

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. 2014-01249

Mark Kelley Respondent,

v.

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

MEMORANDUM IN SUPPORT OF APPELLANTS'
PETITION FOR REHEARING

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Pursuant to Rule 240, SCACR, Appellants submit this Memorandum in Support of Appellants' Petition for Rehearing of the appeal in the above-entitled cause.

ARGUMENT

1. **THE COURT OF APPEALS ERRED IN HOLDING THAT THERE WAS SUFFICIENT EVIDENCE THAT APPELLANTS (“DEFENDANTS” OR INDIVIDUALLY “SUN NEWS” OR “DAVID WREN”) PUBLISHED A FALSE AND DEFAMATORY STATEMENT CONCERNING RESPONDENT (“PLAINTIFF” OR “MARK KELLEY”) AND FAILING TO CONSIDER “ALL PARTS OF THE PUBLICATIONS” AT ISSUE IN THEIR FULL CONTEXT. (APPELLANTS’ PETITION FOR REHEARING, POINT 1)**

The First Amendment requires that a public figure libel plaintiff such as Mark Kelley prove the publication of a **false** statement by defendant. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768-69, 106 S. Ct. 1558, 1559, 89 L. Ed. 2d 783 (1986); *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 531, 506 S.E.2d 497, 513 (1998) (*Holtzscheiter II*) (Toal, J., concurring). Further, it is for the court to determine as a matter of law if the communication is reasonably capable of conveying a defamatory meaning. *Holtzscheiter II*, 332 S.C. at 520, 506 S.E.2d at 507 (citing 50 Am. Jur. 2d *Libel & Slander* § 119 (1995)); *Tavoulaareas v. Piro*, 817 F.2d 762, 779 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 870, 108 S. Ct. 200, 98 L. Ed. 2d 151 (1987) (after considering both the allegedly defamatory “words themselves and the entire context in which the statement” occurred, the Second Circuit affirmed the district court's grant of judgment notwithstanding the verdict, reversing the jury's finding of falsity).

Thus, to protect the “uninhibited, robust and wide-open” debate on public issues guaranteed by the First Amendment,¹ a court's threshold task in its gatekeeper role is to

¹*New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).

determine if a statement alleged to be libelous is capable of a false and defamatory meaning. In a defamation case involving a public figure plaintiff, appellate courts “must ‘make an independent examination of the whole record,’ so as to assure [themselves] that the judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times Co.*, 376 U.S. at 285, 84 S. Ct. at 729 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697 (1963)).²

The Court of Appeals, in the portion of its opinion addressing the issue of falsity, erroneously focused on a single statement from a single news article – one sentence in the May 23, 2010 article which stated:

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

By failing to consider that statement in the full context of the May 23, 2010 news article and the related articles at issue in this case,³ the Court of Appeals erred in affirming the trial court’s denial of Appellants’ Motion for Directed Verdict and Motion for Judgment Notwithstanding the Verdict.

It is well established that “the intent and meaning of an alleged defamatory statement must be gathered not only from the words singled out as libelous, but from the context; all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context

² In an analogous context, the Supreme Court of South Carolina noted the court’s “significant gatekeeping role” in addressing a defendant’s summary judgment motion in intentional infliction of emotional distress cases. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 72 (2007)

³ The May 21, May 23 and May 25, 2010 news articles were considered together by the jury in making its determination of liability for defamation and must be considered together when analyzing the context of the statements at issue. (R. p. 588).

would show them to have.” *Jones v. Garner*, 250 S.C. 479, 485, 158 S.E.2d 909, 912 (1968) (citing 33 Am. Jur. *Libel and Slander* § 87). That bedrock principle remains unchanged:

[T]he court must look at the entire communication and not examine sentences or portions or with an eye constrained to the objectionable feature alone.

50 Am. Jur. 2d *Libel and Slander* § 124 (1995).

The Supreme Court of South Carolina has strictly applied this principle to reject non-meritorious libel claims. In *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976), the Supreme Court affirmed a directed verdict for a newspaper defendant in a libel case despite the publication of an untrue headline stating that plaintiff’s wife – who had been shot by plaintiff – had died from the shooting. Plaintiff contended that the inaccurate headline falsely accused him of killing his wife. *Id.* at 77, 221 S.E.2d at 771. The Supreme Court, however, held as a matter of law that a later sentence in the article – noting the plaintiff’s wife was “in serious condition this morning in the intensive care unit” – rendered the untrue headline “innocuous.” *Id.* at 81, 221 S.E.2d at 773.

Appellants respectfully submit that the Court of Appeals, in conducting its *de novo* review on the issue of falsity, improperly viewed the publications “with an eye constrained to” the single sentence cited above from the May 23, 2010 article, discounting or ignoring altogether the full context of the newspaper's reporting which made it demonstrably clear that it was not accusing Mark Kelley of delivering the campaign contributions and thereby committing a crime under South Carolina law.

As the Court of Appeals noted in its opinion, Mark Kelley introduced into evidence three news articles authored by defendant news reporter David Wren and a

single editorial. A review of those publications “in context” and considering “all parts of” those publications, demonstrates that the single sentence the Court focused on in addressing the issue of falsity was “rendered innocuous” by other specific statements in those articles. In other words, the additional language in the news reports neutralized the sting of any imprecision or negative connotation in that sentence. For example:

- The May 21, 2010 Article (R. p. 638) (emphasis added):
 - This article was published under the headline “**Dean handed over envelope of \$84,000.**”
 - That headline by itself makes clear that it was **Dean** – not Mark Kelley – who delivered the envelope of campaign contributions to gubernatorial candidate Gresham Barrett.
 - The first sentence of this article states: “**Brad Dean** arranged a meeting last year with gubernatorial candidate Gresham Barrett **in which he gave Barrett an envelope of cashier’s checks** from local corporations linked to a former chamber board chairman, Dean and Barrett confirmed Thursday.”
 - The article states: “**There is no indication that Dean**, president of the Myrtle Beach Area Chamber of Commerce, **did anything illegal by delivering about \$84,000 in campaign contributions to Barrett.**” Again, this portion of the article makes clear that it was Dean, not someone else, and not Mark Kelley, who delivered the campaign contributions.
 - The fourth paragraph of the article states: “**Dean said he delivered some of those checks to Barrett** because he knew the politician would be in town for an unrelated fundraiser.” Again, the article makes clear it was Dean, not someone else, and not Mark Kelley, who delivered the checks.
 - The article later notes: “Mark Kelley, a lobbyist for the Chamber of Commerce, also attended that meeting, according to Barrett.” There is clearly no suggestion in this statement that it was Mark Kelley who delivered the checks.
 - The article further notes: “There are strict rules that forbid lobbyists from facilitating campaign donations for statewide candidates; however, a spokesman for the S.C. Ethics Commission says it does not appear any laws were violated in this case.” Thus

the May 21, 2010 article makes clear that even the South Carolina Ethics Commission did not understand or contend that Kelley had himself “delivered” any campaign contributions, since such a delivery would have been a clear violation of state law.

- The May 23, 2010 Article (R. p. 639):
 - On May 23, 2010, the newspaper published an article which focused on the sources of campaign contributions made to various candidates and political action committees. The sole mention of Mark Kelley is in the sentence on which this Court focused in its opinion: “Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June.”
 - Kelley is mentioned in only this one paragraph of the article’s 37 paragraphs.
 - In a later paragraph the article states: “Last week, **Dean said he delivered contributions to Barrett** and state Sen. Ray Cleary, R-Murrells Inlet.” (emphasis added.)
 - There is no suggestion in the entire article that the newspaper intended that readers understand that Mark Kelley in fact delivered the contributions to Barrett.
 - If the newspaper had, in fact, intended to state that Mark Kelley had delivered the checks – in violation of state law – that statement would have been headline news, not buried in the article’s fourteenth paragraph.
- The May 25, 2010 Article (R. p. 641):
 - This 33-paragraph article focused on (1) a demand by a group of Myrtle Beach business owners that certain political candidates return campaign contributions they received from companies with ties to the Myrtle Beach Area Chamber of Commerce and (2) questions raised by the group about the source of the campaign funds.
 - Mark Kelley is mentioned in only one paragraph of this article. Robert Kelley, the president of the business owners group questioning the sources of the donations, said Brad Dean had “changed his story about the chamber’s involvement in the campaign donations.” Then Robert Kelley said, “In the past, the chamber has denied any involvement in the scandal, but now Brad Dean admits he set up the lunch with [chamber] lobbyist Mark Kelley and he handed Mr. Barrett the envelope full of checks.”

- Only a strained and not contextual reading of this sentence would lead to a conclusion that the speaker Robert Kelley was stating that Mark Kelley “handed Mr. Barrett the envelope.” Mark Kelley is mentioned nowhere else in the article, and there is nothing else in this article to suggest that a reader was intended to take from that single paragraph that Mark Kelley had himself handed Barrett the envelope with campaign contributions. The Ethics Commission attorney Hazlewood is, in fact, quoted in this article as saying the contributions appear to have been legal. (R. p. 641) Delivery by Plaintiff would, of course, have made the contributions illegal.
- The May 30, 2010 Editorial (R. pp. 642-43):
 - This editorial explicitly stated: “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.**” (Emphasis added.)
 - The May 21 news articles had also made it clear that Kelley, though present, had not delivered the checks: “...a spokeswoman for the S.C. Ethics Commission said it does not appear any laws were violated in this case. ‘Just being in the same room is not a violation, it happens all the time,’ said Cathy Hazlewood, the commission’s general counsel.” (R. p. 638).
 - The jury found that the May 30, 2010 editorial did not contain a false and defamatory statement about Mark Kelley. (R. p. 13).

The Second Circuit’s decision in *Tavoulareas* offers this Court specific guidance on the constitutionally mandated review of defamatory meaning and evidence of falsity in a public figure libel case. On November 30, 1979, *The Washington Post* published a headline and statement that William Tavoulareas, then president of Mobil Corporation, had “set up his son ... as a partner in a London-based shipping management firm that has since done millions of dollars in business operating Mobil-owned ships under exclusive, no-bid contracts.” 817 F.2d at 769. William Tavoulareas brought a libel action against the newspaper, and a jury found the statement to be false and defamatory and awarded him \$250,000 in compensatory damages and \$1.8 million in punitive damages. *Id.* at 771.

The district court entered judgment notwithstanding the verdict. *Id.* The Second Circuit affirmed the district court's order. *Id.* at 798.

The Second Circuit noted that “in reviewing a defamation verdict, courts must exercise particularly careful review,” citing the Supreme Court’s mandate in *New York Times Co.* that courts reviewing such verdicts must conduct an “independent examination of the whole record” in order to assure “that the judgment does not constitute a forbidden intrusion on the field of free expression.” *Id.* at 776. The Second Circuit acknowledged that “in determining what defamatory meaning the article is capable of bearing, we perform the quintessential function of the court in defamation actions” *Id.* at 777.

The Second Circuit then analyzed the article at length, considering “both the words themselves and the entire context in which the statement occurs.” *Id.* at 779. The majority opinion firmly rejected the plaintiff’s (and the dissent’s) characterization of the article’s meaning – that the “set up” language meant that the entire relationship between Mobil and the other business entities was a “nepotistic act.” *Id.* at 780. As the court noted: “Nothing in law or common sense supports saddling a libel defendant with civil liability for a defamatory implication nowhere to be found in the published article itself.” *Id.* After rejecting the defamatory implications urged by plaintiff, the Second Circuit also held that no reasonable jury could find that the “set up” allegation was false. *Id.* at 786.

For these reasons, Appellants respectfully submit that the Court of Appeals, in performing “the quintessential function of the court in defamation actions” brought by public officials, erred by failing to consider “all parts of” the publications at issue, in their full context, when addressing whether Defendants published a statement concerning Plaintiff which was false and defamatory. Appellants respectfully urge the Court of

Appeals to reconsider its opinion, review the key statement the Court focused on in its opinion in the full context of the newspaper's publications, and reverse the trial court's denial of Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

2. **THE COURT OF APPEALS ERRED IN FINDING THERE WAS SUFFICIENT EVIDENCE OF CONSTITUTIONAL ACTUAL MALICE ON THE PART OF DEFENDANTS BY (1) IMPROPERLY SUBSTITUTING AN OBJECTIVE STANDARD – RECKLESS DISREGARD OF “THE LIKELIHOOD THE ARTICLES COULD BE INTERPRETED TO ACCUSE KELLEY OF DELIVERING THE CONTRIBUTIONS” – FOR THE REQUIRED SUBJECTIVE STANDARD OF “A HIGH DEGREE OF AWARENESS OF PROBABLE FALSITY,” AND (2) IMPROPERLY ALLOWING AN “IMPRECISE” STATEMENT, READ OUTSIDE OF ITS FULL CONTEXT, TO SUPPORT A FINDING OF CLEAR AND CONVINCING EVIDENCE OF ACTUAL MALICE. (APPELLANTS’ PETITION FOR REHEARING, POINT 2)**

- A. The Court of Appeals Erred by Substituting an Objective Standard for the Required Subjective Standard in Addressing the Issue of Actual Malice.

Both the United States Supreme Court in *New York Times Co.* and the Supreme Court of South Carolina in *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000) have clearly described what a plaintiff must demonstrate to satisfy the actual malice requirement:

Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1986). The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth. *New York Times Co.*, 376 U.S. at 280-81, 84 S. Ct. at 726; *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993). 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.’ *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968) (emphasis supplied [by court]). There must be evidence the defendant had a ‘**high degree of awareness of . . . probable falsity.**’ *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S. Ct. 209, 216, 13 L. Ed. 2d 125 (1964) (emphasis supplied [by court]).

Elder, 341 S.C. at 114, 533 S.E.2d at 902. Whether the evidence is sufficient to support a finding of actual malice is a question of law. *Id.* at 113, 533 S.E.2d at 901-02.

The Court of Appeals, in applying the constitutional actual malice standard, erred in substituting an objective standard for the constitutionally mandated subjective standard. In analyzing the record regarding the issue of “reckless disregard,” the Court of Appeals did not determine whether reporter David Wren “had a high degree of awareness of probable falsity” or “in fact entertained serious doubt as to the truth” of the statements at issue. Instead, the Court of Appeals asked whether Wren “recklessly disregarded the likelihood the articles could be interpreted to accuse Kelley of delivering the contributions.” In other words, the Court of Appeals considered whether Wren – acting as a reasonable person – **should** have understood that a reader might interpret the words “along with” to mean “and” (instead of “accompanied by”). That test – clearly a negligence standard – is an objective test and dilutes beyond recognition the test the First Amendment requires to be used in determining whether a defendant has published a statement with knowing falsity or reckless disregard of the truth. *See Garrison*, 379 U.S. at 79, 85 S. Ct. at 218 (reversing conviction for criminal libel; holding that the fact that an exercise of ordinary care would have revealed the falsity of the published statement is insufficient to establish reckless disregard for the truth).

It is well established that reckless disregard for the truth “is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.” *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325; *Elder*, 341 S.C. at 114, 533 S.E.2d at 902. By allowing the determination of actual malice to turn on whether David Wren should have known the statement at issue “could be interpreted” to accuse Mark Kelley of delivering the contributions, the Court of Appeals substituted an impermissible objective standard for the required subjective standard.

In support of its affirmance on the issue of actual malice, the Court of Appeals relied heavily on Wren’s emails with various sources as evidence of whether he “recklessly disregarded the likelihood the articles could be interpreted to accuse Kelley of delivering the contributions.” This reliance demonstrates exactly why the Court of Appeals erred in using this objective test. A review of the quotes from the emails referenced in the opinion demonstrates no evidence that Wren had “serious doubts” as to the truth of, or “a high degree of awareness of probable falsity” of, any statements in the publications relating to Plaintiff’s attendance at a luncheon where \$84,000 in campaign contributions was passed to a gubernatorial candidate. Rather than showing serious doubts on Wren’s part, the emails reveal a reporter asking probing questions, exploring possibilities, and testing theories, thereby trying to get those who may have information to provide facts and background. That is, he was doing his job as a professional reporter.

For these reasons, the Court of Appeals erred by misapplying the constitutional “reckless disregard” standard to find that Defendants published a statement they knew or should have known would have been interpreted by readers to mean something dramatically different from what the reporter intended to say. This finding does not

satisfy the subjective high degree of awareness of probable falsity standard required by the First Amendment.

For these reasons, Appellants respectfully urge this Court to reconsider its opinion, apply the required subjective constitutional actual malice standard, and reverse the trial court's denial of Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

B. The Court of Appeals Erred by Allowing an Imprecise Statement, Read Outside of Its Full Context, to Support a Finding of Clear and Convincing Evidence of Actual Malice.

Appellants respectfully submit that there can be no finding on this record that reporter David Wren both (1) understood the statement at issue to have a false and defamatory meaning, and (2) published it with a "high degree of awareness of [its] probable falsity." *See Garrison*, 379 U.S. at 74, 85 S. Ct. at 216. Wren arguably used imprecise language which, read in the full context of the May 23 article, and in the context of all the articles at issue, nonetheless did not appear to him and others to convey a false and defamatory meaning. (R. p. 95 lines 5 through 10; p. 118 lines 17 to 24; p. 146 lines 20 to 24; p. 171 lines 23 to 25; p. 197 lines 8 to 12). While one may argue that a person taking ordinary care would have used different phrasing, that objective analysis is not the First Amendment test required when the speech at issue involves a public figure, especially one engaged in core political activity.

A similar misapplication of the actual malice standard was expressly rejected by the U.S. Supreme Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). In affirming the First Circuit Court of Appeals' reversal of the district court's finding of constitutional actual malice, the

Supreme Court emphasized the critically important responsibility courts bear in public figure libel cases:

The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing evidence of ‘actual malice.’

Id. at 511, 104 S. Ct. at 1965.

In *Bose*, defendant had published a review of plaintiff’s audio speakers which stated that instruments heard through the Bose sound system tended to wander “about the room.” *Id.* at 493-94, 104 S. Ct. at 1956. Plaintiff sued, claiming that statement was false and harmful to its business reputation.

Defendant’s engineer, who wrote the report on which the article at issue was based, testified at trial that he had believed the sound in fact moved back and forth along the wall between the speakers, but that he thought that was the same as moving “about the room.” In short, at the time the article was published, the engineer believed the “about the room” statement meant the same as “along the wall.” The district court, acting as the finder of fact, found that an “average reader” would interpret the phrase “about the room” according to its “plain ordinary meaning” and rejected the engineer’s testimony that the magazine’s phrasing meant the sound moved laterally between the speakers. *Id.* at 496, 104 S. Ct. at 1957.

The trial court ruled that the engineer's testimony as to his intended meaning was not credible, based upon his testimony and his demeanor at trial.⁴ *Id.* at 497, 104 S. Ct. at 1957-58. The district court then concluded that the "about the room" statement was false and that plaintiff had proved by clear and convincing evidence that it was published with knowing falsity or with a high degree of awareness of its probable falsity.

The Court of Appeals, applying a *de novo* review and "independently examining the record to ensure that the district court ha[d] applied properly the governing constitutional law and that the plaintiff has indeed satisfied its burden of proof," reversed the trial court's finding of constitutional actual malice. *Id.* at 492, 104 S. Ct. at 1955. The Court of Appeals stated:

[We] are unable to find clear and convincing evidence that CU published the statement that individual instruments tended to wander about the room with knowledge that it was false or with reckless disregard that it was false or not. The evidence presented merely shows that the words in the article may not have described precisely what the two panelists heard during the listening test. **CU was guilty of using imprecise language in the article – perhaps resulting from an attempt to produce a readable article for its mass audience. Certainly this does not support an inference of actual malice.** [citation omitted.]

Id. (emphasis added).

The Supreme Court, in affirming the Court of Appeals' reversal of the district court's finding of constitutional actual malice, acknowledged that the trial court had taken the engineer at his word and believed that the engineer knew that the meaning of the language that he employed did not accurately reflect what he had actually heard and that, therefore, he must have known the statement was inaccurate at the time he wrote it.

⁴"Seligson [the engineer] is an intelligent person whose knowledge of the English language cannot be questioned. It is simply impossible for the Court to believe that he interprets a commonplace word such as 'about' to mean anything other than its plain ordinary meaning." *Id.* at 497, 104 S. Ct. at 1957-58.

Id. at 512, 104 S. Ct. at 1965-66. The Supreme Court, upon its *de novo* review of the record, then found:

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.

The Supreme Court concluded:

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, 171-72 (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.*, 376 U.S. at 271-272 (citation omitted).

Id. The Supreme Court then affirmed the Court of Appeals' reversal of the trial court's determination – as the finder of fact – that defendant had published the statement with actual malice.

As in *Bose*, this record does not support a finding by clear and convincing evidence that reporter David Wren both understood the statement at issue to have a false and defamatory meaning and published it with a high degree of awareness of its probable falsity. At most, it was the sort of "imprecise language" and "inaccuracy that is commonplace in the forum of robust debate" that the First Circuit and the Supreme Court found insufficient to support a finding of constitutional actual malice.

The Supreme Court's analysis and conclusion offer firm guidance to the Court of Appeals on this critical issue of constitutional actual malice. The articles at issue arose from a local controversy involving fundamental political questions. Local business owners challenged the source of certain campaign contributions to various political candidates and questioned possible contributions from the Myrtle Beach Area Chamber of Commerce to a gubernatorial candidate. Reporter David Wren and his newspaper reported on this controversy. The three news articles and related headlines at issue in this case all focus on that larger controversy, not on the issue whether Mark Kelley's hands touched the envelope containing \$84,000 in checks chamber president Brad Dean delivered to the gubernatorial candidate.

These newspaper articles addressed a controversy of critical political importance and public concern – whether campaign money flowed from business interests to elected officials whose political actions may have in turn benefitted those business interests. Plaintiff Mark Kelley, a former state legislator and then legislative lobbyist, was, without dispute, present at the meeting where the envelope changed hands, and the newspaper correctly reported these facts. To permit the single “imprecise” statement this Court has focused on – when read in the full context of the numerous statements more precisely describing this transfer of political funds by Dean and not by Kelley – to support a finding of clear and convincing evidence of constitutional actual malice and a \$650,000 libel verdict against these Defendants would encourage just the type of self-censorship *New York Times Co.* and its progeny warned against.

This verdict, on these facts, sends a clear message to those charged with reporting about issues of public concern vital to a well-functioning democracy: use one imprecise

phrase in an otherwise carefully written news report about an ongoing political dispute, and you may be faced with an onerous libel verdict in favor of a public figure referenced in the publication. This will send a clarion signal to news organizations to “steer far wider of the unlawful zone” in reporting on important issues of public and political concern. *New York Times Co.*, 376 U.S. at 279, 84 S. Ct. at 725 [citations omitted].

As the Supreme Court wisely cautioned: “Whatever is added to the field of libel is taken from the field of free debate.” *Id.* at 272, 84 S. Ct. at 722 (citations omitted). Will we be a sound democratic society if news organizations decide they must avoid reporting about this type of controversy involving political candidates, lobbyists and business interests for fear of a large libel verdict arising from an inadvertent imprecise phrase? In *New York Times Co.* and in its progeny, including *Bose*, the Supreme Court answered this question with a resounding “No.”

For all of these reasons, Appellants respectfully submit that the Court of Appeals, in conducting its *de novo* review of the trial court record, erred in its application of the “actual malice” standard to Defendants’ conduct. Appellants urge the Court of Appeals to reconsider its opinion and reverse the trial court’s denial of Defendants’ Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

3. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TESTIMONY OF PLAINTIFF’S EXPERT WITNESS DR. WILLIAM E. LEE TO SUPPORT PLAINTIFF’S CLAIM OF ACTUAL MALICE WAS PROPERLY ADMITTED (1) REGARDING DEFENDANTS’ FAILURE TO CONFORM WITH JOURNALISTIC STANDARDS, AND (2) REGARDING DEFENDANTS’ ACTUAL SUBJECTIVE STATE OF MIND ABOUT THE FALSITY OF THE STATEMENTS PUBLISHED. (APPELLANTS’ PETITION FOR REHEARING, POINT 3)

A. Pursuant to Rule 403, SCRE, Plaintiff’s expert witness testimony regarding objective journalism standards of care

should have been excluded for the purpose of establishing constitutional actual malice.

It is well established that constitutional “actual 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). Whether a defendant acted with reckless disregard for the truth “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, 88 S. Ct. at 1325. Thus, “[i]t is insufficient to show that 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 the standard. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 665, 109 S. Ct. 2678, 2685, 105 L. Ed. 2d 562 (1989). The United States Supreme Court and the Supreme Court of South Carolina have thus set a high bar for public figure libel claims: Only a subjective knowledge of falsity or high degree of awareness of probable falsity will constitute the actual malice a public figure plaintiff must prove by clear and convincing evidence.

At trial, Kelley moved 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; R. p. 291, line 7). Defendants objected on various grounds, 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 a negligence standard into the case. (R. p. 295, lines 10-19). The

trial court qualified Dr. Lee as an expert. (R. p. 296, lines 2-9). Dr. Lee proceeded at trial to offer his opinion regarding use of anonymous sources, the need to examine a source's motive for providing information, and the need for precise writing. (R. p. 334, line 15 – p. 336, line 2; R. p. 337, line 19 – p. 338, line 1; R. p. 351, line 20). Dr. Lee testified that, in his opinion, “*The Sun News* did not act the way professional news organizations act in these circumstances,” that he did not believe that defendant Wren was careful in his reporting, and that Wren was “blowing smoke.” (R. p. 321, lines 21-23; R. p. 338, lines 13-14; and R. p. 354, line 3).

Dr. Lee's testimony regarding objective standards of journalism should have been excluded pursuant to Rule 403, SCRE in this public figure libel case because its prejudicial effect substantially outweighed its probative value. Allowing an expert witness to testify about a defendant's departure from journalism standards opens the door for the jury to erroneously equate this objectively measured departure with the subjectively determined reckless disregard for the truth that the constitutional actual malice standard 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. As the Supreme Court of South Carolina 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.” *State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013).

The admission of Dr. Lee's expert testimony on professional standards of journalism provided the jury his opinions on issues that did not constitute a part of the

actual malice standard. The policies of the newspaper were offered to demonstrate that a departure from these policies constituted actual malice, when, if the policies would ever be relevant it would be to establish negligence, not actual malice.

Courts addressing this exact issue have excluded expert testimony in actual malice cases under the standards of Rule 403. *See, e.g., Tilton v. Capital Cities/ABC, Inc.*, 938 F. Supp. 751, 753 (N.D. Okla. 1995) (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 [*sic*] to [the] Defendants.”); *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1264-65 (S.D.N.Y. 1989) (excluding expert testimony in actual malice case under Rule 403); *Brueggemeyer v. Am. Broad. Cos., Inc.*, 684 F. Supp. 452, 465 (N.D. Tex. 1988) (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 properly concerned with expert testimony regarding journalism standards diverting the jury’s focus from the subjective actual malice standard.

For these reasons, Dr. Lee's testimony regarding objective standards of journalism should not have been admitted for the purpose of proving the subjective “high degree of awareness of probable falsity” on the part of Defendants required by the First Amendment. Appellants urge the Court of Appeals to reconsider its opinion and reverse the trial court’s denial of Defendants’ Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

B. Pursuant to Rule 702, SCRE, Plaintiff's expert witness testimony as to reporter David Wren's actual subjective

state of mind should have been excluded in this public figure/actual malice case.

In its opinion, the Court of Appeals stated:

We hold the trial court did not err in admitting Dr. Lee's testimony. Although some of Dr. Lee's testimony concerned professional standards and whether Wren and Sun Publishing conformed to those standards, **he focused primarily on whether the evidence indicated Wren had substantial doubt as to the truth of the statements he published in the articles or had a reckless disregard for their truth or falsity.** Thus, the crux of Dr. Lee's testimony was that Wren knowingly published a false statement with actual malice – the central issue in the case – not that he should be held liable for deviating from professional standards. Therefore, the testimony was relevant because it assisted the jury in determining the central issue in the case. (emphasis added.)

The Court of Appeals thus acknowledged that the “crux of Dr. Lee's testimony” were his opinions that David Wren “knew [the publication] was false” (R. p. 349, line 11) and was “disregarding the truth or the falsity of what he was writing.” (R. p. 355, lines 15-17). Appellants respectfully submit that it was just this deployment of Dr. Lee's testimony to somehow divine and explain Wren's subjective state of mind that constituted an impermissible departure from both evidentiary and constitutional standards.

Rule 702, SCRE 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.”

In determining whether expert testimony would help the jury, Rule 702 “imposes on the trial courts an affirmative and meaningful gate keeping duty.” *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). This gate keeping duty requires a court to make three inquiries into 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 v. CAS Med. Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (internal quotation marks and citations omitted). The Supreme Court of South Carolina 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 v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

First, it is readily evident from this record that Dr. Lee had no training in any field other than journalism and had no specialized knowledge or skill permitting him to analyze defendant Wren's state of mind in publishing the articles. He was simply 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; 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). It was, thus, impermissible for Dr. Lee to be permitted to use his unqualified opinion of Wren's subjective state of mind at the time of the articles' publication to influence the jury in its determination of Wren's state of mind.

Courts have long rejected attempts to have expert witnesses on journalism standards testify regarding a libel defendant's subjective state of mind. *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 defendant's 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.”); *Harris v. Quadracci*, 856 F. Supp. 513, 519 (E.D. Wis. 1994), *aff’d*, 48 F.3d 247 (7th Cir. 1995) (“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).

Second, a journalism expert’s testimony on a defendant’s state of mind is not reliable. Although nonscientific expert testimony has “no formulaic approach” for determining its reliability, *White*, 382 S.C. at 270, 676 S.E.2d at 686, 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. Thus, because Dr. Lee claims 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 for the very purpose the Court of Appeals contends it was admitted. *See Wang*, 260 S.W.3d at 160.

Finally, 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.” *See id.* Instead, 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 on that issue 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*, 938 F. Supp. at 743. The jury in this case had no need for Dr. Lee’s opinion as to Wren’s subjective state of mind, and his testimony regarding the reporter’s state of mind was likely to prejudice, confuse and mislead the jury. *See Brueggemeyer*, 684 F. Supp. at 465.

Dr. Lee’s expert testimony on the defendant’s state of mind thus fails all three parts of the Rule 702 test established by the Supreme Court of South Carolina as well as the mandates of the First Amendment. His opinions about what Wren subjectively knew or believed about the truth of the articles should have been excluded from evidence.

For all of these reasons, Appellants respectfully submit that the Court of Appeals erred in determining (1) that Dr. Lee’s expert testimony regarding standards of journalism was admissible on the issue of constitutional actual malice, and (2) that Dr. Lee’s expert testimony regarding David Wren’s actual, subjective state of mind was admissible on the issue of actual malice. Appellants therefore urge the Court of Appeals to reconsider its opinion and reverse the trial court’s denial of Defendants’ Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

**4. THE COURT OF APPEALS ERRED IN HOLDING THAT
THE TRIAL COURT ACTED WITHIN ITS DISCRETION**

IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL ABSOLUTE AS TO THE ISSUES OF COMPENSATORY AND PUNITIVE DAMAGES BECAUSE PLAINTIFF'S EVIDENCE WAS INSUFFICIENT TO SUPPORT THE AMOUNTS OF COMPENSATORY AND PUNITIVE DAMAGES AWARDED AND WERE GROSSLY EXCESSIVE AND SO DISPROPORTIONATE THAT THE JURY CLEARLY BASED THEM ON CONSIDERATIONS NOT FOUNDED ON THE EVIDENCE. (APPELLANTS' PETITION FOR REHEARING, POINT 4)

When an award for compensatory or punitive damages is so grossly excessive and so disproportionate to a plaintiff's injuries that they indicate that the jury acted arbitrarily and out of passion, caprice, prejudice or some other considerations not founded on the evidence, it is the duty of the trial court to set aside the verdict and grant a new trial. *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1990) (citing *Small v. Springs Industries, Inc.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)). For the detailed reasons set out in Section V of the Final Brief of Appellants filed with the Court of Appeals, which Appellants incorporate herein by reference, Appellants respectfully submit that the Court of Appeals erred in finding the evidence at trial was sufficient to support a verdict of \$400,000 in compensatory damages or a verdict of \$250,000 in punitive damages. Appellants urge the Court of Appeals to reconsider its opinion and reverse the trial court's denial of its motion for a new trial absolute.

5. THE COURT OF APPEALS ERRED IN HOLDING THAT THE PUNITIVE DAMAGES AWARD DID NOT VIOLATE THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND IN DENYING DEFENDANTS A NEW TRIAL ON THAT GROUND. (APPELLANTS' PETITION FOR REHEARING, POINT 5)

The First Amendment's guarantee of freedom "of the press," applicable to the states through the Fourteenth Amendment, protects newspapers and other members of the

press from punitive damages awards which serve only to punish speech that a jury does not like or finds offensive. Such punitive damages awards promote self-censorship and diminish the free flow of information to the public on matters of significant public interest such as the campaign financing activities reported by Wren and the newspaper. *See Gertz*, 418 U.S. at 350, 94 S. Ct. at 3012. Appellants urge the Court of Appeals to reconsider its opinion and to reverse the decision of the trial court denying Defendants' motion for a new trial on these constitutional grounds.

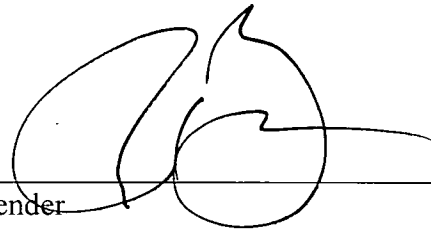
CONCLUSION

By affirming the denial of Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict, the Court of Appeals endorsed precisely the type of libel verdict the U.S. Supreme Court warned courts to guard against in order to protect the "uninhibited, robust and wide-open" debate on public issues guaranteed by the First Amendment and necessary to a vibrant democracy. *New York Times Co.*, 376 U.S. at 270, 84 S. Ct. 710 at 721. That protected debate may involve "vehement, caustic, and sometimes unpleasantly sharp attacks" on government and those engaged in the political process, including at times even erroneous speech. *Id.* at 271, 84 S. Ct. at 721. By adding a constitutional dimension to common law libel jurisprudence in public figure cases, the Supreme Court intended to prevent the self-censorship inevitably resulting from onerous libel verdicts – such as this one – unsupported by clear and convincing evidence of serious doubts as to the truth of the publication or of a high degree of awareness of the publication's probable falsity. The opinion in this case, for the reasons set forth herein,

distorts that constitutional protection beyond recognition in circumstances that lie at the heart of our political processes.

For the reasons set forth herein and in their Petition for Rehearing, Appellants respectfully urge the Court of Appeals to reconsider its opinion and to reverse the trial court's denial of Defendants' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict, and, in the alternative, to reverse the trial court's denial of Defendants' Motions for a New Trial.

Respectfully submitted, this the 5th day of February, 2016.



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