by the punishing of good-faith mistakes.

It is clear that Wren does not meet the requirements for a finding of actual malice, and that to sanction him for this speech would impose excess liability in a way that would have a chilling effect on commentary on public figures in South Carolina. It is important that this Court lend its voice to the chorus of other South Carolina decisions that promote the important role of the First Amendment in the state.

CONCLUSION

For the foregoing reasons, the trial court's denial of appellants' motions for a directed verdict and judgment notwithstanding the verdict should be reversed.

Respectfully submitted,



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