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
Appellate Case No. 2014-001249

Mark Kelley, ... Respondent,

v.

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

RESPONDENT'S REPLY BRIEF TO *AMICI CURIAE BRIEFS*

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STATEMENT OF ISSUES RAISED BY AMICI:

THE MAIN THRUST OF THE AMICI BRIEFS IS TWO-FOLD:

1. The evidence did not meet the criteria set forth under New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710 (1964), 11 l. ed. 2d 686), i.e., there was no evidence presented by Respondent revealing that the Appellants published a defamatory statement concerning Respondent with knowledge of its falsity or with a reckless disregard of its truth or falsity; and

2. Expert testimony is inadmissible in a defamation case to show constitutional actual malice.

STATEMENT OF THE CASE

Please refer to Statement of the Case in Final Brief of Respondent.

For the reasons set forth below, Amici briefs fail to demonstrate any reasons, factual or legal, why the jury verdict and/or the trial court's rulings should be reversed and/or remanded.

ARGUMENTS IN REPLY TO ARGUMENTS OF AMICI:

I. THERE WAS SUFFICIENT EVIDENCE INTRODUCED FROM WHICH A JURY COULD CONCLUDE THAT APPELLANTS PUBLISHED THE DEFAMATORY STATEMENTS WITH ACTUAL MALICE:

Interestingly, the Amicus briefs conspicuously avoid correctly quoting the defamatory language published by the Appellants or referring to Appellant Wren's emails showing his state of mind. Amici give a strained meaning to the language used in the publication by Appellants to conclude that Respondent was simply sitting at a table with Brad Dean when the campaign funds were handed to the candidate, Gresham Barrett. The language used by the Appellants obviously meant to convey to the reading public that both Dean and the Respondent handed the campaign contributions to Barrett and that was described by the Appellants as a crime elsewhere in their articles.

The language was as follows: "Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June." If anyone who read the article was asked, "how many people gave Barrett $84,000 in contributions", the obvious answer would be "two people". If asked, "who gave the contributions", the obvious answer would be "Brad Dean and Mark Kelley".

Appellants and Amici incredibly argue that the reporter meant only to say that Mark Kelley was sitting at the table when Dean handed the contributions to Barrett. Appellant Wren's own emails contradict this position and were the patent reason the jury found his testimony incredible. On May 3, 2010, at 2:30 p.m. (20 days before the article), Appellant Wren revealed his subjective state of mind in his email to Tracy Edge which states, in part, as follows:

> ....so I told him [Trey Walker][1] 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. . . . . 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.* (R. p. 659) (Emphasis added).

This email reveals several critical matters that are germane to this appeal and exposes the reporter's subjective state of mind. First, the source [Trey Walker] to which Appellant Wren was referred[2] by Representative Tracy Edge[3] advised Appellant Wren that he knew nothing about Respondent Kelley giving campaign donations to Barrett; therefore, there was no evidence of that fact. Second, the email reveals Appellant Wren's subjective state of mind was that he believed Respondent Kelley arranged the meeting and gave the donations to Barrett, both of which were crimes. Third, it revealed that Appellant Wren's subjective state of mind was that he believed all campaign managers had little or no ethics and that Trey Walker was a liar; however, he called him for the purpose of using him as a supposedly reliable source (until he didn't say what Appellant Wren wanted him to say). Fourth, Appellant Wren subjectively believed, although he had no such evidence, that his theory that Respondent Kelley arranged the meeting and gave the campaign donations to Barrett was "*something that will eventually be shown*". Fifth, Appellant Wren's continued efforts to gather evidence to justify his accusations that Respondent had committed the above crimes failed on May 20, 2010 when Tim Pearson, Nikki Haley's campaign manager, sent an email to Appellant Wren stating "maybe go ask Gresham directly who gave him the money."

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[1] Trey Walker was Henry McMaster's campaign manager in his bid for governor.

[2] The first source was Trey Walker who "said he didn't know anything about it..." *See* R. p. 400, line 22.

[3] Wren testified that Tracy Edge did not make "any suggestion about involvement by Mark Kelley in that campaign contribution." *See* R. p. 400, lines 18-20:

> Q. Did Representative Edge make any suggestion about involvement by Mark Kelley in that campaign contribution?
>
> A. Not that I recall.

(R. p. 652). Appellant Wren then met Gresham Barrett at a political campaign event in Myrtle Beach, S.C. and asked Barrett who gave him the donations. Barrett told Appellant Wren that Brad Dean gave him the contributions. (R. p. 404, l.16 – R. p. 405, line 3). Appellant Wren then called Dean who verified that he (Dean) had given Barrett the donations. (R. p. 405, lines 14 – 24). Appellant Wren then wrote his article of May 21, 2010. (R. p. 405, line 25 – R. p. 406, line 3; Plaintiff's Exhibit 1). Finally, Appellant Wren contacted Tim Pearson, Nikki Haley's campaign manager and Justin Stokes (who was a Haley campaign worker that had earlier "jumped ship" from the Barrett campaign camp) in his attempt to accuse Respondent of the crimes aforesaid knowing them to be obviously biased sources.[4] Reliance on the unsupported word of obviously biased sources for key allegations is evidence which a jury is entitled to consider in evaluating the existence of actual malice. An appellate court on review is similarly entitled to consider that evidence. Tavoulareas v. Piro, 759 F.2d 90 (D.C. Ct. App. 1985).

Prior to the May 23, 2010 article (R. 639, Plaintiff's Exhibit 2), Appellant Wren knew there was no evidence that Respondent had any involvement with setting up the meeting or handing Barrett campaign donations. This was all direct evidence obtained from the reporter's testimony and his emails. This provided direct evidence of the reporter's state of mind when he printed the defamatory articles. From this direct evidence, the jury logically concluded that the Appellants printed the defamatory articles knowing they were defamatory and false, thus providing clear and convincing evidence of constitutional actual malice.

On May 23, 2010, Appellant Wren again revealed his subjective state of mind by sending another email to Justin Stokes and Tim Person asking for emails which may show Respondent's involvement with "setting up the meeting and handing him (Barrett) the money (campaign donations)." The email stated, in part, as follows:

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[4] *See* R. p. 419, lines 8-11: Q. Were you skeptical of Justin Stokes?
A. I was.
Q. Were you skeptical of Tim Pearson?
A. Yes.

> ... 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[5] 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. . . . .
>
> .... Also, if there are any emails or documents that show ... *Kelley's role in setting up the Barrett meeting* would be a great help. ... (Emphasis added), (R. p. 661).

Appellant Wren's own emails expose his subjective state of mind. When reading them, it becomes apparent that there was a complete absence of evidence that Respondent did anything illegal and the Appellants were advised of this from all quarters. All the evidence from all of Appellants' sources pointed to nothing other than Respondent ate lunch with an old school friend at the invitation of Brad Dean.[6] In the face of this complete absence of evidence, Appellants published the defamatory articles, knowing them to be false and/or with a reckless disregard for their truth or falsity.

This absence of evidence was discussed by the editorial staff of the Appellants in its editorial on May 30, 2010. It is not coincidental that the editorial was titled, "ABSENCE OF EVIDENCE." The editorial makes it clear that the editors understood the articles the same way the jury did when it awarded Respondent actual and punitive damages – that Appellant Wren was accusing Respondent of the crimes listed above. The following language from the editorial admits that Appellants had no evidence against Respondent when the prior articles accusing Respondent of crimes were published:

> ...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.*) (Emphasis added) (R. 642, Plaintiff's Exhibit 5).

The above language, "[a]s we *now* know", indicates a *previous* belief and state of mind that Respondent was guilty of the ethics violations Appellants accused him of in the previous articles.

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[5] B.J. Boling was a campaign manager for Gresham Barrett.

[6] *See also* R. p. 409, lines 21-23, R. p. 417, lines 1-13.

(Emphasis added). The parenthetical phrase in the above quotation can only be read to conclude that Barrett is lying when he stated that Respondent Kelley had no involvement. By using the phrase, "no matter what the unprovable truth is", they are continuing to claim Respondent Kelley was guilty of ethics violations but they admit there was an "absence of evidence". This is direct evidence that the Appellants admit their accusation of ethics violations against Respondent Kelley in the face of an "absence of evidence." Stating that there is an "Absence of Evidence" is a damning admission by Appellants that they entertained serious doubts as to the truth of their publications and that they had a high degree of awareness of probable falsity. It also establishes a purposeful avoidance of the truth.

During the trial, Respondent pieced together evidence which proved that the Appellants accused Respondent of a crime and/or was unfit in his trade or profession, published the defamatory accusations to third parties, with knowledge of its falsity or with a reckless disregard of its truth or falsity, entertaining serious doubts as to the truth of its publication and with a high degree of awareness of its probable falsity. Those pieces of evidence were interwoven during the trial through testimony and documentary evidence which convinced the jury that Respondent had proved his case by clear and convincing evidence. The Court was required to admit each item of evidence if the totality of the all the evidence proves by clear and convincing evidence that the Appellants published the defamatory accusations with constitutional actual malice.

"That no piece of evidence in a defamation suit *alone* will support a verdict does not mean that together all the evidence may not be clear and convincing. (Emphasis added). Pieces to a jigsaw puzzle sometimes appear nothing more than scattered fragments, but when placed together in proper fashion they create a clear picture." Tavoulareas v. Piro, 763 F.2d 1472 (D.C. Ct. App. 1985).

The principle that "debate on public issues should be uninhibited, robust, and wide-open," Tavoulareas v. Piro, 245 U.S.App. D.C. 70, 759 F.2d 90, 144 (1985) (Wright, J., dissenting) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710 (1964), 11 L. Ed. 2d 686), must be reconciled with "an individual's interest in his or her reputation [which] is of the highest order," Ollman v. Evans, 242 U.S. App. D.C. 301, 750 F.2d 970, 974 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127, 86 L.Ed.2d 278, 105 S. Ct. 2662, 53 U.S.L.W. 3837 (1985). Again, as was emphasized in Ollman, the protection of one's reputation

> is an eloquent expression of the respect historically afforded the dignity of the individual in Anglo-American legal culture. A defamatory statement may destroy an individual's livelihood, wreck his standing in the community, and seriously impair his sense of dignity and self-esteem.

Tavoulareas v. Piro, 763 F.2d 1472 (D.C. Ct. App. 1985).

II. EXPERT TESTIMONY IS ADMISSIBLE IN DEFAMATION CASES:

A. APPELLANTS FAILED TO PRESERVE FOR APPEAL THE ISSUE OF WHETHER EXPERT TESTIMONY IS ADMISSIBLE IN A PUBLIC FIGURE'S DEFAMATION ACTION:

Appellants failed to object to the expert's testimony cited in briefs of Amici. Since it was not objected to during the trial, this issue can't be raised on appeal. Moreover, the testimony of which Amici complain was not briefed by Appellants, obviously because Appellants did not object to the testimony and therefore waived their right to appeal on that ground.

Since the Appellants neither objected to the expert's testimony contained in briefs of Amici's nor briefed the matters contained in those briefs concerning the expert's testimony, Amici cannot raise it for the first time on appeal.

Appellants made only five (5) objections during the entire direct and re-direct testimony of Plaintiff's witness, Dr. William E. Lee:

(1) an objection to the Sun News Ethics Policy (R. p. 310, lines 7-11 and R. p. 330, line 25 – R. p. 339, line 3) which the Court overruled,

(2) an objection that the answer was not responsive to the question (R. p. 333, line 15 – R. p. 334, line 6) which was cured by rephrasing the question,

(3) an objection to a question of whether the article accused the Plaintiff of a crime (R. p. 343, line 9 – R. p. 344, line 14) which was sustained and the Court instructed the jury to disregard the question and answer,

(4) an objection to a question of whether the journalist "should have known" that the story printed was wrong (R. p. 347, line 18 – R. p. 348, line 13) which was sustained and the question was rephrased eliminating the quoted language, and

(5) an objection to a question which Plaintiff's counsel withdrew (R. p. 374, lines 1-21).

No other objections were made by Appellants to the testimony of the expert. Moreover, the Appellants' brief is void of any argument that the expert impermissibly testified as to Appellant Wren's state of mind. All of the references to the expert's testimony cited by Amicus Curiae were not objected to at trial. The so-called "state of mind" testimony of the expert was simply references by the expert to sworn admissions in Appellant Wren's deposition and emails written by Appellant Wren showing Respondent had no involvement in the campaign donations and that Appellant Wren "already knew he [Respondent] didn't handle the money; that's what Gresham Barrett and Brad Dean told me." (R. p. 349, lines 16-18). Therefore, not only the arguments of Amici concerning the so-called "state of mind" testimony of the expert not preserved for appeal by a timely objection at trial, but also those issues were not briefed by Appellants.

"Amici curiae are limited to arguing those issues that the parties presented to the lower court. *See* McQueen v. South Carolina Coastal Council, 340 S.C. 65, 539 S.E.2d 628 (2000), *vacated on other grounds,* 533 U.S. 943 (2001)." Toal, Vafai, & Muckenfuss, Appellate Practice in South Carolina, 2nd Ed., p. 76. "The [Amicus] brief is limited to argument of the issues on appeal as presented by the parties and must comply with the requirements of Rules 208(b) and 211, SCACR." *Id. at 218.*

Appellants failed to object at trial to the issues briefed by *Amicus Curiae* and therefore said issues are not preserved for appeal. "An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Busillo v. City of N. Charleston, 404 S.C. 604, 606, 745 S.E.2d 142, 144, (S.C. Ct. App. 2013).

Objections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal. State v. Davis, 309 S.C. 56, 419 S.E.2d 820 (Ct. App. 1992). A motion *in limine*, even if granted, does not remove the need for a contemporaneous objection at trial. *See* State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). Motions *in limine* are not final determinations of whether evidence will be admitted at trial. *Id.* If a motion *in limine* to exclude evidence is denied, a party must renew its objection when the evidence is presented during trial. *See* White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989), *rev'd on other grounds,* 301 S.C. 560, 393 S.E.2d 182 (1990).

Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal. *See* Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (holding that a contemporaneous objection is

"required to properly preserve an error for appellate review"); Cogdill v. Watson, 289 S.C. 531, 537, 347 S.E.2d 126, 130 (Ct. App. 1986) ("The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object."). *See* Holroyd v. Requa, 361 S.C. 43, 603 S.E.2d 417 (Ct. App. 2004). *See also,* Parr v. Gaines, 309 S.C. 477; 424 S.E.2d 515 (Ct. App. 1992).

In this case, there was no objection to the evidence when it was presented at trial. Since Appellants did not appeal the issue of admissibility, it cannot be raised for the first time here by Amicus Curiae.

B. COURTS HAVE ALLOWED EXPERTS TO TESTIFY IN DEFAMATION CASES INVOLVING CONSTITUTIONAL ACTUAL MALICE:

Amici challenge whether expert testimony can be used at all in defamation cases. However, courts have allowed expert testimony in defamation cases.

In addition to a general determination as to whether expert testimony will be allowed, the Court must determine whether an expert can properly testify as to actual malice, which is a central issue in this case. Amici, of course, maintains that no expert can have probative opinions as to actual malice as the determination of actual malice is conjecture about another's state of mind, which is speculative and inadmissible.

Given that the standard for actual malice in the media defamation context comes from the standard used in defamation cases, Amici has used various "sound bites" taken from defamation cases to support their contention that expert testimony is not probative of the existence of actual malice. However, Amici's contention is contrary to a plethora of defamation cases indicating that expert testimony can be probative of the issue of actual malice, including Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989), a crucial decision by the U.S. Supreme Court in a defamation case, which Amici all but ignores.

First, it is important to remember that Amici has contended that the only evidence probative of malice are the self-serving assertions of the Appellants that statements made concerning the Respondent only stated that he was present when campaign donations were given to the candidate for governor, Gresham Barrett. Apparently Amici argues that unless Respondent elicits testimony on the witness stand from Appellants admitting that they acted with actual malice or produce a witness to say that he heard Appellants state that they acted with actual malice (which is extremely unlikely to happen), Respondent loses. This position is clearly absurd – Respondent must have a

chance to prove the existence of actual malice by circumstantial evidence. "Permitting the termination of a defamation action on the basis of a defendant's self-serving proclamation about what he thought was true would effectively emasculate the law. . . A defendant cannot halt the plaintiff's case by simply declaring that he or she acted without actual malice." Currier v. W. Newspapers, Inc., 855 P.2d 1351, 1356 (Ariz. 1993). "There must be alternative paths that Plaintiffs can utilize in order to convince a jury that Defendants acted with actual malice." *Id.*

It is clear from the case law in the defamation area that circumstantial evidence which allows a jury to infer Defendants' subjective state of mind is probative of the issue of actual malice. In Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, the U.S. Supreme Court stated:

> If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail. A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. The standard is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a high degree of awareness of probable falsity. As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. In a case such as this involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 688, 109 S. Ct. at 2696 (internal quotations, ellipses and citations omitted). *See also,* Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 900 (9th Cir. 1992) (recklessness may be found when obvious reasons to doubt the truth of a statement are ignored) See Harte-Hanks, 491 U.S. at 667-68, 109 S.Ct. at 2686, 105 L.Ed.2d at 577 (evidence concerning motive is relevant to actual malice). Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir. 1971) ("Vandenburg I"), cert. denied, 404 U.S. 864, 92 S. Ct. 49, 30 L.Ed.2d 108 (1971), appeal after remand, 507 F.2d 1024, 1027 (5th Cir. 1975). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 157, 87 S.Ct. 1975, 1992, 18 L.Ed.2d 1094, 1112; Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980); Hunt v. Liberty Lobby, 720 F.2d 631, 643 (footnote omitted), ([W]hen an article is not in the category of "hot news," that is, information that must be printed immediately or it will lose its newsworthy value, "actual malice may be inferred when the investigation for a story . . . was grossly inadequate in the circumstances.)

The Court in Harte-Hanks therefore held that where such direct proof is missing, the jury may nevertheless infer that the publisher was in fact aware of the falsity if it finds that there were

"obvious reasons to doubt" the accuracy of the statement, and that the defendant did not act reasonably in dispelling those doubts. Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 900 (9th Cir.1992). "It is not, however, the failure to act reasonably in itself that establishes malice; that failure is only a link in the chain of inferences that could (but need not) lead a jury to conclude that the publisher failed to conduct an investigation because he was already pretty much aware of the falsity or recklessly disregarded" whether it was true or false. Id. at 900. As both Masson and Hart-Hanks point out, "[a]lthough failure to investigate will not *alone* support a finding of actual malice, the purposeful avoidance of the truth is in a different category. *Id.*, Harte-Hanks at 491 U.S. at 692 (citation omitted) (Emphasis added). "The central inquiry is whether the evidence discloses that a defendant purposefully avoided the truth." Suzuki Motor Corp. v. Consumers Union of U.S., 330 F.3d 1110, 1136 (9th Cir. 2003), *cert. denied* 124 S.Ct. 468. Thus, it is clear that Respondent is allowed to prove that Appellants purposefully avoided the truth by presenting various types of circumstantial evidence.

One of these allowable methods is showing a departure from accepted professional standards by a failure to investigate. In Harte-Hanks, 491 U.S. at 669, the U.S. Supreme Court specifically considered the defendant newspaper's departure from accepted standards, which included failures to interview a key witness, to listen to audio tapes of relevant conversations, and to complete an investigation, in order to show obvious reasons for doubting the veracity of the story. This evidence supported a conclusion that there was a deliberate effort to avoid the truth, leading to a finding of actual malice.

While constitutional malice may not be simply equated with the performance of a reasonably prudent publisher/reporter, courts have held that when considering the issue of constitutional malice, it is permissible for a jury to consider whether a journalist's investigation of a story was "grossly inadequate" as measured against the standard of the reasonably prudent publisher/reporter under the circumstances. Hunt v. Liberty Lobby, supra, 720 F.2d at 643, quoting Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 [*5] (5th Cir. 1971), cert. denied, 404 U.S. 864, 92 S. Ct. 49, 30 L.Ed.2d 108 (1971), appeal after remand, 507 F.2d 1024, 1027 (5th Cir. 1975).

Taking guidance from the U.S. Supreme Court as set forth in Harte-Hanks, other courts have routinely held that testimony establishing a departure from accepted professional standards (such as standard investigating and publishing techniques, etc.) are probative of the issue of actual malice and can be used to prove (along with other circumstantial evidence) purposeful avoidance

of the truth in order to establish actual malice. *See* Currier v. W. Newspapers, Inc., 855 P.2d 1351, 1356 (Ariz. 1993) (wherein the court stated, "The record also contains evidence of ..... breaches of journalistic standards" referring to a letter to editor from a former news editor of the paper which "charged that [the reporter's] column ..... was unethical by professional journalistic standards.); Hinerman v. Daily Gazette Co., 423 S.E.2d 560, 573 (W.Va. 1992) (Although egregious deviation from accepted standards of journalism standing alone will not carry the day for a public official libel plaintiff, egregious deviation is one important piece of circumstantial evidence which, when combined with other evidence, can lead a jury properly to find that subjective appreciation of falsity or recklessness existed at the time of publication).

Supporting this contention, the testimony of journalism experts has been deemed relevant and probative to this inquiry in several other defamation cases:

(1) Contrary to Amici's reference to Russell v. Am. Broad. Cos., Inc., No. 94 C 5768, 1997 WL 598115, 1997 U.S. Dist. LEXIS 14589 (N.D. Ill. 1997), the Federal District trial court allowed an expert in journalism to testify as to the defendant's failure to follow journalistic standards stating "As an initial matter, the court finds that, contrary to ABC's position, evidence of a significant departure from ABC's standards may have relevance to the question of whether ABC acted with constitutional malice in broadcasting the *PrimeTime Live* segment."

(2) The Ninth Circuit held that expert testimony regarding the violation by the publisher of *Consumer Reports* magazine of accepted journalistic standards "does shed light on the propriety of [the publisher's] response to contrary rollover evidence and, thus, is entitled to be given appropriate weight." Suzuki Motor Corp. v. Consumers Union of U.S., 330 F.3d at 1137 n. 14. As the *Suzuki* court stated, the "critical inquiry . . . is whether [the publisher] failed to act reasonably in investigating and responding to contrary studies in a manner that suggested it was attempting purposefully to avoid discovering the truth of the matter." *Id.* at 1138.

(3) A journalism expert for plaintiff testified, over defendant's objection, that the *Fortune* reporters' investigation and writing 'fell far below the standard of journalism' and that the reporters 'knew [the article] was false.'" Bressler v. Fortune Magazine, 971 F.2d 1226, 1228 (6th Cir. 1992), *cert. denied* 507 U.S. 973. In that case, although the court did not find that evidence supported a "purposeful avoidance of the truth" as was found in Harte-Hanks, the court nonetheless considered this expert testimony in its analysis.

(4) The court permitted testimony of eight different expert witnesses for the plaintiff on issue of defendant's malice in publishing allegedly defamatory statements in the case of Lieberman v. American Dietetic Association, 1996 WL 490779 (N.D. Ill.).

(5) An appellate court held that the trial judge did not abuse her discretion in permitting expert testimony on journalistic standards and practices in the case of Prozeralik v. Capital Cities Communications, Inc., 222 A.D.2d 1020, 635 N.Y.S.2d 913, (Supreme Court, App. Div., 4th Dept., NY 1995).

(6) Even the news media has been allowed to use an expert to show the opposite, i.e., that there was no evidence to indicate the reporter acted with knowledge of the article's falsity, or with serious doubts about the truth of the article, or with a high degree of awareness of the article's probable falsity. Meisler v. Gannett Co., 12 F.3d 1026 (11th Cir. 1994). In this case the news media relied on the affidavits of the Plaintiff's experts. If the news media is entitled to use expert testimony to show that there was "no evidence to indicate that [a media defendant] acted with knowledge of the article's falsity, or with serious doubts about the truth of the article, or with a high degree of awareness of the article's probable falsity" certainly a defamed plaintiff would be entitled to use an expert witness to show contrary evidence.

If the use of journalism experts in defamation cases has been deemed appropriate and helpful to a jury, it cannot be said that it was error to admit such testimony here. As recognized by the Trial Judge, the journalism process is not a process that is typically familiar to a layperson.

This process is almost always conducted behind the closed doors of a newsroom. Unless he or she is a journalist, no juror in this case will likely have heard of, much less have experienced, the intricacies of the news gathering business or the standards and ethics applicable thereto. The process is complex, sophisticated, and unfamiliar to a layman. It is unlikely that a jury will be able to understand the process itself (and the accepted standards with which it is conducted and the ethics involved) without the assistance of an expert who is versed in the nuances of journalism standards and ethics. Moreover, Black's Law Dictionary provides that the term "ethics" means *inter alia* "conforming to professional standards of conduct."

Dr. Lee is exactly the type of expert who is qualified regarding whether the Appellants' conduct conformed to professional standards of conduct. Thus his testimony as to the Appellants' respective departures from accepted professional standards and ethics was not only helpful, but was essential to this case.

It is important to remember that it is extremely unlikely that Appellants will admit to acting with actual malice. It is just as unlikely that Respondent will find a witness who will testify that he or she overheard Appellants stating that they acted with actual malice. Thus, Respondent can only prove actual malice with circumstantial evidence. That circumstantial evidence was present in this case, but was hidden within the Appellant Wren's own emails *which revealed Wren's subjective state of mind.* (Emphasis added).

Thus, Respondent must be able to present expert testimony to assist the jury in determining what would constitute an extreme departure from journalistic standards. This would then aid the jury in determining whether there was a purposeful avoidance of the truth, whether Appellants had a substantial doubt as to the truth of what they printed, whether the Appellants knew that what they printed was false, whether the Appellants consulted "obviously biased" sources, whether the Appellants fabricated the story, whether the denial of knowledge from Appellants' so-called sources warranted further investigation, and whether Appellants knew Respondent had no involvement in the campaign donations in light of the fact that even the known biased sources told Appellants that Respondent had no involvement.

C. THE CASES CITED BY AMICI DO NOT PROVIDE GUIDANCE

Amici cite several cases for their contention that experts cannot testify as to the issue of actual malice. However, Amici fail to examine in any depth the U.S. Supreme Court holding in Harte-Hanks (which holds that circumstantial evidence--including departure from acceptable professional standards--is probative of the issue of actual malice), as Plaintiffs have done above. Any other cases that are cited by Defendants are necessarily controlled by this holding, yet Amici only briefly touches on the generalities of Harte-Hanks.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING RESPONDENT'S EXPERT TO TESTIFY:

In the *voire dire* examination of the expert, Dr. William E. Lee, the Court stated:

> "I believe that this witness possesses some specialized knowledge based upon his education and experience that would assist the trier of fact, the Jury, in understanding that evidence in this case. There's a lot of evidence in this case. I believe also that his education and

knowledge would certainly exceed that of a juror and that in doing so, he has met the standard for an expert in this state." (R. p. 293, lines 15-22)

"I believe this witness is qualified to testify. I think his testimony will assist the trier of fact and I'm going to allow him to be qualified as an expert and to testify."(R. p. 296, lines 7-9)."

Appellants' and Amici's major problem with their argument is that although an oral *in limine* motion was made (out of the presence of the jury) at trial just prior to the expert's testimony, there was a complete failure of the Appellants to object during the expert's testimony before the jury and, therefore, this issue was not properly preserved for appeal. "If a motion *in limine* to exclude evidence is denied, a party must renew its objection when the evidence is presented during trial." *See* White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App. 1989), *rev'd on other grounds,* 301 S.C. 560, 393 S.E.2d 182 (1990).

Moreover, Amici's argument that Rule 702 of the South Carolina Rules of Evidence prevents the admission of Dr. Lee's testimony is misplaced. Appellants never renewed their objection when the evidence was presented at trial and it was not preserved for appeal.[7]

More importantly, the grounds of Appellants' appeal do not include an abuse of the judge's discretion in qualifying the expert and allowing him to testify. "The qualification of a witness as an expert and the admissibility of his or her testimony are matters left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of that discretion *and* prejudice to the opposing party." Nelson v. Taylor, 347 S.C. 210, 553 S.E.2d 488 (S.C.App. 2001). (Emphasis added).

Since Appellants failed to object to the expert's testimony during the trial before the jury and failed to list, in their grounds for appeal, an "abuse of discretion" in allowing the expert to testify, it cannot be raised by the Appellants or Amici on appeal.

However, assuming, for the sake of this argument that the Appellants made proper objections at trial and included an "abuse of discretion" as grounds for appeal, the testimony of the expert was properly admitted because it went to more than just the admission of journalistic standards and their breach by the Appellants – his testimony referred to the proof that Appellants had substantial doubts about the accuracy of what was being published.

[7] Appellants failed to argue Rule 403, South Carolina Rules of Evidence in the trial below.

Dr. Lee pointed out that the evidence showed Appellant Wren, from his own emails, knew, after contacting seven (7) sources, that Respondent was not involved in the campaign donations. Three of the sources (Dean, Barrett, and Boling) advised him that Respondent neither set up the meeting nor gave the campaign donations to Barrett. Three of the sources (Walker, Pearson and Stokes) advised him they knew nothing. And one of the sources (Edge) made no suggestion about involvement of Mark Kelley in the campaign donation. The expert referred to the Appellant Wren's own emails as evidence of his "state of mind" when he published the defamatory articles. He also referred to the fact that Appellant Wren's own emails revealed that every source he contacted told him that Respondent was not involved in facilitating the meeting or giving/handing campaign donations to Barrett. The emails also showed that Appellant Wren was the only person making the accusations against Respondent and that his efforts were geared toward getting someone to say that Respondent facilitated the meeting and handed Barrett the donations. He also pointed out that Appellant Wren admitted that Walker, Pearson and Stokes were obviously biased sources. Appellant Wren, as shown above, testified that he was skeptical of both Pearson and Stokes and stated in one of his emails that he "knew campaign managers have no little or no ethics, but to lie about something that will eventually be shown to be true isn't going to help him." He also testified that he didn't recall Representative [Tracy] Edge making "any suggestion about involvement by Mark Kelley in that campaign contribution. (*See* footnote 3 above.) Finally, he admitted, under oath, that he asked both Brad Dean and Gresham Barrett who gave the campaign donations and both told him that Brad Dean gave the donations. His emails also revealed that B.J. Boling informed him that it was Brad Dean, not Respondent, who set up the meeting. (*See* Plaintiff's Exhibit 11, R. p. 661). The expert testified as to the importance of accuracy in reporting on crimes and that the evidence showed that Appellant Wren was conscious of the fact that there was no evidence against Respondent when he published his article.

As shown in the *voire dire* cross-examination of the expert by Appellants' counsel, he was to testify as to departures from journalistic standards by the Appellants as it related to whether the Appellants knew what it was reporting was false or whether Appellants published with a reckless disregard, i.e., whether the reporter had substantial doubts about the accuracy of what was being published.

> 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. You have not been in a position to evaluate David Wren's state of mind with respect to any of the publications, have you?

A. Actually, there are emails and portions in his deposition in which he talks about knowledge of certain things, which are not true. (R. p. 285, lines 3-17).

* * * * *

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. . . . . Where a source is questionable, where the information has been acquired from – in a questionable way, where there is inherent improbability to the charge, a reporter's claim I didn't think it was false cuts no mustard.

Q. Oh, I agreed entirely with that.

A. So, the answer is should've known is an important part of the reckless disregard portion of actual malice.

Q. And it relates to whether or not the reporter had substantial doubt about the accuracy of what was being published?

A. And the sources and information gathering. (R. p. 286, lines 2-18).

As can be seen, Respondent did not rely solely upon the testimony of the expert and his opinion that the Appellants breached their own journalistic standards. Respondent presented other evidence, both direct and circumstantial, concerning the Appellants' state of mind by showing that they knew their statements concerning Respondent facilitating the meeting and giving donations to Barrett were false because they admitted they had been advised it was false. The direct and circumstantial evidence revealed that Appellants published the defamatory statement with substantial doubts about its accuracy and had a high degree of awareness that what they printed was false. As stated above, a failure to investigate can be evidence of actual malice; publishing defamatory statements based upon biased and unreliable sources can be evidence of actual malice; publishing defamatory statements where there is an inherent improbability of the charge can be

evidence of actual malice; and a purposeful or deceitful avoidance of the truth can be evidence of actual malice. The evidence revealed that Appellants used biased sources (the campaign managers which Appellant Wren was admittedly "skeptical" of); that none of these biased sources knew anything about Respondent giving donations to Barrett (although Appellate Wren suggested to them that Respondent was involved in the donations); that both Dean and Barrett directly told Appellant Wren that Dean, not Respondent, gave the donations; that Appellant Wren "doesn't recall" Representative Edge never suggesting Respondent had any involvement with the donations; and that based all his sources, Appellant Wren was faced with evidence that there was an inherent improbability to his charge that Respondent was involved with the donations.

The expert simply assisted the jury in putting all this evidence together to show a more clear picture of the Appellants' state of mind leading to the jury's finding of actual malice.

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Respondent respectfully submits that the judgment of the circuit court should be affirmed.

Respectfully submitted,

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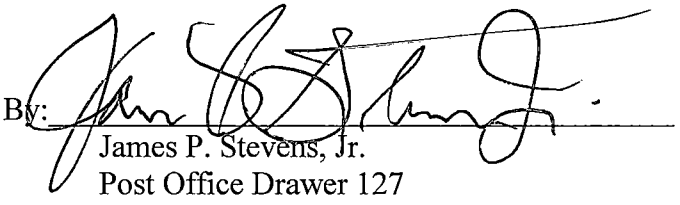
By: 

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SC Court of Appeals

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

Court of Appeals No. 2014-001249
Case No. 2012-CP-26-03804

Mark Kelley, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Respondent's Reply Brief to *Amici Curiae Briefs*** complies with Rules 208(b) and 211, *SCACR*.

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PROOF OF SERVICE

I certify that I have served **Respondent's Reply Brief to *Amici Curiae Briefs*** on all parties in this appeal by depositing a copy of it in the United States Mail, postage prepaid, on October 21, 2015, addressed to the following:

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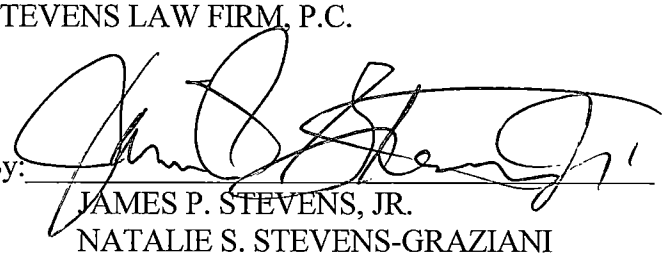
By: 

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