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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5375 (S.C. Ct. App. Filed January 1, 2016)

Mark Kelley,.....Respondent,

v.

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

APPENDIX II

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1 Q: Okay. Well, if this money is coming from LLCs, do you
2 think it might be important to get familiar with what an LLC
3 is and how it's made up?

4 A: In the context of the news stories ---

5 Q: Yes.

6 A: --- that we've been talking about? I did not believe it
7 was important for me to become an expert on LLCs in order to
8 publish the stories, no.

9 Q: Okay. Well, well, at least do you know that when you set
10 up an LLC, you can file an article of organization and you put
11 the members and the managers in the articles of organization?

12 A: I am aware that when you register an LLC, that there are
13 some names attached, sometimes more than with others, yes.

14 Q: Okay. And those articles of organization can be acquired
15 through requests from the Secretary of State; do you know
16 that?

17 A: I know they're registered with the Secretary of State,
18 yes.

19 Q: And that your reporter could have asked the Secretary of
20 State for the articles of organization for any of the LLCs or
21 from the Secretary of State of any of the LLCs? Are you
22 familiar or do you know that David Wren, as an investigative
23 reporter, could have contacted the Secretary of State of South
24 Carolina and obtained all of the articles of organizations for
25 all of the LLCs that are listed in that email?

1 A: Okay.

2 Q: Do you know that?

3 A: I certainly know that you can go to the Secretary of
4 State's Office and gather that information, yes.

5 Q: As an investigative reporter, don't you think that's
6 important to do if you trying to find out who came up with the
7 money?

8 A: I know that David looked into all of the LLCs that, that
9 were given to the, to the candidates that we have written
10 about, yes.

11 Q: How did he do that?

12 A: He had information from the -- I know he went to the
13 Secretary of State. I don't know that he physically went to
14 the Secretary of State's office, but he had information from
15 the Secretary of State's office. He had information from
16 Horry County.

17 Q: But that didn't go along with the accusation that Mark
18 Kelley had anything to do with compiling the campaign
19 contributions and giving them to Barrett, did it?

20 A: We didn't publish anything that said ---

21 Q: That's not what I asked you. That didn't have anything to
22 do with Mark Kelley gathering the money and giving it to
23 Barrett, did it, from the LLCs?

24 A: I'm sorry, but I'm really unclear what you're asking.

25 Q: The LLCs had nothing to do with any allegation that Mark

1 Kelley was at the meeting or delivered or set up the meeting
2 or delivered the money to Gresham Barrett, does it; the LLCs
3 have nothing to do with that accusation?

4 A: Some of the money, some of the checks that were delivered,
5 that Brad Dean delivered to Gresham Barrett that day at the
6 lunch came from the LLCs.

7 Q: Right.

8 A: Yes.

9 Q: But that has nothing to do with Mark Kelley, does it?

10 A: Mark Kelley was at the lunch.

11 Q: But the money coming from the LLCs has nothing to do with
12 Mark Kelley, does it? /

13 A: That's correct.

14 Q: Okay. Thank you. This lunch did not make news until two
15 weeks before the primary, right?

16 A: The story that you have as -- in your exhibits was
17 published, the first one was published May 21st of 2010.

18 Q: Okay. When was the primary?

19 A: The primary was in early June; I don't remember the date.

20 Q: Okay. So a month?

21 A: I guess approximately.

22 Q: Okay. Do you know when the lunch happened?

23 A: The lunch happened the previous year in 2009.

24 Q: So, the fact that information about a lunch that happened
25 in a previous year that came from a -- that information coming

- 1 from a member of the campaign of Nikki Haley was not important
2 to report that it came from the Nikki Haley Campaign?
3 A: The fact that the original or some of the original
4 information about the lunch came from a political opponent's
5 campaign was not the point of the story. The point of the
6 story was that for several months Brad Dean had said he, the
7 Chamber was not connected nor was he connected to the
8 distribution of the checks that were in question. Then the
9 story about the lunch appeared when Brad Dean and Gresham
10 Barrett confirmed that actually -- that they were at the lunch
11 and that Brad handed the checks to Mr. Barrett.
12 Q: Will you look and see if Exhibit Number Twelve is over
13 there?
14 A: Here it is. It says Twelve.
15 Q: There's a sentence that starts with conflicts of interest.
16 Can you read that sentence?
17 A: Certainly. Conflicts of interest or the appearance
18 thereof erode the public's trust and undermine the mission of
19 our world.
20 Q: Okay. So it's important to keep the public trust?
21 A: Absolutely.
22 Q: Is it important to let the public know if anybody is
23 trying to sway the outcome of a political runoff or political
24 campaign for the Republican Primary?
25 A: People's attempts to sway the outcome and to sway

1 reporting, especially when it's near election time, is common
2 place. It, it's, you maintain the public's trust in our work
3 when what you report is fair and accurate and carefully
4 reported.

5 Q: Okay. Well, then we need to talk about carefully
6 reporting. If you are careful in reporting, shouldn't you
7 have said Brad Dean delivered the money to Gresham Barrett
8 period and Mark Kelley was there when the money was delivered
9 with Drea Byars because she was there too, right?

10 A: I believe the story does say that one of Mr. Barrett's
11 campaign aides was at the table, yes, but I also know this to
12 be true. The story is accurate.

13 Q: Okay. Exhibit Two the part that's circled. Tell me where
14 it says Drea Byars was there along with Brad Dean?

15 A: She's in the story somewhere. Would you like for me to
16 read them and tell you which one.

17 Q: No, I want you to read that one?

18 A: She's not in that paragraph.

19 Q: Okay. Well, wouldn't it have been, if you're reporting
20 news accompanying Brad Dean was Barrett and who is alongside
21 of Brad Dean and Gresham Barrett; shouldn't you put everybody
22 that was there?

23 A: No.

24 Q: Why not?

25 A: Gresham Barrett was a candidate for Governor. Brad Dean

1 was and remains the head of the Myrtle Beach Area Chamber of
2 Commerce, a, a citizen, a leader in our community who had said
3 for several months that he had nothing to do with the handling
4 or the distribution of several campaign checks. The story
5 somewhere says that one of Mr. Barrett's aides was also at the
6 meeting. It wouldn't be uncommon for a gubernatorial
7 candidate to travel with an aide. In my experience as a
8 journalist, they frequently come with someone else on their
9 staff when they come to talk to people. There's someone with
10 them to help move them along so they don't get stuck sitting
11 somewhere too long. The other person at this lunch was Mark
12 Kelley, who was a lobbyist for the Chamber. So, to explain
13 Mr. Kelley's presence there in part was to simply say there
14 were four people at the table, Brad Dean connected with the
15 Chamber, Mark Kelley connected with the Chamber and Gresham
16 Barrett, who was a gubernatorial candidate.

17 Q: My question was why didn't you say in that sentence that
18 Drea Byars was there or in that article that Drea Byars was
19 there alongside Brad Dean and Gresham Barrett; that was my
20 question? Can you please answer that question?

21 A: I'd be happy to. She's not newsworthy.

22 Q: Okay. And Mark Kelley is newsworthy why?

23 A: Mark Kelley is well known in the community. He was a
24 longtime legislator in Horry County and he, at that time,
25 served as a lobbyist for the Chamber.

1 Q: Okay. How do you know he served as a lobbyist for the
2 Chamber? Isn't it true that he didn't serve as a lobbyist for
3 the Chamber at that lunch meeting and hasn't been a lobbyist
4 for the Chamber all along?

5 A: It is my understanding that the corporation for which he
6 serves as lobbyist as a title different from the Myrtle Beach
7 Area Chamber of Commerce. However, it's also my understanding
8 that, that organization is the lobbying arm of the Chamber.

9 Q: Based on what?

10 A: Based on information and reporting done by David Wren and,
11 and his, with whom I have complete confidence.

12 Q: You said along with Chamber lobbyist Mark Kelley is a
13 parenthetical expression. Can you define what a parenthetical
14 expression is?

15 A: It sets -- this one is set off by commas.

16 Q: Isn't it true that a parenthetical expression can be taken
17 out of a sentence and for an example would be in my opinion,
18 by the way, those things can be taken out of a sentence and
19 they don't change the meaning of the sentence?

20 A: That would be correct.

21 Q: Okay. Would you please look at Exhibit Number Five, I
22 think. Isn't it true that the Absence of Evidence is The Sun
23 News' false allegation that Mark Kelley delivered the money to
24 Barrett?

25 A: Absolutely not.

1 Q: Isn't it true that the Absence of Evidence that The Sun
2 News falsely reported was that he set up the meeting?

3 A: Absolutely not..

4 Q: Isn't it true that the Absence of Evidence is The Sun News
5 -- isn't it true that in the Absence of Evidence, The Sun News
6 falsely alleged was that Mark Kelley delivered the campaign
7 contributions to Barrett in June?

8 A: No.

9 Q: Then why would Barrett be pinned from telling that he
10 didn't, that Dean delivered the money or pinioned, whichever
11 the word might be?

12 A: Would you repeat the question?

13 Q: Then why would Barrett be forced to or pinned down and
14 held back or made to say that Dean delivered the money instead
15 of Mark Kelley?

16 A: The entire sentence says, If Kelley handed the money over,
17 the transaction would have been explicitly illegal effectively
18 forcing Barrett to say Kelley had no involvement in pinioning
19 or pinning the donations on Dean no matter what the unprovable
20 truth is. It is the opinion of the newspaper that what really
21 happened there, only the people who attended could say for
22 sure.

23 Q: Okay. And it's also the opinion of The Sun News that what
24 was told by Brad Dean and what was told by Gresham Barrett
25 were un -- an unbelievable circumstance?

1 A: It creates this, what it says is basically this. If

2 Kelley had handed the money over, it would have effectively
3 been an illegal transaction. It goes on to say ---

4 Q: Thank you.

5 A: You're welcome.

6 Q: Go on, it goes on to say what?

7 A: It does not say that, that Mark Kelley ever did anything
8 illegal nor have we ever printed that Mark Kelley did anything
9 illegal. He attended a meeting and the General Counsel for
10 the South Carolina Ethics Commission very clearly stated that
11 his presence was not illegal and there you have it.

12 Q: Okay. Go on to read the next paragraph, please.

13 A: The Chamber's defense all along has been that the checks
14 came not from the Chamber but from the companies under whose
15 name the donations were made. Dean now says that he simply
16 collected and delivered them. Again, there is no evidence to
17 disproving the statement but the circumstances make it
18 difficult to believe.

19 Q: But the circumstances make it difficult to believe. And
20 you think that you're not accusing Mark Kelley of delivering
21 the money when you put in there or you allow it to be put in
22 an editorial that there's no evidence disproving this
23 statement but the circumstances make it difficult to believe?

24 A: I believe this editorial overall calls into question the
25 credibility of Brad Dean.

1 Q: And not Mark Kelley?

2 A: It does not call into question the, the honesty of Mark
3 Kelley, no.

4 Q: Wasn't he looking for evidence to make Mark -- show Mark
5 Kelley delivered the money?

6 A: Who is he?

7 Q: David Wren?

8 A: David was doing reporting to find out where the money came
9 from. It was a legitimate and important in his story; it
10 remains so.

11 Q: I'm looking for Exhibit Number Eleven. Can you look and
12 see if it's over there? I'm sorry. Okay. I'll just let you
13 see my copy because I can't find the Court copy.

14 A: Okay.

15 Q: If I represent to you that that's the May 23rd email from
16 David Wren to Justin Stokes and Tim Pearson; would you agree?

17 A: I accept that, yes.

18 Q: Okay. Did you read that email before you approved the
19 Absence of Evidence article?

20 A: No.

21 Q: Did you ask to see this email?

22 A: No.

23 Q: What was the unprovable truth that your article and that
24 editorial refer to?

25 A: I don't believe any article, any news article referred to

1 unprovable truth.

2 Q: Okay. Look at Exhibit Four, Five, the one you were just
3 looking at, Absence of Evidence?

4 A: The editorial. I making the distinction the editorial is
5 opinion; that's different from the news stories.

6 Q: Doesn't the opinion mention, mention an unprovable truth?

7 A: It does say unprovable truth, yes.

8 Q: Just a moment.

9 A: Certainly.

10 Q: Did you personally ask about the source of David Wren's
11 source?

12 A: When David and I worked together as editor and reporter,
13 which we did as I testified earlier, since David came back
14 from Denver and became an investigative reporter, our common
15 practice when working on, on quite a few stories that were
16 complex and involved months and months of reporting and a lot
17 of document searching and a lot of interviewing of people from
18 a wide variety of, of sources from emails to personal
19 interviews. Our common practice was to sit down and talk
20 about the stories at various stages of development, what did
21 he know, where was the information coming from. I did not
22 read his emails. I felt no need to, in most cases, see the
23 documentation directly although occasionally I certainly did
24 in conversations with David. He would bring documents in and
25 we would go over them together. But I didn't, as a common

1 practice, read any of the reporters email exchanges, no.

2 Q: Okay. Do you know an antecedent is?

3 A: I should be able to give you a definition, but I'm
4 embarrassed that I'm at a loss right this moment.

5 Q: Do you know what a compound preposition is?

6 A: I'll give you the same answer.

7 Q: Do you know that along with is a compound preposition?

8 A: Okay.

9 Q: Do you agree with that?

10 A: I would say along with is in the case as it's used in the
11 story that we've discussed quite a lot today and yesterday, it
12 is set off by commas and it does not mean and. It means along
13 with.

14 Q: Did you understand my question?

15 A: Probably not.

16 Q: My question was, Do you know that along with is a compound
17 preposition?

18 A: All right. I'll accept that.

19 Q: Okay. I'm done. I have no further questions.

20 MR. BENDER: Nothing further, Your Honor. Thank you.

21 THE COURT: You may step down. Thank you very much.

22 Witness?

23 MR. BENDER: I move her to be excused.

24 THE COURT: Any objection?

25 MR. STEVENS: No, no objection.

1 THE COURT: You're excused from your subpoena.

2 MS. O'CONNOR: Thank you, sir.

3 THE COURT: Witness, Mr. Bender?

4 MR. BENDER: No, Your Honor. Defense rests.

5 THE COURT: Very well.

6 BY THE COURT:

7 THE COURT: Ladies and gentlemen, the Defense has rested.
8 I have some matters that I need to take up with the Jury -- or
9 that will take some time or with the attorneys, but we will
10 not need you for the balance of the evening. I'm going to
11 release you. I would like to see you back in here at 9:30 in
12 the morning and I believe we can conclude this case.

13 Mr. Ropp, would you take the Jury out.

14 Let me again give my previous admonitions not to discuss
15 the case or do any independent research or read any articles
16 that may be in the newspaper or anything online. Don't make
17 any comments about it and don't discuss it with anyone. Don't
18 allow anyone to discuss it with you. Thank you very much.

19 (REPORTER'S NOTE: Jury exits courtroom. 5:00 P.M. The
20 following takes place outside the presence of the Jury.)

21 THE COURT: All right. Gentlemen, Mr. Postal is about to
22 send you an amended charge. I have amended it substantially.
23 I've added essentially what all of you wanted. There was one
24 part that you asked for, Mr. Bender, that is editorializing.
25 It is, it was something about the First Amendment. I don't

1 feel it has any relevance at all to this case.

2 MR. BENDER: You're talking about the portion from
3 Holtzscheiter talking about -- I can't think of the ---

4 THE COURT: Yes. Let me see. I don't. I don't and I
5 say that with tongue in cheek. But look at it. We're gonna
6 nail down this charge before we leave here tonight. I will
7 expect no additional amendments or changes in the morning. I
8 want to have it printed and ready to go for this Jury. Again
9 this will be the charge for the first phase of the bifurcated
10 trial. I don't know if we'll even need one for the second
11 phase, but that will be the one for the first phase.

12 Each of you have sent verdict forms. I'm gonna send Mr.
13 Bender's over to Mr. Stevens; I'm gone send Mr. Stevens' over
14 to Mr. Bender. I'll tell you now, Mr. Stevens, I don't think
15 yours will work. You say we find for the Defendants on the
16 first cause of action, second cause of action, third cause of
17 action; how will they know? We need one verdict. We need a
18 simple verdict form. Although Mr. Benders' is not necessarily
19 simple, it would be easier to follow.

20 I also have a very serious question in my mind concerning
21 this charge and that is this. In a libel case, it's my
22 understanding that where it involves a public figure Plaintiff
23 or public official Plaintiff, the actual malice element is a
24 separate and distinct element of a libel action. The question
25 in my mind is whether or not the clear and convincing standard

1 for finding actual malice also applies to the finding of the
2 other elements of the, of libel, such as a false statement
3 about the Plaintiff unprivileged published to another person.
4 I have a question in my mind that I want you to be prepared to
5 answer and I'll give you until tomorrow morning to do that as
6 to whether or not the requirement of a clear and convincing
7 standard on actual malice also applies to those other elements
8 of common law, those traditional elements of common law. I
9 frankly don't know and I haven't seen anything that tells me
10 that. Do you have anything, Mr. Bender?

11 MR. BENDER: Your Honor, I'm thinking about Gertz and I
12 think the South Carolina Supreme Court has talked about it
13 but, at this moment, the case is not coming to mind.

14 THE COURT: Just hand me one up in the morning and we'll
15 ---

16 MR. BENDER: I will ---

17 THE COURT: And that can be an easy change.

18 I'm gonna give you about thirty minutes or so to look
19 over these things. Drew is shooting them to you or they're
20 there now. Let's look them over and let's discuss them. Let's
21 take about a half hour break and then we'll discuss it.

22 MR. BENDER: Your Honor, before you leave, I'd like to
23 renew Defendant's Motion for ---

24 THE COURT: I'm sorry. I'm sorry. I failed to give you
25 an opportunity to do that and I will hear you.

1 MR. BENDER: The arguments are as previously stated. I'm
2 anticipating a similar ruling.

3 THE COURT: And may I adopt my exact ruling. Okay?
4 Thank you.

5 MR. STEVENS: I would like to make a motion for directed
6 verdict also for the record.

7 THE COURT: And I would respectfully deny it.

8 MR. STEVENS: Thank you, Your Honor.

9 THE COURT: Thank you. Okay.

10 THE COURT: Okay.

11 (RECESS - 5:07 P.M.)

12 *****OFF THE RECORD*****

13 (On the Record - 5:38 P.M.)

14 THE COURT: Gentlemen, have we had enough time to think
15 about it?

16 MR. REDMOND: I think we have, Your Honor.

17 THE COURT: All right. Okay. Let me hear from Mr.
18 Stevens first.

19 MR. STEVENS: Your Honor, our, our objections as to the
20 public figure would run throughout.

21 THE COURT: Right. Obviously. Obviously.

22 MR. STEVENS: The only other thing that I see and I have
23 read it and I was trying to read it quickly. Did we get the
24 charge on the Erickson case where the repeating of defamation
25 is the same as defamation that ---

1 THE COURT: I did not see that. The headnote that you
2 had on Erickson said a Defendant or publisher asserting truth
3 as a defense in a defamation case must proof that the
4 statement or purported fact is true, not that the person
5 quoted actually made the statement.

6 MR. STEVENS: That's correct.

7 THE COURT: That's in there verbatim.

8 MR. STEVENS: Okay. Thank you. I'm sorry, I just didn't
9 see it.

10 THE COURT: It's in there verbatim. I'll tell you where
11 it is. Yes?

12 MR. BENDER: Page Six.

13 THE COURT: Yes.

14 MR. BENDER: While we're talking about that, we would
15 object to that on the grounds that is shifting the burden of
16 proof on the truth to the Defendant. We have pleaded truth
17 when it hasn't been established that the Plaintiff would have
18 the burden of proof of falsity. So I think ---

19 THE COURT: Say it again?

20 MR. BENDER: Certainly. Erickson is saying when you
21 plead truth, you have to prove that what was said was true,
22 not that somebody said it. I agree that that's a principal,
23 but that by injecting truth as a defense here, it's shifting
24 the burden to the Defendant to prove truth, which is not part
25 of actual malice. We had answered raising truth because when

1 the case first started, there was no indication whether it was
2 gonna be a private or public plaintiff case.

3 THE COURT: Well, I think what Erickson is saying is the
4 issue is whether or not the statement is true or not, not
5 whether or not someone else made it; what it's saying is the
6 Defendant has -- I mean, the Defendant must prove that the
7 statement is true, not that someone else said it and I just
8 repeated it.

9 MR. BENDER: I think that, that's part of the problem
10 because I think that under actual malice, the Plaintiff is
11 gonna have to prove that what was published was false and that
12 the Defendant knew it was false at the time it was published.

13 THE COURT: Well, I have instructed them fully on that.
14 In fact I have your instruction on that.

15 MR. BENDER: I understand. What I am suggesting is by
16 raising truth here, particularly saying a Defendant or
17 publisher asserted truth as a defense, but truth is not a
18 defense any longer in an actual malice case.

19 THE COURT: Well, why did you raise it?

20 MR. BENDER: Because when, when the complaint was filed,
21 I didn't know whether it was gone be a public or private
22 Plaintiff. I had to raise it. I think once you make the
23 decision that this is a public figure Plaintiff ---

24 THE COURT: Does he not still have to prove that it's a
25 false statement?

1 MR. BENDER: Yes.

2 THE COURT: Okay. He has to prove that it's a false
3 statement. That's an element that he must prove. You have
4 had hours of testimony where your witnesses have said it is
5 the truth.

6 MR. BENDER: Sure, and that's to rebut an allegation that
7 is false and he knew it was false.

8 THE COURT: I, I don't understand the distinction.

9 MR. STEVENS: All I am saying is that if it's false, if,
10 if the statement is false, the newspaper cannot insulate
11 itself as a defense simply because that person said it and all
12 we're doing is quoting it; that's all.

13 THE COURT: I think that's what that Erickson quote says,
14 that you can't use as a defense the fact that, well, we really
15 didn't say it; somebody else said it and we just repeated it.
16 That, that's what his charge is saying.

17 MR. BENDER: Well, actually that raises another question
18 that I don't think is in this case and that would be neutral
19 reportage and there's no reason to bring in neutral reportage
20 where you have the Plaintiff with the burden to prove falsity.
21 The Plaintiff's burden here is to prove falsity and notice of
22 falsity or reckless disregard of potential falsity. I think
23 if you put this truth issue in here, that's gonna look like
24 it's shifting the burden to the Defendants to prove truth and
25 that's not ---

1 THE COURT: Well, Mr. Stevens, would it satisfy you then
2 to simply say it's not a defense for the Defendant, for the
3 publisher, to assert that he or she or it was simply quoting
4 someone else?

5 MR. STEVENS: That's fine.

6 THE COURT: Would that satisfy you?

7 MR. BENDER: I think then you have to say that the
8 Plaintiff must prove that that statement was false and that
9 the Defendant had the awareness of potential falsity or
10 reckless disregard.

11 THE COURT: And that's in there.

12 MR. STEVENS: I think you're charging that, Your Honor.

13 THE COURT: I'm charging that fully.

14 MR. BENDER: Well, I think you have to say that with
15 respect to all elements of ---

16 THE COURT: Why don't I put that where I am charging
17 actual malice?

18 MR. BENDER: I think that would be fine.

19 THE COURT: Okay.

20 MR. BENDER: What I'm trying to avoid is the notion that
21 it's not a defense to say somebody else said it. Well, it's a
22 defense if somebody else says it and in certain circumstances
23 that are not really at issue here. We have made them an issue
24 because of the actual malice obligation of the Plaintiff. I
25 think if you say if, if Plaintiff contends that someone else

1 has a made a false statement that's been published by the
2 newspaper, the Plaintiff has the burden of proving the falsity
3 of that statement and the constitutional malice on behalf of
4 the Defendant.

5 MR. STEVENS: I agree with that.

6 THE COURT: Okay. Well, then isn't that what's already
7 in my malice charge? So, why do we even need this?

8 MR. BENDER: Well, that was my thought from the
9 beginning, Your Honor.

10 THE COURT: Why do we even need it, Mr. Stevens?

11 MR. STEVENS: To save problems, I'll withdraw it.

12 THE COURT: Okay. Take that out, Drew.

13 MR. STEVENS: The only other exception -- May I proceed?

14 THE COURT: Go ahead. Go ahead.

15 MR. STEVENS: It is and I don't know what paragraph it
16 is, but it is the paragraph that deals with the words bristled
17 with ambiguities. I think that is a charge that he's -- he's
18 making it a charge where he pulled it out where the Court has
19 given their opinion about certain facts.

20 THE COURT: Commenting on the evidence, is what you're
21 saying.

22 MR. STEVENS: Yeah, and it -- for example, let me explain
23 something to you. The Supreme Court in the handbook cases
24 reversed a judge who said to the Jury quoting straight out of
25 that particular case, that a, an employer should not issue a

1 handbook requiring the employee to promise and then deviate
2 from it at its own whim. That's essentially what this is.
3 That's the kind of statement that that ---

4 THE COURT: This is what it says. If the adoption of the
5 language in question that was chosen by the Defendant in one
6 of a number of possible rational interpretations of an event
7 -- I'll take out bristled with ambiguities. I don't know that
8 that's necessary.

9 MR. BENDER: It's a direct quote from Bose, the consumer.

10 THE COURT: Why don't I just say that it was ambiguous?

11 MR. STEVENS: I think that will work. Okay.

12 THE COURT: An event that was ambiguous and descriptive
13 challenges for the writer. The choice of such language,
14 though reflecting a misconception does not place the speech
15 beyond the outer limits of the First Amendment's broad
16 protective umbrella.

17 MR. STEVENS: That's gone really confuse the Jury. The
18 don't know what the outer limits of the First Amendment's
19 broad protective umbrella means.

20 THE COURT: You want to change that to say raises
21 liability or creates liability on the part of the Plaintiff, I
22 mean the Defendant? An event that is ambiguous and presents
23 descriptive challenges for the writer. The choice of such
24 language though reflecting a misconception does not place
25 speech -- what if we say does not necessarily make this speech

1 actionable.

2 MR. BENDER: I was gonna say does not -- instead of
3 actionable because I think the Jury doesn't know what that
4 means.

5 THE COURT: And they, they can figure that better than
6 beyond the umbrella of the broad protection of the First
7 Amendment.

8 MR. BENDER: I wasn't trying -- I can't improve on the
9 writing. How about this, that instead of broad umbrella, say
10 even though that the choice of such language though reflecting
11 a misconception does not constitute actual malice.

12 THE COURT: I would go with that if I said it does not
13 necessarily.

14 MR. STEVENS: I didn't quite understand. I think -- it's
15 is a charge on -- it is the type of language from a case that
16 our Supreme Court has said that the Trial Court must avoid.

17 THE COURT: I'm just gone put in does not necessarily
18 give rise to liability.

19 MR. BENDER: I think that's fine.

20 THE COURT: Okay. How about that?

21 MR. STEVENS: Okay.

22 THE COURT: It's not necessarily -- and that way they can
23 give it such weight as they, they choose and use it for what
24 purposes they, they like.

25 Okay. What else, Mr. Stevens?

1 MR. STEVENS: That's it.

2 THE COURT: All right. Mr. Bender? You want George to
3 do this?

4 MR. BENDER: I do. He's been working the computer.

5 MR. REDMOND: The, it's on page seven, the, there was a
6 request there, request number ten regarding insinuation. Our
7 -- it needs a qualification, I believe, because this is
8 Cooper v. Laboratory was a private figure Plaintiff and the
9 first portion of this is okay. The Defendant need not be
10 accomplished in a direct manner and an insinuation may be
11 defamatory. A mere insinuation is actionable as a positive
12 assertion and their cite has if it is false and malicious and
13 malicious is common law rule not actual malice and its meaning
14 is plain, so ---

15 THE COURT: Well, why don't we take malicious out and
16 just put false and its meaning is plain.

17 MR. REDMOND: Well, I think that in order for it to be
18 defamatory, it has to be if it is false, published with actual
19 malice and its meaning is plain. So, instead of malicious ---

20 THE COURT: Okay. That's the rule. We'll put that there
21 and we'll go with that.

22 MR. STEVENS: Or reckless disregard.

23 THE COURT: Well ---

24 MR. REDMOND: That, that's included in actual malice.

25 THE COURT: I'm gonna charge actual malice and that'll

1 have that. And its meaning is plain. Okay. All right.

2 Mr. Redmond?

3 MR. REDMOND: The only other -- I think on page nine for
4 whatever disregard is missing an s, but at the, in the first
5 paragraph there, if that matters at all.

6 THE COURT: It does. We want to make it as clear as
7 possible.

8 MS. STEVENS-GRAZIANI: I'm sorry, I didn't hear what?

9 MR. REDMOND: The word disregard on page nine, the first
10 paragraph, is missing an r.

11 MS. STEVENS-GRAZIANI: I don't know what page. What ---

12 THE COURT: Disregards, with reckless disregard of
13 whether it was ---

14 MR. REDMOND: Yeah it's -- diregard is what's in there;
15 it's missing an s.

16 THE COURT: Well, that's what it should be. That is with
17 the knowledge that it was false or with reckless disregard of
18 whether it was false.

19 MR. REDMOND: You have disregard in there?

20 THE COURT: Yes, it says disregard.

21 MR. REDMOND: Okay. Mine had disregard, public figure.

22 THE COURT: Yeah.

23 MR. REDMOND: Disregard that.

24 THE COURT: Wait a minute. Wait a minute. You're -- is
25 that what you were talking about, Mr. Redmond, the sentence

1 that says ---

2 MR. REDMOND: The sentence is correct.

3 THE COURT: Oh, okay. Oh, I see where you're talking
4 about. Right at the end, reckless disregard for the truth.

5 MR. REDMOND: Mine had a misspelling in the disregard
6 that was right in the middle.

7 LAW CLERK: Diregard.

8 MR. REDMOND: Diregard; that's it. I'm sorry.

9 THE COURT: Okay. We were looking for an s at the end.

10 MR. REDMOND: I hate to be ---

11 THE COURT: All right.

12 MR. REDMOND: The only other issue, Your Honor, and I
13 understand you've made a ruling as far as the language from
14 Holtzscheiter in regard to explaining the First Amendment

15 THE COURT: I understand.

16 MR. REDMOND: Just for the record, I wanted to put forth
17 that we believe that language is -- makes it more readable as
18 a practical matter, but as a legal matter, it's important
19 because it's appropriate to mention the first law, put it in
20 the charges of this case because it is the law and it's
21 applicable in this case, the First Amendment of the United
22 States Constitution. The second point on that is it's sort of
23 necessary because it's referred to in other charges when it
24 talks about the constitutional protection. And a third matter
25 was that this was a clipping, a quote from Judge Toal, who was

1 citing the United States Supreme Court in Dunn and Bradstreet,
2 and we just think that, you know, if Judge Toal puts it in an
3 opinion so that it makes it more understandable for the bar,
4 we think it also would be -- it's not just flowery language;
5 it's important for background for the jurors to understand
6 that this is the law that we're applying and that's, that's
7 all, Judge.

8 THE COURT: All right. Thank you. Any, anything
9 further?

10 MR. STEVENS: No, sir.

11 THE COURT: Anything further, Mr. Redmond?

12 MR. REDMOND: No, Your Honor.

13 THE COURT: Okay. Gentlemen, I hate to've kept you over.
14 However, I have adopted this policy since I've been on the
15 Bench for almost seven years now. I've had juror after juror
16 come and tell me how helpful it is particularly in a complex
17 case to have a copy of the charge. I read this charge as per
18 the instructions of the Court verbatim. This is the charge
19 they will have. I have -- I don't think I've had but one time
20 where a Jury has come back or a Jury has come back and asked
21 for another explanation of law. It just doesn't happen.

22 MR. BENDER: You give each juror a copy of it?

23 THE COURT: I usually provide them with one and instruct
24 that they're welcome to as many as possible. Some juries do
25 come back and ask for twelve and we provide them if they need

1 them. But we, we have that available for them.

2 In the morning, I'd like to hear from you on the issue of
3 whether or not the common law elements and the burden of proof
4 for a public figure changes as to all elements of a libel
5 action or is it solely or is clear and convincing solely
6 applicable to the requirement they find actual malice. I,
7 don't know the answer to that question. It occurred to me
8 when I was doing this charge and I quite frankly don't know
9 the answer. Now, Mr. Bender tells me he thinks he's got
10 something and that would be wonderful.

11 MR. BENDER: I found one as to falsity. Of course,
12 there's no presumption of falsity, the Plaintiff has to prove
13 it. And I think -- I'm looking at Bose Corp v. Consumer's
14 Union.

15 THE COURT: Did that involve a public figure or ---

16 MR. BENDER: Yes, the Bose Corporation, which makes
17 speakers was held to be a public figure.

18 THE COURT: Okay.

19 MR. BENDER: And the Court says we may accept all the
20 purely factual findings. The District Court, nevertheless,
21 holds as a matter of law the record does not contain clear and
22 convincing evidence that the witness or his employer prepared
23 the loudspeaker article with knowledge that it contained a
24 false statement or with reckless disregard of the truth.

25 THE COURT: But that goes to the actual malice

1 requirement.

2 MR. BENDER: The way I, the way it seemed to be
3 structured -- and I'll be happy to give you the case -- it
4 struck me that they were talking about prove of falsity with
5 respect to ---

6 THE COURT: Well, let's be in here at 9 o'clock in the
7 morning and let's look at it.

8 Mr. Stevens, you may agree that it's a clear and
9 convincing as to all elements.

10 MR. STEVENS: No.

11 THE COURT: I know of no other case where there would be
12 a hybrid approach to the elements of an offense. I have never
13 encountered that. However, I do recognize that we do have a
14 wealth of cases involving the duty of a -- or the burden on a
15 Plaintiff in a civil case and a wealth of cases involving
16 libel and slander where the Plaintiff is a, a private figure
17 and it's clear that in those cases, the burden of proof is by
18 a preponderance. However, it is equally clear that where
19 there's a public figure at least the burden of proof as to
20 actual malice is clear and convincing as it would be for
21 punitive damages. But -- and I say there's no hybridization.
22 We do have that in cases seeking punitive damages where
23 they're tried together.

24 MR. STEVENS: I think -- I'm gonna research that also and
25 I'm gonna make some calls and get some more educated opinions.

1 But as I see it, the constitutional issue where you have a
2 First Amendment right, they put the extra burden for proving
3 actual malice. Now, where you've got a private figure, the --
4 New York Times and all the progeny always shows that you got
5 to show to a media Defendant that they have engaged in
6 something that you can prove false. But as a private figure,
7 you still have to prove that the newspaper reporter failed to
8 use due care. When it becomes a public figure, then you got
9 to show actual malice. That's all they have ever said that
10 ---

11 THE COURT: By clear and convincing evidence?

12 MR. STEVENS: Yeah. Proving a statement is false is by
13 preponderance of the evidence in my, my meager opinion. And
14 from what I have -- you know how many my dad and I have tried
15 and we have never had that come up before. And the charges we
16 have had are just like you said that the normal elements of
17 defamation, slander, proving a statement was made, proving
18 that it is false is by preponderance of the evidence. But
19 then if you can't prove actual malice, you lose.

20 THE COURT: We're gonna have to make an adjustment of the
21 charge in the morning based on whatever my ruling is. We're
22 either gonna have to put in a, add a, a preponderance of the
23 evidence charge and tell them what a preponderance of the
24 evidence charge is and explain to them that the first elements
25 of libel generally must be proved by a preponderance of the

1 evidence and then we already have one in for explaining what
2 clear and convincing is and that that is an additional
3 requirement when there's a public figure. We're either gonna
4 have to put preponderance in or we're gonna have to tell them,
5 this Jury, that they must also find these other elements by
6 clear and convincing evidence, one of the two.

7 MR. STEVENS: I believe it had it in there, by
8 preponderance of the evidence.

9 THE COURT: Well, I think it's in the Bose.

10 MR. STEVENS: Okay.

11 THE COURT: So, Mr. Redmond, go back and make David
12 Miller do this.

13 MR. REDMOND: I'll get him right on it. Yes, sir.

14 THE COURT: Make Ashley do it.

15 MR. REDMOND: I might have more luck there.

16 THE COURT: All right. Thank you.

17 MR. REDMOND: Thank you.

18 MS. STEVENS-GRAZIANI: May I say or ask a question? We
19 have exhibits for all the jurors and -- of all the
20 Plaintiff's, not all of the Plaintiff's, but One through
21 Fifteen. The articles, I think that it might be important for
22 at least them to have a copy of all of the articles -- each
23 have their own copy of the articles.

24 MR. STEVENS: Would you like the extra copies?

25 THE COURT: It might benefit both parties to have them.

1 MR. BENDER: No problem. Just the articles is what we're
2 talking about.

3 THE COURT: Just the articles.

4 MS. STEVENS-GRAZIANI: Well, this has the emails, too,
5 which also go to actual malice and it's the evidence that the
6 Plaintiff has produced.

7 THE COURT: Have you reproduced all of the exhibits?

8 MS. STEVENS-GRAZIANI: Yes.

9 THE COURT: I don't want to emphasize any particular
10 exhibits. I don't really have a problem with it. If you've
11 made up a package for every juror and it's got every exhibit
12 Plaintiff's and Defendant's in it, I have no problem doing
13 that. But I do have a problem with emphasizing Plaintiff's
14 exhibits or a portion of the exhibits by reproducing those and
15 giving those to the jurors. I think it overemphasizes those
16 particular exhibits. I don't mind you doing them all, but
17 what's good for the goose is good for the gander. You want to
18 do them all, you wouldn't have any objection to that, would
19 you, as long as they're ---

20 MS. STEVENS-GRAZIANI: Even the depositions or could we
21 exclude the depositions?

22 THE COURT: No, for goodness sake. Don't tell me you're
23 gonna do the depositions.

24 MS. STEVENS-GRAZIANI: So, if I reproduce all of them,
25 except for the depositions; that would be okay?

1 MR. BENDER: No problem.

2 THE COURT: No problem with that.

3 Gentlemen, I want to hear from you on these verdict forms
4 tomorrow. It's gonna be a very complex verdict form, okay?
5 My ruling on the standard of proof is going to have to be
6 reflected in the verdict form. The verdict form is gonna have
7 to make special interrogatories, I believe. Okay. Or contain
8 special interrogatories.

9 I find it in a case like this to be easier for the Jury.
10 This is what you got to do.

11 MR. STEVENS: May I ask the Court, are you wanting us to
12 also, are they coming back with an actual damage verdict?

13 THE COURT: That's all they can do tomorrow.

14 MR. STEVENS: Okay.

15 THE COURT: Tomorrow morning.

16 MR. STEVENS: Okay. And you want a special
17 interrogatories as to actual malice?

18 THE COURT: Just that.

19 MR. STEVENS: Okay.

20 THE COURT: No mention whatsoever of punitive damages.

21 MR. STEVENS: Okay.

22 THE COURT: Also, gentlemen, be aware of the new punitive
23 damages statute.

24 MR. STEVENS: I am.

25 THE COURT: Okay. Thank you.

Kelley v. Sun Publishing, Inc., et al.
BY THE COURT

550

1 MS. STEVENS-GRAZIANI: It's time to get that reversed.

2 (RECESS - 6:00 P.M.)

3 *****OFF THE RECORD*****

4 (END OF DAY THREE.)

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1 (MAY 8, 2014)

2 (On the Record - 9:22 A.M.)

3 CHARGE CONFERENCE

4 THE COURT: I think this morning one of the issues I
5 wanted to discuss with you is the burden of proof. The
6 question is whether or not the traditional elements of libel
7 must be proven by the Plaintiff by a preponderance of the
8 evidence and the additional element or requirement for relief
9 that has been established by case law that there must be a
10 showing of actual malice or constitutional malice in the case
11 of a public figure must be proven by clear and convincing
12 evidence or it's a requirement that all elements of the, the
13 Plaintiff's case must be proven now by clear and convincing
14 evidence.

15 Now, let me hear from you Mr. Stevens?

16 MR. STEVENS: I think it requires the Court to look back
17 to the history of defamation law. And the history of
18 defamation law as it came down from England said a false
19 statement was presumed to be false. It also said that in, in
20 proving your case ---

21 THE COURT: Presumed to be false or harmful?

22 MR. STEVENS: False and harmful.

23 THE COURT: Okay.

24 MR. STEVENS: If it was ---

25 THE COURT: Yeah.

1 MR. STEVENS: It also required that the Defendant prove
2 the truth if he pled it, in other words, the burden shifted.
3 However, when, and that remained the law and still remains the
4 law when you've got defamation between private figures.

5 Now, the constitutional issue -- and in those cases, you
6 had to prove ill will, the old malice standard. When the New
7 York Times v. Sullivan case came up, that's when the Supreme
8 Court brought out the, the additional requirement that the
9 Plaintiff had to prove by clear and convincing evidence,
10 actual malice.

11 THE COURT: But only in the case of a public official,
12 public figure ---

13 MR. STEVENS: That's correct. And they also ---

14 THE COURT: --- or otherwise.

15 MR. STEVENS: That's correct. And they also, where the
16 man was a private figure, but the Defendant was a media
17 Defendant, the private figure also has to show some fault,
18 such as the very Mary Alice Firestone vs. Time case, in which
19 Mary Alice Firestone was married to a public figure. They
20 claimed that she was a public figure, but the Court said no.
21 And in that particular case, the, the domestic case, they were
22 reported on the domestic case, and the allegations between the
23 parties was adultery. It was a big article, the articles
24 being written about it and the Final Order of the Court came
25 out and in Florida, they got, I guess you would call no fault

1 divorce, but they call it a different thing than we call it,
2 living separate and apart for a year. They are entitled to a
3 divorce if the parties are not quote/unquote domesticated.
4 Now, the news reporter had the pleadings and the order and he
5 reported that the divorce was granted on the grounds of
6 adultery. Mary Alice Firestone sued claiming that the
7 reporter libeled her because he accused her of adultery. And
8 the reporter's defense was I was not familiar -- I'm not
9 familiar with court procedure or that area of the law. It is
10 a kinda complicated area of the law. And the Court said in
11 that case that it was not the reporter's fault that he
12 misinterpreted the law in Florida. Instead of saying the
13 divorce is granted on -- the parties weren't domesticated, he
14 reported that that, that it was granted on the grounds of
15 adultery and the Court said that, that the Plaintiff did not
16 prove that the Defendant committed some negligent act.

17 Now we've got the public figure and the media Defendant
18 and we go back to the New York Times v. Sullivan and St.
19 Amant, Gertz v. Welch. And Gertz v. Welch, modified New York
20 Times v. Sullivan by stating that opinion does not excuse the
21 Defendant. Where the opinion states facts, the news media is
22 responsible if the statement is made with reckless disregard,
23 with a knowledge of its falsity or with a reckless disregard
24 of whether it was true or false and where the media has
25 serious doubts as to what they were printing.

1 So, the only thing that the U.S. Supreme Court has done
2 is add an additional hurdle to a public figure when a media
3 Defendant is being sued to prove actual malice by clear and
4 convincing evidence. The U.S. Supreme Court has never said
5 that you got to prove the ordinary elements of defamation that
6 is ---

7 THE COURT: The traditional.

8 MR. STEVENS: --- the statement that it was published and
9 that the publication was of and concerning the Defendant, that
10 if you printed it with -- you accuse somebody of a crime or
11 unfit in the trade or profession, it was not only defamation
12 per se, libel per se, but it was also actionable per se. In
13 other words, if we prove actual malice, the law goes back and
14 says that we only have to prove our damages by a preponderance
15 of the evidence. So, I've looked and I have called several
16 attorneys as I said I would, who I respect their opinions and
17 have tried defamation cases and they agree with what I just
18 stated.

19 THE COURT: Your position is that the traditional
20 elements of a libel action need only be proven by a
21 preponderance of the evidence and that the Jury should be
22 instructed that in the case of a media Defendant and a public
23 figure, there is an additional element requiring a showing of
24 constitutional or actual malice proven by clear and convincing
25 evidence.

1 MR. STEVENS: That's correct.

2 THE COURT: Am I clear?

3 MR. STEVENS: Yes. Yes, sir.

4 THE COURT: Okay. All right. Mr. Bender, let me hear
5 from you now.

6 MR. BENDER: Thank you, Your Honor.

7 As to the traditional elements, we're not contesting
8 publication. We are contesting defamation -- defamatory
9 content; they're gonna have to prove that. I think the core
10 issue you asked us about is does the Plaintiff have to prove
11 falsity by clear and convincing evidence and in South Carolina
12 Jurisprudence section on Libel, Section 67, published by the
13 Bar, the United States Supreme Court has not so held the
14 standard of clear and convincing evidence would appear to
15 apply also to the Plaintiff's burden of proving the falsity of
16 the defamatory comment. That seems to be the result reached
17 by the South Carolina Supreme Court and I'll hand up a list of
18 these cites, Haulbrooks v. Overton and Beckham v. Sun News.
19 It's also been discussed by other courts. The South Carolina
20 Supreme Court discussed it in Peeler v. Spartan Radiocasting,
21 although not as clear as perhaps it could've, but if you look,
22 it's talking about what's encompassed in actual malice and it
23 seemed to be saying -- the Court seemed to be saying there
24 that the proof of falsity required actual malice. There's
25 also, I reached a different ---

1 THE COURT: Are you combining ---

2 MR. BENDER: No, I think it's separate, but I think that
3 the falsity has to be proved by that same clear and convincing
4 standard that the actual malice has to be proven by is how I
5 read these cases. And I think that's certainly what the South
6 Carolina Jurisprudence is saying.

7 The clearest discussion of it is in a very famous U.S.
8 District Court case, Sharon, Ariel Sharon, the former Prime
9 Minister of Israel suing the Time, Inc. and that case cites
10 several other cases, but the quotation from Sharon, Plaintiff
11 bears the burden of establishing falsity and actual malice by
12 clear and convincing proof and it cites Edwards v. National
13 Audubon Society, which is the start of neutral reportage;
14 Buckley v. Littell and one other case.

15 THE COURT: Do you have a copy of the Sharon case for me?

16 MR. BENDER: I don't, but I have the cite.

17 THE COURT: All right. Could you give me the cite?

18 MR. BENDER: Yes, Your Honor, I have a list right here.

19 THE COURT: Okay.

20 MR. BENDER: I was working off my iPad and don't have a
21 printer for it. So ---

22 THE COURT: All right. What is your response to that, to
23 the Sharon case if counsel has correctly cited Sharon, in
24 quoting Sharon?

25 MR. STEVENS: I have to admit, Your Honor, I have not

1 seen nor read that case. I may have put in the query into
2 WestLaw last night, not wrong, but I couldn't find anything.

3 THE COURT: Well, I don't want to look at it, but the
4 quotation that counsel refers to would seem to say that it
5 does New York Times does extend it, the requirement of proof
6 to all the elements. I mean, doesn't it appear to say that if
7 counsel has correctly cited the case?

8 MR. STEVENS: I think what he cited was it only extended
9 to our proving falsity. We don't have to prove publication
10 and we don't have to prove damages.

11 THE COURT: Well, I don't think publication is really an
12 issue.

13 MR. STEVENS: And we don't have to prove damages by clear
14 and convincing evidence.

15 MR. BENDER: Well, we haven't -- I haven't addressed
16 that, but I think ---

17 THE COURT: Okay.

18 MR. BENDER: --- I think that is a requirement and I
19 think ---

20 THE COURT: All right. Well, let, me hear from you.

21 MR. BENDER: I think Gertz v. Robert Welch, Inc. talks
22 about that it and it gave much of the history of libel that
23 Mr. Stevens has recited this morning and it talks about how
24 imposition of constitutional malice is a burden on a public
25 Plaintiff. It was designed to protect from self-censorship

1 and its discussion, the Court talks about damages and it,
2 Gertz is a private figure case, but it's talking about the
3 requirement of proof of actual damages. And it seems to me to
4 be saying that if you don't prove, if you're a private
5 Plaintiff and you don't prove actual malice, you can only
6 recover actual damages. Well, since public plaintiffs are
7 required to prove actual malice, I think this is a suggestion
8 that that's also the requirement for a public plaintiff with
9 respect to damages because we're moving away from the concept
10 of presumed damages in a libel case. We've moved all the way
11 from strict liability to fault. We've then imposed this
12 additional constitutional requirement and I would argue that
13 the Gertz reference indicates that actual malice is related to
14 the Plaintiff's requirement for proof on damages also. The
15 clear and convincing standard is required for fault in this
16 case, actual malice or falsity and for damages.

17 THE COURT: And you cite Gertz there; is that correct?

18 MR. BENDER: Yes, sir. That's -- and the cite on Gertz
19 is 94 Supreme Court 2997. And I was looking at the, at
20 Section 4 in the decision.

21 THE COURT: You cited a, a, a South Carolina Supreme
22 Court case.

23 MR. BENDER: I have two of them here, Your Honor, I made
24 reference to them.

25 THE COURT: Peeler?

1 MR. BENDER: Well, actually I did cite Peeler and I think
2 I put the Peeler cite on that list. I also cited Haulbrooks
3 v. Overton.

4 THE COURT: What was the date of the New York Times case;
5 does anyone recall that?

6 MR. BENDER: 1964, it's Times v. Sullivan.

7 THE COURT: All right. Let me take a quick break. What
8 other issue did we have that we wanted to discuss this
9 morning; wasn't there one other?

10 MS. STEVENS-GRAZIANI: The verdict ---

11 MR. BENDER: The verdict form, Your Honor.

12 THE COURT: Oh, the verdict form, yes.

13 Have you prepared another proposed verdict, form, Mr.
14 Stevens?

15 MR. STEVENS: I had and I'm in the process of doing that,
16 but let me tell you what I -- it depends on your ruling. We
17 -- our verdict form says that the, we find that the Plaintiff
18 has proven a defamatory statement, that it was false and that
19 he is -- that it injured him and his reputation by a
20 preponderance of the evidence. We also find that the
21 Plaintiff had proven by clear and convincing evidence, actual
22 malice. That is that the statement was made with knowledge of
23 its falsity or with a reckless disregard of its falsity. And
24 we have -- that's another one to each one of those. And then
25 it will say in the second one, if it's no, stop deliberating

1 on that particular issue and we're doing it as to each of the
2 articles, rather than to say first cause of action, second
3 cause of action. And then the third would be we find for the
4 Defendant. And we find for the Plaintiff actual damages and
5 we find for the Defendant or we find for the Defendant. They
6 have to answer to questions.

7 THE COURT: How will this Jury be able, able with your
8 suggested verdict form, to distinguish between the Defendants;
9 we have two Defendants here.

10 MR. STEVENS: I haven't got to that.

11 THE COURT: We have an editorial.

12 MR. STEVENS: I think they have already agreed to that.

13 THE COURT: And the evidence does not implicate Mr. Wren
14 in the publication of that.

15 MR. STEVENS: We're gonna do that to each one of them as
16 to the, the three articles. David Wren and Sun Publishing,
17 they've agreed to that. And then the four, when you get down
18 to the publication of the editorial, the verdict would only be
19 against Sun News.

20 THE COURT: Gentlemen, how do you propose to distinguish
21 then an award of damages of, of course The Sun News would be
22 joint and severally libel for an award against Mr. Wren. We
23 agree with that?

24 MR. BENDER: Yes, sir.

25 THE COURT: Okay. All right.

1 MR. BENDER: Let me say it out loud so the Court
2 Reporter can hear that. I agree with that.

3 THE COURT: But not necessarily the reverse?

4 MR. BENDER: I believe that's a yes meaning that a
5 judgment could be against The Sun News, but not against David
6 Wren?

7 THE COURT: Yes. And then you got the hybridization
8 where you have the Jury under your proposed verdict form
9 rendering a verdict against The Sun News and rendering a
10 verdict against David Wren. I could see a situation where one
11 would not be libel for the other or Mr. Wren would not be
12 libel for a judgment against The Sun News. There could be all
13 sorts of combinations in there as a result of that and
14 overlapping damages. Who would be entitled to a setoff upon
15 payment by one party or the other?

16 MR. BENDER: I don't have a readily available answer for
17 that.

18 THE COURT: But it's something we certainly need to
19 address before any verdict form is submitted to the Jury. For
20 instance, a verdict could be rendered against Mr. Wren. A
21 verdict could be rendered against The Sun News. They could be
22 for different amounts, they could involve different
23 publications. The damages may be separate and distinct for
24 each one. Say there's a judgment against The Sun News and
25 the Jury's determination was that that judgment, I mean, that

1 liability and the assessment of damages is solely for the
2 article and it may be more -- I mean, the editorial and it may
3 be more damaging than say the article that was written by Mr.
4 Wren. And then there's another judgment against him for say
5 for one article. Are they the same damages? Are they
6 different damages? If Mr. Wren were to, again, if supposing
7 there's a verdict for argument sake. Mr. Wren, the judgment
8 is paid for him, does The Sun News gets some credit for that
9 when Sun -- there may be different damages altogether. I
10 mean, how do, how do we make a distinction for this Jury?

11 MR. BENDER: I don't know how it would be possible to
12 apportion damages to -- I don't know how it would be possible
13 to apportion damages on the article by article basis. I would
14 think that maybe the issue is to find falsity, if the Jury
15 finds falsity by clear and convincing evidence, they would
16 also find actual malice by clear and convincing evidence, does
17 it find damages by clear and convincing evidence on behalf of
18 the Plaintiff. If it finds those, I don't know that it's
19 necessary to apportion them on an article by article basis.
20 If you go, if you go through each article, has Plaintiff
21 proven falsity with respect to this article; has Plaintiff
22 proven actual malice with respect to this article? Go all the
23 way down and if they answer yes to each of those and to the
24 editorial, well with the articles ---

25 THE COURT: What if they don't? What if they break it

1 out, some articles are and some articles aren't; what if none
2 of the articles are and just the editorial is or perhaps one
3 article and the editorial? How are you gonna break out the
4 damages? I mean how ---

5 MR. BENDER: I think the point I'm trying to make is, is
6 there liability with respect to the news reports? If yes, and
7 actual malice is proven. What damages is the Plaintiff
8 entitled to recover and then maybe from whom, Wren or The Sun
9 News? Then on the other side, is the editorial false,
10 defamatory, published with actual malice? If yes, do you find
11 liability against The Sun News? Yes. What damages would the
12 Plaintiff be entitled to recover for the editorial?

13 THE COURT: Well, I would think that you're gonna have to
14 do something that way.

15 MR. STEVENS: Might I offer a suggestion?

16 THE COURT: Yes.

17 MR. STEVENS: In my view, I certainly don't want to set
18 up a ground for them to appeal if we get a verdict.

19 THE COURT: I have a feeling that that's where we're
20 headed.

21 MR. STEVENS: I do, too.

22 THE COURT: Regardless of how it comes out.

23 MR. STEVENS: But let me, let me liken this to particular
24 case ---

25 THE COURT: And I have tried to be cautious in this case

1 for that reason.

2 MR. BENDER: I think you have been.

3 MR. STEVENS: Like in an automobile accident, you've got
4 somebody who's speeding, that's wrong; he's crossing the
5 center line, that's the second wrong. You can't -- the
6 damages to the Plaintiff is the same. I think that you should
7 charge the Jury just like you would in a automobile wreck
8 case. That if there is, if there is any one of the articles
9 that's defamatory and it injures him and his reputation, then
10 he is entitled to a verdict. And that we only have to prove
11 that one of them is and they have already agreed and all the
12 evidence shows that as to the articles by Wren, not only is
13 David Wren responsible, but under respondeat superior The Sun
14 News is responsible. In addition to that, they approved his
15 articles. So, you've got joint several liability there. So,
16 the verdict as to the articles has got to be joint. I don't
17 see any way to separate that.

18 THE COURT: Not as to the articles. As to the articles
19 -- and I think Mr. Bender indicated that in a comment to me
20 yesterday or the day before that there, there's no question
21 about the, the issue of respondeat superior; that's not an
22 issue.

23 MR. BENDER: That's not an issue.

24 THE COURT: That if Mr. Wren is libel, The Sun News is
25 libel jointly and severally. Okay?

1 MR. STEVENS: That's why I think we don't have to have a
2 special verdict. If you're going to charge the complete that
3 all of the elements has got to be clear and convincing
4 evidence, it's in your charge and then if they find that any
5 other or two or more, are defamatory and it injures him in his
6 occupation, trade or profession, or accuses him of a crime,
7 he's entitled to a verdict.

8 THE COURT: Well, let me ask you this and this will help
9 clear it up, Mr., Mr. Stevens. Would you agree on this record
10 that any verdict issued in this case would be jointly and
11 severally owed and would encompass the exact same damages?

12 MR. STEVENS: Yeah, I agree.

13 (REPORTER'S NOTE: Mr. Stevens confers with Ms. Stevens-
14 Graziani.)

15 MR. STEVENS: Well, but -- but the damages are the same.

16 THE COURT: What I'm trying to avoid ---

17 MS. STEVENS-GRAZIANI: I know.

18 THE COURT: --- if we end up with a, if you get a verdict
19 and again, and let me state, I don't know, but I, I'm looking
20 at this from what might happen. Would you agree that if
21 there's a verdict, there's a verdict against Sun News, there's
22 a verdict against Mr. Wren, that that's a joint and several
23 calculation of damages by the Jury and you may not collect it
24 twice.

25 MR. STEVENS: That's right. That's right.

1 THE COURT: Even if the Jury were to come back and say we
2 find that we have defamation and damages on the editorial and
3 we have damages and defamation over here on the articles, that
4 they are still the exact same damages and you may not collect
5 them twice. Do you see where I'm coming from, Mr. Bender?

6 MR. BENDER: Yes, sir.

7 THE COURT: And that's the problem I have.

8 MR. BENDER: Sure.

9 THE COURT: Are we gonna end up where we have possible,
10 possibly judgments against two Defendants, which may be
11 collected in whole on the argument that it was a set of
12 articles here, a -- for which there may be some damages and
13 there's an editorial over here from which this Defendant had
14 nothing to do with, there's no evidence to support that and
15 these damages may be entirely different. The Jury may have
16 found damages from the editorial that are different from the
17 damages in the articles and they're separately -- or each is
18 collectible against each Defendant. I mean, I, I'm a little
19 concerned about that. I don't want to see that argument down
20 the road. I want it, I'm trying to, Mr. Stevens is saying
21 it's all the same damages. Okay. Let's let it be the same
22 damages.

23 MR. BENDER: And here's a proposal on how to deal with
24 that.

25 THE COURT: Okay.

1 MR. BENDER: Verdict for Wren, yes or no; verdict for Sun
2 News, yes or no; verdict for Plaintiff, total damages; and
3 then damages that are shared, Wren's share a total, The Sun
4 News' share a total. Let the Jury apportion the total. Set
5 one total and then apportion that.

6 THE COURT: But then would that not eliminate respondeat
7 superior and joint liability?

8 MR. STEVENS: I have a very big problem with doing that,
9 separating the two Defendants. They have already agreed to
10 joint and several liability as to the articles. If you give
11 the Jury the opportunity to find against The Sun News and not
12 the, the agent, the verdicts gonna get set aside. If the
13 Supreme Court says on the articles there's no evidence that
14 The Sun News was negligent in or they weren't complicit in the
15 actual malice test and that's happened before. They've
16 already said its joint and several liability. That if David
17 Wren's articles were false and you meet the actual malice,
18 that their responsible under respondeat superior and I think
19 that takes that issue away from Your Honor. I mean, we've
20 agreed to it. So, I believe that the verdict should be a
21 general verdict and you tell the Jury that if we separate it
22 with preponderance of the evidence, you can do that. Do you
23 find actual malice, you've got to do that. If they don't find
24 actual malice against -- if you find actual malice you move to
25 damages. And then you award a verdict against the -- both

1 Defendants if you find that any of the articles met the burden
2 and you award it according to the burden of proof as to
3 damages. If you find that only the editorial is defamatory,
4 then your verdict must be only against The Sun News, but if
5 you find them all defamatory, your verdict must be against
6 both Defendants. That makes it very simple. You've got one
7 verdict from. If it's all clear and convincing, just say do
8 you find that the Plaintiff has proved his case by clear and
9 convincing evidence.

10 THE COURT: What if I were to do that, Mr. Bender, in my
11 charge and have it in my written charge where I tell the Jury
12 that there's several possible verdicts in this matter
13 depending on their view of the evidence in the case. If you
14 find that the articles were defamatory and you find that Mr.
15 Wren was the agent of The Sun News, you may award damages
16 resulting from the publication of the articles against both
17 Defendants. You may also find that there was no defamation
18 and return a verdict in favor of both Defendants as to the
19 articles. As to the editorial, if you find the same to be
20 defamatory and meeting the other elements described in my
21 charge, you may only return a verdict against The Sun News.

22 MR. BENDER: I think that's the solution.

23 THE COURT: Okay.

24 MR. BENDER: I didn't want to be reversed respondeat
25 superior.

1 THE COURT: You may only return a verdict against The Sun
2 News and not Mr. Wren for any damages resulting from the
3 publication of the editorial. Okay?

4 MR. BENDER: I think that's the answer.

5 THE COURT: Okay.

6 MR. STEVENS: The only, the only thing that I would add
7 again there, if you find that he's an agent for the Defendant,
8 they have already said that -- they stipulate that he's an
9 agent of the Defendant.

10 THE COURT: Well, is Mr. Bender, is -- I mean, is that
11 stipulated that he was an agent?

12 MR. BENDER: Yes.

13 THE COURT: That if they find the articles defamatory in
14 meeting -- what I want you two gentlemen to do is sit down
15 together. You know what we're doing. I will add that right
16 at the end of my charge where it begins, there are so many
17 possible verdicts. Write what you would like and I think
18 you're in agreement now. Let's just craft the language, hand
19 it up to me and let me look at it and in the meantime, I want
20 to read Sharon. Okay?

21 MR. STEVENS: Okay. Our charge, our request would have
22 the elements of the preponderance of the evidence for the
23 normal and we, we still believe that that is the law. We
24 respect, Your Honor, if you rule in accordance with Sharon,
25 but we want to hand up our charge that if we prove ---

1 THE COURT: I really think, Mr. Stevens, for practical
2 purposes, it doesn't make a whole lot of difference ---

3 MR. STEVENS: I think it does.

4 THE COURT: --- those traditional elements are met fairly
5 clearly as far as the publication to another party, about,
6 those things are really not disputed, but I think what we're
7 gonna do in this case is probably create new law. The Supreme
8 Court is going to address the issue regardless of how this
9 goes, in my view. I think it probably will and it's probably
10 something that needs to be -- I don't think they've addressed
11 it, but we'll see and I'll do the best I can. But I do want
12 to read, particularly, Sharon and if you gentlemen would work
13 on that while I'm out of the room.

14 MR. STEVENS: Your Honor, you want me to collaborate with
15 them two on the clear and convincing all the way across?

16 THE COURT: I want to have this result in as few issues
17 as possible.

18 MR. STEVENS: Okay.

19 THE COURT: If we can agree that this is how the charge
20 should be given and this is how the verdict form is done;
21 that's one more issue we will not have to deal with down the
22 road. Okay. Thank you very much.

23 MR. BENDER: Thank you.

24 (RECESS - 9:58 A.M.)

25 *****OFF THE RECORD*****

1 (On the Record - 10:34 A.M.)

2 BY THE COURT:

3 THE COURT: You have a verdict form, gentlemen, that we
4 can live with?

5 MR. BENDER: Yes. We have it with the exception of we
6 need to figure out what your charge is gonna be with respect
7 to falsity.

8 THE COURT: All right. I have found some guidance in the
9 Sharon case as you indicated earlier and I do recall it now
10 the indictment of Ariel Sharon, who was the Defense Minister
11 for Israel by the Time Magazine. Judge -- I think it was
12 Judge Sofaer, District Court, Federal District Court, was
13 considering a motion for summary judgment actually and in his
14 discussion, although I believe it is merely dicta, I think it
15 does give us guidance. He is discussing the general concept,
16 I believe, of a summary judgment and he says as a further
17 general consideration pertinent to evaluating Time's argument
18 or a further general consideration pertinent to evaluating
19 Time's argument is the fact that Plaintiff bears the burden of
20 establishing falsity, which is one of the traditional elements
21 of libel and actual malice, which is what we all agree as a
22 clear and convincing standard, establishing falsity and actual
23 malice by clear and convincing proof. He continues on with a
24 discussion of one of the issues and he concludes by saying
25 thus the proof of Minister Sharon's denials -- and we're

1 talking about falsity generally in this whole paragraph -- the
2 proof of General Sharon's denials ultimately must depend on
3 his credibility and upon Time's proof to the contrary
4 including impeachment, which Sharon bears the burden of
5 establishing his version by clear and convincing evidence. I
6 don't think there's any doubt that that Court was applying a
7 clear and convincing standard across the board to all the
8 traditional elements of libel and I think that is probably a
9 correct assessment of the law. I see no reason to hybridize
10 the burden of proof, the Plaintiff's burden of proof in
11 establishing liability. I understand that we customarily do
12 that in any case where we're looking at such things as
13 punitive damages, but that's a different issue. Here if we do
14 not establish the standard across the board, we have
15 overlapping issues in the establishment of actual malice or
16 constitutional malice by clear and convincing and establishing
17 the traditional elements. I see where they would overlap. I
18 think it's the standard. I think it's clear and convincing
19 standard across the board. I don't think it makes a whole lot
20 of practical difference in this case, but I think that's
21 probably the issue or resolve this issue and that's how I
22 would rule. Okay.

23 MR. BENDER: Thank you, Your Honor. We'll plug that into
24 the verdict form then.

25 THE COURT: Well, I think we've got to go back. I don't

1 think I give a preponderance issue, but I do mention -- I
2 thought that there was something in the charge where I had
3 used preponderance. Under public figure, the topic, second
4 paragraph, actual malice is the subjective standard which
5 tests the Defendant's good faith, belief in the truth of his
6 or her statement to recover on a claim for defamation, the
7 constitutional actual malice standard requires proof by clear
8 and convincing evidence that the defamatory statement relating
9 to the, to matters of public concern regarding the Plaintiff's
10 status or conduct as a public figure was made with knowledge
11 of its falsity and so forth and so on. I, I think we need to
12 insert somewhere the standard of proof. I have a description
13 of the, of what clear and convincing evidence is but we need
14 to make it clear that it applies to the proof required of the
15 Plaintiff in the case.

16 MR. BENDER: It looks like it might fit at the end of
17 that clear and convincing evidence section you have, Your
18 Honor.

19 THE COURT: Okay.

20 MR. BENDER: Make it clear that it applies to falsity ---

21 THE COURT: Why if I just put there, in order to prevail
22 the Plaintiff must prove its case by clear and convincing
23 evidence. Would that suffice?

24 MR. BENDER: I would put it as to false -- as to falsity,
25 actual malice damages.

1 THE COURT: A sentence that says the Defendant, I mean
2 the Plaintiff must prove falsity or all the, or I can just say
3 all the elements of this offense, because there are others.

4 MR. BENDER: You cover all the elements.

5 THE COURT: Yes.

6 MR. BENDER: Cause, I'm just looking at this one
7 page. You've gone over the elements earlier, so I think
8 that's fine.

9 THE COURT: How about that, Mr. Stevens. That's my
10 ruling and I know you don't agree with that or probably don't
11 but let me say that ---

12 MR. STEVENS: I believe that the law provides that if we
13 do prove our damages, excuse me, we do prove our elements by
14 clear and convincing evidence of falsity, they accused him of
15 a crime, that he was unfit in his trade or profession and it
16 was done with knowledge and reckless disregard, the law then
17 presumes actual damages.

18 MR. BENDER: No, there's no presumption of damages
19 anymore.

20 THE COURT: I don't believe so, Mr. Stevens.

21 MR. STEVENS: Okay. My, my objection, of course, is that
22 I don't believe it applies to all the elements.

23 THE COURT: All right. Well, at the end of page eleven,
24 Drew, under clear and convincing evidence I want you to add
25 another paragraph. In order to prevail, the Plaintiff must

1 prove its case by clear and convincing evidence as to falsity,
2 actual malice and damages.

3 MR. BENDER: I would suggest substitute his for its?

4 THE COURT: That's what I have. I have -- you mean put
5 his?

6 MR. BENDER: His.

7 THE COURT: His. Okay.

8 MR. BENDER: Unless you're saying a Plaintiff.

9 THE COURT: Okay. All right. Anything further other
10 than what you've pointed out, Mr. Stevens, as far as any
11 modification of the charge? And that's based on your
12 disagreement as to whether or not clear and convincing
13 standard applies.

14 MR. STEVENS: Well, I agree with -- you know, I'm not
15 agreeing but I understand your charge. If I'm going to be
16 held to that high of truth, there is -- and I am not prepared
17 to give you the cite, but there is law that where the, where
18 the actions of the Defendant if we prove by clear and
19 convincing evidence, but the action makes the damages a lot
20 more difficult to prove, that the Jury can take it into
21 consideration because of the defamation case, this is the type
22 of damages that a Plaintiff will never know he sustained
23 wherein that we can go back and use the, the history of his
24 increase in clientele and show -- we've got one witness that
25 said he lost one, but that the, that the -- all we have to do

1 is show by clear and convincing evidence that we did sustain
2 damages but we don't have to prove those damages to a
3 mathematical certainty. It must be based on ---

4 THE COURT: All right. Mr. Bender.

5 MR. BENDER: Well, I think that the measure of damages is
6 always -- there's no requirement for mathematical certainty as
7 to damages but there has to be evidence of injury to support
8 the damage award.

9 THE COURT: In my charge I have here ---

10 MR. STEVENS: I didn't mean to complicate it, Your Honor.

11 THE COURT: It says, I say here actual damages need not
12 be proven to a mathematical certainty.

13 MR. STEVENS: Yes, sir.

14 THE COURT: It's in there. It's the typical language.

15 MR. STEVENS: There is language in some of the cases
16 where the actions of the Defendant in damaging the Plaintiff
17 necessarily makes it difficult for the Plaintiff to prove his
18 damages.

19 THE COURT: Okay.

20 MR. STEVENS: So that the burden is lessened to some
21 extent to take into consideration that those damages will be
22 hidden because of the, of the Defendant's actions. In other
23 words, what I'm saying is where someone is ---

24 THE COURT: I think what you're doing is making a classic
25 presumed injury or presumed damages argument; are you not?

1 Isn't that from ---

2 MR. STEVENS: No, not really. It's -- there is case law
3 on that and I was not prepared because of your ruling on it.

4 THE COURT: Well, I think the charge on damages precisely
5 tells the Jury what -- anything further, Mr. Bender?

6 MR. BENDER: I don't believe so, Your Honor ---

7 THE COURT: All right.

8 MR. BENDER: --- on the verdict form; thank you.

9 THE COURT: And do you have some agreement as to a
10 verdict form now?

11 MR. BENDER: We haven't -- we've plugged in clear and
12 convincing evidence but Mr. Stevens has not looked at it with
13 that in there to make sure we're all in agreement.

14 THE COURT: All right. Let's, let's let Mr. Stevens look
15 at it and if you will send it Drew, Drew can send it on to my
16 copier and we can get one printed out quickly.

17 MR. STEVENS: Your Honor, might I say, as to the verdict
18 form, if you charge to the jury -- you got to prove, we've got
19 to prove our case by clear and convincing evidence. It
20 doesn't need to be included in the verdict form because they
21 necessarily have to go and say he's proved it by clear and
22 convincing evidence. So the, the verdict forms will then be
23 real simple. We find for the Plaintiff, blank dollars actual
24 damages against both Defendants on one or more of the
25 articles.

1 MS. STEVENS-GRAZIANI: That's the way we have that worded
2 as to, as to -- we have it worded as to the ---

3 THE COURT: I haven't seen it.

4 MR. BENDER: We took their form and started with it and
5 the only changes we made we changed preponderance of the
6 evidence that the Plaintiff had to ---

7 THE COURT: I think that's it and it's appropriate to ---

8 MR. BENDER: To put in clear and convincing?

9 THE COURT: Do we have like first, second and third
10 causes of action? Jurors don't know what that is.

11 MS. STEVENS-GRAZIANI: No, we don't have that anymore.

12 THE COURT: Okay. All right. Somebody send it to Drew.

13 MS. STEVENS-GRAZIANI: I'll send it right now.

14 MR. STEVENS: I was just trying to make it a little bit
15 more simple because you're charging the Jury the burden of
16 proof is uniform all throughout. If you've already charged
17 them that we have to prove by clear and convincing evidence
18 ---

19 THE COURT: Let's just see what it, let me see what we've
20 got here. All right. Mr. Stevens, your only objection is if
21 we repeat the standard in it?

22 MR. STEVENS: I beg your pardon?

23 THE COURT: Is that your only objection, just repeat the
24 standard that we've charged already in it?

25 MR. STEVENS: Yes.

1 THE COURT: I'm gonna leave it in. I don't think it
2 really makes a difference..

3 MR. STEVENS: One correction you need to make, if the
4 Jury unanimously answers yes to both findings of -- well,
5 there's three findings.

6 THE COURT: There's three and as to the editorial -- go
7 back to the first page; it says three on the -- there's one
8 and -- all right. Let's change it to all three; is that
9 correct, all three?

10 MR. REDMOND: Yes, Your Honor.

11 THE COURT: All right. All three and I think it says
12 that on, on the editorial, does it not?

13 MR. REDMOND: Yes, I didn't catch it on the first one and
14 the second paragraph, if the Jury unanimously answers no, it
15 says to either -- it should say to any on both pages.

16 THE COURT: Okay.

17 MR. STEVENS: Shouldn't it say all?

18 MR. REDMOND: No, just to any.

19 THE COURT: And if you didn't prove your malice, if you
20 didn't prove damages, if you didn't prove the other elements.
21 If you didn't do any of those, if there's any of those that
22 you didn't do, then there would be a verdict for the
23 Defendants. Okay. Let me look again.

24 All right, gentlemen, thank you.

25 That's what we'll do.

1 Now. are we ready to argue?

2 MR. STEVENS: Yes..

3 MR. BENDER: Yes, sir.

4 THE COURT: Okay. Brad, if you would, bring the Jury in.

5 (REPORTER'S NOTE: Jury enters courtroom. 11:01 A.M.)

6 THE COURT: Good morning, ladies and gentlemen. I want
7 to apologize for keeping you back in your jury room so long
8 this morning, but whenever there's a case to be tried, there
9 are many legal issues that must be addressed by the Court and
10 administrative issues that also be addressed by the Court and
11 all those things need to be placed on the record so that
12 there's clarity as to what transpired during the entire case.
13 We were here well into the evening last night doing those
14 things and back again this morning and we've been busy. We
15 haven't been just wasting your time, but we do apologize for
16 the delay in bringing you back in.

17 I gave you a brief summary of how the case would proceed
18 in my preliminary remarks to you. I think I explained to you
19 that once the evidence was in and both sides had had an
20 opportunity to present their positions and had rested that
21 then the attorneys would have an opportunity to sum up, you
22 know we used to call it arguments and I guess we still do from
23 time to time, but that's not really what they are. They're
24 summations by the attorneys. I cautioned you earlier that
25 opening remarks were not evidence, things that the attorneys

1 said. The only thing that you can consider in making
2 decisions concerning this case are, of course, the things you
3 hear from the witness stand that were given under oath.
4 Likewise, whatever the attorney may say in his closing remarks
5 is not evidence either. They certainly have the right to
6 comment and a duty to comment on the evidence and talk to you
7 in terms of the evidence that was presented to you during this
8 trial to emphasize evidence that they think was significant,
9 to deemphasize evidence they do not think was significant. I
10 know both of these attorneys and know they would not mislead
11 you, but they are real busy during the trial of a case. I'm
12 certain that neither one of them would mis-state the evidence
13 in this, this trial. But remember, their view of the evidence
14 is simply that, their view of the evidence. They are
15 summarizing their position to help you understand the evidence
16 in a light most favorable to their client. If they comment
17 about evidence in such a way it were mentioned, a piece of
18 evidence that you didn't hear or don't recall, then you are
19 the trier's of fact, you will determine what weight is to be
20 given the evidence or whether the evidence existed. They also
21 have an opportunity to speak to you about the law in the case.
22 What they believe I will charge you the law is and I've in
23 fact given them a copy of my charge on the law. I told you at
24 the beginning of this case that I have a policy that's a
25 little different from most judges. I prepare a transcript of

1 my charge that I will make available to you, I will give you
2 to use during your deliberations. So, these attorneys will
3 probably talk to you about the law and how you should apply
4 the law during your deliberations. Remember though that I am
5 the -- or the determination of the law is ultimately my job.
6 I am the only one with authority to say what the law is and
7 you have to be guided by the law as I give it to you during
8 your deliberations. So keep that in, in my mind.

9 Mr. Stevens will begin by making his first summation.
10 That will be followed by Mr. Bender or Mr., or counsel with
11 him, Mr. Redmond. Following that Mr. Stevens will have one
12 more opportunity to reply to Mr. Bender's argument. If you
13 would pay close attention.

14 Mr. Stevens, are you ready?

15 MR. STEVENS: Yes.

16 THE COURT: Okay.

17 CLOSING BY MR. STEVENS:

18 MR. STEVENS: May it please the Court and may it please
19 you ladies and gentlemen of the Jury. I want to thank you for
20 your close attention. I know it's been tiring for you sitting
21 here listening to the testimony and I want to say that I won't
22 -- I spent a while introducing the evidence and I may have
23 introduced more than one time and you may have been thinking
24 you can get on with it, you've already convinced us or maybe I
25 need some more evidence, but don't, don't let what I did that

1 could've had and that opportunity to say, oh, who was that,
2 Mark Kelley? Wasn't he the one they accused of, of a crime?
3 Oh, we don't need that; let's not use him; hu-huh (negative
4 response. So what happens? The doors of opportunity for Mark
5 Kelley closed so silently he never knew the door was open in
6 the first place and they know it. They know it and then they
7 complain because we can't go out there and ask -- there's
8 40,000 readers, which one of y'all didn't hire Mark Kelley?
9 But you've got the reasonable basis to award lost income to
10 him. You know what he made at least one job. They can
11 complain all they want to but remember how they've tried this
12 case and how they've avoided the truth and return a verdict
13 for this gentleman. Give him his life back. Give him his
14 reputation back and send a message back to Sun News and tell
15 them don't report things that are false, don't, quit ruining
16 reputations and families. Speak the truth when you render
17 your verdict and that's all we ask of you. Make it a full cup
18 of justice. Thank you.

19 CHARGE TO JURY:

20 THE COURT: Ladies and gentlemen, let me remind you,
21 during this trial you and I have certain duties to perform.
22 As the Trial Judge, it's my responsibility to preside over the
23 trial of the case and I also have the duty to rule on the
24 admissibility of the evidence offered during this trial and
25 you are to consider only the evidence before you. If there

1 was any testimony ordered stricken from the record during the
2 trial, you must disregard that testimony. You are to consider
3 only the testimony which has been presented from this witness
4 stand, any exhibits which have been made a part of the record
5 in this case and any stipulations of counsel.

6 I have the additional duty to charge you the law
7 applicable to this case. It is your duty as jurors, to accept
8 and apply the law as I now state it to you. If you think you
9 have any idea as to what the law is or what the law ought to
10 be and it does not agree with what I tell you the law is, you
11 must forget that idea because you are sworn to accept the law
12 and apply the law exactly as I state it to you. In every case
13 tried in this Court before a Jury, the Jury becomes the sole
14 and exclusive judge of the facts. A Trial Judge cannot
15 comment on or make any statement about the facts in a case.
16 Since you are the sole judges of the facts, do not think by
17 anything I have said during the trial of this case, that I
18 have any opinion about the facts in the case. The law does
19 not allow me to have an opinion about the facts.

20 There are two types of evidence generally presented
21 during a trial, direct evidence and circumstantial evidence.
22 Direct evidence is the testimony of a person who claims to
23 have actual knowledge of a fact, such as an eyewitness. It is
24 the evidence which immediately establishes the main fact to be
25 proved.

1 Circumstantial evidence is proof of a chain of facts and
2 circumstances indicating the existence of some fact. It is
3 evidence which immediately establishes collateral facts from
4 which the main fact may be inferred. Circumstantial evidence
5 is based on inference and not on personal knowledge or
6 observation. It is proof that does not actually establish the
7 fact in question but that asserts or describes something else
8 from which you may either reasonably infer the truth of the
9 fact or at least reasonably infer an increase in the
10 probability that the fact is true. For circumstantial
11 evidence to be sufficient to warrant the finding of a fact,
12 the circumstances must lead to that fact with reasonable
13 certainty. The facts and circumstances should be considered
14 in light of ordinary experience and common sense. The
15 existence of a fact cannot be based on speculation, surmise or
16 conjecture.

17 The law makes absolutely no distinction between the
18 weight or value to be given to either direct or circumstantial
19 evidence nor is a greater degree of certainty required of
20 circumstantial evidence than of direct evidence.

21 Necessarily, you must determine the credibility of the
22 witnesses who have testified in this case. Credibility simply
23 means believability. It becomes your duty as jurors to
24 evaluate the evidence and determine which evidence convinces
25 you of its truth. In determining the believability of

1 witnesses who have testified in this case, you may believe one
2 witness over several witnesses or several witnesses over one
3 witness; you may believe a part of the testimony of a witness
4 and reject the remaining part of the testimony of that same
5 witness. You may believe the testimony of a witness in its
6 entirety or reject the testimony of a witness in its entirety.
7 You can consider whether a witness has an interest in the
8 results of the trial, whether the witness is prejudiced
9 towards either the Plaintiff or the Defendant. The
10 opportunity the witness may have had to see the matters and
11 things about which the witness may testify and you may
12 consider the way a witness acts on the witness stand.

13 The Rules of Evidence ordinarily do not permit witnesses
14 to testify as to opinions or conclusions. An exception to
15 this rule exists for witnesses we call expert witnesses. A
16 witness, who by education and experience, has become expert in
17 some art, science or profession, may give an opinion as to the
18 subject the witness claims to be an expert in and may also
19 give the reasons for the opinion. You should consider any
20 expert opinion given by a witness and like any other evidence,
21 give it the weight you think it deserves. If you decide that
22 an expert's opinion is not based on sufficient education and
23 experience or if you decide that the reasons given in support
24 the opinion are not sound or that the opinion is outweighed by
25 other evidence, you may disregard the opinion entirely. An

1 expert's opinion is to be given no greater weight than that of
2 other witnesses simply because the expert is -- the witness is
3 an expert and you do not have to accept an expert's opinion
4 even though it's uncontradicted.

5 The Plaintiff brings this action for libel. Libel is a
6 type of defamation. Defamation is an intentional tort or
7 civil offense. That's what tort means, a civil offense. That
8 basically means that Defendant made a false statement
9 concerning the Plaintiff to a third party and that the
10 statement or communication tends to impeach the Plaintiff's
11 honesty, integrity, virtue or reputation and to expose him or
12 her to public hatred, contempt or ridicule or to cause the
13 individual to be shunned or avoided or to be injured in his or
14 office, business or occupation. If a defamatory statement is
15 written or broadcast by the media, we refer to the defamatory
16 statement as libel.

17 The elements of defamation in this case include, number
18 one, a false and defamatory statement concerning another; two,
19 an unprivileged publication to a third party; three, actual
20 malice on the part of the publisher and for special harm
21 caused by the publication. A principal may be held libel for
22 defamatory statements made by its agent acting within the
23 scope of his employment or within the scope of his apparent
24 authority. One who publishes a defamatory statement of fact
25 is not subject to liability for defamation if the statement is

1 true. To create liability for defamation, there must be
2 publication of matter that is both -- both defamatory and
3 false. There can be no recovery in defamation for a statement
4 of fact that is true. Although the statement is made for no
5 good purpose and is inspired by ill will towards a person
6 about whom it is published and is made solely for the purpose
7 of harming him. The truth of the matter published is an
8 absolute defense and the defense is valid if the statement
9 about the Plaintiff is substantially true. The Plaintiff must
10 also prove that the alleged defamatory statement was
11 communicated or published by the Defendant to a third party.
12 A publication is defined as the communication of defamatory
13 matter to a third person or persons to render any kind of
14 defamation as action there must be a publication. The alleged
15 statement must be published to a third party. Defamation need
16 not be accomplished in a direct manner. An insinuation may be
17 defamatory. A mere insinuation is actionable as a positive
18 assertion if it is false, published with actual malice and its
19 meaning is plain.

20 If a defamation action is brought by a Plaintiff who is a
21 public figure, there are special legal requirements that you
22 must consider. In this case, a legal determination that the
23 Plaintiff, Mr. Kelley, is a public -- I have made a legal
24 determination that the Plaintiff, Mr. Kelley, is a public
25 figure. You need not consume yourselves with the issue of

1 whether the Plaintiff in this case is a public figure; I have
2 made that determination.

3 In a defamation action brought by a public figure, the
4 Plaintiff must prove the defamatory statement was made with
5 what we refer to as constitutional actual malice. To meet
6 this standard, the Plaintiff must show that Defendant made the
7 statement either with knowledge that it was false or with
8 reckless disregard for its truth, thus the Plaintiff must
9 prove constitutional actual malice where he is a public figure
10 defamed in matters of public interest or concern.
11 Actual malice is a subjective standard which tests the
12 Defendant's good faith belief in the truth of his or her
13 statement. To recover on a claim for defamation, the
14 constitutional actual malice standard requires a public figure
15 to prove by clear and convincing evidence that the defamatory
16 statement relating to matters of public concern regarding the
17 Plaintiff's status or conduct as a public figure was made with
18 knowledge of its falsity or with reckless disregard of whether
19 it was true or false. The Plaintiff must demonstrate the
20 Defendant realized his statement was false in fact,
21 entertained serious doubts as to the truth of his publication
22 or acted with a high degree of awareness of probable falsity.
23 A reckless disregard for the truth however requires more than
24 a departure from reasonably prudent conduct. There must be
25 sufficient evidence to conclude either the Defendant made the

1 statements with a high degree of awareness of probable falsity
2 or that the Defendant in fact entertained serious doubts as to
3 the truth of its publication. Mere negligence is insufficient
4 to prove actual malice. Therefore, a public figure is
5 prohibited from recovering damages for a defamatory falsehood
6 relating to a matter of public interest or concern without
7 clear and convincing proof the statement was made with actual
8 malice, that is with the knowledge that it was false or with
9 reckless disregard of whether it was false or not. A public
10 figure may recover for injury to reputation on clear and
11 convincing proof that the defamatory falsehood was made with
12 knowledge of its falsity or with reckless disregard of the
13 truth.

14 If adoption of the language in question that was chosen
15 by the Defendant was one of a number of possible, rational
16 interpretations of an event that is ambiguous and presents
17 descriptive challenges for the writer, the choice of such
18 language, though reflecting a misconception does not
19 necessarily give rise to liability.

20 Again, it is worth emphasizing that the actual malice
21 standard is not satisfied merely through a showing of ill will
22 or malice in the ordinary sense of the term. Nor can the fact
23 that the Defendant published the defamatory material in order
24 to increase its profits suffice to prove actual malice.
25 Actual malice instead requires at a minimum, that the

1 statements were made with a reckless disregard for the truth.
2 Although the concept of reckless disregard cannot be fully
3 encompassed in one infallible definition. It is clear that
4 the Defendant must have made the false publication with a high
5 degree of awareness of probable falsity or must have
6 entertained serious doubts as to the truth of its publication.
7 A reckless disregard for the truth requires more than a
8 departure from the reasonably prudent conduct or from
9 reasonably prudent conduct. There must be sufficient evidence
10 to permit the conclusion that the Defendant in fact
11 entertained serious doubts as to the proof of his publication.
12 There must be evidence that the Defendant had a high degree of
13 awareness of probable falsity. Failure to investigate before
14 publishing even when a reasonably prudent person would have
15 done so is not sufficient to establish reckless disregard.
16 Actual standard malice is not satisfied merely through a
17 showing of ill will or malice in the ordinary sense of the
18 term. It is insufficient to show the Defendant made the
19 editorial choice or simply failed to investigate or verify
20 information. There must be evidence at least that the
21 Defendant purposely avoided the truth.

22 A statement on matters of public concern must be provable
23 as false before there can be liability under state defamation
24 law where a media Defendant is involved. A statement of
25 opinion relating to matters of public concern, which does not

1 contain a provably false factual connotation will receive full
2 constitutional protection.

3 Clear and convincing evidence is an elevated standard of
4 proof which lies between the lesser standard of preponderance
5 of the evidence used in most civil cases and the higher
6 standard of beyond a reasonable doubt, which is required in
7 criminal cases. Clear and convincing evidence is that degree
8 of proof which will produce in the minds of the Jury a firm
9 belief as to the allegations sought to be established. Such
10 measure of proof is intermediate, more than a mere
11 preponderance but less than is required for beyond a
12 reasonable doubt. It does not mean clear and unequivocal.
13 Clear and convincing evidence requires that evidence must be
14 found to be credible. The facts to which the witness
15 testified must be distinctly remembered. The testimony must
16 be precise and explicit and the witness must be lacking in
17 confusion as to the facts in issue. The evidence must be of
18 such weight that it produces in the mind of the Jury a firm
19 belief or conviction without hesitancy as the truth of the
20 allegation sought to be established.

21 When the law places upon the party a burden of proof by
22 clear and convincing evidence, the law means that the evidence
23 is not ambiguous, doubtful, equivocal, or contradictory, but
24 the evidence is pointed to the issue and satisfactory in the
25 sense that the source from which it comes is one which you

1 jurors can place credence. In order to prevail, the Plaintiff
2 must prove his case by clear and convincing evidence as to
3 falsity, actual malice and damages.

4 The Plaintiff must prove that his reputation was damaged
5 by the defamatory statement. The Plaintiff must prove that
6 the damages naturally and proximately resulted from the
7 Defendant's statement. Actual damages are damages which
8 compensate the Plaintiff for the injury and put the Plaintiff
9 in the same position as he was prior to the defamatory
10 statement as much as is possible. General damages including
11 humiliation, hurt feelings, mental suffering, injury to
12 reputation and other types of injuries on which you cannot
13 place a monetary value.

14 The Plaintiff must also prove any special damages
15 resulting from the defamatory statements. Special damages are
16 monetary damages with respect to the property, business,
17 profession or occupation of the Plaintiff such as loss of a
18 job, the loss of customers or the loss of a business
19 relationship as a result of the injury to the Plaintiff's
20 reputation.

21 A Plaintiff is never entitled to recover conjectural or
22 speculative damages, but if you find the Plaintiff is entitled
23 to a verdict for actual damages, your verdict should include
24 an amount to cover any past, present and future damages which
25 were proximately caused by the Defendant. Any future damages

1 must be reasonably certain to occur in the future as a result
2 of the Defendant's act. Actual damages need not be proven to
3 a mathematical certainty or be based on evidence of the
4 precise amount of damages the Plaintiff has suffered. Instead
5 the evidence must allow you to determine what amount of
6 damages is fair, just and reasonable.

7 Now, ladies and gentlemen of the Jury, there are three
8 possible verdicts which you may return in this case. First if
9 you find that the Plaintiff has proved his case as to any of
10 the articles authored by David Wren in accordance with the
11 charge I have just given you. Your verdict must be rendered
12 against both David Wren and The Sun News.

13 Number two, if you find that the Plaintiff has only
14 proven his case as to the editorial, which is not authored by
15 David Wren, but it was published in The Sun News, in
16 accordance with the charge that I have just given you, your
17 verdict must be rendered only against The Sun News.

18 If you find that the Plaintiff has not proven his case as
19 to the articles authored by David Wren and the editorial not
20 authored by Mr. Wren, your verdict must be rendered in favor
21 of Defendants.

22 If the Plaintiff recovers damages, he is entitled only to
23 one recovery for his damages and this will be reflected on the
24 verdict form that you will be given. Now, there's no
25 significance whatsoever in which the verdict forms states

1 these possible verdicts. It is simply that I had to put one
2 before the other.

3 Let me remind you that all twelve of you must agree on
4 the verdict. Your verdict cannot be based on sympathy,
5 passion, prejudice, emotion or any other consideration not in
6 the evidence in this case.

7 Now, Madam Foreperson, when the -- I'm gonna send you
8 into your jury room and when the jury agrees on a verdict, I'm
9 gonna ask you to sign your name to the verdict form after
10 having filled it out and then knock on the jury room door and
11 let Mr. Ropp or the Deputy who would be there, know that you
12 have reached a verdict and we'll bring you back in.

13 Now, I'm gonna ask you not to begin your deliberations
14 quite yet when you first go in. There may be a further
15 instruction that I have to give you. I don't think so. The
16 attorneys and I have gone over the, the instructions, but we
17 have to gather together all of the exhibits and those things
18 so that they will be available for you during your
19 deliberation.

20 I think I told you earlier that it has always been my
21 practice to provide the jury with a transcript of my charge.
22 As you may have heard during my charge, the law is very
23 complex in this area and I don't think it would be reasonable
24 for us to expect you to remember everything that I just
25 charged you. And so I'm gonna have a copy of, of my charge

1 and any additional charge I might add available for you.

2 I do want to point out to you that I have prepared a
3 verdict form and this verdict form, because of the complexity
4 of this case, is significantly longer than the normal verdict
5 form, but I'm confident that you can handle it. I would just
6 ask you to follow all the instructions. It begins with a
7 question that says as to the May 20th, May 23rd or May 25th,
8 2010 articles authored by the Defendant, David Wren, we find
9 that the Plaintiff has proven by clear and convincing evidence
10 that the Defendants made a false statement about the
11 Plaintiff, published the statement and that said statement
12 injured the Plaintiff personally and in his occupation and
13 profession. You will answer that question yes or no. And
14 again, there's no significance whatsoever to whether I put yes
15 or no first, I just had to put one, but you will mark it.
16 Then it goes on to say if yes -- if you had answered yes to
17 that question, we also find that the Plaintiff has proven by
18 clear and convincing evidence that the statement was published
19 with actual malice, which is the state -- which is the
20 statement was made with knowledge of its falsity or reckless
21 disregard of its truth or falsity and you will answer that
22 question. If you answer that question yes, then you will move
23 down and you will be asked if yes, we also find that the
24 Plaintiff has proven by clear and convincing evidence that the
25 Defendant or the Plaintiff -- gentlemen, that should say

1 Plaintiff sustained actual damages.

2 MR. BENDER: Yes.

3 THE COURT: That's what I get for having these attorneys
4 help me prepare the verdict form. I will amend that, but it
5 should say that the Plaintiff. It asks you whether the
6 Plaintiff has sustained actual damages and then you will be
7 asked if you've answered yes to all those questions, how much
8 the damages would be if you have reached that point.

9 Then we move over to a second set of questions that asks
10 essentially the same questions in the same order, but about
11 the editorial. If you would -- have paid close attention to
12 my charge, you will see that we're talking about two
13 Defendants and two different things. One being a group of
14 articles authored, allegedly being authored by Mr. Wren, I
15 don't really think there's a question about that and then an
16 editorial written by the newspaper or published by the
17 newspaper.

18 If you have any questions about the verdict form, please
19 let me know. We will, we will address those. I think you
20 can, you can certainly follow it and answer the questions as
21 you go along.

22 Now I'm gonna send you into your jury room. I have
23 already ordered lunch for you. It should be -- it should be
24 here. I asked that it be here at one o'clock and its one
25 minute till one. So, I was estimating when we would be done.

1 So, it should be here very shortly. Make yourself comfortable
2 in your jury room. Wait for me to give you further
3 instructions. I will tell you this. If I send in my charge
4 and I send in my verdict form and we send you all the exhibits
5 in, that's the signal to begin your deliberations. Okay? If
6 I need to bring you back, I will and we will -- I'll give you
7 further instructions. All right. Thank you very much.

8 Mr. Ropp, if you would take them, gather all the
9 exhibits, give them to the Court Reporter and take the Jury
10 back into the jury room.

11 BAILIFF: Yes, sir.

12 THE COURT: And make sure that their lunch is there.

13 (REPORTER'S NOTE: Jury exits courtroom. 1:00 P.M. The
14 following takes place outside the presence of the Jury.)

15 THE COURT: Anything further?

16 MR. STEVENS: Nothing from the Plaintiff other than ---

17 THE COURT: Other than your previous objections
18 concerning the charge?

19 MR. BENDER: Nothing further, Your Honor, just the
20 reminder you failed to dismiss the alternates.

21 THE COURT: I'm not going to dismiss them because there
22 may be a punitive award.

23 MR. BENDER: Okay. Thank you.

24 THE COURT: So, I'm going to segregate them. I will
25 instruct -- Brad, if you would, before deliberations begin,

1 segregate the alternates. I know I usually release them when
2 I go in, but in this case, I'm going to need to keep them.
3 They must be kept segregated from the rest of the jury panel.

4 DEPUTY: Yes, Your Honor.

5 THE COURT: Okay. All right, gentlemen, please get with
6 Ms. Richardson here and let's make certain that we have the
7 exhibits.

8 Ms. Richardson, if you would mark this charge.

9 COURT'S EXHIBIT TWO

10 ADMITTED INTO EVIDENCE

11 (REPORTER'S NOTE: Jury deliberations begin. 1:06 P.M.)

12 (RECESS - 1:06 P.M.)

13 *****OFF THE RECORD*****

14 (On the Record - 1:42 P.M.)

15 THE COURT: All right. Please keep your seats. I have a
16 question here from the, the Forelady, says we have articles
17 for May 21st, 2010, not May 20th, 2010. Are we supposed to be
18 making a verdict on an additional article or is May 20th not
19 the correct date?

20 MR. STEVENS: May 20th is not the correct date. It
21 should be May the 21st, but, Your Honor, we have said the
22 beginning that that was not a point of -- I just completely
23 missed it.

24 THE COURT: All right, sir.

25 MR. STEVENS: If we were not claiming that that May 21st

1 article was defamatory.

2 THE COURT: All right. How do you want me to respond to
3 this Jury? Tell them that, that the wherever there is
4 reference to May 21st, 2010, they should consider ---

5 MS. STEVENS-GRAZIANI: Ignore it.

6 MR. STEVENS: Ignore it. Just say the only thing they
7 need to consider -- that was is the scrivener's error.

8 THE COURT: That May 21st is the right one?

9 MR. STEVENS: May 23rd and May 25th is the right one.

10 MS. STEVENS-GRAZIANI: Right.

11 MR. STEVENS: Now as to per quod ---

12 THE COURT: Well, they have an article for May the 21st?

13 MR. STEVENS: That's it. We just wrote it down wrong and
14 I did not pick up on it.

15 THE COURT: Well, these verdict forms say May 20th, 23rd
16 and 25th.

17 MR. BENDER: I think the 20th should be 21.

18 THE COURT: That's what they're saying. We have one for
19 May the 21st.

20 MR. STEVENS: Tell them that -- again, I misspoke. If
21 they find per quod, then the 21st will come into play.

22 THE COURT: Find for who?

23 MR. STEVENS: Per quod instead of per se.

24 THE COURT: Yeah.

25 MR. STEVENS: Just tell them it's a scrivener's error.

1 MR. REDMOND: That it should be 21st instead of 20th.

2 THE COURT: Okay. Where ever a reference is made to May
3 the 21st, it should read -- I mean 20th, it should be May the
4 21st?

5 MR. STEVENS: That's right.

6 THE COURT: I'm gonna send this note back in saying all
7 references to a May 20th article, to a May 20th, 2014 article
8 should actually read as May 21, 2010. All right, is that
9 sufficient, gentlemen? All reference, I'm writing it on a
10 note and I'm sending it back to the, to the Forelady that says
11 all references to a May 20th, 2014 article should actually
12 read as May the 21st, 2014?

13 MR. STEVENS: 2010. It should be 2010.

14 THE COURT: 2010, should be read as May 21st, 2010.

15 MR. BENDER: That's correct.

16 THE COURT: Okay. All right. Take that back to them.

17 COURT REPORTER: And mark this as ---

18 THE COURT: Yes, and mark it as an exhibit.

19 COURT REPORTER: Court's Exhibit Three.

20 COURT'S EXHIBIT NUMBER THREE

21 ADMITTED INTO EVIDENCE

22 THE COURT: We, that's gonna be on the record. We're
23 good with that.

24 Gentlemen, I wanted to ask you, in the event that there
25 is a, an actual verdict, how do you intend to proceed and how

1 much time do you anticipate you will need on a punitive phase?

2 I think the charge will be rather short. All I have to do is
3 give an additional charge on punitive damages, fairly simple.

4 MR. STEVENS: That's -- I don't anticipate any further
5 witnesses, just ---

6 THE COURT: Well, what will you do then? Will you put up
7 witnesses?

8 MR. BENDER: I don't intend to.

9 THE COURT: Or, or do you both just desire to argue once
10 again?

11 MR. STEVENS: Yes.

12 THE COURT: Just reargue and then have me charge on
13 punitive damages. You think that would be sufficient and let
14 them take it on the witnesses they have?

15 MR. BENDER: I think that's correct.

16 THE COURT: Okay. Well, this is new ground. I, quite
17 frankly have never had a Defendant who requested it. They
18 always say, well let's just do it -- and it's optional as to
19 how you do it, but we'll do it that way.

20 Also. with the new statute in place, what do you believe
21 is the Court's duty in the event of a punitive award for
22 review of the award? Is it on the statutory factors or is it
23 on the Gamble factors or both?

24 MR. REDMOND: The statute, Your Honor, says considering
25 all relevant evidence including the factors identified in the

1 statute. So, in my mind it would say both.

2 THE COURT: Okay.

3 MR. REDMOND: There is a ---

4 THE COURT: There is a lot of overlapping with Gamble and
5 the statute. I just wondered if the legislature intended for
6 the statute to replace Gamble?

7 MR. BENDER: It didn't seem to say so.

8 THE COURT: I don't know. We'll -- out of an abundance
9 of caution, we'll do it all. Okay. All right. If that's the
10 case. Thank you.

11 MR. BENDER: Thank you.

12 (RECESS - 1:47 P.M.)

13 *****OFF THE RECORD*****

14 (On the Record - 4:45 P.M.)

15 (REPORTER'S NOTE: The following takes place outside the
16 presence of the Jury.)

17 THE COURT: Where's Mr. Stevens?

18 MS. STEVENS-GRAZIANI: He's out of the court.

19 THE COURT: Well, find him.

20 MS. STEVENS-GRAZIANI: He said that I can handle it.

21 THE COURT: Okay.

22 MR. REDMOND: Natalie and I have been working on the
23 proposed ---

24 THE COURT: No, we've got a verdict. He don't want to be
25 here?

1 MS. STEVENS-GRAZIANI: Okay. I thought you were ---

2 MR. REDMOND: I didn't know we had a verdict. We were
3 just ---

4 THE COURT: We have a verdict. Okay. I'd like to know,
5 gentlemen, on this, we're on the record, okay?

6 It's my understanding from my Clerk now, that you do not
7 believe that the, the statute, the 2012 statute applies; is
8 that right, Ms. Stevens-Graziani?

9 MS. STEVENS-GRAZIANI: That's correct, Your Honor.

10 THE COURT: Mr. Bender, is that correct?

11 MR. BENDER: That's correct.

12 THE COURT: All right. Now, what about the fact that
13 we've bifurcated this case. I think we can try it any way we
14 want. Have you agreed to the bifurcation, Ms. Stevens-
15 Graziani?

16 MS. STEVENS-GRAZIANI: Yes.

17 THE COURT: And Mr. Bender?

18 MR. BENDER: Yes.

19 THE COURT: So, now where that leaves us is if there is
20 an award of actual damages, if there is an award of actual
21 damages, we must address the issue of punitive damages. If
22 that is the case, it's my understanding that the Plaintiff,
23 neither the Plaintiff nor the Defendant intend to place other
24 evidence in the record; is that correct?

25 MR. BENDER: That's correct.

1 THE COURT: Is that correct, Ms. Graziani?

2 MS. STEVENS-GRAZIANI: That's correct.

3 THE COURT: And you wish for me to allow you to make a
4 continued statement if it's necessary to the Jury, address, or
5 do a summation concerning punitive damages; is that right, Ms.
6 Stevens-Graziani?

7 MS. STEVENS-GRAZIANI: That's correct.

8 THE COURT: Is that right, Mr. Bender?

9 MR. BENDER: That is correct, Your Honor.

10 THE COURT: Followed by a charge on the law; is that
11 correct, as well?

12 MR. BENDER: That's correct.

13 THE COURT: All right. Now we have prepared a charge
14 based on the statute. It's my understanding that neither of
15 you wish for me to charge the statute, that you want a
16 different charge in punitive damages; is that right, Ms.
17 Stevens-Graziani?

18 MS. STEVENS-GRAZIANI: That's correct.

19 THE COURT: Is that right, Mr. Bender?

20 MR. BENDER: That's correct.

21 THE COURT: Have you prepared something for me?

22 MR. BENDER: I think it's in the process right here.

23 MS. STEVENS-GRAZIANI: I was working on it and he, he was
24 telling me that he wanted to include the Mitchell v. Fortis
25 headnote eleven, but I was reviewing it and I think that's for

1 the Court's review not the Jury's and I would ask that the
2 Gamble factors be ---

3 THE COURT: The Gamble factors and the Fortis factors are
4 for the Court's post-judgment review?

5 MS. STEVENS-GRAZIANI: Right.

6 THE COURT: Okay. I will tell you this. It's late. We
7 don't have Court tomorrow. If in fact, if, and I do not know,
8 please, if in fact there is an award, a punitive award, if
9 there is a punitive award, if there is an actual award, I
10 don't know. It's my intent to dismiss the Jury. I will allow
11 you the weekend to prepare comments to the Court concerning
12 the Gamble, Gore and Fortis factors if there is a punitive
13 award and I will allow you that time to make post-verdict
14 motions. Is that agreeable, Mr. Bender?

15 MR. BENDER: Yes, sir.

16 THE COURT: That will give you the weekend and will give
17 you the weekend, Ms. Stevens-Graziani. Do you all understand
18 that? Does everyone agree with that process?

19 MS. STEVENS-GRAZIANI: Yes, Your Honor.

20 THE COURT: Okay. Now if there is an award of actual
21 damages and if we go to punitive damages, I want to make sure
22 we're in agreement as to the charge; it seems like we are.
23 How far are we away from that, Mr. Redmond?

24 MR. REDMOND: Very close, one issue.

25 THE COURT: As to the verdict form, if that is necessary,

1 I want to be able, if there is an award of actual damages, to
2 go directly into tell the Jury that there's one other issue
3 they must decide and that would be the issue of punitive
4 damages in that the Plaintiffs have prayed for punitive
5 damages and our Court system requires that they review that
6 after an award of actual damages. And I want to go
7 immediately -- I just want to tell them what we're doing. I
8 want to go immediately then into your remarks and then I want
9 to charge and I want to be able to hand them a verdict form, a
10 separate verdict form as to punitive damages. I don't know if
11 any of this is gonna be necessary but I want to be ready for
12 it. My understanding is that we would simply -- what do you
13 want on it? What do you want it to say?

14 MR. BENDER: I'm sorry, Your Honor.

15 THE COURT: In case we need it, what do you want a
16 verdict form for punitive damages if punitive damages, if we
17 get that far, what do you want it to say?

18 MR. BENDER: I think we need to divide it again as
19 between Wren and The Sun News if it's respect to the articles
20 and The Sun News if it's respect to the editorial.

21 THE COURT: Okay. Well, what I will do then is I will
22 tell them that I will be handing into them a verdict form for
23 their use. Okay? We will prepare that quickly after the
24 charge. We will have the Deputy take it in to them for their
25 use. Okay? It will be a form that we can all agree on.

1 Okay?

2 MS. STEVENS-GRAZIANI: Okay.

3 THE COURT: Okay. All right. So, Mr. Redmond, can you
4 get that, that charge ready? I mean, do you have it about
5 ready? Let's look at it because, you know, we're not under
6 the statute anymore, we're -- let's see what we've got. Just
7 please be seated and let's work on it. Let's get it done.

8 Mr. Stevens, in that we are all in agreement now that the
9 statute does not apply.

10 MR. STEVENS: Yes, sir.

11 THE COURT: There should be a relatively simple punitive
12 damage charge; would you agree?

13 MR. STEVENS: Yes.

14 THE COURT: Okay.

15 (REPORTER'S NOTE: Brief break in record while verdict form is
16 prepared.)

17 THE COURT: All right. That is just it, the eight
18 factors? There's no -- Do we need a charge concerning the
19 amount of punitive damages and the extent of punitive damages?
20 Don't you think we need that, gentlemen?

21 All right. How about this final paragraph I have,
22 Finally, any award of punitive damages must be limited to
23 punishment and may not affect the economic bankrupt -- the
24 Defendants' ability to pay any punitive damages award should
25 be considered. However, economic bankruptcy -- the economic

1 factor is not an absolute bar to the award of punitive
2 damages.

3 MR. STEVENS: Well, I don't think that applies because
4 did he have insurance involved ---

5 THE COURT: Okay. Is what you have said to me, what you
6 want me to charge on the issue of punitive damages?

7 MR. REDMOND: Your Honor, can the last paragraph now that
8 you have in there be edited to take out the economic
9 bankruptcy. In other words, ---

10 MS. STEVENS-GRAZIANI: Just to take out the bankruptcy
11 language.

12 THE COURT: Finally, any award of punitive damages must
13 be limited to punishment.

14 MS. STEVENS-GRAZIANI: Yeah.

15 MR. REDMOND: That part is okay. And to this end, the
16 Defendant's ability to pay should be considered and leave it
17 at that.

18 MS. STEVENS-GRAZIANI: Yeah.

19 THE COURT: Okay. Is that it?

20 MS. STEVENS-GRAZIANI: Yes.

21 THE COURT: All right. Drew, let's add that to it.
22 Okay? And then again, I'm gonna add your verdict must be
23 unanimous.

24 We do all this and may not even need it. All right.
25 Thank you.

1 Okay: All right. Very well. All right.

2 MR. BENDER: Could we get a copy of that now, please?

3 THE COURT: Yes, I have it exactly as Mr. Redmond sent it
4 with the addition these two sentences. Finally, any award of
5 punitive damages must be limited to punishment and to this
6 end, the Defendants' ability to pay any punitive damage award
7 should be considered. Your verdict must be unanimous. That's
8 the only thing that's added to it.

9 Do you agree with the charge, Mr. Stevens?

10 MR. STEVENS: Yes, Your Honor.

11 THE COURT: Do you agree with the charge, Mr. Bender?

12 MR. BENDER: Yes, sir.

13 THE COURT: All right. Then let's bring in the Jury and
14 let's see what we have.

15 (REPORTER'S NOTE: Jury enters courtroom. 5:04 P.M.)

16 THE COURT: All right. Madam Forelady, have you reached
17 a verdict?

18 JUROR 150: Yes, we have.

19 THE COURT: And was your verdict unanimous?

20 JUROR 150: Yes, Your Honor.

21 THE COURT: All right. If you would, give your verdict
22 form to the Clerk.

23 Very well. Yes, ma'am, would you publish the verdict for
24 me?

25 VERDICT OF THE JURY:

1 CLERK: The State of South Carolina, County of Horry, in
2 the Court of Common Pleas, Case Number 2012-CP-26-3804, Mark
3 Kelley, Plaintiff versus The Sun Publishing Company, Inc.
4 D/B/A/ The Sun News and David Wren, Defendants. Verdict.
5 Verdict one as to news article, number one as to May 21st,
6 2010 and May 23rd, 2010 and May 25th, 2010 articles authored
7 by the Defendant, David Wren, we find this Plaintiff has
8 proven by clear and convincing evidence that the Defendants
9 made a false statement about Plaintiff and that said statement
10 injured the Plaintiff personally and in his occupation and
11 profession. Yes.

12 We also find the Plaintiff has proven by clear and
13 convincing evidence that said statement was published with
14 actual malice, which is the statement was made by the
15 knowledge of its falsity or reckless disregard of its truth or
16 falsity. Yes.

17 We also find that the Plaintiff has proven by clear and
18 convincing evidence that Plaintiff sustained actual damages.
19 Yes.

20 If the Jury answers yes to all three findings above, we
21 find for the Plaintiff against both Defendants' actual damages
22 in the amount of \$400,000.

23 Juliet Galton, Foreperson, Conway, South Carolina May
24 8th, 2014.

25 Verdict form as to editorial. Number two, as to the

1 editorial dated May the 30th, 2010, we find that the Plaintiff
2 has proven by clear and convincing evidence that the Defendant
3 made a false statement about the Plaintiff, published that
4 statement and that said statement injured the Plaintiff's
5 reputation. No.

6 If the Jury answers no to either one of the findings
7 above, we find for the Defendant, Sun Publishing Company, Inc.
8 as to the editorial identified above.

9 Juliet Galton, Foreperson, Conway, South Carolina, May
10 8th, 2014.

11 Madam Forelady, ladies and gentlemen of the Jury, is this
12 your verdict? Please signify by raising their right hands.

13 (REPORTER'S NOTE: Jury unanimously complies.)

14 CLERK: Thank you.

15 THE COURT: Ladies and gentlemen of the Jury, again, I
16 ask you, is this your verdict?

17 (REPORTER'S NOTE: Jury unanimously responds in the
18 affirmative.)

19 THE COURT: And it's still your verdict?

20 (REPORTER'S NOTE: Jury unanimously responds in the
21 affirmative.)

22 THE COURT: Any request for individual polling from the
23 Plaintiff?

24 MR. STEVENS: None from the Plaintiff, Your Honor.

25 THE COURT: From the Defendant?

1 MR. BENDER: None, Your Honor, thank you.

2 THE COURT: Very well. Ladies and gentlemen of the Jury,
3 I know that it is late in the evening but there is one other
4 matter than we must have you address. The Plaintiff in this
5 case has requested or prayed for as we refer to it in the law,
6 for punitive damages. Those are damages in excess of actual
7 damages. I will instruct you on the law. Both the Plaintiff
8 and the Defendant at this time have an opportunity to put up
9 additional evidence. However, they have both informed me that
10 they do not wish up to put up additional evidence, that they
11 wish to submit it to you upon the record in this case. To
12 that end, they are both now entitled to a short summation
13 concerning punitive damages after which I will instruct you on
14 the law of punitive damages.

15 Mr. Stevens?

16 CLOSING BY STEVENS:

17 MR. STEVENS: Thank you, Your Honor. Ladies and
18 gentlemen of the Jury, I know it's late and it's after 5
19 o'clock and we certainly don't mean to take very long.

20 Punitive damages simply are damages ---

21 THE COURT: One second. I had kept the alternates out of
22 an abundance of caution. I usually release the alternates as
23 soon as it's given to the case. I think at this time, we can
24 release our alternates. Anyone have any objection?

25 MR. STEVENS: No, Your Honor.

1 MR. BENDER: No, Your Honor.

2 THE COURT: Mr. Ropp, you may tell the alternates that
3 they may be released. However, if they wish to stay, they
4 certainly may do so.

5 BAILIFF: Yes, sir.

6 THE COURT: But they may not participate in the
7 deliberation.

8 BAILIFF: All right.

9 THE COURT: I'm sorry, Mr. Stevens, I did not mean to
10 interrupt you.

11 MR. STEVENS: That's quite all right, Your Honor.

12 I don't plan to take much time because I know you all
13 want to get home. Since you have found actual damages, the
14 law says that the Plaintiff can't recover punitive damages
15 unless you find actual damages; that's the reason for the fact
16 that we're back here.

17 Punitive damages must be proven by clear and convincing
18 evidence just like the actual damages do. There is also some
19 elements that His Honor will charge you but the purpose of
20 punitive damages is to punish and to deter the Defendants from
21 engaging in like conduct. The, the discretion to award
22 punitive damages is solely within your discretion. You can
23 award it and or you don't have to award it. But if you feel
24 that the Defendant in its actions would continue, then you may
25 want to send them a message that we're awarding punitive

1 damages to tell you to quit engaging in that type of conduct.
2 That's all I have to say to you. I will leave it within your
3 good judgment and conscious. Thank you.

4 THE COURT: Mr. Bender.

5 CLOSING BY BENDER:

6 MR. BENDER: May it please the Court, Your Honor.
7 Forelady and members of the Jury, thank you very much for your
8 attention to this matter.

9 These damages that are being sought now are exactly what
10 they're described as by their name, punitive damages. And if
11 you feel on the basis of the charge the Judge gives you that
12 there will be a need to punish David Wren and The Sun News,
13 then it's within your power to make that decision. I would
14 ask you to consider as you debate and discuss that was there
15 anything that the Plaintiff could have done to reduce or
16 mitigate his damage. And the answer is clearly, yes, he could
17 have done so with a telephone call, an email or have someone
18 else in 2010 say you made a mistake, I was there, I didn't
19 know it was a fundraiser and I had nothing to do with it.
20 That didn't happen. Two years later, this lawsuit was filed.
21 You've made a determination on his actual injury, now the
22 question is, has the Defendant, David Wren and has The Sun
23 News engaged in sufficiently reprehensible conduct as the
24 Judge will describe it that you feel the need to punish them.
25 Thank you.

1 CHARGE TO JURY:

2 THE COURT: All right. Ladies and gentlemen of the Jury,
3 if you award and in this case you have awarded actual damages,
4 you may also consider an award of punitive damages. Punitive
5 damages are intended to punish the Defendant for extraordinary
6 and outrageous misconduct and to prevent the Defendant and
7 others from committing similar acts in the future.

8 Are you having difficulty hearing?

9 JUROR 150: Yes, sir.

10 THE COURT: Did you not hear what -- I will start again
11 if I was not speaking up and I apologize. Let me move my --
12 and let me begin again if you don't mind.

13 If you award actual damages and in this case you have
14 awarded actual damages, you may also consider an award of
15 punitive damages. Punitive damages are intended to punish the
16 Defendant for extraordinary and outrageous misconduct and to
17 prevent the Defendant and others from committing similar acts
18 in the future. Punitive damages can only be awarded when
19 conduct of the Defendant has been something more than just
20 negligent. The evidence must establish the Defendants' acts
21 were reckless, willful and wanton. Meaning there was a
22 conscious indifference to the rights of others or a reckless
23 disregard of them. If you find that the Defendants' conduct
24 was willful, wanton or reckless, you may award the Plaintiff
25 punitive damages. To support an award of punitive damages,

1 the Plaintiff must prove by clear and convincing evidence that
2 the conduct complained of included a consciousness of
3 wrongdoing at the time of the conduct.

4 Now, I have previously provided you with my charge
5 concerning the meaning of clear and convincing proof. The
6 same will apply to your determination of punitive damages.
7 Before awarding punitive damages, you must consider and weigh
8 several factors, which may be pertinent to the facts of this
9 case.

10 The first factor is reprehensibility of the actions by
11 the Defendant. This principal reflects the view that some
12 wrongs are more blameworthy than others. In considering we
13 have a reprehensibility, the Jury may consider whether one,
14 the harm caused was physical as opposed to economic. Two, the
15 tortious conduct, evidence and indifference to or a reckless
16 disregard for the health or safety of others. Three, the
17 target of the conduct had financial vulnerability. Four, the
18 conduct involved repeated actions or was an isolated incident.
19 And Five, the harm was a result of intentional malice,
20 trickery or deceit rather than a mere accident. Other factors
21 to consider are the severity of the harm caused by the
22 Defendant, the extent to which the Plaintiff, Plaintiff's own
23 conduct contributed to the harm, the profitability of the
24 conduct to the Defendant, the Defendant's ability to pay, the
25 likelihood the award would deter the Defendant and others from

1 like conduct.

2 Finally, any award of punitive damages must be limited to
3 punishment and to this end, the Defendants' ability to pay any
4 punitive damage award should be considered.

5 Again your verdict must be unanimous.

6 Now I am going to prepare and send in for your use in
7 just a moment a, an additional verdict form that you can, very
8 similar to the one that you had for actual damage. It will of
9 course be shorter. But we have not had an opportunity to
10 prepare it because we did not know what your verdict would be.
11 I'm in the process of having that done right now and I should
12 have it in to you momentarily. I have already reviewed this
13 charge with counsel and they tell me they're in agreement with
14 my charge on punitive damages. Like in your earlier
15 deliberations, you will have a copy of my charge and that
16 charge will have the factors and things that I have just
17 instructed you about. So, I will let you go in and begin your
18 deliberations. I will have a verdict form for you in just a
19 moment.

20 Brad, if you would, take the jury to the jury room. And
21 I will have that for you in just a moment.

22 Could you mark that as Court's Exhibit Number?

23 COURT REPORTER: Four.

24 THE COURT: Four.

25 COURT'S EXHIBIT NUMBER FOUR

ADMITTED INTO EVIDENCE

(REPORTER'S NOTE: Jury exits courtroom. 5:18 P.M. The following takes place outside the presence of the Jury.)

THE COURT: All right. I have prepared a verdict form or something very quickly. It's very similar to what we did earlier. Of course, it would only involve the articles and not the, not the editorial and in it I, instructions, mark the appropriate response to the following question; each response must be unanimous.

Number one, as to the May 31st, 2002, the May 23rd, 2010, excuse me or the May 25th, 2010 articles authored by the Defendant, David Wren, we find that the Plaintiff has proven by clear and convincing evidence that Defendants' publication of said article was willful, wanton or reckless. Answer, yes or no.

If the Jury unanimously answered, answered yes to the above, the finding above, we find for the Plaintiff against both Defendants, punitive damages in the amount of, blank. Write your verdict in words and figures.

Okay. And that's what I have. What else would you like added to it?

MS. STEVENS-GRAZIANI: Can we just make sure that the date was right?

THE COURT: I have the right date. I misspoke when I read it.

1 MS. STEVENS-GRAZIANI: Okay.

2 THE COURT: Anything else?

3 MR. BENDER: No, I think that's fine, Your Honor.

4 THE COURT: Okay. All right. Drew, if you'll get that
5 printed and a place for her to sign it. I'm sorry, Drew had
6 one other line down here and I didn't realize it.

7 It says, If the Jury unanimously answered no to the
8 finding above, we find for the Defendant as to the articles
9 identified above and a place for the foreman to sign and
10 initial it just like we had it and then a certification that
11 it is unanimous. We just broke down the verdict form that we
12 used earlier. Okay.

13 Anyone have any objection to that, Mr. Stevens?

14 MR. STEVENS: (Indicates affirmatively.)

15 THE COURT: Mr. Bender?

16 MR. BENDER: Yes, that's fine.

17 THE COURT: Okay. Let's run that off, Drew, and let's
18 get this into them.

19 Madam Clerk, could you take this to them first so they
20 can have it as they begin any deliberation and tell them I
21 will get the verdict form in just a moment.

22 (REPORTER'S NOTE: Jury deliberations begin. 5:21 P.M.)

23 THE COURT: All right. Mr. Stevens?

24 MR. STEVENS: Yes, sir.

25 THE COURT: I have informed other counsel a moment ago

1 that I'm going to defer post-trial motions until Monday
2 morning at 9:30. At that time, I will do a, if necessary, a
3 punitive review. If I do not have to do it, I will still give
4 both of you until Monday morning to prepare for post-trial
5 motions, okay?

6 MR. STEVENS: I have a trial on Monday.

7 THE COURT: With who? It will probably be me.

8 MR. STEVENS: Well, it's about sixteen I think. It's
9 been moving up and I haven't had the chance to see the roster
10 since Monday.

11 THE COURT: Well the last time I looked, I was the Chief.
12 So I would not worry about that.

13 MR. STEVENS: Thank you, Your Honor.

14 (RECESS - 5:22 P.M.)

15 *****OFF THE RECORD*****

16 (On the Record - 5:38 P.M.)

17 THE COURT: Please be seated. We have a verdict.
18 Would you tell Bobby to bring in the Jury, please?

19 (REPORTER'S NOTE: Jury enters courtroom. 5:39 P.M.)

20 THE COURT: All right. Madam Forelady, have you reached
21 a verdict?

22 JUROR 150: Yes, we have.

23 THE COURT: And was it unanimous?

24 JUROR 150: Yes.

25 THE COURT: Thank you very much. If you would give it to

1 the Clerk.

2 You may publish?

3 VERDICT OF THE JURY:

4 CLERK: Yes, sir. The State of South Carolina, County Of
5 Horry, in the Court of Common Pleas, Case Number 2012-CP-26-
6 3804, Mark Kelley, Plaintiff versus Sun Publishing Company,
7 Inc. D/B/A The Sun News and David Wren Defendants. Verdict
8 form as to news articles number one. As to the May 21st,
9 2010, the May 23rd, 2010 and the May 25th, 2010 articles
10 authored by Defendant, David Wren, we find that the Plaintiff
11 has proven by clear and convincing evidence that Defendants'
12 publication of said article was willful, wanton or reckless.
13 Yes.

14 If the jury answers yes to the items above, we find for
15 the Plaintiff against both Defendants' punitive damages in the
16 amount of \$250,000.

17 Juliet Galton, Foreperson, Conway, South Carolina, May
18 the 8th, 2014.

19 Madam Forelady and ladies and gentlemen of the Jury, is
20 this your verdict; if so, please signify by raising your right
21 hands.

22 Thank you.

23 THE COURT: Any need to for individual polling?

24 MR. STEVENS: None, Your Honor.

25 THE COURT: Mr. Bender?

1 MR. BENDER: None, Your Honor.

2 THE COURT: Ladies and gentlemen of the Jury, you have
3 worked very hard this week and before I, I began my service as
4 a Circuit Judge, I was an attorney and I practiced law here in
5 Horry County for many, many years and during that time, I
6 don't know what I didn't try. Anything from a malpractice to
7 contracts and all sorts of things and I will tell you, there
8 is no more difficult case to present and to deliberate than
9 this type of case. They're -- it's difficult. It's, it's
10 just basically difficult to sit in judgment and I'm sure that
11 you probably all understand that now much more than you did
12 before you were selected to sit on this, this Jury. You have
13 been very attentive during this trial. I think you have been
14 conscientious in your service and I can't tell you how much we
15 appreciate it. I know you're tired from your work this week,
16 but please leave here or I hope you leave here with a better
17 understanding of our system, how our system works and perhaps
18 with an appreciation of, of our system. I always like to tell
19 jurors that jury service is not only a civic duty, it's civic
20 right. Each and every one of you have been qualified as
21 jurors or were qualified as jurors on Monday morning and as
22 such, you have the right to come in and participate in this,
23 this procedure. You have the right to resolve issues that
24 arise between the citizens of this county and I hope that you
25 will look at your jury service in, in that way, not so much as

1 a duty that you had to perform.

2 Thank you so much for, for being here. Thank you for
3 your work. I hope that I will see some of you in the future.
4 You know, when I first started practicing law, I would come
5 down here and you couldn't draw a jury panel that I didn't
6 know someone. But I don't think that I have had the pleasure
7 of meeting any of you, but if you do encounter me out and
8 about the county, I'm all over the place, please don't
9 hesitate to approach me and speak to me. I will always love
10 to talk to jurors and tell me about your experience and what
11 you thought about it. I'd love to hear from you.

12 Thank you again for your service.

13 Mr. Ropp, would you make sure that this Jury gets back to
14 the jury room where they can collect their personal effects
15 and make sure they get out to their vehicles?

16 BAILIFF: Yes, sir.

17 THE COURT: Thank you.

18 (REPORTER'S NOTE: Jury exits courtroom. 5:43 P.M.)

19 THE COURT: All right. Gentlemen, tomorrow, as you all
20 know is a state holiday. The Court's will not be in session
21 tomorrow. It has been a long trying case. We have some
22 important matters that we're gonna have to take up in the way
23 of post-trial motions and the review of the award of punitive
24 damages. I am going to reconvene at 9:00 -- well, I have a,
25 a, I will be doing the roster meeting at 9:30 on Monday. That

1 usually doesn't take very long. I'll get some other judge to
2 qualify the Jury and I will reconvene this case at 10:30 on
3 Monday morning.

4 Let me just tell you what I anticipate and what I will
5 allow. I will, of course, hear you on any post-trial motions
6 and I will allow you to address the Court concerning the, the
7 review of the award of punitive damages. Okay.

8 Thank you, gentlemen and it's a pleasure to see you
9 again.

10 MR. BENDER: Thank you, Your Honor.

11 MS. STEVENS-GRAZIANI: Thank you.

12 MR. STEVENS: Thank you.

13 (RECESS - 5:50 P.M.)

14 *****OFF THE RECORD*****

15 (END OF DAY FOUR.)

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1 showed. The inquiry has to be what did the publication say
2 and the publication said along with and let's suppose that
3 David Wren were motivated by ill will directed at Kelley
4 although he said he wasn't. That's not sufficient.

5 THE COURT: And I understand that.

6 MR. BENDER: And the question is in Bose, I think points
7 this out quite clearly. Where you have a reporter looking at
8 a situation and trying to describe it, his choice of words
9 alone cannot be the basis for a finding of actual malice.

10 THE COURT: And I think I gave a charge to the Jury to
11 that affect that you asked for.

12 MR. BENDER: And I agreed and I appreciate that. But
13 what I, the point I'm making is that the Court's role in this
14 case, because of the application of the First and Fourteenth
15 Amendment is dramatically different from the role of the Court
16 in an ordinary tort case.

17 THE COURT: And I understand.

18 MR. BENDER: And what I'm suggesting is that there should
19 have been a higher standard for the Plaintiff to move beyond
20 his case.

21 THE COURT: And it's clear and convincing.

22 MR. BENDER: That's right. But I think when, when that
23 motion was denied at the close of the Plaintiff's case, the
24 standard that was articulated was there is a question of
25 evidence construed in the light most favorable to the

1 Plaintiff that allows the case to go forward. That's a lower
2 standard I think than is there clear and convincing evidence
3 here.

4 THE COURT: But the standard the Court was applying was
5 still clear and convincing. This Jury -- there was a dispute
6 as to what Mr. Wren meant; what was the clear, plain, meaning
7 and I think my charge said and the plain meaning; what do you
8 mean when you look at these other things, I think obviously
9 the Jury said it's clear, it's convincing, what he intended to
10 do and what he intended to say.

11 MR. BENDER: I think that that intention is not part of
12 the clear and convincing test. I think ---

13 THE COURT: So under your scenario, unless a journalist
14 came in and said yep, that's what I did, there could never be
15 enough.

16 MR. BENDER: Well I understand that there's difficulty in
17 that regard and that's what St. Amant v. Thompson talks about.
18 It talks about how do you prove the state of mind of the
19 reporter. But making comments provocatively in an email to
20 get somebody to comment for a story is different from what has
21 been published and I think the evaluation has to be on what
22 was published and there is nothing to contradict Wren's
23 testimony that he did not intend to write that Mark Kelley
24 participated in anything illegal. That's why all of the
25 publications make the point that the contributions were not

1 illegal and it was not illegal for Mark Kelley to be in the
2 room when the money was passed. Now isn't it interesting that
3 we all thought the editorial was gonna be where the liability
4 might be in this case far more than with respect to the news
5 reports?

6 THE COURT: Again, my, what I think really doesn't make
7 any difference, but I thought that as well and I hope the Jury
8 -- well, obviously the Jury found that was protected, but
9 whether they considered it and it spilled over, I, I have no
10 idea. Considering the comment that was put in, the
11 parenthetical comment, we know what the real truth is, though.

12 MR. BENDER: My point is that with respect to JNOV, this
13 Court's obligation is to provide a de novo review of the
14 Plaintiff's evidence up through the end of the Plaintiff's
15 case to determine if there was clear and convincing evidence
16 of actual malice to move forward. Obviously, it's my position
17 that there was none. It's also my position that the allowance
18 of the expert testimony on the newspaper standards introduced
19 a question of negligence and negligence is clearly not the
20 threshold for liability in a case of this nature.

21 Moving on to the, the new trial for excessive damages,
22 the Plaintiff testified that his company had one fewer client
23 now than it had at the time of the publication. But as I
24 recall his testimony, he could not tie that to the publication
25 and he had the other unfortunate circumstance of Will McCain

1 having died. He had testimony from Alan Clemmons that
2 somebody asked him about Kelley as a lobbyist, but then didn't
3 call. Well, I suspect in your practice as in all of our
4 practices, somebody might say how about so and so as a lawyer
5 and you never get the call. It happens all the time. I don't
6 think that's a, there's anything other than speculation with
7 respect to any business loss the Plaintiff might have had.

8 THE COURT: And I would agree with you there was really
9 no number tied even to that client. I think that was offered
10 in regard to the general allegations that his reputation was
11 damaged, that he was held to some degree to public scorn in
12 his, in his business. We heard Mr. -- or Representative
13 Clemmons and Representative Hardwick, ex-Representative Hearn,
14 all testified that these matters are taken very seriously and
15 he was ridiculed as a result of it, there were jokes made
16 about it, things of that nature. What if he had put up no
17 evidence of any economic loss? Does that mean he would not
18 have been entitled to some verdict?

19 MR. BENDER: I think that's a good question. But there's
20 a footnote in Justice Toal's concurring opinion in
21 Holtzscheiter, too that suggests in South Carolina there must
22 be economic loss in a defamation case to recover.

23 THE COURT: And I'm not suggesting that there wasn't that
24 testimony. I'm just saying what if there wasn't, had never
25 been any, not a shred, not an attempt? You know, maybe

1 MR. STEVENS: Yeah, and that's when he wrote the email
2 saying, he says he don't know anything about it, Mr. Edge, and
3 in fact he's calling you a liar, which gave ---

4 THE COURT: He just said to ask Mr. Kelley about it.

5 MR. STEVENS: And as a matter of fact, there was an email
6 to, I believe, Tim Pearson and Tim Pearson says, Well, why
7 don't you ask Mark Kelley? And, you know, the only thing, if
8 you recall, the expert testimony was if you're gonna accuse
9 somebody of a crime, you need to do more than call them and
10 leave a message. You need to do the things that actually --
11 David Wren, in fact, did, after all the articles, he wrote a
12 letter to the Chamber of Commerce President in July and -- a
13 very long letter, it was in evidence -- and the President
14 answered it fully. Nothing came out of it about Mark Kelley
15 at all. But it boils down to this, one of the things that we
16 keep forgetting when the evidence comes in is just because the
17 evidence is in and the Defendant says I didn't mean that, the
18 Jury still has to gauge his credibility. Do they believe him?
19 Credibility is one of the kingpins of every trial. It, it,
20 you've got to give the Jury the opportunity to gauge the
21 credibility. The Court can't do that. The Court looks at the
22 evidence that you have and if there is no basis upon which the
23 Jury can return a verdict, then you grant non-suit or a
24 directed verdict, but there was a plethora of evidence in the
25 Plaintiff's case. We, we talked about the understanding of

1 all the legislators who read it. We had other people come in.
2 They, they testified as to how they understood that particular
3 statement. So, the question then becomes is David Wren's
4 characterization of his own article believable? We introduced
5 evidence of the articles that he wrote using the term, along
6 with, where he wrote about Brunty and where he said Brunty
7 along with his partner was arrested or tried. And there's
8 two people it's referring to. The one about the Anderson's
9 wife and her sister moving together to Horry County and I
10 asked him how many and it was two. The, the evidence was
11 overwhelming showing what David Wren meant and what was going
12 on in his mind when he was trying to print these articles and
13 the, one of the main questions was did he confirm sources? He
14 had sources, but the sources were telling him exactly opposite
15 of what he wrote. Also the editor didn't check the sources.
16 She didn't ask him about it. So, all we getting down to here
17 is was there a question of fact? Your Honor was the
18 gatekeeper in looking at was there clear and convincing
19 evidence at the nonsuit stage and at the directed verdict
20 stage and there was clear and convincing evidence. We had, we
21 had clear evidence of what the reporter was thinking about
22 when he wrote these articles and I think probably in this
23 situation, the Jury looked at what he wrote and listened to
24 what he was saying at trial. When you think about it, that
25 was the only defense he could take, that I didn't mean what I

1 said. And now after the fact and after he's done the damage,
2 he comes into court and he tries to alter the English
3 language. I think the Jury saw through that and it was their
4 -- it was their job to determine the credibility of the
5 witnesses. So, I believe that everything that Mr. Bender has
6 asked that you do in his brief, you did. You, you, you put
7 the burden on us. You put clear and convincing evidence as to
8 all elements of the trial, all elements of the tort, the Jury
9 could've looked at any one or more or altogether of all the
10 articles and arrived at a verdict. So, the issue is here is
11 wasn't a separation between the articles. So, we believe that
12 the, the Court looked at it properly. As to the judgment NOV,
13 I think it's the same type of test. Was there, was there some
14 ground to set it aside and I don't believe there is any
15 ground. I'll wait on the amount of damages when he argues
16 that or do you want me to go forward.

17 THE COURT: Well, we will do the punitive review if
18 necessary after we get through the new trial nisi and the JNOV
19 analysis. Okay?

20 MR. STEVENS: Okay. As to actual damages, if you aren't
21 charged not only loss of income, you charged with loss of
22 reputation, damage to the reputation; there's evidence of
23 that. You charged damage for emotional distress, damages for
24 being shunned -- and there was ample testimony that he was
25 shunned by the legislators. Alan Clemmons said he was toxic.

1 He, he lost his ability before the legislators, them thinking
2 that when they went to him and asked him the opinion, he'd
3 give both sides of the case. That of course, the articles
4 they said that made them very concerned about being see with
5 him because the allegation was that he was handing campaign
6 contributions to a gubernatorial candidate and they didn't
7 want anybody to think that they were over there being with a
8 candidate too -- I mean with a lobbyist, too. So and proof
9 like, like we said, as it deals with not only the news media,
10 but also what people see and perception is reality as you look
11 at that. And, and in determining the damages, the courts have
12 said there, there are intangible damages such as loss of
13 reputation and emotional stress, being shunned, I can't even
14 think of all the other elements, but those are intangible
15 damages, which the Jury in its good conscious and sense can
16 apply to, to the facts and arrive at a verdict, which we think
17 as well within reason. What is a man's reputation worth
18 especially where his reputation is the linchpin of his whole
19 occupation. If he loses his reputation; he loses his
20 effectiveness as a lobbyist. So, we believe that the Jury
21 could have awarded \$400,000 just as to his reputation. And,
22 Your Honor charged the Jury that they could assert any damages
23 which may result into the future and I, he's still a lobbyist
24 and is going to be as long as he can work effectively in the
25 legislature. We just believe there is no evidence to show

1 that the verdict was indicative of caprice, passion or undue
2 prejudice. So and, and the punitive damages were even less
3 than actual.

4 THE COURT: All right, Mr. Bender, I'll let you respond.

5 MR. BENDER: Thank you, Your Honor. It's interesting for
6 a toxic lobbyist that his client, Coastal Carolina's
7 President, testified he had a terrific year and he gave him an
8 \$18,000 raise. That's toxicity that a lot of people would
9 like to have, I think.

10 Bose, I think addresses this question convincingly as
11 does Elder v. Gaffney Ledger. But for Bose talking about the
12 role of the Court, the question of whether the evidence in the
13 record in a defamation case is of the convincing clarity
14 required to strip the utterance of First Amendment protection
15 is not merely a question for the trier of fact. Judges, as
16 expositors of the Constitution, must independently decide
17 whether the evidence in the record is sufficient to cross the
18 constitutional threshold that bars the entry of any judgment
19 that is not supported by clear and convincing proof of actual
20 malice. The reason that the Supreme Court of the United
21 States has raised this bar high is that if juries are allowed
22 to award damages that appear to punish speech that is
23 unpopular, that's gonna leave the self-censorship, that's
24 going to diminish the role of free expression in our society
25 and that's the protection the Court has intended by its clear

1 and convincing evidence standard. I think there was certainly
2 evidence, but I don't think it rises to the level of clear and
3 convincing and I'm, I continue to be of the mind that the
4 testimony by the expert was solely to introduce negligence
5 into the standard and as the Supreme Court of South Carolina
6 and the Supreme Court of the United States has said
7 repeatedly, even departure from, accept even a dramatic
8 departure from accepted standards of journalism are not
9 evidence of actual malice and when that Jury hears that expert
10 say this is what the journalist should've done, this is what
11 he should've known, that's negligence, that's not actual
12 malice. And I think that gave the jury a much lower
13 threshold.

14 As to the meaning, I think that the question is, what did
15 David Wren mean, and if you compare that to what was published
16 with what he meant, then asking these questions is entirely
17 consistent with his belief that he had no evidence. If he had
18 had evidence, he said I would have said and.

19 Now, let's talk about perception as reality. What's the
20 perception? We have thirty-some odd articles dealing with
21 questionable campaign contributions. The Chamber of Commerce
22 has denied having any involvement in that and then the
23 President comes back and acknowledges, yes, I did go to a
24 lunch and I was there with Mark Kelley, Gresham Barrett and a
25 campaign worker and \$84,000 changed hands. Well, what's the

1 perception there? That the role of the lobbyist somehow was
2 related to this campaign event. Would there have been
3 suspicion of the lobbyist? Was the lobbyist doing anything
4 illegal? And the publications answered that question. The
5 contributions were not illegal. Mark Kelley's presence at the
6 table was not illegal. So, it doesn't make any difference
7 what the interpretation might be of Brad Dean, along with
8 Chamber lobbyist Mark Kelley, did, the publications made it
9 clear that there was nothing illegal. Had Kelley done
10 something different and there was no proof, there was no
11 publication that Kelley did anything differently than sit at
12 the table and sitting at the table is okay, you can't make the
13 leap from along with accuses him of a crime when the
14 publication said he doesn't -- did nothing illegal. So, under
15 that circumstance, I don't see how there could possibly be
16 clear and convincing evidence that David Wren meant to say
17 that Mark Kelley participated in the delivery of the
18 contribution and that David Wren knew at the time he wrote
19 that, that it was false. Looking at the publications
20 themselves, it's clear that Wren is attempting to interpret
21 for the public a circumstance where the Chamber had initially
22 denied involvement, now the Chamber is involved and there's a
23 lobbyist there. It didn't make any difference what kind of
24 lobbyist Mark Kelley was, if he were lobbyist for Coastal
25 Carolina and handed the money over, that would've been illegal

1 conduct and the publication said he did nothing illegal and
2 quoted the expert on that. So, I think that applying the
3 clear and convincing standard, there was inadequate proof to
4 give this case to the Jury, particularly with the injection of

5 ---

6 THE COURT: I'm keenly aware of the Court's treatment of
7 the First Amendment. I can appreciate the necessity of, of
8 open debate, fair comment, free speech. There is no question
9 that that is an important right, constitutional right and that
10 there must be protection for those who provide information on
11 matters of general interest to us. There's no question about
12 that but that is why we have a heightened standard. I made a
13 determination at the beginning of this trial that Mr. Kelley
14 was a public figure, thereby embracing the heightened
15 standards as set forth by our Supreme Court in these matters.
16 That standard is a standard of clear and convincing evidence.
17 It also interjects -- my finding that he was a public figure
18 interjects into the traditional libel case the requirement
19 that there also must be a unanimous finding by the finder of
20 facts, the Jury, of actual malice. That is that he knew what
21 he was printing was not true or that he printed it with
22 reckless disregard for its truth or falsity. And in my charge
23 I went on to impress upon the Jury that that was a conscious,
24 substantial doubt in the truth of what was being printed.
25 Now, as we progressed through this trial, the issue was what

1 was printed. Was there an allegation printed that a lobbyist
2 made or delivered a campaign contribution? The Jury made that
3 finding unanimously. That was submitted to them as a special
4 interrogatory. The question now becomes whether or not in
5 doing so the Jury violated its oath and my instructions in
6 returning this verdict. I understand that I'm the gatekeeper.
7 I have to determine whether or not, whether or not the
8 Plaintiff, in his case, has produced evidence to support a
9 finding by clear and convincing -- a finding by clear and
10 convincing standard that the publication was false and that it
11 was printed with constitutional or actual malice.

12 I looked at the evidence that was presented by the
13 Plaintiff in its case in chief and I recall not only that the
14 articles were put into the record, but there were also emails
15 exchanged between the writer and several other persons. Those
16 emails, I believe, provide clear and convincing proof of the
17 writer's intent and the existence of constitutional malice in
18 printing the matters concerning Mr. Kelley.

19 Looking at the award of actual damages, I consider the
20 testimony concerning injury to Mr. Kelley's reputation. I
21 heard from several representatives, Dr. DeCenzo, who said that
22 quite frankly, we held up his pay increases and I'm unclear
23 exactly as to what was said there. I'm unclear as to whether
24 it was \$18,000 a year or it was 18,000 over three years; I'm
25 not sure. I, I became a little bit confused in that, but

1 regardless of that, that would be a -- and the Jury may not
2 have been, but that would not have been a significant factor
3 in the award of these damages. There was testimony from Mr.
4 Kelley concerning the, how it affected him, how it affected
5 his family. I am especially concerned about Representative
6 Clemmons stating that he became toxic. As a person who must
7 be elected by the legislature, I am familiar with the role of
8 lobbyist and legislators. I have many friends in the
9 legislators -- legislature and one thing that is absolutely
10 certain in my mind is their concern about even the appearance
11 of any impropriety when it comes to a lobbyist. I've heard my
12 legislator friends mention that many, many times and I think
13 they all are always guarded in their association with
14 lobbyists in that respect. They understand how serious
15 ethical violations are.

16 I believed -- I believe that the verdict is not excessive
17 or so excessive as to be shockingly disproportionate to the
18 injuries or that the Jury acted of passion, caprice, prejudice
19 or any other consideration not found in the evidence. I
20 believe that the evidence that was presented in this case does
21 support a verdict of \$400,000. When we see verdicts in the
22 millions on libel cases, this Jury appeared to me to be very
23 conscientious. They deliberated for some four hours. I think
24 that they applied the correct standard. But I do want to
25 point that I extended the clear and convincing standard to all

1 elements for the Jury and I am aware that that was the
2 standard that they should have used and it's the standard that
3 I used in my review of this, this verdict. For those reasons,
4 I would deny the motion for a JNOV and I would deny the motion
5 for a new trial nisi and for remittitur.

6 All right. Now, do we want to go on to the review of the
7 punitive damages?

8 MR. BENDER: Yes, please Your Honor.

9 THE COURT: All right.

10 MR. STEVENS: Your Honor, he had also made a motion for a
11 new trial absolute.

12 THE COURT: And I would deny it on the same ground.

13 MR. BENDER: I thought that was included in what you just
14 said.

15 THE COURT: I did too, but I want to make sure that it
16 is.

17 MR. BENDER: I'll be happy to raise it again if you
18 haven't ruled.

19 THE COURT: I have. Okay. Now let's look at the
20 punitive award.

21 Okay.

22 MR. BENDER: Thank you, Your Honor.

23 THE COURT: Okay.

24 MR. BENDER: Punitive damage award in this case raises in
25 addition to the questions for review under the most recent

1 Supreme Court question or issues on punitive, whether or not
2 the assessment of punitive damages in a case like this against
3 the media Defendant is violative on its own of the First and
4 Fourteenth Amendment giving the Jury the opportunity to assess
5 damages without there being any particular anchor to that
6 award. Now typically, punitive damage award review talks
7 about the ratio because in most instances the punitive damages
8 are some multiple of the actual; here, they're slightly over
9 half of the actual so I don't think ratio ---

10 THE COURT: Less than one.

11 MR. BENDER: I'm sorry?

12 THE COURT: Ratio of less than one.

13 MR. BENDER: So I think the ratio is not an issue. I
14 think that if we look at the guidepost established with
15 respect to reprehensibility, which I think is the question
16 here. If you decide that there is no First and Fourteenth
17 Amendment bar to the award of punitive damages against a media
18 Defendant, what are the reprehensible standards established by
19 the South Carolina Supreme Court.

20 THE COURT: In Fortis? Is that what you were looking at,
21 Fortis?

22 MR. BENDER: Yes.

23 THE COURT: Okay. Okay.

24 MR. BENDER: Let me make sure of that, yes.

25 THE COURT: Okay.

1 MR. BENDER: I would call it Mitchell, but ---

2 THE COURT: Well I think the last one ---

3 MR. BENDER: Mitchell v. Fortis Insurance Company ---

4 THE COURT: Mitchell v. Fortis, yes, I always refer to it
5 as Fortis for whatever reason but we're talking about the same
6 case.

7 MR. BENDER: We're on the same page?

8 THE COURT: Yes, sir.

9 MR. BENDER: Was the harm physical as opposed to
10 economic?

11 THE COURT: In that regard I would say that there is very
12 little testimony considering the physical injury although Mr.
13 Kelley did indicate that he had some, certainly some emotional
14 stress as a result of it and I'll hand that to you, that it
15 points more towards the physical -- I mean the economic than
16 it does the physical.

17 MR. BENDER: As I understand the standard that cuts
18 against the award.

19 THE COURT: Yes.

20 MR. BENDER: Did the conduct of the Defendants convince
21 an indifference to or a reckless disregard for the health or
22 safety of others. I don't think there was a health or safety
23 issue here specifically this is a reputational injury. So, I
24 think that's probably an irrelevant factor.

25 THE COURT: Uh-huh (affirmative response).

1 MR. BENDER: If it's a factor at all, it probably cuts
2 against the award.

3 Did the target of Defendants' conduct have financial
4 vulnerability? I think if you look at Mitchell, the financial
5 vulnerability there was this person was denied insurance and
6 as a consequence incurred out-of-pocket medical expenses that
7 in fact threatened his life because he was HIV positive and
8 needed preventive care.

9 THE COURT: And I think he -- I don't know if you would
10 find him to be financially vulnerable or not. He was taken up
11 by a charity of some kind who provided him with the care that
12 he needed I think during his sickness.

13 MR. BENDER: But here Plaintiff did not have the
14 financial vulnerability. He remained employed at Coastal
15 Carolina, had considerable other ---

16 THE COURT: Certainly not in the sense that Mitchell did.

17 MR. BENDER: Certainly. Did the conduct involve repeated
18 actions or was the conduct isolated? It was at most four
19 publications out of a string of thirty-some odd publications
20 tracking these questionable campaign contributions and the
21 citizens group challenge to those. So, I would urge that it
22 was, it was isolated. In each instance, the publication made
23 the point that nothing illegal was done by Kelley.

24 Was the harm the result of intentional malice, trickery
25 or deceit rather than a mere accident? I think the malice is

1 being discussed there is the common law malice, hatred, ill
2 will or spite, and I think that there was no testimony that
3 David Wren had any malice in that common law sense as to Mr.
4 Kelley. Trickery, there doesn't seem to have been any
5 trickery. Deceit, there is nothing deceitful here. David
6 Wren investigated an ambiguous circumstance related to
7 questionable campaign contributions, made a judgment about how
8 to convey that to the public and did so.

9 So, what I would urge here is that any punitive damage
10 award under these circumstances would be inappropriate.

11 THE COURT: All right. All right. Do you want to
12 discuss the other Mitchell v. Fortis tests? I know you
13 discussed reprehensibility and you said ratio was not an issue
14 in your, your mind. Do you want to talk about the difference
15 between the punitive award and any civil penalties? I don't
16 think they're any that would come into play here and that
17 would not be a consideration for the Court.

18 MR. BENDER: I don't know of any. And in terms of
19 comparison, the cases that have involved punitive damage
20 awards that I'm aware of Sanders v. Prince, Elder v. Gaffney
21 Ledge, Holtzscheiter v. Thompson Newspapers were all set aside
22 on other grounds.

23 THE COURT: Okay. Let me hear from you, Mr. Stevens.

24 MR. STEVENS: As to the reprehensibility -- did I
25 understand the elements we have to consider is whether it was

1 harm as opposed to economic -- physical as opposed to
2 economic, the tortious conduct -- an indifference to or
3 reckless disregard for the health and safety of others and
4 target of the conduct had financial responsibility or
5 vulnerability, that the conduct involved repeated actions or
6 was an isolated incident, and five, the harm was a result of
7 intentional malice, trickery or deceit rather than a mere
8 accident. And as it relates to that portion, what we're
9 trying to do is we're trying to use one kind of case into, put
10 into a defamation case.

11 Emotional distress is to some extent physical. The, the
12 testimony -- and Your Honor charged the Jury that they still
13 have to, to use the same test by clear and convincing evidence
14 as to the Plaintiff's burden and clear and convincing evidence
15 as to whether it was false or whether it was reckless
16 disregard for the truth or falsity as you had in the liability
17 case. The, they can't say Mr. Kelley didn't have a financial
18 vulnerability here. The testimony was that he did lose -- the
19 President of Coastal Carolina did not give him the raises
20 that, that he was giving everybody else. He kept him there
21 for three years and at ---

22 THE COURT: And I want to tell you, Mr. Stevens, that
23 there is no question that there was financial vulnerability in
24 that it involved his occupation. I think the point that Mr.
25 Bender was trying to make was his financial vulnerability was

1 not that which we would have found in the, in the Mitchell v.
2 Fortis case where a young man was denied treatment for AIDS or
3 an AIDS infection because his insurance company refused
4 wrongfully to, to say it was covered.

5 I would agree with you that there is financial
6 vulnerability here to some extent but not to that great extent
7 that we found in, in Mitchell.

8 MR. STEVENS: The question is how much financial
9 vulnerability?

10 THE COURT: And then we look at potential fault. We must
11 consider that, the potential ---

12 MR. STEVENS: The, the conduct here also was not a single
13 act. It was over nine articles, excuse me, eight articles and
14 it lasted a pretty long time. I believe the last article was
15 in November of that year. So, it started in May and ended six
16 months later and the articles continued -- and, if you recall,
17 our fourth cause of action per quod, taking all of the
18 articles together. Did it accuse Mr. Kelley of unfitness in
19 his present trade or profession per quod. In other words, the
20 inference from all the articles together excluding the, the
21 editorial, the Jury could've found a verdict based upon that.
22 Also, the harm was a result of intentional malice, trickery,
23 deceit, rather than mere accident. These are things that the
24 Court has got to apply and in some degree, and I don't think
25 you have to apply all of them if they don't apply to the case

1 then you don't apply that. But what we're talking about here
2 is Mitchell v. Fortis and Kelley v. Sun News are two different
3 separate causes -- types of cases. Would you follow what the
4 Defendant wanted you to follow in charging the Jury on actual
5 malice, constitutional burden of actual malice by clear and
6 convincing evidence. We didn't talk about ill will anywhere
7 in the trial. We didn't talk about trickery or deceit or mere
8 accident. It wasn't an accident that he wrote what he wrote.
9 In, in the considerations that Your Honor has to give to
10 determine whether to sustain the verdict of the Jury for
11 punitive damages, you also have to look at did the Jury
12 believe that the Defendant should be punished for what they
13 did and/or to hold them up as an example to deter others from
14 doing -- engaging in the same kind of conduct, of course,
15 based upon clear and convincing standard and the actual malice
16 definition and you charged the Jury all of that. It was, it
17 was substantial burden on the part of the Plaintiff, but the
18 Jury found that there was clear and convincing evidence and we
19 believe that we don't, when you apply the standard under
20 Mitchell v. Fortis, which some of the tests don't apply, you
21 don't want to compare apples with oranges. If you applied
22 intentional malice, it would be an improper application
23 because that wouldn't be constitutional malice; it would be
24 under the private figure where you have to show ill will.
25 THE COURT: Mr. Bender?

1 MR. STEVENS: Have I answered ---

2 THE COURT: Yes, sir.

3 MR. STEVENS: Okay.

4 THE COURT: Mr. Bender, you may respond.

5 MR. BENDER: One point in terms of deterrents of similar
6 conduct in the future, that's the concern of self-censorship;
7 that's a concern of the First and Fourteenth Amendments.
8 And with respect to the duration of any particular harm, had
9 the Plaintiff or anyone on his behalf contacted the newspaper
10 after any one of the news reports that he found to be false,
11 misleading, defamatory, had there been contact, the
12 clarification would have been written. I thought that
13 testimony was in the record.

14 THE COURT: Why wasn't there a clarification written then
15 after the suit was filed.

16 MR. BENDER: I'm sorry, you said what?

17 THE COURT: Why wasn't there a clarification then made
18 after the suit was filed. I heard nothing about that.

19 MR. BENDER: Because that would have been Exhibit One.
20 If they had written a clarification, clearly they were wrong.
21 You can't ---

22 THE COURT: So, they didn't want to admit they were
23 wrong?

24 MR. BENDER: You can't write a clarification after you've
25 been sued.

1 THE COURT: Well, I don't know why? Is there a rule that
2 says you can't?

3 MR. BENDER: Because the first thing that's gonna be
4 exhibited in the Plaintiff's case is here they've admitted
5 they were wrong.

6 RULING OF THE COURT:

7 THE COURT: Okay. All right. Reading Fortis or Mitchell
8 v. Fortis -- and, of course, this is a departure to some
9 extent from the new statute we have involving the case
10 accruing after -- was it January the 1st of 2012? Our
11 legislature has attempted to set out the, the factors that we
12 should consider. I think those factors though are in keeping
13 with the prior jurisprudence. Fortis, Gamble, Gore, or
14 Mitchell not Fortis, Gamble and Gore that we have become
15 accustomed to using and I think they pretty much -- the new
16 statute pretty much follows that. I do find it significant
17 here, let me say from the outset that this award of punitive
18 damages would not be offensive to the new statute. It would
19 fall within the limits that the legislature has set, has set
20 and I understand that we're not dealing with that statute
21 because this accrued before the time that the statute took,
22 came into effect, but I, I do think that that is certainly
23 worth mentioning.

24 The Mitchell case, at least in my understanding of the
25 Mitchell case, says that we still look to Gamble for, for

1 guidance. The, the Mitchell case articulated a, a, a, a four-
2 part test or a new test for conducting post-judgment review of
3 punitive damages, but it was very clear in that decision that
4 the new analysis sort of encompassed in the first four factors
5 of a Gamble review and I think it's clear that we still have
6 to look somewhat to Gamble. Gamble said that the Court could
7 -- may consider the following, may; I don't think the Court is
8 bound by any one part of the test. The Defendant's degree of
9 culpability; two, duration of the conduct; three, the
10 Defendants' awareness or concealment; and four, the existence
11 of similar past conduct.

12 Now, in the Mitchell case, the Court said the test that
13 we give you, that is reprehensibility, ratio and comparative
14 penalty award prongs of the new test, would cover the first
15 four, but I think the remaining tests under Gamble, likelihood
16 the award will deter the Defendant or others from like
17 conduct; whether the award is reasonably related to the harm
18 likely to result from such conduct; the Defendant's ability to
19 pay; and finally, any other factors the Court deems
20 appropriate.

21 We have talked about the reprehensibility. We've sort of
22 been hung up on that. But under Mitchell in any discussion
23 that in determining the reasonableness of a particular ratio
24 of actual potential harm to a public, to a punitive damage
25 award, the Court should consider the likelihood that the award

1 would deter the Defendant from like conduct whether the award
2 is reasonably related to the harm likely to result in such
3 conduct and the Defendants' ability to pay. And I think what
4 we're doing there is we're going right back to, to Gamble and
5 the Court's interjecting under a ratio type assessment those
6 other factors. I certainly think that there is a, a,
7 connection, a nexus between this award and the likelihood that
8 it will deter the Defendant from like conduct. I think that
9 it is substantial enough that it would, but I do not believe
10 that it is unreasonably high.

11 Again, the ratio is less than one to the, to the actual
12 damages. It is, I believe, reasonably related to the harm
13 that was like -- the potential harm or harm that was likely to
14 result in such conduct. It could've resulted in a total
15 spurning of Mr. Kelley and Mr. Kelley may not have been able
16 to work again as a, as a, as a lobbyist. And, of course,
17 there was some comment made during the course -- during the
18 course of the trial about The Sun News having forty or fifty
19 thousand dollars -- forty or fifty thousand readers. It's
20 well known that The Sun News is a substantial newspaper.
21 If we go to the comparative penalty award, where comparable
22 cases are to be considered, it says that the Court may
23 consider the type of harm suffered by the Plaintiff or
24 Plaintiffs. And that is harm to one's reputation and I can't
25 think of any greater harm to one's reputation. We have a

1 history in this country of reputation being protected by
2 verdicts. The reprehensibility of the Defendants' conduct,
3 the ratio of actual or potential harm to the punitive damage
4 award and the size of the award and any other factors the
5 Court may deem appropriate.

6 Looking at this award, again, the ratio was less than
7 one. It's \$250,000 compared to a \$400,000 award of actual
8 damages. I do believe based on the evidence that I have heard
9 and the findings of this Jury, we're looking at the adequacy
10 of the award. This Jury made specific findings of malice,
11 clear and convincing proof of actual malice on the part of the
12 reporter and the paper in this case and I believe that this
13 award of \$250,000 as punitive damages is justified and I will
14 deny the motion to -- or I will find that my review indicates
15 that award of punitive damages is appropriate in this case.

16 Okay, gentlemen. Thank you.

17 MR. STEVENS: Thank you, Your Honor.

18 ADJOURNED - 12:10 P.M.

19 **(END OF DAY FIVE.)**
20
21
22
23
24
25

FRIDAY

Partly cloudy

80

Saturday
Partly cloudy

80

FORECAST | 3C

READ BY 7 OUT OF 10
ADULTS IN PRINT AND
ONLINE EACH WEEK

625-6555



Dean handed over envelope of \$84,000

Rep. confirms
meeting with
chamber chief

By DAVID WREN
dwren@thesunnews.com

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.

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.

Dean said local business owners offend campaign donations to the chamber's headquarters because they knew current and past chamber board members were raising money for candidates.

Dean said he delivered some

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of these checks to Barrett because he knew the politician would be in town for an unrelated fundraiser.

"This was not the chamber of commerce raising money," Dean said. "There was no public money or chamber money involved."

Since October, Dean had asserted that the chamber had nothing to do with raising money for candidates, including members of the Myrtle Beach City Council who were seeking re-election last November.

At least one local group has questioned whether a series of contributions was related to lawmakers' passage of the 1 percent sales tax for tourism, which funnels money to the chamber.

Dean told The Sun News on Thursday that he has never denied attending meetings where the campaign donations were

See DEAN | Page 9A

DEAN

From Page 1A

delivered, including a second meeting with state Sen. Ray Cleary, R-Murrells Inlet, but his attendance did not represent an endorsement by the chamber.

U.S. Rep. Barrett, R-3rd District, is one of four GOP candidates vying for the governor's office.

Barrett's money was among \$24,600 in donations given to him, four City Council incumbents and seven state legislators in the months after the council members and state legislators passed laws that allowed the sales tax increase in Myrtle Beach.

Money from that tax is given to the chamber for tourism advertising purposes.

Grant Branham, the chamber's board chairman, also has insisted for months that there is no tie between the chamber and the campaign contributions. Branham said he solicited the contributions on his own from "like-minded businessmen and women."

Branham also said he "delivered these contributions to candidates" that deserve re-election.

Dean gave the money to Barrett during a June 20 lunch meeting at Roy and Sid's restaurant at The Market Common in Myrtle Beach, according to Barrett and documents obtained by The Sun News. Barrett spokesman B.J. Boling said Dean arranged the meeting through Barrett's finance and scheduling staff.

Mark Kelley, a lobbyist for the chamber of commerce, also attended that meeting, according to Barrett. Kelley did not return a telephone call Thursday.

There are strict rules that forbid lobbyists from facilitating campaign donations for statewide candidates; however, 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 Hazelwood, the commission's general counsel. "He (Kelley) is not supposed to touch the envelope or hand over the envelope."

The campaign contributions have drawn scrutiny because it is not clear where at least 15 of

the corporations obtained the money to make the donations. One of the corporations was dissolved in 2007 because it failed to pay its taxes. Some of the other corporations are land-holding entities with no revenue.

Myrtle Beach lawyer Shep Guyton, a former chamber board chairman, is the registered agent for those 16 corporations. Guyton did not return telephone calls Thursday.

Hazelwood said she cannot talk about the campaign donations, and she would not say whether the commission is investigating the matter. Hazelwood previously has said the donations appear to have been legal.

"I can neither confirm nor deny the existence of a complaint," she said.

Donations from the Guyton-related corporations were made by cashier's checks, making it difficult to trace the source of the funds. All of the cashier's checks to all candidates are dated June 8 and all of them are in sequential order. The cashier's checks were drawn off accounts at South Atlantic Bank, where Guyton is a board member.

Barrett, who was in Myrtle Beach on Thursday to announce his endorsement by three local mayors, said he has no plans to return the money.

"At the present time, we feel certain the spirit of the law and the letter of the law has been followed," he said.

State Rep. Tracy Edge, R-North Myrtle Beach, is the only candidate who has returned the campaign donations. Edge said he had concerns about the donations' origin, but he "couldn't get anybody to answer my questions or even talk about it."

Edge said he held onto the cashier's checks until December, when Guyton demanded their return.

"He was adamant about wanting them back," Edge said.

A Myrtle Beach-based group called Business Owners Organized to Support Tourism, or BOOST, has questioned whether the campaign donations were payback for legislators' and council members' approval of the 1 percent sales tax for tourism development.

That tax, which went into effect Aug. 1 and is expected to generate up to \$18 million a year,

was locked onto the city's sales tax.

BOOST also has questioned whether at least some of the money came from the chamber of commerce.

"BOOST's contention all along is that the chamber of commerce was directly responsible for coordinating hundreds of thousands of dollars of campaign contributions for incumbents," said Tom Herron, a spokesman for the group.

Contact: DAVID WREN at 625-6251



5/30

Bad debt adds to donor Sunday mystery

Late on bills, LLC cut checks to politicians

By DAVID WREN
dwren@thesunnews.com

GARDEN CITY BEACH | The foreclosure of a beach house here is raising more questions about the source of campaign donations made last year by a group of corporations with ties to the Myrtle Beach Area Chamber of Commerce.

The home - at 551 S. Waccamaw Drive - is owned by Garden City Partners LLC, which made 13 campaign donations totaling \$20,500 last year to political action committees, incumbent state legislators, Myrtle Beach City Council members and U.S. Rep. Gresham Barrett, R-3rd District, who is running for governor.

While Garden City Partners was donating thousands of dollars to politicians, it also was failing to pay a bank loan tied to the beach house, according to court documents filed earlier this month in Georgetown County.

Shop Guyton, a Myrtle Beach lawyer and the registered agent for Garden City Partners, did not return telephone calls last week.

Robert Kelley - founder of Business Owners Organized to Save Tourism, a group of area tourism-related business owners - said he questions why Garden City Partners would make political donations instead of paying its bills.

Kelley said he also doubts whether the corporation truly is the source of money for its donations. Court and public records show the corporation's only asset is the beach house.

"It's been our point this



CRASH

From Page 1A

remained of the Air India Express flight from Dubai to this port city. Instead, scores of blackened bodies were pulled from the blackened tangle of aircraft cables, twisted metal, charred trees and mud at the crash site. Many of the dead were strapped into their seats; their bodies burned beyond recognition.

By Saturday night, rescuers

had pulled 158 bodies from the wreckage. The eight survivors were being treated in hospitals, the airline said.

Relatives of the victims, who had been waiting at the airport for the plane's arrival, stood near the wreckage weeping. Ummer Farooq Mohammed, a survivor burned on his face and hands, said it felt like a tire burst after the plane landed. "There was a loud bang, and the plane caught fire," he said.

"The plane shook with vibra-

tions and split into two," O.K. Pradeep, another survivor, told CNN-IBN television. He jumped out of the aircraft with four others into a pit, he said. Moments later, a large explosion set off a blaze that consumed the wreckage, he said.

The plane was carrying 160 passengers - all Indian - and six crew members, Air India officials said. Four infants and 19 other children were among the passengers. The British pilot, who was of

Serbian origin, and an Indian co-pilot were among the dead, officials said.

Employees of JAT Airways, the Serbian national carrier, identified the captain as Zlatko Chisic, 65, a Serb with a British passport who had been flying for Air India for the past three years. He had previously flown for JAT, but like many pilots had left the airline in recent years as it plunged into deep financial troubles. The JAT employees spoke on condition they not be identi-

fied, because they were not permitted to speak to the media.

Civil Aviation Minister Praful Patel said that conversations with the cockpit and other records showed the flight was operating normally before the touchdown.

Indian Home Minister Palaniappan Chidambaram said the plane's pilot had more than 10,000 hours of flying experience, including 26 landings at Mangalore. The co-pilot had more than 3,750 hours of experi-

ence and 66 landings at Mangalore, he said.

External Affairs Minister S.M. Krishna said the Mangalore runway had a reputation for being difficult.

"Our worst fears have come true," he told the Press Trust of India.

The crash was the deadliest in India since the November 1996 midair collision between a Saudi airliner and a Russian cargo plane near New Delhi that killed 349 people.

HOUSE

From Page 1A

whole time that it looks like someone came up with a large amount of money and used these LLCs to make political contributions," said Kelley, whose organization has questioned whether the donations were political pay-back for a tax increase that benefits the chamber of commerce.

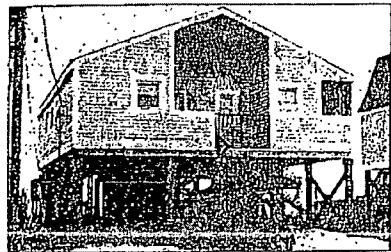
"This whole thing could be cleared up today if they would just say, 'Here are the businessmen and women behind these LLCs who gave the money,'" Kelley said.

Political donations by corporations that don't have to disclose their membership represent "a huge problem," according to John Grangle, director of Columbia-based Common Cause of South Carolina, which advocates for open government.

"Donors can hide behind multiple LLCs and the ultimate source of their money is often unknown," Grangle said.

Guyton, a former chamber board chairman, also is the registered agent for 14 other corporations that donated money to politicians last year. All told, those corporations made 160 donations totaling \$225,000 - all of them in the form of cashier's checks in sequential order purchased on the same day at South Atlantic Bank, where Guyton is a board member.

Cathy Hazelwood - general counsel for the S.C. Ethics Commission, which oversees campaign donations - said she can-



The beach house at 551 S. Waccamaw Drive belonging to Garden City Partners.

not discuss the contributions associated with Guyton's corporations. Hazelwood would not say whether the commission is investigating the matter, but previously has said the donations appear to have been legal.

Brad Dean, the chamber's president, said last week that the chamber acted as a clearinghouse for some of the donations - corporations would send the contributions to the chamber's headquarters and the money then would be distributed to politicians.

Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June. Those contributions included a \$3,500 cashier's check from Garden City Partners.

South Carolina Bank & Trust filed a foreclosure lawsuit against Garden City Partners on May 13, claiming the corporation owes nearly \$1.2 million on a

past-due loan. Garden City Partners has not yet filed an answer to the lawsuit.

Court documents show Garden City Partners took out the loan on April 17, 2006, to buy the beach house. The loan was supposed to be repaid within two years, but the bank allowed the corporation to extend the loan maturity date four times. When the most recent due date passed in January without any payment, the bank opted to foreclose on the property.

Garden City Partners is trying to sell the house before the foreclosure is final. The house, which has been on the market since January, has a list price of \$649,500 - a little more than half of the amount owed.

Guyton and the four other members of Garden City Partners each signed personal guarantees on the loan, and the bank has asked the court for a deficiency judgment, which means

those members would be responsible for paying back the difference between a sale price and the loan amount.

Three of the other members - Edward Williams, Dean Karavan and John Miller - could not be reached for comment. The fourth, Hayward Gullidge, said he also was not aware that the corporation had made any political donations.

"I'm probably the least political person you'll ever meet," Gullidge said.

Mark Lazarus, a member of another Guyton-related corporation called Creek View Land Partners LLC, has said that he also did not know Guyton was making political contributions in the corporation's name. Creek View Land Partners distributed \$13,500 in cashier's checks to politicians last year.

Lazarus said that corporation did not have any money to make political donations.

"It does not have money; it has a piece of land," he said.

Other than Guyton, none of the other members of Garden City Partners has ever made personal donations to a political candidate, according to state and federal databases. An Edward Williams made a combined \$50 donation to two local political action committees last year, but it is not the same person as the corporation's member.

It is not clear whether any of the members of Garden City Partners also are members of

some of the other Guyton-related corporations that made campaign contributions. That is because the S.C. Secretary of State does not require public disclosure of a corporation's members.

However, court documents show that while Garden City Partners was making political contributions, some of its members were facing other debt-related legal action:

> First National Bank of the South filed a debt collection lawsuit in April against the members of Sand Dollar Cottage LLC - including Williams, Karavan and Guyton - for failing to repay a \$300,000 loan;

> Carolina First Bank filed a foreclosure lawsuit this month against Prunt and Orange Partners LLC - whose members include Williams, Karavan and Guyton - for failing to repay a loan used to purchase property on Front Street in Georgetown; and

> Thornburg Mortgage foreclosed on Karavan's home in The Forest at Briarcliffe neighborhood this year, and the home will be sold at auction next month.

Money from the Guyton-related corporations is among \$324,600 in campaign donations given to Barrett, four City Council incumbents and seven state legislators in the months after the council members and state legislators passed laws that allowed a 1 percent sales tax increase in Myrtle Beach.

Most money from that tax is given to the chamber of commerce for tourism advertising purposes. The tax is expected to

generate up to \$18 million per year, or as much as \$180 million over the 10-year life of the legislation, though the city will take nearly 20 percent of the funds for property tax breaks and tourism infrastructure.

Dean and Brant Branham, the chamber's board chairman, have insisted for months that there is no tie between the chamber and the campaign contributions. Branham said he solicited the contributions on his own from "like-minded businessmen and women."

Branham also said he "delivered these contributions to candidates that deserve re-election."

Last week, Dean said he delivered contributions to Barrett and state Sen. Ray Cleury, R-Murrells Inlet. Dean previously has distanced himself from the political donations.

Robert Kelley said ties between the corporation's contributions and the chamber of commerce should prompt Dean, Guyton and others to be more forthcoming about who gave the money and why.

"With so much public money now going to the chamber, we'd like transparency over where the money came from to make those contributions," he said. "They're going to get up to \$160 million of our money over the next 10 years, but they won't even tell us where more than \$300,000 in donations came from."

> Contact DAVID WREN at 626-0281

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Sun News, The (Myrtle Beach, SC)

2010-05-24

BOOST calls for Barrett, others to return campaign money (with video)

David Wren, dawren@thesunnews.com

A group of Myrtle Beach area business owners on Monday called for gubernatorial candidate Gresham Barrett and 10 other local politicians to return \$225,000 in campaign contributions given to them last year by corporations with ties to the Myrtle Beach Area Chamber of Commerce.

The group — Business Owners Organized to Support Tourism, or BOOST — has questioned whether the contributions were legal and it wants the chamber of commerce to prove that no public money went to political candidates.

Bred Dean, the chamber's president, has said no public money or chamber funds were included among the corporations' donations.

Dean did not return telephone calls Monday seeking comment. In a prepared statement sent to area media, Dean said it is "sad and disappointing that a fringe special-interest group [BOOST] continues to repeat old accusations and unfounded allegations" about the chamber of commerce.

City Councilman Randal Wallace, who received \$15,000 from the corporations, said he believes the current controversy is being driven by the light governor's race and the GOP primary on June 8.

"This is typical election-year politics," Wallace said, "it all goes away when Barrett either wins or loses."

BOOST President Robert Kelley said during a news conference that there are too many unanswered questions about the source of money used by the corporations, which do not have to disclose their membership.

Kelley questioned why at least one of the corporations made \$20,500 in political contributions last year yet failed to pay the mortgage on its only asset — a beach house — which now is in foreclosure.

Kelley also said Dean has changed his story about the chamber's involvement in the campaign donations.

"In the past, the chamber has denied any involvement in this scandal, but now Bred Dean admits he set up the lunch with [chamber] lobbyist Mark Kelley and he handed Mr. Barrett the envelope full of checks," said Robert Kelley, who is not related to the lobbyist.

A Barrett spokesman told The Sun News last week that Dean arranged the meeting in which the corporations' donations were given to the politician.

"We may never know whether what took place was sloppy, stupid or arrogant — my guess is it's a lot of each," Robert Kelley said.

Barrett and local politicians — including six state legislators and four City Council members — should return the money or donate it to charity, he said.

"I know the candidates haven't done anything illegal, but if I was running for office I would want to know where every penny came from," he said.

A spokesman for Barrett could not be reached for comment. U.S. Rep. Barrett, R-3rd District, is one of four GOP candidates running for governor. Barrett told The Sun News last week that he believes the donations were legal and he has no intention of returning the money.

State Sen. Ray Cleary, R-Murrells Inlet, said he would give back the money if it is proven that there were problems with the funds but he has not seen any proof of that.

"The people who contributed are honorable people; if they did something wrong, I'll give it back," Cleary said. "But I'm not going to insult the people who raised money for me by giving it back based on these allegations. That wouldn't be fair because it would make it appear as if they had done something wrong."

A seventh state legislator — state Rep. Tracy Edge, R-North Myrtle Beach — is the only politician to have returned the money he received from the corporations. Edge told The Sun News that he returned the money because he could not get anyone at the chamber or Shap Guyton, the corporations' registered agent, to explain the source of the money.

Guyton has not returned telephone calls to The Sun News.

Robert Kelley said he wants the chamber of commerce to open its financial records for the past 18 months "for full transparency in the spending of every single dollar."

"I don't feel that they are being completely forthcoming with all of the facts," he said.

Wallace said there is no mystery behind the donations. Wallace said he asked Brent Brannham, the chamber's board chairman, to help raise money in what he felt would be a highly contested council race.

"I was having trouble raising money and I was worried about it," Wallace said. "I asked for a lot of area business leaders to help, and I spent every dime I raised to get re-elected."

City Councilman Wayne Gray said he believes the contributions were gathered legally.

"No regulatory office has stated that they were improper or illegal," Gray said. "The donations were very legal."

Mayor John Rhodes agreed, saying the state Ethics Commission "found there was nothing wrong with the checks, so there's no reason to give them back."

Rhodes said he would return the money if further investigation shows there was any wrongdoing.

Guyton, a former chamber board chairman, is the registered agent for 15 corporations that donated money to politicians last year. All told, those corporations made 160 donations totaling \$225,000 — all of them in the form of cashier's checks in sequential order purchased on the same day at South Atlantic Bank, where Guyton is a board member.

Money from the Guyton-related corporations is among \$324,500 in campaign donations given to Barrett, four City Council incumbents and seven state legislators in the months after the council members and state legislators passed laws that allowed a 1 percent sales tax increase in Myrtle Beach.

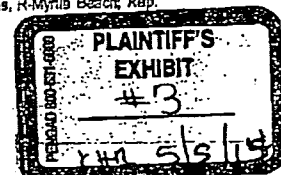
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Robert Kelley has said he suspects the contributions were payback for legislators' and council members' support of the tax.

Cathy Hazelwood — general counsel for the S.C. Ethics Commission, which oversees campaign donations — has said she cannot discuss the contributions associated with Guyton's corporations. Hazelwood would not say whether the commission is investigating the matter, but previously has said the donations appear to have been legal.

Former City Councilman Chuck Marino also received contributions from the corporations, as did the following state legislators: Rep. Alan Clemmons, R-Myrtle Beach; Rep. Liston Bartfield, R-Aynor; Rep. Nelson Hardwick, R-Sunrise Beach; Rep. Thad Viera, R-Myrtle Beach; and Rep. George Haam, R-Conway.

App'x 647
-640-



Donations tied to MB chamber blasted Tuesday

BOOST calls for return of politicians' \$225,000

By DAVID WHEAT
dwheat@thesunnews.com

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VIDEO
Watch a video at
TheSunNews.com

A group of Myrtle Beach area business owners on Monday called for gubernatorial candidate Grasham Barrett and 10 other local politicians to return \$225,000 in campaign contributions given to them last year by corporations with ties to the Myrtle Beach Area Chamber of Commerce.

The group - Business Owners Organized to Support Tourism, or BOOST - has questioned whether the con-

tributions were legal, and it wants the chamber of commerce to prove that no public money went to political candidates.

See BOOST | Page 3A



By Steve Jaramila sjaramila@thesunnews.com
BOOST president Robert Kelley and a group of Myrtle Beach area business owners, citizens and taxpayers called Monday on Grasham Barrett and other politicians to return campaign donations.

BOOST

From Page 1A

Brad Dean, the chamber's president, has said no public money or chamber funds were included among the corporations' donations.

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Former City Councilman Chuck Martino also received contributions from the corporations, as did the following state legislators: Rep. Alan Clements, R-Myrtle Beach; Rep. Liston Barfield, R-Aynor; Rep. Nelson Hardwick, R-Surfside Beach; and Rep. George Neum, R-Corwys.

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EDITORIAL

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The fundamental premise behind our campaign finance laws is simple: The public has a right to know who is paying for a candidate's political campaign.

It's a premise, of course, that gets trampled upon in every election that features any significant fundraising. You'd be hard-pressed to find a candidate with more than mere pocket change in his campaign account who isn't reporting donations from an assortment of all-but-anonymous companies. Because South Carolina's campaign-finance reporting laws are so weak, this practice is unfortunately legal — even though it violates the spirit that prompted our laws.

Last year's \$324,000 donation dump on a variety of local and state politicians, however, shows such brazen disregard for this premise that we have to wonder if it may have crossed even the faint lines in the sand drawn by state law.

When we don't know who's donating the money, it's impossible to know if a second principle of campaign finance is being followed: There should be limits on how much money a candidate can receive from any one person.

This view is not as universally held as the first one. Some hard-line libertarians believe that campaign cash is a form of political speech that should not be restricted

Candidates who
got donations

Governor | Gresham Barrett
State House of
Representatives | Alan
Clemmons, Liston Barfield,
Tracy Edge (since returned),
Nelson Hardwick, George
Hearn, Thad Viers
State Senate | Ray Cleary
Myrtle Beach City Council |
Mayor John Rhodes, Wayne
Gray, Chuck Martino, Randal
Wallace

ble. 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 pinning the donations on Dean no matter what the unprovable truth is.)

The chamber's defense all along has been that the checks came not from the chamber, but from the companies under whose name the donations were made. Dean says now that he simply collected and delivered them. Again, there is no evidence disproving this statement, but the circumstances make it difficult to believe.

Several of the donations "came" from companies in serious financial trouble, such as landholding companies

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openness in
government
- > Promote
good works
- > Analyze
policy effects
on the
community's
long-term
health
- > Hold lead-
ers account-
able to the
people

believe that campaign cash is
a form of political speech
that should not be restricted.

and about a dozen states
support this view by allow-
ing unlimited contributions.
State Rep. Thad Viers (a re-
cipient of the above money)
is paying homage to this
idea, for example, in saying
he might support a ban on
contributions from corpora-
tions if the limits on individ-
ual contributions were raised.

Most people, however, be-
lieve that allowing any one
donor to dump unlimited
amounts of cash on a candi-
date essentially amounts to
buying them. This is where
the deep concern about last
year's donations springs
from: If some entity spent
\$96,000 on four City Council
races — well above what any
individual council candidate
spent to win — who owns the
City Council?

On this second point, S.C.
law is actually much clearer,
setting absolute limits on do-
nations from individuals in
state and local races. Unfor-
tunately, with the require-
ments of reporting who's be-
hind the money so weak, it is
very easy to get around those
limits: Just pass the money
through the bank account of
an LLC you own, and it's
clean and legal — political
money laundering 101, de-
fended with a smirk by any
candidate who received the
money.

□ □ □

⑤ The darkest accusation in
this affair is that the money
in question came directly
from the Myrtle Beach Area
Chamber of Commerce as a
kickback for passing the
1 percent sales tax for tour-
ism advertising, passed out
to City Council members
and state representatives
who helped make it happen —
and, inexplicably, Gresham
Barrett in his bid for
governor.

There is virtually no evi-
dence to prove this allega-
tion, but there's a host of cir-

serious financial trouble,
such as landholding compa-
nies that were unable to
make mortgage payments on
properties they owned that
have since fallen into foreclo-
sure. Further, the checks
were cashier's checks, which
are bought from a bank rather
than drawn from an ac-
count, with the LLC names
simply written in the memo
line. Further, the check num-
bers are in sequential order,
suggesting they were all
bought at once.

The simplest conclusion is
that the money came from
the same source, with the
LLC names added as an af-
terthought. According to Po-
litical Money Laundering
101, all they had to do to make
it legal was pass the money
through an LLC's bank ac-
count to make it donation-
ready. It's unclear at this
point whether the donors
even took that simple step.

Ultimately, whether the
source of money is one per-
son, one organization, or just
a group of like-minded indi-
viduals with more money
than bodies to pin it on has
yet to be shown. (Technically,
it's impossible that the dona-
tions actually came directly
from sales tax money — the
donations were made in
June, and the first sales tax
check was not collected until
August.) Bank statements of
the LLCs in question would
settle the question defini-
tively, but those are beyond
reach of the public — suggest-
ing that some authority with
stronger investigatory pow-
ers should consider this
case.

• Though their long denials
of any involvement have
damaged their credibility in
this case, the chamber may
yet be telling the truth that
the donations did not come
from them. But hiding be-
hind the cloak of anonymity
afforded by state law makes
that claim harder for them to
substantiate, and they de-
serve the scrutiny they are

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FBI, IRS probe Myrtle Beach campaign donations

■ MB Chamber, politicians investigated
David Wren, dwren@thesunnews.com

The FBI and the Internal Revenue Service have launched criminal investigations into \$239,500 worth of campaign contributions given last year to political action committees and area politicians, including former gubernatorial candidate Gresham Barrett and members of the Myrtle Beach City Council.

The FBI and the IRS want to know where the money came from and why the donations were made in the form of cashier's checks purchased at Myrtle Beach-based South Atlantic Bank.

The contributions purportedly were given by 14 corporations with ties to the Myrtle Beach Area Chamber of Commerce.

However, some of those corporations had no money when the donations were made, according to court documents and interviews by The Sun News. One of the corporations had been dissolved for nearly two years for failing to pay its taxes when the donations were made.

Dorise Talista, spokeswoman for the FBI, would neither confirm nor deny any active investigation. The IRS office in Myrtle Beach did not return a telephone message left by The Sun News.

However, the federal agencies have interviewed at least two people since the investigation started.

State Rep. Tracy Edge, R-North Myrtle Beach, said he met with investigators on July 7. He said the investigation appears to focus on possible money laundering, criminal conspiracy and tax fraud.

Edge, the only politician who refused to accept the cashier's checks, said he gave the money back because no one would tell him the source of the funds.

Investigators also have interviewed Tom Herron, spokesman for a local business group that has been critical of the campaign donations. Herron declined to discuss specifics of that meeting.

Herron's group - Business Owners Organized to Support Tourism - has questioned whether the donations were payback for politicians who last year pushed through a 1 percent sales tax increase that helps fund the chamber's marketing programs.

Myrtle Beach lawyer Shep Guyton, a former chairman of the chamber's board of directors, is the registered agent for all of the corporations that made campaign donations with cashier's checks.

Guyton, who also is a board member at South Atlantic Bank, has not responded to requests for interviews.

Wayne Wicker, the bank's chief executive officer, did not respond to a request for comments.

Edge said the FBI and the IRS indicated that they were going to obtain bank records to see if any wrongdoing occurred.

The federal Bank Secrecy Act requires financial institutions to keep records of and report to the IRS and others all cash purchases of cashier's checks totaling \$10,000 or more in a day.

The cashier's checks used for campaign donations all have the same date - June 8, 2009 - and they are in sequential order.

Banks also are supposed to file a suspicious activity report if money laundering or any other criminal act is suspected.

It is not clear whether South Atlantic Bank reported the purchase of those checks to the federal government.

U.S. Rep. Barrett, R-3rd District - who lost the gubernatorial bid to Nikki Haley in last month's primary election - received \$49,000 in cashier's checks from Guyton's corporations.

Those checks were among campaign donations that Brad Dean, the president of the chamber of commerce, delivered to Barrett during a lunch meeting last summer.

Mark Kelley, the chamber's lobbyist, also attended that meeting.

Dean did not return telephone calls to The Sun News on Wednesday.

Although Dean has repeatedly stated that the chamber was not involved in raising money for political candidates, he told The Sun News in May that the chamber acted as a clearinghouse for contributions.

Local business owners often sent campaign donations to the chamber's headquarters, Dean said, because they knew current and past chamber board members were raising money for candidates. Chamber officials then would disburse the money.

"This was not the chamber of commerce raising money," Dean told The Sun News in May.

"There was no public money or chamber money involved."

Brant Brantam, the chamber's board chairman when the donations were made, has said for months that there is no tie between the chamber and the campaign contributions. Brantam has said he helped raise the money on his own from "like-minded businessmen and women."

Brantam also did not return a telephone call to The Sun News on Wednesday.

Incumbent candidates for the City Council, including Mayor John Rhodes, also received cashier's checks from Guyton's corporations, according to filings with the state's Ethics Commission.

Rhodes said neither the FBI nor the IRS have asked to meet with him.

"If anybody wants to talk to me, I welcome that," Rhodes said. "I'll talk to them all day if they want."

Edge and other members of Horry County's legislative delegation also received cashier's checks.

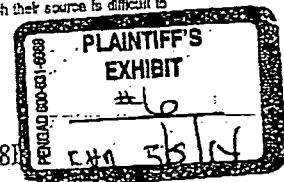
All of those politicians, with the exception of Edge, have said they do not believe the contributions violate any laws. Edge said he is not sure whether any laws were violated.

"The donations were very legal," City Councilman Wayne Gray told The Sun News last month.

Herb Hayden, executive director of the Ethics Commission, has said the donations do not appear to have violated state election laws, even though their source is difficult to trace because of the cashier's checks.

Hayden did not return a telephone call to The Sun News on Wednesday.

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Edge, however, said he was suspicious of the donations and held onto them until December, when Guyton demanded their return.

"He was adamant about wanting them back," Edge said.

Each of the 14 corporations issued cashier's checks of \$1,000 to council candidates and legislators and \$3,500 to Barrett and the political action committees - the maximum amount allowed under state law.

Robert Kelley, president of BOOCT, has questioned how a group of corporations with little apparent financial backing could have raised so much money for candidates.

Mark Lazarus, a former Henry County councilman and a partner in one of Guyton's corporation, told The Sun News last year that the corporation had no money to make political donations.

"I have no idea where the money came from and I absolutely did not approve of this," Lazarus said.

The foreclosure of a beach house owned by another Guyton corporation is raising more questions about the source of campaign donations. The corporation failed to make its loan payments on the beach house, yet donated \$20,500 to candidates and PACS.

"We may never know whether what took place was sloppy, stupid or arrogant," Robert Kelley said during a May news conference in which BOOCT called for the chamber to disclose its financial records. "My guess is it's a lot of each."

Chamber officials and politicians say there is no link between the donations and the 1 percent sales tax increase that was approved last year. That tax, which went into effect Aug. 1, was tacked onto the city's sales tax. It is expected to generate up to \$19 million a year for the chamber.

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FBI, IRS probe donors

MB Chamber, politicians investigated

By DAVID WREN
dwren@thesunnews.com

The FBI and the Internal Revenue Service have launched criminal investigations into \$229,600 worth of campaign contributions given last year to political action committees and are politicians, including former gubernatorial candidate Graham Barrett and members of the Myrtle Beach City Council.

The FBI and the IRS want to know where the money came from and why the donations were made in the form of cashier's checks purchased at Myrtle Beach-based South Atlantic Bank.

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FBI

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Edgo, the only politician who refused to accept the cashier's checks, said he gave the money back because no one would tell him the source of the funds.

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Mark Kelley, the chamber's lobbyist, also attended that meeting.

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Although Dean has reportedly stated that the chamber was not involved in raising money for political candidates, he told The Sun News in May that the chamber acted as a clearinghouse for contributions.

Local business owners often sent campaign donations to the chamber's headquarters, Dean said, because they knew current and past chamber board members were raising money

for candidates. Chamber officials then would disburse the money.

"This was not the chamber of commerce raising money," Dean told The Sun News in May.

"There was no public money or chamber money involved," Brant Brantham, the chamber's board chairman when the donations were made, has said for months that there is no tie between the chamber and the campaign contributions.

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Contact DAVID WREN at 676-0281



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Campaign staffers say Myrtle Beach Area Chamber of Commerce president brought in disputed cash

Chamber chief denies raising disputed cash
David Wren, dwren@thesunnews.com

E-mails sent between members of Grosham Barrett's gubernatorial campaign staff last fall point to Brad Dean, president of the Myrtle Beach Area Chamber of Commerce, as the person who raised political donations funneled through corporations that now are the focus of a federal criminal investigation.

Dean has denied raising the money for Barrett and other politicians, and said no chamber money was used to make political donations.

However, an advocate for open government said Barrett's perception that Dean or the chamber of commerce raised the money would be just as effective in garnering influence, regardless of the ultimate source of the donations.

"If a politician has it in his mind that the money came from a certain business or individual, he'll keep that in mind when it comes time for legislation that could affect that business or individual," said John Crangle, executive director of Common Cause South Carolina, a nonprofit group that advocates for more accountability in government.

Dean declined to comment on why e-mails cite him as the person responsible for arranging contributions to Barrett and others following passage last year of a tax increase that benefits the chamber.

"I have not seen the e-mails you mention and, as such, I have no way of knowing the context of the e-mails nor can I know if they are authentic," Dean said.

The FBI and the Internal Revenue Service are investigating the source of the funds and why the donations were made through a series of sequentially numbered cashier's checks purchased on the same day at South Atlantic Bank, according to those who have been interviewed by the federal agencies.

Myrtle Beach lawyer Shop Guyton, who was a board member at South Atlantic Bank, is the registered agent for the corporations under investigation. It is not clear whether Guyton remains on the bank's board of directors. His name and photo have been removed from the bank's website.

Guyton and Wayne Wicker, the bank's president, have not returned telephone calls to The Sun News. Joy Klein, the bank's director of marketing, did not respond to a request for information about Guyton's status.

Dean declined to say whether he has been interviewed by the FBI or IRS.

"It is [the chamber's] policy not to comment on pending legal matters," he said.

The e-mails, obtained by The Sun News, show Barrett's staff attempting to pin down the source of the campaign donations after an Associated Press reporter raised questions about them in an Oct. 14 e-mail to B.J. Boiling. Boiling was communications director for Barrett during the Republican's failed gubernatorial run.

"There may be an issue with these donations," AP reporter Jim Davenport wrote in the e-mail to Boiling. "Want to get your head around the sources and get back to me?"

Boiling forwarded Davenport's e-mail to other campaign staffers, including Justin Stokes, Barrett's deputy campaign manager.

"These guys are tied to the Myrtle Beach Chamber of Commerce," Stokes said in an e-mail to Boiling and two of Barrett's political consultants - Warren Tompkins and Heath Thompson.

"Brad Dean, the chamber's president, worked behind the scenes to pull these together last quarter," Stokes said in the e-mail.

Tompkins, in another e-mail, told staff members that he "cannot figure what the issue would be" with the donations.

"Try Mark Kelley, our Horry expert, or perhaps Allan [sic] Clammons," Tompkins wrote in the e-mail, suggesting that those two could answer questions about the donations.

"Talk to Mark Kelley," Stokes told Tompkins and the others in another e-mail. "He would be familiar with these contributions and the connection" between the corporations and the chamber of commerce.

Kelley is a former legislator who now is the chamber's lobbyist.

The e-mails do not make clear why Barrett's staff thought Kelley would be familiar with the contributions. The S.C. Ethics Commission has strict rules that prohibit lobbyists from participating in campaign fundraising for state politicians.

Kelley and state Rep. Alan Clammons, R-Myrtle Beach, did not respond to requests for comments.

Clammons also is among the politicians who received donations from the 14 corporations that are under investigation.

Those corporations made \$239,500 in campaign contributions to seven state legislators and four Myrtle Beach City Council incumbents in the weeks after they approved a 1 percent sales tax hike for the city last year.

Barrett - one of Kelley's political allies - also received the donations, although he had no role in passing the tax.

Crangle said the use of shell corporations to hide the true source of campaign donations is one of the biggest problems in S.C. politics, often allowing individuals to exceed contribution limits without detection.

That type of corporate giving "is inherently corrupt and ought to be banned," he said.

Crangle said he doubts legislation reining in such donations will occur, however, because the politicians benefiting from the system are the ones making the laws.

The state Ethics Commission has been reviewing whether the donations violated state laws, but that agency has not referred any information to Attorney General Henry McMaster, who would prosecute such violations, according to McMaster spokesman Mark Plowden.

"We are not involved in that situation down there with the chamber," Plowden said. "That's the feds' show right now."

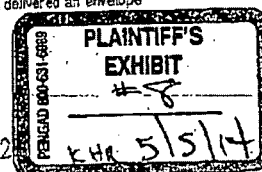
Cathy Hazelwood, general counsel for the commission, said she "can neither confirm nor deny the existence of a complaint" about the campaign donations or possible violations by Kelley.

The donations that are under investigation are among at least \$324,500 in political contributions made to Barrett and others by chamber-related businesses and individuals in the weeks after the tax passed.

Most of the money from the tax, which is expected to generate about \$18 million a year for the next decade, goes to the chamber to pay for tourism marketing programs.

Barrett - who lost his bid for governor during a primary runoff against eventual Republican candidate Nikki Haley - told The Sun News in May that Dean delivered an envelope with \$84,000 in campaign donations, including those from Guyton's corporations, during a lunch meeting last year.

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Kefauver also attended that meeting, Barrett said.

Dean has repeatedly said that the chamber does not raise money for political candidates. He said he delivered the contributions to Barrett because he knew the politician would be in town for an unrelated fundraiser.

Dean said the chamber last year acted as a clearinghouse for political donations - business owners would send the contributions to the chamber's headquarters and the money then would be distributed to politicians. Dean said the chamber has stopped that practice.

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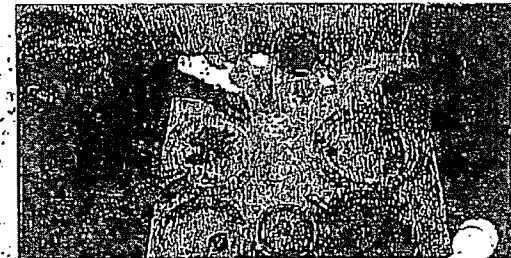


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MYRTLE BEACH, SOUTH CAROLINA | TheSunNews.com | NOVEMBER 10, 2010

Campaign donors face foreclosures

By DAVID WREN
dwren@thesunnews.com

A foreclosure lawsuit has been filed against two more of the corporations that made campaign contributions last year that have been tied to the Myrtle Beach Area Chamber of Commerce.

Bank of North Carolina filed the

lawsuit last week against WKG Land Partners LLC and Back Gate Partners LLC. The bank claims those corporations have defaulted on a \$500,000 loan. No court date has been set.

Shep Guyton, a Myrtle Beach lawyer who is the registered agent for both corporations, did not return a telephone call to The Sun News.

Guyton is the registered agent for



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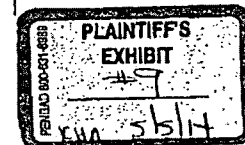
14 corporations that made \$239,500 in campaign contributions that now are the focus of criminal investigations by the FBI and the Internal Revenue Service.

The investigations focus on possi-

ble money laundering, tax fraud and criminal conspiracy, according to state Rep. Tracy Edge, R-North Myrtle Beach, who has been interviewed by the agencies.

Edge is the only lawmaker who did not accept the campaign contributions.

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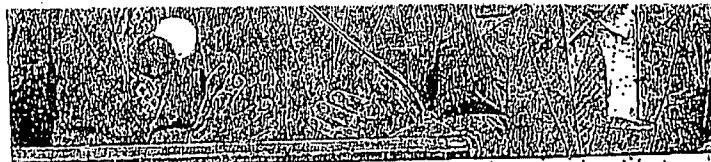
cell men to join me in opposition. In the end, I think that Starnes realized it was going nowhere and withdrew her rezoning application," he wrote.

Batch plants have been a topic of concern in Horry County lately. The county is trying to figure out which of its 14 plants

or she can ask for a different rezoning or leave the property as is.

Whatever she or other property owners plan to do in the area, Campisi said, "we will be keeping an eye on it."

Contact LORENA ANDERSON at 644-1722.



House Majority Whip Rep. James E. Clyburn (center), Sen. Jeff Merkley (left) and Rep. John Spratt introduce legislation March 10 in Washington.

the facility's name.

But in job to cousin... poss... said, and in this can try to gauge if Conway really to make the deal.

"I ain't going to sneeze at it," he said.

Contact STEVE JONES at 4.

LAWSUIT

From Page 1A

The campaign donations — all in the form of sequentially numbered cashier's checks purchased on the same day at South Atlantic Bank — were given to politicians who supported a 1 percent tax increase in Myrtle Beach. Money from that tax goes to the chamber of commerce for its tourism marketing efforts.

Guyton is a former president of the chamber's board of directors. Guyton also was a member of South Atlantic Bank's board of directors until his resignation earlier this year.

Donations also were made to failed gubernatorial candidate Cresham Barrett, who did not play a role in the tax increase but was supported by chamber board members. Barrett ac-

cepted the money last year during a luncheon with chamber President Brad Dean and Mark Kelly, the chamber's lobbyist.

This is at least the fourth Guyton-related corporation facing foreclosure in the months after they made campaign contributions.

The foreclosure lawsuits have some critics of the tax increase questioning how corporations that could not pay their bills managed to funnel thousands of dollars in contributions to politicians.

Dean has said the money did not come from the chamber of commerce.

Brant Branham, the chamber's board chairman when the donations were made, has said they came from "like-minded businessmen and women."

WK& Land Partners made contributions of \$8,500 apiece

to political action committees that helped re-elect Myrtle Beach City Council members.

Back Gate made 10 contributions totaling \$12,500 to council candidates, state legislators and Barrett.

Bank of North Carolina said in its lawsuit that those corporations failed to repay a \$500,000 loan that came due in 2008. The bank, which is the successor to Beach First National Bank, said the corporations now owe \$570,245 with interest accruing at \$65.02 per day.

Those corporations pledged property they own in Cypress River Plantation, located in the Burgess community, and in a shopping center at the back

gate of the former Myrtle Beach Air Force Base as collateral for the loan.

In addition, Guyton and business partners Edward Williams and Dean Karavan signed personal guarantees for the loan.

Williams and Karavan could not be reached for comment.

Officials with the U.S. attorney's office and the S.C. Ethics Commission said Tuesday they cannot confirm or deny that an investigation is taking place. They declined to comment further on the matter.

At least two other Guyton-related corporations are facing foreclosure in separate lawsuits filed earlier this year.

Deluxe Land Partners, which made \$20,500 in dona-

tions to political candidates — failed to repay a \$250,000 loan, according to Bank of North Carolina.

Garden City Partners, which made \$20,500 in campaign contributions, failed to repay a \$1.2 million loan, according to S.C. Bank & Trust.

In addition to the foreclosures, a partner in another corporation tied to Guyton told The Sun News that the corporation had no money to make political donations. That corporation's only asset is a piece of land.

Another corporation for which Guyton was the registered agent was dissolved nearly two years before it made donations to political candidates.

Money from the Guyton-re-

lated corporations \$324,500 in campaign contributions given to Barrett.

Council incumbents state legislators in the after the court, the legislators in the lowered a 1% increase in Myrtle Beach.

Most of that money the chamber of commerce advertising. The city 20 percent of the funding for tax breaks and infrastructure projects.

The tax is expected to cost up to \$18 million over the 10-year period.

Contact DAVID W. 626-0281.

Cafe Old Vienna

LUNCH SPECIAL TODAY (while supplies last!)
STUFFED PEPPERS — Bell peppers stuffed with fresh ground beef, pork & rice — deliciously spiced and open-baked, served over homemade Tomato Sauce with homemade potato pancakes on the side — this dish will warm up your heart & soul, yummmmy...

WEDNESDAY — NIGHT OFFER:
 Get with this coupon **50% OFF** Your 2nd Entree. Valid for Dinner on Wed. only, Exp. 11/24/10
 Entree must be of equal or greater value. Not valid with any other offer.
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NEW HOURS: LUNCH: Tues.-Sat. 11am-2:30pm
DINNER: Only Wed., Thurs., Fri., & Sat. 4pm-9pm
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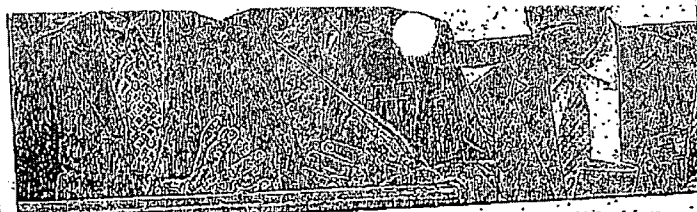
Now is the time to refinance or purchase a new home

Please call Christy or I
 and ask about our
**NO-COST PURCHASE
 REFINANCE OPTION**

and made the same reasoning re-
ther Coun-
he in oppo-
mid, I think
lized it was
l withdrew
cation," he
been a top-
ry County
is trying to
its 16 plants

the same reasoning re-
est before the council again,
or she can ask for a different re-
zoning or leave the property as
is.
Whatever she or other prop-
erty owners plan to do in the
area, Campisi said, "we will be
keeping an eye on it."

Contact LORENA ANDERSON
at 444-1722



House Majority Whip Rep. James E. Clyburn (center), Sen. Jeff Merkley (left) and Rep. John Spratt introduce legislation March 10 in Washington.

members aren't ready accepting
one to come forward with \$1 million for
the facility name.
But it's his job to consider any pro-
posals, he said, and in this case at least
try to gauge if Conway residents want
to make the deal.
"I ain't going to sneeze at \$1 million,"
he said.

Contact STEVE JONES at 444-1765.

ceptions - all
initially num-
ber checks pur-
chase day at
le - were giv-
no supported
ease in Myr-
ron that tax
ber of com-
ism in pack-
er president
board of direc-
as a member
Bank's board
is resignation.
were made to
ial candidate
who did not
tax increase
d by chamber
Barrett ac-

cepted the money last year dur-
ing a luncheon with chamber
President Brad Dean and Mark
Kelly, the chamber's lobbyist.
This is at least the fourth
Guyton-related corporation fac-
ing foreclosure in the months
after they made campaign
contributions.
The foreclosure lawsuits
have some critics of the tax in-
crease questioning how corpo-
rations that could not pay their
bills managed to funnel thou-
sands of dollars in contribu-
tions to politicians.
Dean has said the money did
not come from the chamber of
commerce.
Brant Branham, the cham-
ber's board chairman when the
donations were made, has said
he raised the money indepen-
dently from "like-minded busi-
nessmen and women."
WKG Land Partners made
contributions of \$3,500 apiece

to political action committees
that helped re-elect Myrtle
Beach City Council members.
Back Gate made 10 contribu-
tions totaling \$12,500 to council
candidates, state legislators
and Barrett.
Bank of North Carolina said
in its lawsuit that those corpo-
rations failed to repay a
\$500,000 loan that came due in
2008. The bank, which is the
successor to Beach First Na-
tional Bank, said the corpora-
tions now owe \$570,245 with in-
terest accruing at \$65.02 per
day.
Those corporations pledged
property they own in Cypress
River Plantation, located in the
Burgess community, and in a
shopping center at the back

gate of the former Myrtle Beach
Air Force Base as collateral for
the loan.
In addition, Guyton and busi-
ness partners Edward Williams
and Dean Karavan signed per-
sonal guaranties for the loan.
Williams and Karavan could
not be reached for comment.
Officials with the U.S. attorney
and the S.C. Ethics
Commission said Tuesday they
cannot confirm or deny that an
investigation is taking place.
They declined to comment fur-
ther on the matter.
At least two other Guyton-re-
lated corporations are facing
foreclosure in separate lawsuits
filed earlier this year.
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which made \$20,500 in dona-

tions to political candidates -
failed to repay a \$350,000 loan,
according to Bank of North
Carolina.
Garden City Partners,
which made \$20,500 in cam-
paign contributions - failed to
repay a \$1.2 million loan accord-
ing to S.C. Bank & Trust.
In addition to the foreclo-
sures, a partner in another cor-
poration tied to Guyton told The
Sun News that the corporation
had no money to make political
donations. That corporation's
only asset is a piece of land.
Another corporation for
which Guyton was the regis-
tered agent was dissolved near-
ly two years before it made do-
nations to political candidates.
Money from the Guyton-re-

lated corporations is among
\$324,500 in campaign dona-
tions given to Barrett, four City
Council incumbents and seven
state legislators in the months
after the council members and
legislators passed a law that al-
lowed a 1 percent sales tax in-
crease in Myrtle Beach.
Most of that money goes to
the chamber of commerce for
advertising. The city gets about
20 percent of the funds for prop-
erty tax breaks and tourism in-
frastructure projects.
The tax is expected to gener-
ate up to \$18 million per year over
the 10-year life of the
legislation.

Contact DAVID WHEAT
626-0281

fe Old Vienna

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all peppers stuffed with fresh ground beef, pork & rice - deliciously
hot, served over homemade tomato-Sauerkraut with homemade potato
sauce - this dish will warm up your heart & soul, yummmmm.

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50% OFF Your 2nd Entree, Valid for Dinner on Wed. only, Exp. 11/24/10
not to be equal or greater value. Not valid with any other offer.
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PH: Tues-Sat 11am-2:30pm
ed, Thurs, Fri, & Sat 2pm-4pm

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Wren, David <dwwren@thesunnews.com>

Re: Fw: Brad Dean Luncheon

Mon, Jul 19, 2010 at 5:48 PM

Tim Pearson <tpearson@gmail.com>
Reply-To: tpearson@gmail.com
To: "Wren, David" <dwwren@thesunnews.com>

Not really my call, but pushed Stokes on it some. Let me know if you don't hear from him in the near future.

Tim

Sent from my Verizon Wireless BlackBerry

From: "Wren, David" <dwwren@thesunnews.com>
Date: Mon, 19 Jul 2010 17:11:20 -0400
To: Tim Pearson <tpearson@gmail.com>
Subject: RE: Fw: Brad Dean Luncheon

Tim,

I'm hoping to use those e-mails now that the primary is over and Barrett is out of the picture. Wanted to check with you, though. We will, of course, not identify the source of the e-mails or say how we obtained them.

Thanks,

David

From: tpearson@gmail.com (mailto:tpearson@gmail.com) On Behalf Of Tim Pearson
Sent: Thursday, May 20, 2010 9:02 AM
To: Wren, David
Subject: Re: Fw: Brad Dean Luncheon

maybe go ask gresham directly who gave him the money:
http://www1.scnw.com/scp/news/political/local_govt/article/gresham_barrett_in_mahj_major_announcement_in_myrtle_beach_thursday/16009/

On Wed, May 19, 2010 at 9:06 PM, Wren, David <dwwren@thesunnews.com> wrote:

Good. Thanks. I'll be in touch later this week.

David

From: tpearson@gmail.com on behalf of Tim Pearson
Sent: Wed 5/19/2010 9:02 PM
To: Wren, David
Subject: Fwd: Fw: Brad Dean Luncheon

Luncheon details - from Barrett's schedule email. Darryl Broome is Barrett's Chief of Staff in Congress. Natalie his wife (sorry to point out the obvious).
Lbyas67 is Luke Byars, who is Barrett's campaign manager.

----- Forwarded Message -----

From: "Barrett, J. Gresham" <jgresham@mail.house.gov>
To: "Broome, Darryl" <Darryl.Broome@mail.house.gov>; "Barrett, Natalie" <natalie.Barrett@mail.house.gov>; Justin E. Stokes <justinc06@yahoo.com>;
lbyas67@aol.com
Sent: Monday, June 15, 2009 3:39:57 PM
Subject: Brad Dean Luncheon

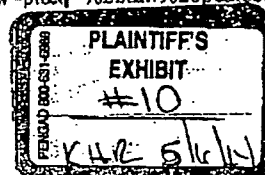
When: Saturday, June 20, 2009 1:00 PM-2:00 PM (GMT-05:00) Eastern Time (US & Canada).

Where: Sid and Roy's (Market Commons)

Note: The GMT offset above does not reflect daylight saving time adjustments.

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22tim%20pearson...> 6/6/2012

App'x 659
-652-



D. WREN 026



Wren, David <d.wren@the-sunnews.com>

Fwd: FW: Questionable donations

Tim Pearson <timg@nabiley.com>
To: "Wren, David" <d.wren@the-sunnews.com>

Wed, May 19, 2010 at 8:11 PM

Another ...

----- Forwarded Message -----

From: Justin E. Stokes <jstokes06@yahoo.com>
To: TompkinsJW@aol.com; bj@grishambarratt.com; health@cott-howell.com
Sent: Wed, October 14, 2009 3:58:54 PM
Subject: Re: FW: Questionable donations

Talk to Mark Kelley. He would be familiar with these corporations and the connection.

From: "TompkinsJW@aol.com" <TompkinsJW@aol.com>
To: bj@grishambarratt.com; jstokes06@yahoo.com; health@cott-howell.com
Sent: Wed, October 14, 2009 3:51:37 PM

Subject: Re: FW: Questionable donations

All appear to be beach developers. Cannot figure what the issue would be. Try Mark Kelley... our Harry expert or perhaps Alan Clemmons.

In a message dated 10/14/2009 3:52:24 P.M. Eastern Daylight Time, bj@grishambarratt.com writes:

Yes they are. I've asked davenport what the issue may be. Waiting to hear back.

From: TompkinsJW@aol.com [mailto:TompkinsJW@aol.com]
Sent: Wednesday, October 14, 2009 3:47 PM
To: bj@grishambarratt.com; jstokes06@yahoo.com; health@cott-howell.com
Subject: Re: FW: Questionable donations

are these to Barratt? If so, what would the issue be?

In a message dated 10/14/2009 3:48:56 P.M. Eastern Daylight Time, bj@grishambarratt.com writes:

File see below.

From: Davenport, Jim [mailto:jimd@davenport@ep.org]
Sent: Wednesday, October 14, 2009 3:45 PM
To: bj@grishambarratt.com
Subject: Questionable donations

There may be an issue with these donations. Want to get your head around the sources and get back to me?

905 Polo Partners LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
AM & RD Tide Agency	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Back Gate LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Beach Paralegal	1298 Professional Dr	Myrtle Beach SC	29577	2500	6/22/2009
CF Plantation Partners LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Creek View Land Partners LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Dekore Land Partners LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Office Park Partners	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Partners of Cypress Plantation LLC	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Portcher Partners	1298 Professional Dr	Myrtle Beach SC	29577	3500	6/22/2009
Carter Skyles Inc.	153 Long Ridge Dr	Murrelets Inlet SC	29578	3500	6/22/2009

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&vicv=pt&q=%22mark%20kelley...> 6/6/2012

Heather C. Carter	183 Long Ridge Dr.	Murphy Hill SC	29578	Business Owner	3500	8/22/2009
Jonathan H. Carter	183 Long Ridge Dr.	Murphy Hill SC	29578	Business Owner	3500	8/22/2009
Mitar Direct Inc.	4421 Stuart Andrew Blvd., Ste. 608	Charlotte NC	28217		3500	8/22/2009
Vista Media	4421 Stuart Andrew Blvd., Ste. 608	Charlotte NC	28217		3500	8/22/2009
Caroline Coast Investments	4625 Cleander Dr.	Myrtle Beach SC	29578		3500	8/22/2009
Guyton Family Investments LLC	4625 Cleander Dr.	Myrtle Beach SC	29578		3500	8/22/2009
AMRD Real Estate	67 Bayberry Lane	Myrtle Beach SC	29572		3500	8/22/2009
Martin Lee Enterprise LLC	7568 Enterprise Rd.	Myrtle Beach SC	29568		3500	8/22/2009
Pedraza Advocacy Consultants LLC	7568 Enterprise Rd.	Myrtle Beach SC	29568		3500	8/22/2009
Robert B. Guyton	6502 Lake Dr.	Myrtle Beach SC	29572	Attorney	3500	8/22/2009

AP Associated Press

Jim Davenport
The Associated Press
Statehouse-Columbia
803-254-7870
803-917-0542
803-709-5510 (Columbia Bureau)

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(TP_08_0130)
web: 800-421-1000



RE: Barrett

Wren, David <DWREN@thesunnews.com>
To: "Justin E. Stokes" <justinsc06@yahoo.com>

Wren, David <dwren@thesunnews.com>

Mon, Jul 12, 2010 at 6:54 PM

Thanks. These are the e-mails I was interested in:

XXXXXXXXXX

From: Justin E. Stokes <justinsc06@yahoo.com>
To: TompkinsJW@aol.com; bj@greshambarrett.com; health@scott-howell.com
Sent: Wed, October 14, 2009 3:58:54 PM
Subject: Re: FW: Questionable donations

Talk to Mark Kelley. He would be familiar with these contributions and the connection.

From: "TompkinsJW@aol.com" <TompkinsJW@aol.com>
To: bj@greshambarrett.com; justinsc06@yahoo.com; health@scott-howell.com
Sent: Wed, October 14, 2009 3:51:37 PM

Subject: Re: FW: Questionable donations

All appear to be beach developers. Cannot figure what the issue would be. Try Mark Kelley... our Henry expert or perhaps Allan Clammond.

In a message dated 10/14/2009 3:53:24 P.M. Eastern Daylight Time, bj@greshambarrett.com writes:
Yes they are. I've asked developers what the issue may be. Waiting to hear back.

From: Justin E. Stokes <justinsc06@yahoo.com>
To: TompkinsJW@aol.com; bj@greshambarrett.com; health@scott-howell.com
Sent: Wed, October 14, 2009 3:57:44 PM
Subject: Re: FW: Questionable donations

These are all from last quarter. These guys are tied to the Myrtle Beach Chamber of Commerce. Head Dean, the Chamber President, worked behind the scenes to pull these together last quarter.

From: "TompkinsJW@aol.com" <TompkinsJW@aol.com>
To: bj@greshambarrett.com; justinsc06@yahoo.com; health@scott-howell.com
Sent: Wed, October 14, 2009 3:46:33 PM

Subject: Re: FW: Questionable donations

are these in Barrett? If so, what would the issue be?

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22mark%20kelley...> 6/6/2012

In a message dated 10/14/2009 3:48:56 P.M. Eastern Daylight Time, b.j.gresham@barrett.com writes:
 His son below

From: Davenport, Jim (maltorjdavenport@sc.09)
 Sent: Wednesday, October 14, 2009 3:45 PM
 To: b.j.gresham@barrett.com
 Subject: Questionable donations

There may be an issue with these donations. Want to get your hands around the sources and get back to me?

905 Polo Partners LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
AM & RD Title Agency	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Back Gate LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Beach Paralegal	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
CF Plantation Partners LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Creek View Land Partners LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Deluxe Land Partners LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Office Park Partners	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Partners of Cypress Plantation LLC	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Porchers Partners	1298 Professional Dr.	Myrtle Beach SC	29577	3500	6/22/2009
Center Station Inc.	153 Long Ridge Dr.	Murrells Inlet SC	29576	3500	6/22/2009
Heather C. Carter	153 Long Ridge Dr.	Murrells Inlet SC	29576	Business Owner	3500 6/22/2009
Jordan H. Carter	153 Long Ridge Dr.	Murrells Inlet SC	29576	Business Owner	3500 6/22/2009
Miller Direct Inc.	4421 Stuart Andrew Blvd., Ste. 605	Charlotte NC	28217	3500	6/22/2009
Vista Media	4421 Stuart Andrew Blvd., Ste. 605	Charlotte NC	28217	3500	6/22/2009
Carolina Coast Investments	4605 Olander Dr.	Myrtle Beach SC	29578	3500	6/22/2009
Guyton Family Investments LLC	4605 Olander Dr.	Myrtle Beach SC	29578	3500	6/22/2009
AMRD Real Estate	57 Dayberry Lane	Myrtle Beach SC	29572	3500	6/22/2009
Martin Lee Enterprise LLC	7588 Enterprise Rd.	Myrtle Beach SC	29588	3500	6/22/2009
Patricia Advisory Consultants LLC	7588 Enterprise Rd.	Myrtle Beach SC	29588	3500	6/22/2009
Robert S. Guyton	9502 Lake Dr.	Myrtle Beach SC	29572	Attorney	3500 6/22/2009

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f54&view=pt&q=%22mark%20kelley...> 6/6/2012

Jim Davenport
The Associated Press
Statehouse-Columbia
NJ3-234 7670
803-417-9362
NJ3-789 3511 (Columbia bureau)

From: Justin E. Stokes [mailto:justinc06@yahoo.com]
Sent: Monday, July 12, 2010 5:14 PM
To: Wren, David
Subject: RE: Barrett

Let me think on it overnight - If that works, I'm beginning a new job in two weeks, which may put me in a position to not get pulled in. Which emails do you need to see?

Justin E. Stokes

From: "Wren, David" <dwren@thesunnews.com>
To: justinc06@yahoo.com
Sent: Mon, July 12, 2010 9:45:33 AM
Subject: RE: Barrett

Justin,
I'm wondering if you had the chance to see what I sent you about the Barrett investigation. I'm not sure if you have seen it or not.
Thanks,
David

I am a member of the Columbia Journalism School. I am not a member of the Columbia Journalism School.
Sent: Mon, July 12, 2010 9:45:33 AM
To: Justin Stokes
Subject: Barrett

Any help I can provide for any other news items, but I can't find a way to get around the Barrett investigation. I'm not sure if you have seen it or not.
Thanks,
Justin
Sent from my iPhone 3G/3GS

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22mark%20kelley...> 6/6/2012

The McClatchy Company Mail - (no subject)

Page 1 of 1



Wren, David <dwren@thesunnews.com>

(no subject)

Justin E. Stokes <justinc06@yahoo.com>
To: "Wren, David" <dwren@thesunnews.com>

Thu, Jul 22, 2010 at 3:57 PM

Did you get my email earlier?

I'm fine with you using the emails as long as you don't show the actual emails to anyone and protect the source.

Thanks.

Justin E. Stokes

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22justin%20e.%20...> 6/6/2012



Wren, David <dwren@thesunnews.com>

RE: I called trey walker and he denied knowing anything about it

Wren, David <DWREN@thesunnews.com>
To: "Edge, Tracy" <Tracy.Edge@bccoombany.com>

Mon, May 3, 2010 at 4:09 PM

Any word back from trey or o'connor?

From: Edge, Tracy [mailto:Tracy.Edge@bccoombany.com]
Sent: Monday, May 03, 2010 2:51 PM
To: Wren, David
Subject: Re: I called trey walker and he denied knowing anything about it

I'm gonna call oconnor at the state and see where he is on it. My guess, and its a good one I think, is that they all think that Kelley is protected in some way by the paper. I just wanted to see how you brought me up before I call trey. This will take me some time but Richard quinn is probably the real one making this happen. If so, he will talk to you with no hesitation.

From: Wren, David <dwren@thesunnews.com>
To: Edge, Tracy
Sent: Mon May 03 14:30:13 2010
Subject: RE: I called trey walker and he denied knowing anything about it

Yeah, you told me it would be ok if I mentioned we had talked so I told him that we were talking about the checks earlier today and you had told me that Walker had some e-mails from the Barnett campaign that would show Mark Kelley distributed donations to him. I then asked him about O'Connor at The State but didn't say how I knew about him working on a story. 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.

From: Edge, Tracy [mailto:Tracy.Edge@bccoombany.com]
Sent: Monday, May 03, 2010 2:26 PM
To: Wren, David
Subject: Re: I called trey walker and he denied knowing anything about it

Did you mention me. He is calling me now. He can wait a while.

<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22mark%20kelley...> 6/6/2012

The McClatchy Company Mail - RE: I called trey walker and he denied knowing anythin... Page 2 of 2

From: Wren, David <dwren@thesunnews.com>
To: Edge, Tracy
Sent: Mon May 03 14:14:39 2010
Subject: I called trey walker and he denied knowing anything about it

I told him we had talked about the chamber of commerce checks and he flat out denied ever saying anything to you and I asked him if he was working with John OConnor at The State and he denied that as well. I wonder what's up?

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<https://mail.google.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22mark%20kelley...> 6/6/2012



Wren, David <dwren@thesunnews.com>

The Sun News articles

Wren, David <DWREN@thesunnews.com>
To: Justinsc06@yahoo.com, lcperson@gmail.com

Sun, May 23, 2010 at 10:15 AM

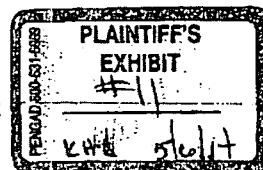
Justin and Tim,
I wanted to pass along links to a couple of articles that have been published in The Sun News over the past few days and see if you can help me unravel this mystery a little more. I keep hearing from several people that Kalon Dawson is a key player behind the chamber of commerce donations to Barrett and others. I cannot figure out why he would be involved though. Do either of you have any insight into his involvement in this? 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 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. I'm trying to piece together who raised all the money, how they were funneled through the various LLCs and why and why the chamber picked Barrett as the candidate they were going to endorse (could it be anything besides the fact that Kelley is the chamber lobbyist and a big supporter of Barrett?). Any help or insight you can give me would be appreciated. Also, if there are any e-mails or documents that show Dawson's involvement or Kelley's role in setting up the Barrett meeting would be a great help. Thanks again. The links to the stories are below.
David

<http://www.thesunnews.com/2010/05/23/1489923/bad-debt-adds-to-donor-mystery.html?plckFindCommentKey=CommentKey:04727c81-0a7e-4a1b-815a-2007c671f9a8#none>

http://www.thesunnews.com/2010/05/21/1486805/dean-handed-over-envelope-of-84000.html#storylink=omni_popular

<https://mail.vnnle.com/mail/u/0/?ui=2&ik=5590033f34&view=pt&q=%22mark%20kelley...> 6/6/2012

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D. WREN 035

Ethics policy

Introduction

As journalists, our mission is to shine light in dark places, provide an accurate portrait of the community and tell compelling stories. Our profession was founded on the public's trust, and thus we must preserve it.

A profession that subjects people and institutions to intense and constant scrutiny must itself maintain the highest of principles. Conflicts of interest, or the appearance thereof, erode the public's trust and undermine the mission of our work.

The following code of ethics is a statement of our principles. It may not cover all situations encountered in the workplace, but it serves as a guide and a basis for discussion and further interpretation as our field evolves.

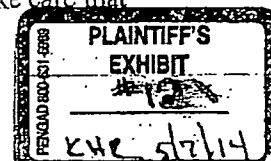
Section 1: Keeping conduct professional

-- Connections: We must never use our position at the paper to gain an advantage in commercial or personal business. We do not seek or accept special consideration from public officials, business leaders and others who are covered or may be covered by The Sun News. We must be aware of business connections and personal affiliations of immediate family members. Care should be taken to ensure such connections do not influence news coverage. We won't use our position to obtain free or discounted goods or services not available to the general public. Free-lancing: Employees of The Sun News can free-lance for organizations not in direct competition with the paper. Supervisors must be notified prior to accepting such work. While on a free-lancing assignment, employees should not represent themselves as a member of The Sun News staff. We do not use business hours or equipment and supplies of The Sun News to conduct free-lance work. Unpublished or incomplete work conducted as an employee of The Sun News may not be used for free-lancing purposes. We do not use our position at The Sun News to get out of speeding tickets or to solve personal problems. We do not use company letterhead or business cards for personal use (i.e. to make a complaint to a company.)

-- Gifts, freebies: We do not accept gifts. Doing so compromises or gives the appearance of compromising the integrity of the newspaper. There are times, however, when returning a gift isn't the best option. If declining or returning a gift would insult or embarrass the giver or if the gift is a perishable food item, give it to charity and send the giver a note explaining the paper's policy. Flowers sent to the newspaper or to an individual can be donated to a hospital or a nursing home.

-- Honorariums given to an employee for delivering a speech, for example, should be returned with an explanation of policy and a request that the giver donate it to a charity of their choice. Token, unsolicited gifts valued at \$5 or less may be accepted.

-- Image: When in the public eye, we are a reflection of The Sun News and must conduct ourselves accordingly. Behavior and appearance must be professional. Be sure to take off your work badge or identification when you're off duty, especially in social settings such as a bar. Also, our personal blogs or pages on networking sites such as myspace.com can be a reflection of us. If you are identifiable on your personal blog or site, take care that



any content is appropriate and unrelated to your work at The Sun News.

-- Information Handling: Internal information about the operations, employees, etc. of The Sun News should not be shared with members of other media organizations or the public unless management grants approval. When covering The Sun News or its employees, we report the facts in the same manner as all other subjects; no special consideration should be made, no preferential treatment should be given.

-- Meals, tickets and travel: Accepting freebies in any form can cost The Sun News its most valuable asset: credibility; therefore, as a general rule, we pay our own way.

-- Moonlighting: Additional employment outside the duties of employment at The Sun News must be approved by an editor prior to accepting such employment.

-- Relationships: Refrain from engaging in a romantic relationship with someone you work directly with, such as a source, or with someone you cover. Avoid writing or editing a story about a relative, friend, etc.
If a relationship develops with a source, notify your supervisor so a beat change can be discussed.

-- Outside Activities: We are encouraged to be involved in the community that we serve through, for example, charities and civic clubs; however, we must keep such activities separate from our job responsibilities. Never use your position at The Sun News to solicit money or services for any group. Work for political organizations is even more sensitive. Because most reporters will at some point cover an election or an elected government body, no association can exist that calls into question the objectivity of the reporter or the newspaper. When volunteering or doing work for charity, be clear upfront that your position at The Sun News is separate from your volunteer work. It may be helpful to say: "Although I work for The Sun News, this is a personal commitment I'm making to this organization. I cannot influence news coverage or advertising for the organization." Newsroom employees should not wear campaign stickers or buttons supporting a particular candidate. They should avoid other overt signs of support such as car bumper stickers or lawn signs. Employees are entitled to vote, but they must remain neutral professionally.

-- Promotion/Boosterism: The Sun News and its staff must take great care to ensure news coverage is not used as a promotional tool for goods, services or organizations.

-- Public Appearances: If invited to participate in a TV show, radio show or speaking engagement in a capacity that reflects your position at the paper, seek a supervisor's approval first. Do not make public statements on behalf of The Sun News unless authorized by management to do so.

-- Review copies: Books, compact discs, etc., send unsolicited for review by The Sun News that have not been reviewed should be donated to a charity, library or school. Materials that have been reviewed become the property of the reviewer.

Section 2: Reporting with integrity

-- Accuracy: We must strive to be completely accurate in all that we report or represent. Check and double-check the spelling of names and places, phone numbers, Internet addresses. We must never print a phone number that we have not called or a Web address we have not visited. While we do not allow sources to read stories before publication, we should verify facts with the pertinent sources. In stories involving highly technical information, we may allow the source to read our words before they go to print to ensure our presentation of the facts is correct. If erroneous information is published, immediately print a correction that accepts responsibility for the mistake and provided the correct information. See corrections for further guidelines.

-- Anonymous Sources: We do not use anonymous sources except in extraordinary cases, which must be approved by the editor or managing editor. The editor shares the reporter's obligation to protect the confidentiality of the source.

-- Community Standards: Keep in mind the general level of community sensitivity regarding all areas of news coverage. While recognizing such standards exist, never pander to them if it means compromising a story.

-- Corrections: We correct all inaccuracies immediately, whether brought to our attention by readers or sources, or whether we discover it ourselves. The corrections run on 2A and must be approved by the editor or managing editor before they are published. Each correction should include a note (that won't be published) explaining how the error occurred. We also run clarifications if in our reporting, editing or headline writing, we may have given readers the wrong impression of a person, place or event. See the corrections policy for details. All requests for a correction should be immediately forwarded to an editor. If a person calls requesting a correction, tell him or her the request will be forwarded to the appropriate person; do not promise to run a correction.

-- Fairness: We must make every effort to report all sides of every issue, no matter how mundane the subject may seem. Toward this goal, we must give each side of an issue an equal chance to speak. We must also be fair in our presentation of the issue, ensuring that both the structure and content of the story is balanced. Avoid using prejudicial terms such as "claimed" and "alleged." In the event a party is unable or unwilling to comment, we should specify that in the story.

-- Newsroom Independence: The newsroom must operate independently in news coverage decisions. We cooperate with all other divisions at The Sun News while maintaining the integrity of news coverage separate and apart from decisions made by advertisers and others who conduct business with the company. Any questions others have regarding this policy should be directed to the managing editor or editor.

-- Paying For news: We don't do it. The practice of paying for news or for access to news calls into question the validity of the news and the motives of seller and buyer.

-- Plagiarism: Plagiarism is never acceptable. All work not our own appearing in the paper, whether it originated from oral or written sources, the Internet or press releases, must be attributed. This includes work for which we have permission to cite, ideas and concepts not accepted as common knowledge, and written and visual work generated by non-Sun News staff members. The Sun News has a zero-tolerance plagiarism policy. It is acceptable to add information from wire service stories with a blanket attribution at the end. "[Name of wire service] contributed to this report." However, if the information is debated or controversial, it's helpful to attribute it where it appears in the story to give readers context. "As of Thursday afternoon, [wire service] was reporting that the death toll in Iraq had climbed to 3,000." If a local story is more than 50 percent wire information, it should not have a local byline. Instead, use a From staff and wire reports credit.

-- Privacy: In dealing with and writing about private individuals, we must always balance their right to privacy against the greater public good. Their legal and moral right to privacy is strong, and we must respect that even when their contribution to a story is desirable or necessary. We must also be sensitive to the wishes of sources who are vulnerable because their physical, mental or emotional condition. Situations requiring heightened sensitivity to privacy rights include stories involving children, people with mental disabilities and victims of tragic events.

-- Representation of self, subject: We do not use surreptitious methods of news gathering. We identify ourselves as reporters to potential sources. On rare occasions, traditional open reporting will not yield information vital to the public. In those cases, the editor or managing editor must approve the assignment, and the reporting methods used should be explained in the story.

-- Truthfulness: We are always truthful in what we report, photograph, design or otherwise represent. Overall fairness and accuracy must never be sacrificed for the sake of style, structure or drama.

Section 3: Specifics for sports, photo desks

Photo

-- Advertising: Sun News photographs are not to be used in advertisements for any organization other than The Sun News. This includes mugshots of politicians. The Sun News reserves the right to use staff photographs in house ads promoting sections of the paper and reprint sales.

-- Alteration: We do not remove objects from editorial photographs or reverse images in news photographs. Questions regarding such techniques should be directed to the photo editor.

-- Touchups, enhancements: It is acceptable to burn and dodge photos. It is also OK to remove dirt and spots from pictures. Correcting color or adding contrast is allowed as long as the image's authenticity remains intact.

--Photo illustrations: Any time the content of a photo is altered, the image should be labeled as a photo illustration. All photo illustrations should be discussed with the photo editor or the senior editor on call. Cutouts used in promos or iconically as secondary art are permitted and do not need photo illustration labels.

--Staging photographs: We do not stage or set up photographs for news stories. News photographs should document events as they occur; any manipulation of events for a photograph is misleading to readers. Portraits of story subjects are permitted, but it should be obvious to readers that the photograph is a portrait.

--Online photos: Be sure photos or mugshots taken from Web sites are not copyrighted. Get permission before using photographs or mugshots from other sites.

--Courtesy photos: We should identify the source of these photos whenever possible. (i.e. Photo courtesy of the Jones family).

--Corpses: Publication of wire and staff photographs showing dead bodies will be decided by the editor or managing editor.

--Editorial Cartoons: We do not use any software, including PhotoShop, to alter editorial cartoons. This includes removing the artist's name or the date. The cartoons may be cropped or reduced in size.

--Sale of Photographs: Reprints of photographs taken by staff members may be purchased by the public but not for the purpose of republication. Direct all inquirers and orders to the customer service department. Reprints of hand-out photographs and those taken by free-lancers are not for sale. The production editor handles all photo requests made by other media organizations.

Sports

--Freebies: Items, such as team calendars, that are available to the public and are used in reporting may be accepted. All others should be declined or given to charity.

--Free-lancing: Do not accept free-lance work for league-or team-sanctioned publications, such as media guides. This also includes work for professional, college and high-school programs and publications.

--Golf: No free golf. This goes for all newsroom staff, not just members of the sports desk.

--Judging: Judging sporting events or exhibitions could call into question the objectivity of our coverage and therefore should be avoided. Columnists judging, charitable events are permitted with okay by supervisor.

--Sources: Avoid sharing or pooling notes with members of other media organizations. If

a pooled quote is used, it should be attributed to the source from which it came.

-- Plan ahead: Eat before or after the event. Politely decline food served at sporting events. If refusing food would offend the giver, you may accept the offerings, but be sure to arrange to have The Sun News reimburse the host for the cost of the food.

-- Tickets: We do not accept free tickets to any sporting event. While press credentials do not apply to this policy, they must never be used for any purpose other than news gathering.

-- Travel: The cost of transportation supplied by sports organizations will be reimbursed by The Sun News. If the organization cannot issue a bill, estimate the cost to the best of your ability, write a check and submit the expense to the newspaper.

Credits

This code of ethics was derived from The Sun News staff discussions and other newspapers' ethics guidelines. In some instances, text was adopted in its entirety for use in The Sun News policy.

News organizations contributing to this policy include: San Jose (Calif.) Mercury News, Lincoln (Neb.) Journal Star, National Press Photographers Association, The Washington Post, Society of Professional Journalists, The Poynter Institute, The (Fort Wayne, Ind.) Journal Gazette and The Associated Press Sports Editors.

The Sun News Corrections policy

Corrections

Q. What errors require corrections?

All factual errors must be corrected. Corrections should be useful, and would not include things such as incorrect folios or promos with incorrect page numbers.

Q. When do we do clarifications?

We run clarifications in cases where our published stories leave readers confused about the facts. When in doubt, ask your editor or Carolyn.

Q. What happens after an error occurs?

The person who generated the error will write the correction and add it to the 2A story folder that includes corrections, kicks, lottery numbers for the next day. Put your name in notes along with an explanation of how it happened, and flag your editor or Carolyn so they'll know they need to edit it.

If appropriate, the reporter should call source and apologize for the error.

Q. How will corrections be written?

The correction _ written by the person responsible for the error _ is subject to an OK from Carolyn or the news editor. A correction should include a description of the story and the date and page on which the story ran. The correction should say if the error occurred in the headline, story, graphic or outline. It should state the nature of the error and provide the missing or correct information.

Examples:

Saddam Hussein's age was incorrect in a story about Iraq on Page 1A Saturday.
He is xx.

A story about the Horry County school system's end-of-year test scores on Page 1C Monday incorrectly said most students failed. Seventy percent of the system's students passed the tests.

A photo caption with a story about dogs on Page 2C Tuesday misidentified John Smith's pet dog, Fido.

Q. Should the correction repeat the error?

If possible, avoid repeating the error in the correction. There are some instances when you may need to repeat the error to make the correction clear. (i.e. A story about the Chesterfield Inn on Page 1A incorrectly listed Parkside Inn & Suites as the new owners. Parkside is leasing the property from RA & RD Investment LLC of North Myrtle Beach, which recently bought the Chesterfield Inn from Centura Bank.)

Q. Where do corrections run?

Most corrections run on Page 2A. The editor or managing editor will decide if a correction needs to run in a different place. Editorial page corrections run on the editorial page.

Q. How will we CQ names, phone numbers and e-mail addresses?

Reporters and photographers are responsible for checking name spellings, phone numbers and e-mail addresses in their work. Use the CCI notes checkmark after each unusual name and all phone numbers and e-mail addresses. The copy desk should make

sure all items are CQ'd by the reporter or photographer, and check on those items without a CQ. Copy editors should also compare all names in cutlines, stories and graphics to make sure spellings are the same. Call both the reporter and photographer or graphic artist if a discrepancy occurs.

5/23/13

The McClatchy Company Mail - FW: questions re. barrett e-mails; public funding and reports

From: Brad Dean [mailto:brad.dean@visitmyrtlebeach.com]
Sent: Friday, July 30, 2010 10:28 AM
To: Wren, David
Subject: RE: questions re. barrett e-mails; public funding and reports



David,

I'm back in the office today and reviewing your questions below; have to complete some other tasks but will have a response for you today. At first glance, I'm a little unclear on a couple of your questions — could you please clarify:

- 1) re. the "discrepancy" you suggest between the city and chamber, I do not believe there is any discrepancy. But I'm not clear on what you are referring to when you say "city's reports". Can you point me to whatever you are referring to?
- 2) re. the two-for-one program, we're happy to provide you with the requested information but it would help me to know which grant and which tax return you are referring to.

Thank you,

Brad

From: Wren, David [mailto:dwren@thesunnews.com]
Sent: Wednesday, July 28, 2010 5:38 PM
To: Brad Dean
Subject: questions re. barrett e-mails; public funding and reports

Brad,

I am working on a couple of chamber of commerce-related stories and have several questions I hope you can answer for me.

I have e-mails from Gresham Barrett's campaign staff members in which they state that you and the chamber of commerce raised the campaign donations associated with Shep Guyton's LLCs.

In one of the e-mails, dated Oct. 14, 2009, Justin Stokes — who was Barrett's deputy campaign manager — states: "These guys are tied to the Myrtle Beach Chamber of Commerce. Brad Dean, the chamber's president, worked behind the scenes to pull these together last quarter."

Why did Barrett's campaign believe that you and the chamber were raising money for his campaign?

How did the cashier's checks that you delivered to Barrett get in your possession? Did Shep Guyton deliver them to you or to the chamber of commerce?

You have previously mentioned that you were in attendance when checks were delivered to Ray Cleary. Were you in attendance when checks were delivered to any other candidates besides Barrett and Cleary? If so, which

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candidates?

In another Barrett e-mail, in which his staff was trying to determine the source of the campaign donations, Warren Tompkins writes: "Try Mark Kelley, our Horry expert, or perhaps Allan Clemmons."

Stokes, in another e-mail writes: "Talk to Mark Kelley. He would be familiar with these contributions."

Why would Mark Kelley be familiar with the contributions and their funding source? Did Mark Kelley play any role in raising money for candidates or in Barrett's campaign?

Have you been interviewed by the FBI or the IRS regarding these campaign contributions?

Regarding the Tourism Development Fee and other state tourism grants:

There appears to be discrepancies in the amount of sales tax collected when comparing the chamber's public funding report with the city's reports.

The city has reported tax collections of \$9,363,734 for the period August through February.

The chamber, in its public funding report for May through March shows local funding of \$7,824,275.

The chamber is showing about \$1.5 million less in local funding than the city says it has collected. Why?

Also, an amendment to the legislation enabling the tax states that the chamber must provide a report – at least every three months – that identifies revenues received during the previous quarter and expenditures made from those revenues during the previous quarter. Those reports must be provided on the chamber's web site.

The chamber's reports, however, are an aggregate of funding and expenses since May 2009. They do not break out quarterly revenues and expenses. Why is the chamber not providing quarterly data as required by state law?

Regarding the Destination Specific Tourism Marketing Grant Program, how did the chamber raise money for the 2-for-1 matching funds? Additional donations for those matching funds do not appear to be reported on the chamber's annual tax returns.

The chamber borrowed \$5 million from Coastal Federal Bank in fiscal 07 and \$7.5 million from BB&T in fiscal 08. The chamber's tax returns indicate these loans were for "state grant funds."

Were the bank loans used to help achieve the 2-for-1 matching funds needed for the Destination Specific grants? If so, to what extent? For example, how much local money was raised from chamber members vs. the money that was borrowed from banks?

Have those two loans been repaid? If so, what funds were used to repay the money? If the loans have not been repaid, what are their balances and what funds will the chamber use to repay them?

I am working on these stories for this weekend, so it would be helpful to get responses as soon as possible.

Thanks for your help,

David Wren

Reporter

The Sun News

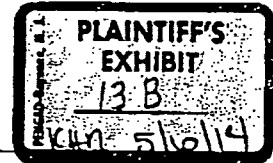
843-626-0281

6/23/13

The McClatchy Company Mail - FW: questions re. barrett e-mails; public funding and reports

Wren, David <DWREN@thesunnews.com>
To: "O'Connor, Trisha" <toconnor@thesunnews.com>

Mon, Aug 2, 2010 at 9:54 AM



From: Brad Dean [mailto:brad.dean@visitmyrtlebeach.com]
Sent: Friday, July 30, 2010 5:28 PM
To: Wren, David
Cc: Spring, Jake
Subject: RE: questions re. barrett e-mails; public funding and reports

With regards to the questions below about chamber finances and the various revenue streams, I've attached the responses to these in a word document. The simple answer is this: there are no discrepancies, we are meeting/exceeding all reporting requirements set by state law, and the credit line is used merely to account for timing differences between marketing expenditures and related revenue sources. I asked our finance staff to assist me on this, and it was easier to collaboratively answer these on a separate document. I trust these answers are sufficient but, if not, feel free to let us know if we have misinterpreted what you are trying to ask. I've copied Jake Springs on this email, as he was asking similar questions earlier this week, so perhaps he will find these answers useful, also.

Re. the emails you mention: I have not seen the emails you mention and, as such, I have no way of knowing the context of the emails nor can I know if they are authentic. If you would like to provide me with a copy of those emails, I will be pleased to review and respond accordingly. If you prefer not to provide the emails for review, perhaps you should contact one of the individuals mentioned to verify the authenticity and inquire of their impressions and insights.

Re. the other questions related to campaign checks, Mr. Guyton, Mr. Kelley, and federal agencies: According to a July 14th Sun News report, there is apparently an investigation into campaign contributions made by local businesses and as such, it is our (chamber) policy not to comment on pending legal matters based upon recent reports by The Sun News. If, at any time, you determine there is no pending legal matter, please advise and I will be pleased to answer your questions.

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 Sun News Questions July 30.doc
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Wren, David <DWREN@thesunnews.com>
To: "O'Connor, Trisha" <toconnor@thesunnews.com>

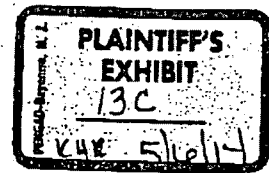
Mon, Aug 2, 2010 at 2:31 PM

This is from today

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6/23/13

The McClatchy Company Mail - FOIA request



FOIA request

7/10/13

Martha Hunn <mhunn@coastal.edu>
To: "Wren, David" <dwren@thesunnews.com>

Thu, May 20, 2010 at 1:37 PM

Good afternoon David,

I have begun the process of collecting the information regarding the Nelson Mullins law firm. I will get back in touch when we've got it all together for you.

Sincerely,

Martha

Martha Hunn

Director of News and Public Affairs

Office of University Communication

Coastal Carolina University

P.O. Box 261954

Conway, SC 29528-6054

Office- 843-349-2962

Mobile- 843-251-7052

Fax- 843-349-2119

Email- mhunn@coastal.edu

www.coastal.edu

From: Edgar Dyer
Sent: Wednesday, May 19, 2010 12:52 PM
To: dwren@thesunnews.com; Martha Hunn
Subject: FW: Mark Kelley lobbying

David,

I am forwarding your request to Martha Hunn and asking her to retrieve the recently completed

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6/23/13

The McClatchy Company Mail - FOIA request

contract with Nelson Mullins law firm, whom we chose to do our DC lobbying after going through the rfp process, and to forward that information to you. Nelson Mullins has offices across the state and in DC. They cover both sides of the aisle pretty well with former Ambassador David Wilkins and former Governor and Secretary of Education Dick Riley. Plus, they have a good staff with much experience on Capitol Hill. Mark Kelley was a member of the committee that selected Nelson Mullins as the best choice for us but neither Mark nor his firm responded to the rfp.

(Martha, all of the information relative to the rfp process will be in Dean Hudson's office.)

As for Mark Kelley, he is actually paid as a CCU employee, I believe. We don't have a contract with him or with KMSO, his lobbying firm in Columbia. He was put on the payroll a number of years ago and has stayed there, rather than executing a contract with his firm.

If there's any other information you need, let me know. We decided we needed a DC presence to assist us in securing funds, at least for the next few years, because of the amount of stimulus dollars and other grant monies that were coming available. We're looking at that expense as an investment. Nelson Mullins is currently trying to secure funds for us for equipment in the new Science building and to purchase a building in Litchfield Beach for our Waccamaw Neck archaeology initiative and our outreach to Sandy Island. Hopefully, we'll get both, but if they bat .500, we'll still come out way ahead.

Eddie

From: Wren, David [mailto:dwren@thesunnews.com]
Sent: Wednesday, May 19, 2010 10:34 AM
To: Edgar Dyer
Subject: Mark Kelley lobbying .

Mr. Dyer,

I am trying to get some information about Coastal Carolina University's lobbying contracts with Mark Kelley. I understand the university recently chose Mr. Kelley's firm to lobby federal legislators in addition to his continuing work at the state level.

Can I get copies of Mr. Kelley's current contracts with the university as well as the names and bid amounts of other firms that competed for the federal contract?

Thanks for your help,

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6/23/13

The McClatchy Company Mail - FOIA request

To: dwren@thesunnews.com
Subject: FOIA request

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2 attachments

Mullins Response to RFP.pdf
1072K

Nelson Mullins Law Firm Intent to Award.pdf
53K

Wren, David <DWREN@thesunnews.com>
To: Martha Hunn <mhunn@coastal.edu>

Tue, May 25, 2010 at 1:07 PM

Thanks Martha,

I was also interested in getting a copy of either Mark Kelley's contract or the contract with his lobbying firm.

I appreciate your help,

David

From: Martha Hunn [mailto:mhunn@coastal.edu]
Sent: Tuesday, May 25, 2010 12:48 PM
To: Wren, David
Subject: FW: FOIA request

[Quoted text hidden]

Martha Hunn <mhunn@coastal.edu>
To: "Wren, David" <dwren@thesunnews.com>

Wed, May 26, 2010 at 12:58 PM

Dear David,

Mark Kelley is in a temporary staff position reporting to the President. I have also confirmed that Coastal Carolina University doesn't have a contract with Mark or his lobbying firm.

Have a good day,

Martha

Martha Hunn

Director of News and Public Affairs

Office of University Communication

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The McClatchy Company Mail --FOIA request

Coastal Carolina University
P.O. Box 261954
Conway, SC 29528-6054
Office- 843-349-2962
Mobile- 843-251-7052

Fax- 843-349-2119

Email- mhunn@coastal.edu

www.coastal.edu

From: Wren, David [mailto:dwren@thesunnews.com]
Sent: Tuesday, May 25, 2010 1:07 PM
To: Martha Hunn
Subject: RE: FOIA request

[Quoted text hidden]

Wren, David <DWREN@thesunnews.com>
To: Martha Hunn <mhunn@coastal.edu>

Wed, May 26, 2010 at 1:00 PM

Can you tell me what Mark Kelley's salary is?

From: Martha Hunn [mailto:mhunn@coastal.edu]
Sent: Wednesday, May 26, 2010 12:59 PM
To: Wren, David
Subject: RE: FOIA request

[Quoted text hidden]

Martha Hunn <mhunn@coastal.edu>
To: "Wren, David" <dwren@thesunnews.com>

Thu, May 27, 2010 at 3:01 PM

Dear David,

Mark Kelley's salary for the current temporary appointment period is \$83,875.

Martha

Martha Hunn

Director of News and Public Affairs

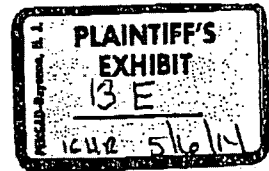
Office of University Communication

Coastal Carolina University

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6/23/13

The McClatchy Company Mail - e-mails



e-mails

1 message

Wren, David <DWREN@thesunnews.com>
To: tim@nikkihaley.com

Thu, May 27, 2010 at 9:57 AM

Tim,

I wanted to check back with you and see if there is any way that we can use the e-mails from Barrett's campaign that seem to show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others. I can definitely protect the source of the e-mails but would say something to the effect that they came from the Barrett campaign after the AP started asking questions in October. Recent events have overshadowed the campaign funding issue and I'm looking for ways to move that story forward.

Thanks,

David Wren

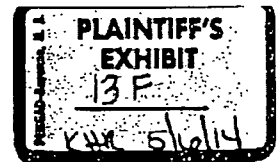
The Sun News

843-626-0281

App'x 684
-677-

6/23/13

The McClatchy Company Mail - CCU lobbying



CCU lobbying

10/10/2010

Wren, David <DWREN@thesunnews.com>
To: "O'Connor, Trisha" <toconnor@thesunnews.com>

Tue, May 25, 2010 at 1:06 PM

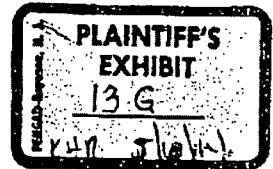
I got the information on CCU's federal lobbying contract signed with Nelson Mullins law firm. The university is paying the firm \$120,000 per year over the next three years to lobby for federal money.

That is in addition to Mark Kelley's fee for state lobbying.

App'x 685
-678-

5/23/13

The McClatchy Company Mail - RE: lobbying question



RE: lobbying question

1 message

Wren, David <DWREN@thesunnews.com>
To: "Edge, Tracy" <Tracy.Edge@bccompany.com>

Wed, Mar 9, 2011 at 10:19 AM

No, might have been Dan Golden for the editorial board, though. I heard him talking to someone this morning about a bill requiring the IL gov to run on the same ticket with the gov. I think he's working on an editorial about that.

From: Edge, Tracy [mailto:Tracy.Edge@bccompany.com]
Sent: Wednesday, March 09, 2011 10:18 AM
To: Wren, David
Subject: Re: lobbying question

Did you just call me?

From: Wren, David <dwren@thesunnews.com>
To: Edge, Tracy
Sent: Wed Mar 09 09:42:00 2011
Subject: RE: lobbying question

I got in touch with Cathy Hazelwood who told me lobbyists can't make contributions to state candidates but can to local candidates. So it looks like it was a legal donation, done in September so it would not show up on any reports until after the election was concluded.

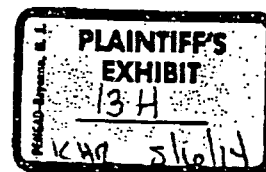
From: Edge, Tracy [mailto:Tracy.Edge@bccompany.com]
Sent: Wednesday, March 09, 2011 9:26 AM
To: Wren, David
Subject: Re: lobbying question

You need any help?

App'x 686
-679-

6/23/13

The McClatchy Company Mail - RE: lobbying question



From: Wren, David <dwren@thesunnews.com>

To: Edge, Tracy

Sent: Wed Mar 09 08:56:17 2011

Subject: lobbying question

Tracy,

Can lobbyists make contributions to political candidates? I see Mark Kelley made a \$600 donation to John Rhodes in Sept. 2009. Is that legal? He also contributed \$500 to Marion Foxworth's campaign the previous year.

David

Confidentiality Notice

This Message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise Legally exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately by phone (843-448-5123) or reply to this e-mail and delete all copies of this message. Thank You

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COASTAL CAROLINA UNIVERSITY

Office of the President



REVISED

March 29, 2006

Mr. Mark S. Kelley
814 Green Bay Trail
Myrtle Beach, South Carolina 29577

Dear Mr. Kelley:

I am pleased to offer you the position of *Legislative Liaison* at Coastal Carolina University. The appointment is at a twelve-month salary of \$70,000.00, beginning April 1, 2006. The position is designated as thirty hours per week. For retirement purposes, this position is considered full-time and will earn full service credit per twelve month period.

Under the South Carolina Classification System, the classification for this position is Director/Adjunct Faculty. The position is categorized as an unclassified administrative staff position. As such, it is covered by the policies for classified staff as described in the University Policies and Procedures Manual. This is the case for all matters of employment including grievance rights, reduction in force, and performance evaluations. These policies require a twelve-month probationary period for new employees in unclassified administrative staff positions.

The exception to the application of policies for classified staff to this position is in the area of salary determination. Salary adjustments for unclassified staff are treated in the same manner as for faculty and unclassified academic administrators.

This offer is subject to any proviso enacted by the South Carolina General Assembly whether it is in effect at the time of the execution of this offer or enacted after the execution of this offer.

Please indicate your acceptance of this offer by signing this letter and returning it to us. We look forward to working with you in your new position at the University.

Sincerely,

Ronald R. Ingle
President

Offer Accepted:

Date:

Enclosure

cc: Janis Chesson

an affirmative action, equal opportunity institution



COASTAL CAROLINA UNIVERSITY

Office of Human Resources and Equal Opportunity

June 27, 2006

Salary Information 2006/2007

Mark Stephen Kelley

Social Security Number: 052-481817
Classification: Director/Adjunct Faculty
Department: President's Office
Status: 12-Month, Full Time
Salary as of 6/30/2006: \$70,000.00
Merit Increase: \$3,500.00
Salary After Merit Increase: \$73,500.00
Salary Effective 7/1/2006: \$73,500.00

ENTERED

AUG 28 2006

STATE

Please direct any questions regarding your Salary Statement to the
Office of Human Resources and Equal Opportunity

PO Box 261954 • Conway, SC 29528-6054 • (843) 349-2036 • Fax: (843) 349-2045 • www.coastal.edu

6-1980



COASTAL CAROLINA UNIVERSITY

July 1, 2007

Salary Information 2007/2008

Mark Stephen Kelley

Classification: Director/Adjunct Faculty
Department: President's Office
Status: 12 Month; Full Time

Salary as of 6/30/2007	\$73,500.00
Merit Increase	\$2,205.00
Salary After Merit Increase	\$75,705.00
Salary Effective 7/1/2007	\$75,705.00

\$ 3,154.88

ENTERED

AUG 1 0 2007

STATE

ENTERED

JUL 03 2007

DATATEL

Please direct any questions regarding your Salary Statement to the
Office of Human Resources and Equal Opportunity

ONE 019100



July 1, 2008

Salary Information 2008/2009

Mark Stephen Kelley

Classification: Director/Adjunct Faculty
Department: President's Office
Status: 12 Months Full Time

Salary as of 6/30/2008 \$75,705.00

General Increase \$757.00

Salary After General Increase \$76,462.00

Salary Effective 7/01/2008 \$76,462.00

ENTERED

JUL 2

2008

ENTERED

JUL 08 2008

DATE

Please direct any questions regarding your Salary Statement to the
Office of Human Resources and Equal Opportunity



Office of Human Resources and Equal Opportunity

REQUEST TO HIRE A TEMPORARY EMPLOYEE

New Position (attach justification Memorandum) Replacement for

Department	Account	Category
President's Office	10-0112	Executive

Start Date: 1/23/09	End Date: 11/22/10 (must extend 1 month)
Name: Mark G. Kelley	SSN: [REDACTED]
Supervisor: David DeCenzo	Hourly Rate: [REDACTED]
	Hours per Week: [REDACTED] (10% of budget for executive temporary employee (20% may be used for the duration of the other 90%)
	Proposed Salary: \$3,107.50 Please note that this rate will be subject to review for compliance with minimum university compliance.
Normal Work Schedule (by virtue of):	Days: [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
Work Days: M [REDACTED] W [REDACTED] Th [REDACTED] Sa [REDACTED] Su [REDACTED]	
OR	Days vary based on university need

Description of Work:
Legislative Liaison

Employment Reference Verified:	Yes	No	On file
Previously employed by the Department:	No	Yes	Employment reference checks are attached
(Employees may not be rehired without a 15 calendar day break in service following any 12-month period.)			

This section to be completed only if "Yes" is marked.

Date of first appointment:	Date most recent appointment ended:
Has the hourly rate changed?	No Yes - If Yes, why?

The above work cannot be performed by another employee. Funds are budgeted and available.
Signature below certifies that there is no violation of the University's nepotism policy.

Cost Center Director
[Signature]
Administrative Unit Head/Dean

Vice President Provost/AD

Return to Office of Human Resources and Equal Opportunity

HREO Approval	Budget Approval



PERSONNEL ACTION FORM

Form must be typed
PRINT AND SIGN

Check One:
☒ Reappointment
☐ Separation

Hire
Change
Other

Name: Kelley Mark SSN: [REDACTED] Date of ID: 5/20/2010

Title/Rank: Legislative Liaison Dept: President's Office Effective date: 11/23/10 End date: 06/30/11

Status: Basis: Faculty 12mo Hours per week: 40

Temporary Faculty 11mo Salary \$ \$50,808.92

Classified 10.5mo Hourly rate \$

Temporary Staff 9mo Supervisor David DeCenzo

Other

HR 3494.25

(check one) and COMPLETE "FROM" AND "TO" SECTION

Account number Basis from to

Title from to

Supervisor from to

FROM: SOURCE	FUND	ACTIVITY	OBJECT	AMOUNT/RATE	PERCENT

TO: SOURCE FUND ACTIVITY OBJECT AMOUNT/RATE PERCENT FROM TO

	10	6112	5061	\$50,808.92	100.00	11/23/10	06/30/11

Serves as Legislative Liaison.

For teaching faculty only: Verified by: [REDACTED] (initials)

Official transcript attached: Highest degree Institution

Satisfies 18 hour rule YES NO If 'NO' approved justification form must be attached

SIGNATURES	DATE	SIGNATURES	DATE
Department		Other required signatures	
Dean/Division		HR signature	
Grants Approval			

ALL AUTHORIZATION/SUPPORT DOCUMENTATION MUST BE ATTACHED.

DO NOT COMPLETE THIS SECTION (HREO)

☐ HAM	☐ RELATION	☐ RE	☐ PMS	☐ ST
☐ WORK	☐ EPMS	☐ MS	☐ BD	☐ FICA
☐ UNMP	☐ STATE	☐ DOB	☐ LVL	☐ FED
☐ SCIS ORP Pending	☐ ORG CHART	☐ DATE	☐ EEO	☐ WGCP
☐ PPOS	☐ DIRECTORY	☐ VET	☐ EN	☐ JE

HREO 10/02

App'x 693
-686-

HR 70282



PERSONNEL ACTION FORM

Form must be typed
PRINT AND SIGN

Check One: Hire
Reappointment Change
Separation Other
Send receipt to:

Name: Kelley Mark Date: 560256

Last First MI
Title/Rank: Legislative Liaison Dept: President's Office Effective date: 07/01/11 End date: 06/30/12

Status: Basis: Hours per week: 83.875
☐ Faculty ☒ 12mo Salary \$ 550,808.92
☐ Temporary Faculty 11mo
☐ Classified 10.5mo Hourly rate \$
☒ Temporary Staff 9mo Supervisor
☐ Other Authorized Processor

HREQ ONLY TPRS
 Last pay date: 6-2-12
 \$ 3494.79

Check one and complete "FROM" and "TO" section

Account number: Base pay/hourly rate: Hours: Basis: from: to:

Title: from: to:

Supervisor: from: to:

FROM:	FUND	ACTIVITY	OBJECT	AMOUNT/RATE	PERCENT
SOURCE					
TO:					
SOURCE	10	6112	5061	550,808.92	100.00
				83.875	

FROM: 07/01/11 TO: 06/30/12

ENTERED

Serves as legislative liaison

OCT 07 2011

For teaching faculty only: Official transcript: attached on file

Highest degree: Institution: Satisfies 18 hour rule: YES NO

If 'NO' approved justification form must be attached.

SIGNATURES DATE SIGNATURES DATE

By signing below, I certify that this transaction is not a violation of the nepotism policy.

☐ Nepotism policy does not apply

☐ Nepotism policy applies Approved Request for Exception to the Nepotism Policy Form is attached

Department: Dean/Division: Grants Approval:

Other required signatures: HR signature:

ALL AUTHORIZATION/SUPPORT DOCUMENTATION MUST BE ATTACHED.

DO NOT COMPLETE THIS SECTION (HREQ)

☐ HAM	☐ RELATION	RO	FN	(PAYROLL)
☐ WORK	☐ EPM	MS	SD	Y/N
☐ UNMP	☐ STATE	DGB	LV	ST
☐ SCRS/OPF Pending	☐ ORG CHART	CDATE	CEO	FICA
☐ SCRS/OPR	☐ DIRECTORY	VET	EN	FED
☐ PPOS			FTP	WGCT
				JB

HREQ 08-11



PERSONNEL ACTION FORM
Form must be typed
PRINT AND SIGN

Check One: ☐ Hire
☒ Reappointment ☐ Change
☐ Separation ☐ Other
Send receipt to: _____

2
SMS

74302 ✓

Name: Kelly Mark
Title/Rank: Legislative Liaison
Status: ☐ Faculty ☐ 12mo ☐ 11mo ☐ 10.5mo ☒ Temporary Staff ☐ 9mo
Hours per week: _____
Salary \$: \$83,875.00
Hourly rate \$: _____
Supervisor: _____
Authorized Processor: _____
Effective date: 07/01/12 End date: 06/30/13
Dutatel ID#: 560256
TSRS
Last pay date: 06/15/12
3494.29 PP

CHECK ONE AND COMPLETE "FROM" AND "TO" SECTION
☐ Account number ☐ Base pay/Hourly rate ☐ Hours ☐ Basis
from _____ to _____
Title from _____ to _____
Supervisor from _____ to _____

ENTERED
JUL 18 2012
DATATEL W

FROM:	FUND	ACTIVITY	OBJECT	AMOUNT/RATE	PERCENT
SOURCE					
TO:					
SOURCE	10	6112	5061	\$83,875.00	100.00

FROM: 07/01/12 TO: 06/30/13

REASON: _____
For teaching faculty only: ☐ Highest degree _____ ☐ Institution _____
☐ Satisfies 18 hour rule ☐ YES ☐ NO If 'NO' approved justification form must be attached.
Official transcript: ☐ attached ☐ on file
Verified by: _____ (initials)

SIGNATURES
By signing below, I certify that this transaction is not a violation of the nepotism policy.
☐ Nepotism policy does not apply
☐ Nepotism policy applies. Approved Request for Exception to the Nepotism Policy Form is attached.
Department: _____
Dean/Division: _____
Grants Approval: _____
Other required signature: _____
HR signature: _____
ALL AUTHORIZATION/SUPPORT DOCUMENTATION MUST BE ATTACHED.

DO NOT COMPLETE THIS SECTION (HREO)
☐ HAM ☐ RELATION
☐ WORK ☐ EPMS
☐ UNMP ☐ STATE
☐ SCRS/ORP Pending ☐ ORG CHART
☐ SCRR/PORR ☐ DIRECTORS
☐ FPOS
RE: _____
MS: _____
DOB: _____
29 DATE: _____
VET: ☐ Y ☐ N
FNU: _____
BD: _____
LVL: _____
EBO: _____
EAC: _____
FTE: _____
(PAYROLL)
ST: ☐ Y ☐ N
FICA: ☐ ☐
FED: ☐ ☐
WGCP: ☐ ☐
RE: ☐ ☐

HREO 08-11



PERSONNEL ACTION FORM

Form must be typed
PRINT AND SIGN

Check One: ☐ Hire
☒ Reappointment ☐ Change
☐ Separation ☐ Other

Send receipt to: _____

Name: Kelley Mark MI TSRS
Title/Rank: Legislative Liaison Dept: President's Office Effective date: 07/01/13 End date: 06/30/14
Status: ☐ Faculty ☐ 12mo Basis: ☐ 12mo Hours per week: 40
☐ Temporary Faculty ☐ 11mo Salary \$ \$99,500.00
☐ Classified ☐ 10.5mo Hourly rate \$ 12.14
☒ Temporary Staff ☐ 9mo Supervisor: 5445.83
☐ Other: _____ Authorized Processor: _____

Check one and complete "FROM" and "TO" section
☐ Account number ☒ Base pay/Hourly rate ☐ Hours ☐ Basis
from 83,875.0000 to 99,500.0000
☐ Title from _____ to _____
☐ Supervisor from _____ to _____ **ENTERED**

FROM:					
SOURCE	FUND	ACTIVITY	OBJECT	AMOUNT/RATE	PERCENT
JUL 10 2013					
TO:					
SOURCE	FUND	ACTIVITY	OBJECT	AMOUNT/RATE	PERCENT
	10	6112	5061	399,500.00	100.00
DATATEL FROM 07/01/13 TO 06/30/14					

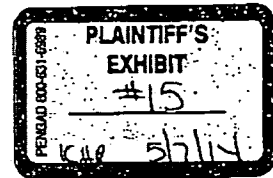
For teaching faculty only: ☐ Highest degree _____ ☐ Institution _____
☐ Satisfies 18 hour rule ☐ YES ☐ NO ☐ attached ☐ on file
Official transcript: _____
Verified by: _____ (Initials)

SIGNATURES DATE SIGNATURES DATE
By signing below, I certify that this transaction is not a violation of the nepotism policy.
☐ Nepotism policy does not apply
☐ Nepotism policy applies. Approved Request for Exception to the Nepotism Policy Form is attached
Department: _____ Other required signatures: _____
Dean/Division: _____ HR Signature: _____
Grants Approval: _____ ALL AUTHORIZATION/SUPPORT DOCUMENTATION MUST BE ATTACHED

DO NOT COMPLETE THIS SECTION (FREQ)			
☐ HAM	☐ RELATION	RC	FNU
☐ WORK	☐ EPMS	MS	SD
☐ UNMP	☐ STATE	DQB	LVL
☐ SCRS/ORP Pending	☐ ORG CHART	I-9 DATE	REQ
☐ SCRR/PORR	☐ DIRECTORY	VET	R/N
☐ PPOS		Y/N	FTB

PATROLL	
Y/N	
ST	☐
FICA	☐
FED	☐
WCCP	☐
JE	☐

HREO 08-11



From: "Wren, David" <dwren@thesunnews.com>
To: justinsc06@yahoo.com
Sent: Mon, July 12, 2010 9:45:33 AM
Subject: RE: Barrett

Justin,
Was wondering if now that the primary is over whether I can go ahead and use the e-mails regarding Brad Dean and the chamber money?
Thanks,
David

From: justinsc06@yahoo.com [mailto:justinsc06@yahoo.com]
Sent: Thu 5/20/2010 4:29 PM
To: Wren, David
Subject: Barrett

Any luck? Looking for any other emails now. But I don't think I have anything documenting. Will keep thinking how else to document he set up the meeting.

Thanks,
Justin
Sent from my Verizon Wireless BlackBerry

DICTIONARY.COM

and

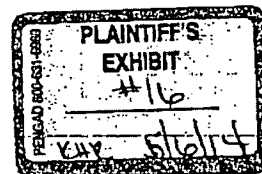
Use **And** in a sentence

and

ænd; *unstressed* ənd, ən, or, *esp. after a homorganic consonant*, n Show
Spelled [and; *unstressed* uh nd, uh n, or, *esp. after a homorganic consonant*, n] Show
IPA
conjunction

1.

(used to connect grammatically coordinate words, phrases, or clauses)
along or together with; as well as; in addition to; besides; also;
moreover: *pens and pencils*.



and (ænd, (*unstressed*) ənd, ən)

— **conj** (preceded by *good* or *nice*)

1. along with; in addition to: *boys and girls*
2. As a consequence: *he fell down and cut his knee*
3. afterwards: *we pay the man and go through that door*
4. (intensifier): *the sauce is good and thick*
5. plus: *two and two equals four*
6. used to join identical words or phrases to give emphasis or indicate repetition or continuity: *better and better ; we ran and ran ; it rained and rained*
7. used to join two identical words or phrases to express a contrast between instances of what is named: *there are jobs and jobs*
8. *informal* used in place of *to* in infinitives after verbs such as *try*, *go*, and *come* : *try and see it my way*
9. an obsolete word for if **an** , **an'** , Informal spellings: **'n** : *and it please you*

— **n**

10. (*usually plural*) an additional matter or problem: *ifs, ands, or buts*

usage The use of *and* instead of *to* after *try* and *wait* is typical of spoken language, but should be avoided in any writing which is not informal: *We must try to prevent (not try and prevent) this happening*

Collins English Dictionary

Pioneers in dictionary publishing since 1819

and (ænd ɪ; unstressed ənd ɪ; ən ɪ)

Definitions

conjunction (*coordinating*)

1. along with; in addition to 'I boys and girls
2. as a consequence 'I he fell down and cut his knee
3. afterwards 'I we pay the man and go through that door
4. *preceded by good or nice* (intensifier) 'I the sauce is good and thick
5. plus 'I two and two equals four
6. used to join identical words or phrases to give emphasis or indicate repetition or continuity 'I better and



Thesaurus.com

Synonyms

conj in addition to; plus

- along with
- also
- as a consequence
- as well as
- furthermore
- including
- moreover
- together with

XFW: Gresham Wins SCGOP Straw Poll

repmkelley@aol.com

Sent: Sunday, April 25, 2010 2:30 PM

To: David DeCenzo [ddencenzo@coastal.edu]; Brad Dean [brad.dean@visitmyrtlebeach.com]; Eddie Dyer [dyer@coastal.edu]; Cynthia Elsberry; Chairman Will Garland [wgarland@sccost.net]; Dick Ward [rww1234@hotmail.com]; Charles Hinson [charles@wacclt.com]; Gary Loftus [gloftus@coastal.edu]; Curt Fredericks [cjfmyrtlebeach@aol.com]; Paul Goodrich [pdgoodrich@spmresorts.com]; Scott McNew [smcnew@ccim.net]; Adam Cates [adamcates@hotmail.com]; Mike Wooten [jmw@ddcinc.com]; John Rhodes [johnrhodes@beachballclassic.com]; Alan Clemmons [clemmons1@aol.com]; Nelson Hardwick [nelsonhardwick@sc.rr.com]; Liston Barfield [liston@sccost.net]; Billy Witherspoon [wdspoon@sccost.net]; George Hearn [ghearn@sccost.net]; Kay Loftus; Joe Woodie [jwoodie@traddcommercial.com]; Anita Floyd [af2690@aol.com]; Annette Young [ayoung48@sc.rr.com]; Doug Wendel [doug.wendel@bcccompany.com]; Brown Bethune [wbbethuneccim@sc.rr.com]

Cc: Berry Stille [bstille@rpmengineers.com]; Bill Golden [bgolden@golffoliday.com]; Coupe DeVille [edeville@sc.rr.com]

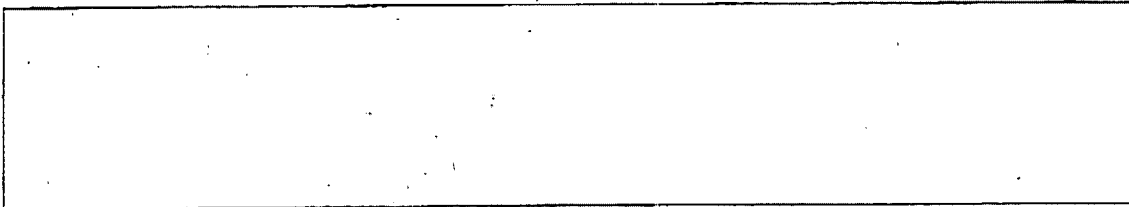
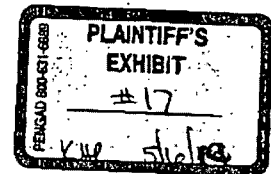
For all that have supported and those that still can and want to this is Great News!!!!
Sent via BlackBerry by AT&T

From: "Luke Byars" <act@greshambarrett.com>

Date: Sun, 25 Apr 2010 14:09:45 -0400

To: <repmkelley@aol.com>

Subject: Gresham Wins SCGOP Straw Poll



Dear Friend,

Sorry to bother you on a Sunday, but I had some great news that just couldn't wait!

Gresham took first place in the South Carolina Republican Party straw poll held at the annual Silver Elephant dinner in Columbia last night. The full results are provided below, but here's the big takeaway from Saturday night's win: with just 44 days left until the Primary, our campaign has seized the momentum and we're not letting go of it.

Republicans from every corner of the state are beginning to realize what you and I have known for quite some time - Gresham is the one candidate with the conservative credentials, character and plan to lead an economic turnaround in South Carolina.

As we head in to the homestretch, we need your help now more than ever. So today, I am asking you to do two things that will make a big difference:

1. **Volunteer** - Get involved with our campaign. We've got plenty of work that needs to be done - from making phone calls, to putting up signs to stuffing envelopes. We could really use your help. [Click here](#) to get involved or call 803.255.8095.
2. **Contribute** - Whether it's \$10, \$50 or **Appx. 702** ever you can give today will go a long way

[clicking here.](#)

Thank you, for everything you do!

Sincerely,

Luke Byars
Campaign Manager
Barrett for Governor

P.S. Here are the full straw poll results from last night's Silver Elephant dinner.

1st Place - Gresham Barrett 37%
2nd Place - Henry McMaster 34.2%
3rd Place - Nikki Haley 18.4%
4th Place - André Bauer 10.4%

P.P.S. For more about last night's straw poll, [click here to read the Post & Courier's coverage.](#)

No longer interested in receiving emails? [Unsubscribe Below.](#)

This message was sent from Luke Byars to repmkelley@aol.com. It was sent from: Gresham Barrett, P.O. Box 287, Columbia, SC 29202. You can modify/update your subscription via the link below.

Email Marketing by

☐ To be removed click here

MyrtleBeachOnline.com

Next Story >

Conway couple in apparent murder-suicide had previous domestic problems

Myrtle Beach family feuds over estate

Published: May 22, 2011

Son accuses sibling, dad of pilfering mom's assets

By David Wren — dwren@thesunews.com

While the matriarch of one of Myrtle Beach's most influential families was dying of cancer, a son and her estranged husband were scheming to steal her money, car, jewelry, real estate holdings and other assets, according to a lawsuit filed by another son in Horry County's probate court.

The lawsuit was filed by Bert Anderson, the youngest of James and Dorothy Anderson's two children and the personal representative of his mother's estate. In it, he said his brother, Bobby, and his father started stealing his mother's assets as soon as they learned she had a terminal illness.

In court documents, James and Bobby Anderson deny any wrongdoing. They say that Dorothy Anderson willfully transferred her belongings "to preserve her estate" and "protect assets from judgment creditors upon her death."

They also say that Bert Anderson has made "fraudulent misrepresentations" to the court about their role in the asset transfers.

Bobby Anderson declined to discuss the lawsuit when contacted by telephone on two occasions last week. James Anderson declined to discuss the lawsuit when contacted at his home. Their lawyer, Robert "Shep" Guyton, did not return messages seeking comment.

At stake is millions of dollars in property and cash that Bert Anderson says belongs to his mother's estate.

Building an empire

Dorothy Anderson was born in 1933 in Conway, the sixth child in a family of 14 siblings. She married James Anderson in 1951 and moved to the beach 18 years later - along with her sister, Mary Frances Tall - when she bought a boarding house on Ninth Avenue North called the Welcome Mat.

Over the next four decades, Dorothy Anderson grew the family's hotel fortune to about a half-dozen properties with more than 2,000 rooms. Along the way, she spearheaded movements to help beautify Ocean Boulevard by burying utility lines underground and talked the City Council into backing Treasures by the Sea - a Christmas-time, nautical-themed light show that she hoped would attract more tourists to the beach during the slow winter season.

Dorothy Anderson also played a key role in local civic organizations, as a founder of the Myrtle Beach Area Hospitality Association and a board member of the Myrtle Beach Area Chamber of Commerce. In 2003, she was named the chamber's Citizen of the Year.

Although the recent real estate collapse wiped out much of the family's wealth - their flagship Poindexter resort, for example, was lost to foreclosure after being in the family for 33 years - the Andersons remain one of this area's business leaders.



App'x 704
-697-

When Dorothy Anderson was diagnosed with stomach cancer in May 2009, her doctor gave her just two months to live.

"The doctor asked my mom if she had any questions and she said, 'No,'" said Bert Anderson, who was with his mother when she was diagnosed. "Then the doctor said, 'Well, can I give you any advice?' My mom's answer was: 'I don't need any advice from you because you've already given up.'"

She then sought treatment at one of the nation's top cancer clinics - MD Anderson Cancer Center in Houston - and battled her disease for more than a year, keeping a hand in the family business until the final months of her life.

"She would still go by the property when she wasn't in a chemo cycle and check on things," Bert Anderson said. "She definitely knew what was going on."

It was after her diagnosis in 2009 that Bert Anderson said his father and brother "embarked upon a scheme" to take Dorothy Anderson's property and other assets, according to the lawsuit filed in November.

The lawsuit alleges that James and Bobby Anderson used deception and forgery to steal Dorothy Anderson's 50 percent interest in 11 parcels of land, with her share worth at least \$4.5 million, according to county property records. Most of the property is located between Kings Highway and Ocean Boulevard in Myrtle Beach, and two of the sites are oceanfront.

James and Bobby Anderson also tricked her into signing over stock certificates worth an estimated \$298,112 and changed the title to her Mercedes Benz automobile, according to the lawsuit.

The lawsuit also outlines an alleged scheme in which James and Bobby Anderson used back-dated documents for JBDC LLC - one of the family's corporations - to block Bert Anderson's access to a Carolina First bank account.

According to the lawsuit, James and Bobby Anderson told Dorothy Anderson that she needed to let Bobby Anderson hold her assets in his name so creditors could not take the property from her. Bert Anderson said could find no evidence that any creditors were threatening to take his mother's property.

"I was able to get a certificate [from the clerk of court] showing that as of July 27, 2010, there were no pending judgments and no judgments filed within the previous 10 years," Bert Anderson said. "That absolutely floored my mom. She realized the stuff she'd been signing away had been done through trickery."

James and Bobby Anderson said in court documents that Dorothy Anderson approved of all the property and other transfers and that Bert Anderson knew or should have known about his mother's financial problems and her desire to protect her assets from creditors after her death.

Bert Anderson "has made claims he knows or should have known to be false," according to court documents James and Bobby Anderson filed January.

Bert Anderson won a default judgment against his brother and father because they failed to file their response to his lawsuit within the time period allowed. Judge Deirdre Edmonds denied a motion by James and Bobby Anderson to set aside that default during a court hearing in March.

Money disappears

The JBDC bank account includes income from one of the Anderson family's rental management programs that is deposited each month. That money is then used to pay the mortgage on 18 condominium units the family owns at the Camelot by the Sea resort in Myrtle Beach. Whatever amount is left over was supposed to be divided equally by James and Dorothy Anderson.

Even though the money was to be split evenly, Bert Anderson's lawsuit alleges that his father and brother started siphoning funds from the bank account in the months leading up to his mother's death.

A series of checks and cashier's checks were written from the JBDC account to Anderson Properties - a corporation that is owned and controlled by James and Bobby Anderson, according to court documents.

Bert Anderson said in his lawsuit that his mother was not aware of Anderson Properties and had no involvement in that corporation.

In addition to the checks, a six-figure deposit that was supposed to go into the account in July was diverted by James and Bobby Anderson before it could be deposited, according to the lawsuit.

James and Bobby Anderson allegedly diverted more than \$483,000 from the account last year, according to Bert Anderson, court documents and bank records.

Bert Anderson said in court documents that his mother became aware that money was being diverted from the bank account and it was "the source of great anguish and worry to her during the final months of her life."

In an effort to keep her funds from being taken, Dorothy Anderson and her husband signed an agreement with Carolina First in September in which her share of the leftover monthly proceeds was to be disbursed only to her.

In her will, Dorothy Anderson designated that money to go to a trust overseen by her estate. She named Bert Anderson to be the personal representative of that estate.

In January, Bobby Anderson closed out the original JBDC account and opened a new one listing him as the corporation's managing member and the account's only signer, according to the lawsuit and bank records.

Bert Anderson alleges that his brother opened the account by using a document that had been back-dated to Feb. 20, 2009. That document purportedly transferred all of James Anderson's interests in JBDC to Bobby Anderson.

Bert Anderson said he has no idea what has happened to the money since his brother opened the new account. He said in a separate lawsuit filed this month against Carolina First that another \$1.1 million is at risk because monthly deposits exceed \$250,000 during the peak summer season.

He wants a judge to freeze the bank account until the lawsuit is resolved and appoint a receiver to take over JBDC. A hearing on those matters is scheduled for 9:30 a.m. Monday at the Horry County Courthouse in Conway.

"We're only arguing about my mom's half," Bert Anderson said, adding that his mother's share will be divided between himself and his brother. "We're saying take the other half and do whatever you want with it. Right now, though, it's 100 percent to them and nothing to me."

Mercedes dispute

Bert Anderson said in interviews and in court documents that his brother and father regularly duped Dorothy Anderson out of her money and belongings during the last year of her life.

For example, Bert Anderson said his mother decided to sell \$61,800 worth of stock she owned in Conway National Bank to his brother in order to raise money for medical bills. Dorothy Anderson transferred the stock, Bert Anderson said, but his brother never paid for it.

"There were properties that were moved out of her name" in the months leading up to her death, Bert Anderson said. "By the time she made her will it was too late. The lawyer said, 'You don't own this piece of property any more.'"

Dorothy Anderson last year had talked to a lawyer about divorcing her husband, but she died before the divorce was finalized. The divorce proceedings are continuing so her estate can claim its right to her share of the marital property.

"When she realized my father and brother were not trying to help her, that they were helping themselves and that my father was not doing anything to protect her, that's what did it," Bert Anderson said. "My mother and father had had problems in the past, but they always moved beyond it. She couldn't get past this, though."

One of the biggest family blow-ups occurred when Bobby Anderson used "coercion and threats" to get Dorothy Anderson to sign over the title to her 2005 Mercedes Benz SL500 automobile, according to the lawsuit.

"Bobby told her that they're getting ready to execute a judgment and the only way she could keep her car was to sign it over to him," Bert Anderson said. "She didn't have any judgments. She had negotiated herself out of judgments in all the real estate deals."

Emails provided to The Sun News by Bert Anderson show he and his lawyer - John Chase of Charleston - tried last year to get Guyton to intervene in a dispute over ownership of the Mercedes.

"Bobby is refusing to sign title back to mom on her car," Bert Anderson wrote to Guyton in an Aug. 23 email. "She confronted him this morning after her car was missing all weekend. She signed title to Bobby in duress in March 2010 or this spring. She was told creditors were going to come and take her car."

Chase followed up with another email to Guyton about two weeks later.

"Your clients have gone to considerable expense - several thousand dollars - to have the ignition and keys changed," Chase wrote in a Sept. 8 email to Guyton. "This does not bode well. Let me hear from you re. this at once, please."

Bert Anderson said his brother never returned the automobile.

Bert Anderson said the theft of his mother's assets was just one of her worries in the months leading up to her death. He said Dorothy Anderson also was being threatened with physical harm if she did not sign over property to James and Bobby Anderson.

In an Aug. 23 email to Guyton, Bert Anderson told the lawyer that his mother had been forced to move from her home "due to threats to her welfare."

"She felt threatened by my dad," Bert Anderson said. "Despite the oceanfront home and all the nice furnishings, she packed one bag and spent the last four months of her life in a condo at the Anderson Ocean Club."

Bert Anderson said family members also threatened him and vandalized his automobile on several occasions, including one Sunday afternoon when he brought lunch to his mother at the condo where she was living.

"I had my tires cut and am being threatened also," he told Guyton in the Aug. 23 email.

Accounts dwindle

At about the same time negotiations were taking place over the Mercedes, Chase and Bert Anderson were asking Guyton for more information about money that was allegedly missing from the JBKD bank account, according to emails provided to The Sun News.

Chase, in a Sept. 8 email to Bert Anderson, recounted a meeting he had that day with Guyton.

"He [Guyton] started off by promising me an accounting concerning the dollars taken out of the rental operating account," Chase wrote in the email. "I showed him ... the supporting documents for the debit allegations we had made. I think it concerned him very much [to] see checks written by your father and endorsed by your brother."

The accounting that Guyton promised never came, according to the emails and court documents.

Chase's frustration over what he felt was a lack of cooperation was evident in an Oct. 1 email he sent to Guyton.

"We perceive your clients to be acting in a dilatory and insincere fashion, for we have not received the accounting information ..." Chase wrote.

The emails also show that Chase and Bert Anderson were suspicious of visits James and Bobby Anderson made to see Dorothy Anderson in the hospital during her final days.

"Mom had a rough weekend and is in ICU," Bert Anderson wrote to Chase on Oct. 4, less than a week before his mother's death. "She is resting but talks in her sleep about what has been done to her. Brother and Dad have done nothing over the weekend but celebrate a wedding that she was not invited to attend. They are just continuing to do their own thing like nothing has happened."

Then, on Oct. 6 - four days before Dorothy Anderson's death on Oct. 10 - Bert Anderson told Chase in an email that his father and brother had begun to visit the hospital more often.

"Dad comes every morning and Bobby at least twice a day," he wrote.

Chase responded in an email: "I don't suppose you need me to tell you this, but I would be very suspicious about your father and brother's sudden change of heart and show of concern."

Bert Anderson said the property and asset transfers that occurred during Dorothy Anderson's final months have created a legal nightmare. He is trying to get his mother's name restored on all of her deeds and the car title.

"We can't probate the estate because of the lack of title and possession," he said. "Things move mighty slow. My brother and father have it within their power to honor her wishes and not go through this long, drawn-out process. It's frustrating."

The battle also has taken an emotional toll on the Anderson family - one that Bert Anderson thinks will never be healed.

"We haven't talked since mom's funeral," Bert Anderson said. "We've been able to put a good public face on it, but we're not a big, happy family. I don't think we ever will be."

Contact DAVID WREN at 626-0281

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Conway Couple's Feud Over Estate Feared to Have Led to Domestic Violence

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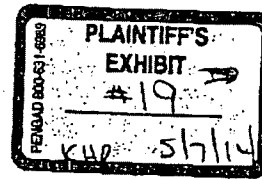
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SEP 18 2013

Weekend forecast looks fantastic for Myrtle Beach area

Federal probe of luxury car exports has Myrtle Beach area ties

Published: September 13, 2013

By David Wren — dwren@thesunnews.com

MYRTLE BEACH — A luxury automobile dealership and at least one area man have been named in a federal investigation into an alleged scheme to export high-end cars to foreign countries through the use of straw buyers, according to civil complaint filed this week in federal court in Columbia.

The complaint was filed along with warrants to seize a dozen vehicles and two bank accounts belonging to companies in Charleston and Houston that intended to export the vehicles, according to court documents. Criminal charges have not yet been filed in the case, which involves agents from the U.S. Secret Service, the State Law Enforcement Division, the Richland County Sheriff's Department and Columbia City Police.

Among those named in the complaint is Myrtle Beach Automotive, which sells BMW and Mercedes automobiles at its location on Jason Boulevard in Myrtle Beach. According to the complaint, Martin Burke — who allegedly recruited straw buyers — told investigators he was introduced to the Charleston exporters by a Myrtle Beach Automotive salesman. That salesman told Burke that he had been selling cars to the brokers through straw buyers for two years and "if you did it the right way" it would be O.K., according to the complaint.

Steve Rollins, general manager of Myrtle Beach Automotive, could not be reached for comment Friday. The complaint does not say where Burke lives.

Edward Sweet of Conway also is named in the complaint as the alleged straw buyer of a \$70,528 Porsche Cayenne from a dealership in Columbia. Sweet could not be reached for comment.

Automobile manufacturers generally prohibit the sale of cars in the U.S. to people who intend to export them for sale in another country, and there are stiff financial penalties for dealerships that knowingly sell their cars for that purpose. To get around those rules, some exporters use straw buyers — people who pretend the car is being purchased for their personal use. Exporters give the straw buyers money to purchase a vehicle and the automobile is then transferred to the exporter after the sale. Exporters typically pay each straw buyer a fee for making the purchase.

Exporters work to get around the rules because luxury cars cost much more in countries such as China — where these automobiles were headed — than in the U.S. The exporters can sell cars to foreign customers for less than it would cost to purchase the same car in that country, yet still make a profit. The scheme, which usually involves counterfeit titling of automobiles, often leads to mail fraud and wire fraud charges against the perpetrators.

Burke told investigators that he recruited Sweet to be the straw buyer for the Porsche, according to the complaint. Burke — who said he and his wife manage beach rental properties for a living — told investigators he also recruited family members to purchase eight luxury BMWs for the exporters.

App'x 710
-703-

According to the complaint, Burke drove Sweet to the Columbia dealership on April 13 and then left Sweet at the dealership. After the sale, federal agents followed Sweet for about a mile to a Lowe's hardware store parking lot, where Burke was waiting. About an hour later, a vehicle transport truck arrived and the driver – along with Burke and Sweet – started to load the Porsche onto the truck. Federal agents stopped the men, seized the vehicle and learned the Porsche was supposed to be taken to a port in New Jersey, according to court documents.

Alex Turkayev – owner of Charleston-based Automotive Export, one of the exporters named in the complaint – told a federal agent that a \$60,000 BMW in the U.S. would sell for about \$160,000 through a traditional car dealer in China, because of that country's high tariffs. Turkayev said salesman at several dealerships knew about the scheme and would contact him on a regular basis to let him know about new inventory, according to court documents.

In addition to the Porsche that Sweet purchased, federal agents have seized 11 luxury cars they believe are part of the export scheme, including another Porsche Cayenne, a pair of BMW X5s and eight Mercedes 350 and 450 models. Nearly \$183,000 was seized from the exporters' bank accounts.

Contact DAVID WREN at 626-0281.

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Mortgage fraud plea nets former Myrtle Beach area real estate agent one day in prison

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Weekend forecast looks fantastic for Myrtle Beach area

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Myrtle Beach "dance off" ends with broken arm, N.C. man jailed

Suspended Myrtle Beach lawyer accused of fraud, forgery

Published: March 19, 2013

By David Wren — dwren@thesunnews.com

MYRTLE BEACH — Mark Brunty, a Myrtle Beach lawyer who has been suspended from his law practice by the state Supreme Court, is accused in court documents of forging the signatures of prominent business leaders in a scheme to steal \$700,000 from a pair of out-of-state investors.

Brunty allegedly forged the names of Burroughs & Chapin Co. Inc. President Jim Apple and Alec Elmore, the vice president of First Federal Savings & Loan in Charleston, on documents used to persuade brothers Morris and Saul Kravecas to invest in phony business deals along the Grand Strand, according to a lawsuit filed in Horry County's circuit court. The brothers' investment, which was supposed to be kept in Brunty's trust account, now is missing.

"It's flat gone as far as we can tell," said Amanda Bailey, a lawyer representing the Kravecas brothers.

Brunty also is missing. Bailey said she has not been able to locate him in order to serve him with a copy of the lawsuit.

Meanwhile, reports with Better Business Bureau offices here and in other states show consumers have filed numerous complaints about a mortgage loan modification program Brunty promoted through email and telephone solicitations he made to people facing foreclosures. According to the complaints, people who responded to the emails received generic loan modification information from Brunty's law firm and a request for an advance payment of \$3,000. The complaints state that Brunty cashed clients' checks but did little work to help them save their homes.

Brunty could not be reached for comment Monday. A recording states that his telephone number is out of service and an answering machine at his law offices states the business is temporarily closed.

Mary Ann Peebles of Sacramento, Calif., is among the consumers who have filed complaints against Brunty. Peebles told The Sun News that someone from Brunty's office called her offering assistance with a mortgage modification. Peebles, a 76-year-old widow, said she sent a \$3,000 payment to Brunty's office but never received any help.

"Like a fool I fell for it because I always thought attorneys were supposed to be honest," Peebles said.

Brunty also is facing a legal malpractice lawsuit in which he is accused of having an inappropriate relationship with a client's wife. Horry County State Bank has filed a lawsuit accusing Brunty of defaulting on a \$50,000 loan and another bank this month foreclosed on Brunty's home in the Dunes Lake neighborhood. That bank obtained a \$294,031 deficiency judgment against Brunty as part of its foreclosure proceedings.

<http://www.myrtlebeachonline.com/2013/03/19/3389871/suspended-myrtle-beach-lawyer...> 6/28/2013

Brunty – along with business partner Dennis Dellinger, who also is named as a defendant in the Kravecas lawsuit – were supposed to keep the investors' money in a trust account but instead used the money for personal expenses, according to court documents. Morris and Saul Kravecas accuse Brunty and Dellinger of fraud, civil conspiracy and other charges. They are asking for unspecified actual and punitive damages.

Trey Deschamps – a Myrtle Beach lawyer representing Dellinger – said his client also was duped by Brunty. Dellinger trusted Brunty to handle legal aspects of the sales and keep the Kravecas brothers' money in his law firm's trust account.

"He [Dellinger] wouldn't have had any access to that money," Deschamps said. "You have an attorney, you're supposed to be able to trust him."

According to the lawsuit, the Kravecas brothers, Brunty and Dellinger formed a partnership in which Brunty and Dellinger were to identify distressed properties and loans that the Kravecas brothers could purchase. In exchange, Brunty and Dellinger would receive 20 percent of the profits from any deals they brokered.

The first deal involved a \$2.7 million loan by First Federal to a Myrtle Beach business that had defaulted on its payments. Brunty and Dellinger told the Kravecas brothers that they could purchase the loan from First Federal for \$600,000 and then resell it within 30 days for a \$150,000 profit. The Kravecas brothers wired \$600,000 to Brunty's law firm to be held in a trust account to purchase the loan. Brunty and Dellinger then sent a document titled "loan sale agreement" to the Kravecas brothers. That document purportedly had Elmore's signature on it.

When the sale failed to close on time, the lawsuit claims Brunty and Dellinger sent a document titled "extension agreement" to the Kravecas brothers. That agreement purportedly had Elmore's signature on it.

Elmore, in an affidavit included with court documents, said his signature on both documents is a forgery.

The second deal involved the purchase of two parcels in the Grande Dunes area of Myrtle Beach – one parcel with 27 ready-to-build home lots and another parcel of nearly 20 acres of undeveloped property behind the Lowe's grocery store off 82nd Parkway. The Kravecas brothers wired a \$100,000 deposit to Brunty's law firm to be held in a trust account. Brunty and Dellinger then sent two letters allegedly confirming the property sales to the Kravecas brothers. Those letters purportedly had Apple's signature on them.

The lawsuit claims that Apple's signature was forged on both letters.

Bailey said the Kravecas brothers have invested in real estate deals in the past, but not in the Myrtle Beach area. Morris Kravecas is a doctor living in the Miami area while Saul Kravecas is a retired corporate executive living in New Jersey.

Bailey said the allegations in the lawsuit didn't come to light until after the state Supreme Court suspended Brunty in November. The court's order did not specify why Brunty was suspended, although the suspension falls under rule 17-b of the state's Rules for Lawyer Disciplinary Enforcement. Rule 17-b states that "upon receipt of sufficient evidence demonstrating that a lawyer poses a substantial threat of serious harm to the public or to the administration of justice, the Supreme Court may suspend the lawyer or transfer the lawyer to incapacity inactive status."

Lesley Coggiola with the state's Office of Disciplinary Counsel said the department's investigation of Brunty is ongoing and he will remain on suspension at least until it is completed. If the department finds sanctions are warranted, it can either enter into an agreement with Brunty or file charges against him for a

Untitled Message

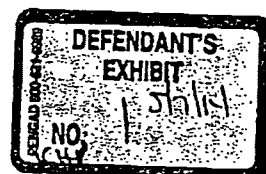
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repmkelley@aol.com

Sent: Saturday, January 09, 2010 4:12 PM
To: Cynthia Elsberry; jriddle@do.hcs.k12.sc.us
Attachments: Index of Taxpaying Ability~1.doc (29 KB)

Please review and comment. I need any changes or additions by Monday evening. The amendment is H-3748 which will be redrafted as an amendment to H-3272.

Thanks,
Mark

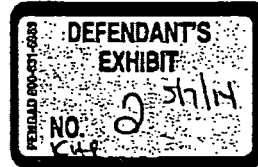


Index of Taxpaying Ability Talking Points

- This amendment allows for school districts to be able to be indexed by the same formula as they are now for purposes of funding K-12 education.
 - The amendment prevents a HUGE shift in EFA funding with no logical reason for doing so.
 - It will stop a disproportionate burden being placed on Districts with high levels of renters.
 - * Poor communities with many low income renters that can not afford to buy a home will have rents increased due to the millage assessed on 6% property.
 - * Poor districts will pay higher proportionate taxes than richer districts with high end owner occupied homes (i.e.... Lexington)
 - Exempting the 4% Taxpayers from the formula creates an Index that has neither rhyme nor reason as to the ability of a community to help in the education of their children.
 - By passing this amendment you will prevent yet another tax increase on the small businessman in districts that have a high percentage of 6% taxpayers.
 - This will allow the education community to have a better comfort level in support of business investment, especially in districts that are in the most need of jobs, because they will not be losing State revenue do to an increase in 6% property in the district.
 - This amendment will prevent an additional burden on the largest tax producing district in South Carolina. More taxes on tourism cuts into the competitive edge they and you worked so hard to gain (2 for 1, Tourism Development Fee, Beach Renourishment Funds, Highway Funds).
-
- Section 2 allows a committee similar to the TRAC committee to study and create a formula to address the Taxpaying Ability of all school districts that is fair and equitable to all concerned.

Re:

Page 1 of 2



Re:

repmkelley@aol.com

Sent: Sunday, January 10, 2010 9:30 PM

To: Cynthia Elsberry

Just got back in town. Thanks for the corrections. Spelling and grammar are some of my weak points. I will correct Jeff's address when he responds.

Mark

Sent via BlackBerry by AT&T

From: Cynthia Elsberry <CElsberry@horrycountyschools.net>

Date: Sun, 10 Jan 2010 20:27:48 -0500

To: repmkelley@aol.com <repmkelley@aol.com>; Jeff Riddle <JRiddle@horrycountyschools.net>

Subject: FW:

Mark,

I just realized that Jeff's address in your original e-mail is incorrect. When I replied to it, it bounced back.
Cindy

Dr. Cynthia C. Elsberry

Superintendent, Horry County Schools

www.horrycountyschools.net

P.O. Box 260005

1605 Horry Street

Conway, SC 29528-6005

843-488-6716 Office

843-742-7996 Cell

843-488-6719 Fax

celsberry@horrycountyschools.net

From: Cynthia Elsberry

Sent: Sunday, January 10, 2010 8:26 PM

To: jriddle@do.hcs.k12.sc.us; repmkelley@aol.com

Subject: RE:

Jeff and Mark,

I've marked my suggestions below:

Index of Taxpaying Ability Talking Points

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Re:

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Dr. Cynthia C. Elsberry
Superintendent, Horry County Schools
www.horrycountyschools.net
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1605 Horry Street
Conway, SC 29528-6005
843-488-6716 Office
843-742-7996 Cell
843-488-6719 Fax
celsberry@horrycountyschools.net

From: repmkelley@aol.com [repmkelley@aol.com]
Sent: Saturday, January 09, 2010 4:12 PM
To: Cynthia Elsberry; jriddle@do.hcs.k12.sc.us
Subject:

Please review and comment. I need any changes or additions by Monday evening. The amendment is H-3748 which will be redrafted as an amendment to H-3272.
Thanks,
Mark

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Dr. Ronald Ingle

From: <RepMKelley@aol.com>
To: <Ringle@coastal.edu>
Sent: Tuesday, July 20, 2004 3:55 PM
Subject: Contract Lobbyists

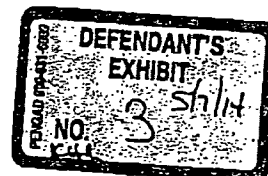
History of Contract Lobbyist Issue in 2004-2005 Budget

- Governor puts a proviso in his Executive Budget to reduce funding to any state agency by the amount they pay for contract lobbyists.
- State Budget originates in the House using the Executive Budget as a guideline only.
- House puts in the line reduction (-) \$60,000.00 for CCU and other amounts for all other schools and agencies that use contract lobbyists by the amount of the contracts, but the House does not put in the proviso that directs the reduction. This is done so as to not create a fight on the House floor over this issue.
- Senate passes the identical lack of language in their version. They leave the line deduction of \$60,000. but put an increase in the overall budget for CCU of \$500,000.00. This is more than any other university received.
- The House and Senate passed the 2004-2005 budget with the actions explained above.
- There is nothing for the Governor to take action on, as pertains to this issue, because there is nothing in the budget that addresses contract lobbyists in proviso.

*** In conversations that I have had with the author of the Bill that would preclude State agencies from hiring contract lobbyists he has expressed an opinion to exempt Higher Education from the restriction in the bill that he will introduce next year.

***** \$500,000. to CCU (recurring) not bad work for contract lobbyists. Wonder what the other "Government Liaison" people were doing?

Please let me know if this is what you need, or if there is more that we can add.



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JAN 27 2015

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
Civil Case No. 2012-CP-26-3804

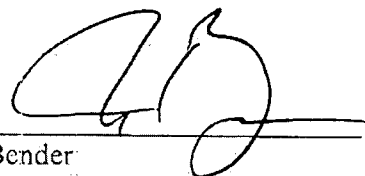
David Wren and Sun Publishing Company Inc.,
d/b/a The Sun News,.....Appellants,

v.

Mark Kelley,.....Respondents.

CERTIFICATE OF COUNSEL

Pursuant to Rule 210(g), *SCACR* the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and does not contain any other material.



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January 23, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JAN 27 2015

SC Court of Appeals

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Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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David Wren and Sun Publishing Company Inc.,
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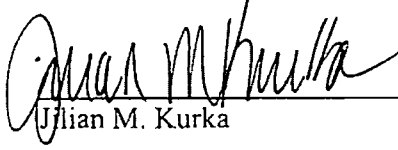
Mark Kelley,.....Respondents.

CERTIFICATE OF SERVICE

I, Jilian M. Kurka, Paralegal to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with a copy of the Record on Appeal by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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January 27, 2015

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.

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v.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT OF FACT WAS PUBLISHED BY APPELLANT CONCERNING THE PLAINTIFF?

II. DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE?

III. DID THE TRIAL COURT'S ADMISSION OF TESTIMONY FROM AN EXPERT WITNESS RELATING TO THE STANDARDS OF PROFESSIONAL JOURNALISM CONSTITUTE PREJUDICIAL ERROR, REQUIRING A NEW TRIAL?

IV. DID THE TRIAL COURT ERR IN FAILING TO GRANT APPELLANTS A NEW TRIAL IN THAT THE AWARD OF DAMAGES IS SO GROSSLY EXCESSIVE THAT IT INDICATES THE JURY WAS MOTIVATED BY PASSION, CAPRICE, PREJUDICE OR OTHER CONSIDERATION NOT FOUNDED IN THE EVIDENCE?

V. IS THE PUNITIVE DAMAGE AWARD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, REQUIRING A NEW TRIAL?

STATEMENT OF THE CASE

Respondent, Mark Kelley (Kelley), a registered lobbyist, initiated a libel action against McClatchy Newspapers, Inc., d/b/a *The Sun News* (newspaper) and reporter David Wren (Wren). The Sun Publishing Co., Inc., the publisher of the newspaper was ultimately substituted as a defendant in place of McClatchy Newspapers, Inc., and in his Second Amended Complaint Kelley alleged that the newspaper and Wren had accused, insinuated or "inferred" [sic] that he had violated South Carolina law by delivering or being involved in the delivery of \$84,000 in campaign contributions to a gubernatorial candidate. (R. pp. 15-18, ¶¶ 5, 17, 29, and 41) Wren and the newspaper answered the allegations of the Second Amended Complaint and discovery was undertaken.

Wren and the newspaper moved for summary judgment before the honorable Lee S. Alford, who ruled that Kelley was a public figure for purposes of his libel action, but denied the motion with leave to renew it upon Kelley's objection that he had not been able to complete the recessed deposition of Wren. Kelley moved for reconsideration of Judge Alford's order, and in response Judge Alford withdrew the determination that Kelley was a public figure. Wren and the newspaper renewed their motion for summary judgment. A hearing was held on February 24, 2014 before the honorable Larry B. Hyman, Jr. When the case was called for trial on May 5, 2014, Judge Hyman, without issuing a written order, advised the parties that he was denying the motion for summary judgment, but ruling that Kelley was a public figure for purposes of this action.

Trial was held before a jury from May 5 through May 8, 2014. Wren and the newspaper moved for a directed verdict at the close of Kelley's evidence and at the close of all evidence. These motions were denied. The jury returned a verdict for Kelley in the amount of \$400,000 actual damages and \$250,000 punitive damages relating to news reports written by Wren and published by the newspaper. The Second Amended Complaint also sought damages for an editorial published by the newspaper, but not written by Wren. The jury found that the plaintiff had failed to meet his burden of proof with respect to the editorial. Wren and the newspaper moved for judgment notwithstanding the verdict or a new trial on May 12, 2014. These motions were denied without written order. It is from the matters and rulings described above that this appeal was taken. No appeal has been taken by plaintiff with respect to his status as a public figure or the determination that he failed to meet his burden of proof with respect to the editorial.

STATEMENT OF FACTS

Commencing in August or September 2009, Wren and the newspaper began reporting on political campaign contributions for the 2010 elections that had been drawn on bank accounts of limited liability companies that apparently had no resources other than beach real estate. (R. p. 398 line 4 to p. 399 line 13) A group calling itself BOOST had made public accusations that the money for these contributions had come from the Myrtle Beach Area Chamber of Commerce. The limited liability companies identified as having made the contributions had a common registered agent who was a former chairman of the board of directors of the Myrtle Beach Area Chamber of Commerce, and some members of the limited liability companies had said they did not know of the contributions or the source of funds for the contributions. (R. p. 398 line 4 to p. 399 line 13)

In May of 2010, Wren was in communication with Tracy Edge, a member of the South Carolina General Assembly, who suggested that Wren contact a campaign worker for the state's Attorney General, then a candidate in the Republican primary for governor, who was thought to have information about a meeting involving Kelley, Brad Dean (Dean), president of the Myrtle Beach Area Chamber of Commerce, and Gresham Barrett (Barrett), a Member of Congress and a candidate in the Republican primary for governor, at which campaign contributions from the limited liability companies had been given to Barrett. The campaign aide contacted by Wren denied having knowledge of the meeting, but ultimately Wren received emails from a former campaign aide to Barrett, who had moved to the campaign of Rep. Nikki Haley. These emails provided details of the meeting involving Dean, Barrett and Kelley. Based on these leads, Wren had a face-to-face conversation with Barrett. Barrett confirmed the luncheon with Dean and Kelley and acknowledged that Dean had delivered campaign contributions at the luncheon.

Wren then called Dean who, having previously denied involvement in the delivery of campaign contributions, for the first time confirmed that he had delivered campaign contributions to Barrett at the luncheon attended by Kelley, Dean and Barrett. (R. p. 399 line 14 to p. 405 line 24) In response to confirmation from Barrett and Dean about the luncheon and the delivery of campaign contributions, Wren wrote, and the newspaper published a news report under the headline "Dean handed over envelope of \$84,000" that described the luncheon and stated with respect to Kelley:

Mark Kelley, a lobbyist for the chamber of commerce, also attended that meeting, according to Barrett. Kelley did not return a telephone call Thursday.

There are strict rules that forbid lobbyists from facilitating campaign donations for statewide candidates; however, 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 Hazelwood, the commission's general counsel. "He [Kelley] is not supposed to touch the envelope or hand over the envelope." (R. p. 638)

Wren testified that he identified Kelley as the lobbyist for the Myrtle Beach Area Chamber of Commerce based on his understanding of the relationship between the Chamber of Commerce and the Grand Strand Business Alliance, an entity for which Kelley was registered to lobby. Wren said he had been told by the president of the Grand Strand Business Alliance that it was the lobbying arm of the Chamber of Commerce, and Dean, the president of the Chamber of Commerce, had told Wren that the Grand Strand Business Alliance received funds from the Chamber of Commerce to pay Kelley's lobbying fee. (R. p. 406 line 17 to p. 407 line 8)

In continuing to report on the campaign contributions from the limited liability companies, Wren wrote and the newspaper published a news report under the headline "Bad debt adds to donor mystery" which reported that one of the limited liability companies, Garden City Partners, that had been identified as the source of funds for \$20,500 in campaign contributions,

was the owner of a beach house that was in foreclosure. That limited liability company was identified as the source of funds for a cashier check in the amount of \$3,500 that was part of the \$84,000 delivered to Barrett at the luncheon with Dean and Kelley. With reference to that check and the contributions, the news report stated:

Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June. Those contributions included a \$3,500 cashier's check from Garden City Partners. (R. p. 639)

The news report identified above also reiterated that Dean had delivered contributions to Barrett, stating:

Last week, Dean said he delivered contributions to Barrett and state Sen. Ray Cleary, R-Murrells Inlet. Dean previously has distanced himself from the political donations. (R. p. 639)

The president of the group questioning the source of funds used to purchase sequentially numbered cashier checks used for campaign contributions, Robert Kelley, said in a news conference with respect to the contributions to Barrett:

Kelley also said Dean has changed his story about the chamber's involvement in the campaign donations.

"In the past, the chamber has denied any involvement in this 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," said Robert Kelley, who is not related to the lobbyist.

A Barrett spokesman told The Sun News last week that Dean arranged the meeting in which the corporations' donations were given to the politician. (R. pp. 640-641)

Continuing to report on the campaign contributions story, Wren wrote and the newspaper published a news report under the headline "FBI, IRS probe donors" that the federal agencies had initiated investigations into the source of funds for campaign contributions made to

candidates, including Barrett. With respect to the cashier checks contributed to Barrett, the news report stated:

U.S. Rep. Barrett, R-3rd District—who lost the gubernatorial bid to Nikki Haley in last month's primary election—received \$49,000 in cashier's checks from Guyton's corporations.

Those checks were among campaign donations that Brad Dean, the president of the chamber of commerce, delivered to Barrett during a lunch meeting last summer.

Mark Kelley, the chamber's lobbyist, also attended that meeting. (R. pp. 644-646)

In further reporting on the campaign contribution issue, Wren wrote and the newspaper published a news report relying on Barrett campaign emails showing Dean's role in connection with the contributions from the limited liability companies. The news report described emails from Barrett campaign staff members trying to ascertain why the Associated Press would be making an inquiry about the contributions from the limited liability companies. The news report stated with respect to the emails:

The e-mails, obtained by The Sun News, show Barrett's staff attempting to pin down the source of the campaign donations after an Associated Press reporter raised questions about them in an Oct. 14 e-mail to B. J. Boling. Boling was communications director for Barrett during the Republican's failed gubernatorial run.

"There may be an issue with these donations," AP reporter Jim Davenport wrote in the e-mail to Boling. "Want to get your head around the sources and get back to me?"

Boling forwarded Davenport's e-mail to other campaign staffers, including Justin Stokes, Barrett's deputy campaign manager.

"These guys are tied to the Myrtle Beach Chamber of Commerce," Stokes said in an e-mail to Boling and two of Barrett's political consultants—Warren Tompkins and Heath Thompson.

"Brad Dean, the chamber's president, worked behind the scenes to pull these together last quarter," Stokes said in the e-mail.

Tompkins, in another e-mail, told staff members that he "cannot figure what the issue would be" with the donations.

"Try Mark Kelley, our Horry expert, or perhaps Allen [sic] Clemmons," Tompkins wrote in the e-mail, suggesting that those two could answer questions about the donations.

"Talk to Mark Kelley," Stokes told Tompkins and the others in another e-mail. "He would be familiar with these contributions and the connection" between the corporations and the chamber of commerce.

Kelley is a former legislator who is now the chamber's lobbyist.

The e-mails do not make clear why Barrett's staff thought Kelley would be familiar with the contributions. The S.C. Ethics Commission has strict rules that prohibit lobbyists from participating in campaign fundraising for state politicians.

Kelley and state Rep. Alan Clemmons, R-Myrtle Beach, did not respond to requests for comments. (R. pp. 647-648)

The news report concluded by stating that Barrett had told the newspaper in May that Dean during a lunch meeting had delivered an envelope with \$84,000 in contributions, including those from the limited liability companies. (R. pp. 647-648)

When more of the limited liability companies identified as the source of campaign contributions faced foreclosure actions, Wren wrote and the newspaper published a news report under the headline "Campaign donors face foreclosures" that included a reference to the contributions to Barrett, stating, "Barrett accepted the money last year during a luncheon with chamber President Brad Dean and Mark Kelley, the chamber's lobbyist. (R. p. 649)

Plaintiff called as a witness Cathy Hazelwood (Hazelwood), General Counsel and Deputy Director of the South Carolina Ethics Commission. Hazelwood had been quoted in several of the news reports, and testified that Wren had called her to inquire if the presence of a lobbyist at a meeting where campaign contributions were passed to a candidate would be a violation of the law. Hazelwood described the call and stated that it was her opinion that the presence of a lobbyist at a meeting where contributions were passed would not be a violation of the law. (R. p. 184 line 13 to p. 185 line 1) Hazelwood was also asked about a quote attributed to her that it would have been illegal for Kelley to have touched the envelope with campaign contributions being delivered to Barrett, and she stated that it was her opinion that had Kelley touched the

envelope he would have been facilitating a campaign contribution, an illegal act. (R. p 185 lines 6 to 11) Hazelwood testified that she had been accurately quoted by Wren in his news reports. (R. p. 186 lines 10 to 24)

Hazelwood testified that it is illegal under South Carolina law for a lobbyist to send a request to someone asking directly or indirectly for a campaign contribution. (R. p. 186 line 25 to p. 187 line 5) Shown plaintiff's exhibit 17, an email forwarded by Kelley to a long list of recipients, reporting on a Republican straw poll, Hazelwood testified that the email contained a solicitation by a lobbyist for campaign contributions and was unlawful. (R. p. 187 lines 6 to 18; pp. 695-696) On re-direct Hazelwood stated that the solicitation of funds was included in the email reporting on the straw poll, and the inclusion of the solicitation of funds made the action illegal for a lobbyist. (R. p. 188 lines 8 to 12) Kelley testified that he did not notice the solicitation for contributions to Barrett contained in the email he forwarded. (R. p. 257 line 24 to p. 258 line 3)

Kelley testified that he remained a registered lobbyist for numerous public and private clients, that one of his business partners, also a lobbyist, had died, and that the firm had lost three clients since 2010, but no client told him why annual contracts with his company had not been renewed. (R. p. 254 line 11 to p. 255 line 14) Asked if he could apportion the loss of lobbying clients due to his partner's death, Kelley could testify only that some of the clients that had been shared with his deceased partner did not renew their annual contracts. (R. p. 265 lines 11 to 22) Kelley, before the publications on which his action is based, was a registered lobbyist for Coastal Carolina University, and was at the time of trial continuing as the lobbyist for the school. The president of the school testified that Kelley was so successful as a lobbyist after the publications

that he was ultimately given an increase in pay of \$18,000 as "the full compression salary relief."
(R. p. 213 line 15 to p. 215 line 24)

Wren testified that when he wrote the sentence, " Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June" he was not saying Dean and Kelley delivered the contributions. Wren testified that had he wished to say that the contributions were jointly delivered, he would have written "Dean and Kelley delivered" the contributions. (R. p. 408 lines 15 to 23) .

Wren testified that when he was quoting Robert Kelley in the news report having the headline, "Donations tied to MB chamber blasted," it was Robert Kelley who used the term "scandal" in describing the campaign contribution issue and that the reference to "he" in the statement "he handed Mr. Barrett the envelope full of checks" was to Dean and not Kelley. (R. p. 410 line 17 to p. 413 line 22; pp. 640-641)

Wren testified that his interest in reporting on the campaign contribution story was to learn the source of the political contributions (R. p. 415 lines 9 to 10), that he did not report that Kelley delivered the envelope or touched the envelope with contributions (R. p. 417 lines 8 to 18), that he had no bias or prejudice against Kelley (R. p. 444 lines 12 to 16), and that he did not believe anything he wrote had been false. Wren testified that had he doubted the accuracy of what he was reporting he would not have written it. (R. p. 420 lines 5 to 14) Significantly, Wren testified that he had never received a call from Kelley or heard from him in any way prior to the initiation of the suit. (R. p. 417 line 22 to p. 419 line 2) Wren also testified that he had not received any communication from anyone complaining that anything in the news reports was inaccurate. (R. p. 418 line 7 to p. 419 line 3) Kelley testified that he did not return Wren's call because does not return Wren's telephone calls. Kelley did not deny that Wren had called him in

connection with the news reports on the campaign contributions. (R. p. 92 lines 10 to 24) In contrast, Kelley's witness Alan Clemmons, a member of the General Assembly, said that if he saw something about him in a newspaper that he didn't like his first call would be to the person who wrote the article "to make sure they understood the facts." (R. p. 119 lines 8 to 14)

Over the objection of Wren and the newspaper, Dr. William E. Lee was qualified as an expert witness to testify to the following:

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 getting—going past the line put down by the U. S. Supreme Court in New York Times v. Sullivan. If you report something with knowledge that it is false or with a reckless disregard as to whether it is true or not. (R. p. 290 line 24 to p. 291 line 7)

Notwithstanding the objection that this testimony would introduce irrelevant standard of care issues into an actual malice case, the expert was allowed to testify that "the Sun News did not act the way professional news organizations act in these circumstances," (R. p. 321 lines 21 to 23) that Wren wasn't careful, (R. p. 338 lines 13 and 14) and that the newspaper deviated from standards. (R. p. 351 line 18 to p. 352 line 4)

STANDARD OF REVIEW

In this case, where the constitutional guarantee of a free press found in the First and Fourteenth Amendments to the United States Constitution is asserted, this court must undertake an independent review of the entire record "to assure...that the judgment does not constitute a forbidden intrusion on the field of free expression." *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed2d 697 (1963), cited in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508, 104 S.Ct. 1949, 1964, 80 L.Ed.2d 502 (1984). This independent,

plenary review is conducted "to preserve the precious liberties established and ordained by the Constitution." *Bose Corp.*, *supra* 466 U.S. 485, 511.

As the United States Supreme Court explained in *Bose Corp.*, *supra*, the determination of constitutional malice in a public plaintiff libel case is not solely a question for the trier of fact, stating:

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 proof of "actual malice."

Bose Corp., *supra*, 466 U.S. 485, 511.

The Supreme Court of South Carolina has applied the standard demanded of the Constitution requiring a full and independent review of the record on the issue of actual malice, stating:

When reviewing an actual malice determination, this Court is obligated to independently examine the entire record to determine whether the evidence sufficiently supports a finding of actual malice. *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996).

Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899, 902 (2000).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT OF FACT WAS PUBLISHED BY APPELLANTS CONCERNING THE PLAINTIFF.

In order to recover in this action, Kelley had the burden of proving publication by Wren and the newspaper of a false and defamatory statement of fact concerning him. *Milkovich v.*

Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed. 1 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986). The evidence introduced in this action was plainly insufficient with respect to this basic element of Kelley's libel claim.

Kelley's Second Amended Complaint alleges that the defamation consisted of the accusation that Kelley delivered \$84,000 of campaign contributions to Barrett. (R. pp. 15-18, ¶¶ 5, 17, 29 and 41) The specific language objected to by Kelley is found in the news report under the headline "Bad debt adds to donor mystery" which states:

Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June. Those contributions included a \$3,500 cashier's check from Garden City Partners.

(R. p. 639)

Under South Carolina law, falsity of a publication cannot be established with reference to isolated passages in a publication, but must be established by reference to the entire publication. *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968). The language complained of by Kelley is followed by language in the same news report which states that it was Dean who delivered the contributions to Barrett:

Last week, Dean said he delivered contributions to Barrett and state Sen. Ray Cleary, R-Murrells Inlet. Dean previously has distanced himself from the political donations.

(R. p. 639)

Kelley's effort to establish the falsity of one paragraph in Exhibit 2 is further undermined by other publications introduced into evidence by Kelley. Exhibit 1 is a news report with the headline, "Dean handed over envelope of \$84,000." That same publication quoted Hazelwood

saying Kelley's presence when the contributions were passed was not illegal. (R. p. 638)

Plaintiff's Exhibit 7, a news report with the headline, "FBI, IRS probe donors" states:

Those checks were among campaign donations that Brad Dean, the president of the chamber of commerce, delivered to Barrett during a lunch meeting last summer.

Mark Kelley, the chamber's lobbyist, also attended that meeting.

(R. p. 646)

Kelley did not meet his burden of proving the falsity of the publications of which he complains, to wit: that he delivered \$84,000 in campaign contributions, because the publications taken as a whole state clearly and accurately that while Kelley attended the luncheon with Dean and Barrett, it was Dean who delivered the contributions.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE IN THAT THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

Even if it could be assumed, *arguendo*, that the statement, "Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June" contained a false and defamatory statement of fact of and concerning Kelley, as a matter of law, he was not entitled to recovery of damages since there was no clear and convincing evidence that the false and defamatory statement of fact was made with constitutional actual malice.

The claim in this case rests upon a contention of defamation arising from a news report on the conduct of Kelley as a public figure and is thus subject to the protection of the free press under the First and Fourteenth Amendments of the United States Constitution as set forth in *New York Times Co. v. Sullivan*, 376 U.S. 254, 259, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964):

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he

proves that the statement was made with “actual malice”—that is, with knowledge that it was false or with reckless disregard of whether it was false or not....

This “federal rule” prohibiting recovery of damages for a defamatory falsehood has been extended beyond public officials to public figures, with public figures required to prove “actual malice” as defined in *New York Times Co. v. Sullivan*, *supra*. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The court ruled Kelley was a public figure; therefore, his proof was required to meet the constitutional actual malice threshold, and this he failed to do.

The Supreme Court of South Carolina has explained fully the actual malice requirement in *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000), by describing what must be shown and what is irrelevant:

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 (1996). 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 Time Co. v. Sullivan*, *supra*; *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, 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, 13 L.Ed.2d 125 (1964) (emphasis supplied [by court]).

Elder v. Gaffney Ledger, *supra*, 533 S.E.2d 899, 902.

Kelley and his witnesses testified that the sentence “Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June” meant that Dean

and Kelley had delivered the money. (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) Wren testified that the prepositional phrase, set off from the subject of the sentence and the verb by commas, was to indicate that Kelley was “along with Dean when Dean delivered the contributions.” (R. p. 408 line 15 to p. 409 line 13) Wren’s explanation of the structure of the sentence was corroborated by Patricia O’Connor who was Wren’s editor at the time of the publications. Her testimony was that the parenthetical, “along with” meant that Kelley was in the company of Dean when Dean transferred the money to Barrett, not that Dean and Kelley passed the money. (R. p. 481 line 15 to p. 482 line 6)

Kelley, who acknowledged in an email to the superintendent of Horry County Schools that “Spelling and grammar are some of my weak points,” (R. p. 710; p. 264 lines 19 to 25) was not deterred from testifying as to what he thought Wren meant when he wrote, “Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions....” Kelley’s witnesses also said Wren said Dean and Kelley delivered the contributions. This testimony does not constitute clear and convincing proof of actual malice because it does not establish that Wren had substantial doubt about the accuracy of what he wrote as compared to what Kelley and his witness thought had been written. The Supreme Court of the United States explained the distinction in discussing the choice of language by a writer whose choice of “about the room” rather than “along the wall” in a product review of a speaker was the basis of a libel claim by a plaintiff which was required to prove actual malice:

Aside from Seligson’s [the author] vain attempt to defend his statement as a precise description of the nature of the sound movement, the only evidence of actual malice on which the District Court relied was the fact that the statement was an inaccurate description of what Seligson had actually perceived. Seligson of course had insisted “I know what I heard.” The trial

court took him at his word, and reasoned that since he did know what he had heard, and he knew the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it. "Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves.*" *Time, Inc. v. Pape*, 401 U.S., at 285, 91 S.Ct., at 637 [citation omitted]. Here, however, adoption of the language chosen was "one of a number of possible rational interpretations" of an event "that bristled with ambiguities" and descriptive challenges for the writer. *Time, Inc. v. Pape, supra*, 401 U.S., at 290, 91 S.Ct., at 639. 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.

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512, 104 S.Ct. 1949, 1966, 80 L.Ed.2d 502 (1984).

The evidence established beyond any doubt that Dean, Kelley and Barrett were at a luncheon meeting, sitting at the same table, when Dean passed an envelope with \$84,000 in campaign contributions to Barrett. Even if "along with" was an inaccurate choice of phrase by Wren, it is not an inaccuracy that establishes actual malice as the United States Supreme Court has stated on many occasions and forcefully in *Bose*:

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, 91 S.Ct., at 640. "Realistically, ... some error is inevitable; and the difficulties of separating fact from fiction convinced the court in *New York Times, Butts, Gertz*, and other 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. Landó*, 441 U.S. 153, 171-172, 99 S.Ct. 1635, 1646-1647, 60 L.Ed2d 115 (1979). "[E]rroneous statement is inevitable in free debate, and ... must be protected if the freedoms of expression are to have the 'breathing space' that

they 'need ... to survive.'" *New York Times Co. v. Sullivan*, 376 U.S., at 271-272, 84 S.Ct., at 721-722 (citation omitted).

Kelley offered no proof that Wren and the newspaper shared his and his witnesses' interpretation of the language chosen by Wren to reflect that Kelley was sitting with Dean when money was passed, and without such proof the trial court allowed liability to be imposed not for what was written, but for what was not intended to be written by Wren. *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), cert. denied, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 152 (1991). Since the actual malice rule required Kelley to demonstrate by clear and convincing evidence that Wren had a "high degree of awareness of ... probable falsity" in what he wrote, and since the record establishes without challenge that Wren had no doubt about the choice of language reflecting in his mind that Kelley was accompanying Dean when the money was delivered, and not that Kelley was involved in the delivery of the money, Kelley failed to meet his burden of proof on actual malice.

If there was error in what Wren had written, and as discussed above, that was not proven by Kelley, Kelley's first remedy was self-help as the United States Supreme Court explained in *Gertz, supra*, 418 U.S. 323, 344, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974):

The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

Kelley, as he testified, never contacted Wren to challenge the publications until he filed his suit nearly two years after the publications. The actual malice rule was adopted to make it more difficult for public plaintiffs to recover in libel actions because such plaintiffs had greater opportunities for self-help, and the United States Supreme Court has stated because of this

greater opportunity, “[T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.” *Gertz, supra*, 418 U.S. 323, 345, 94 S.Ct. 2997, 3010, 41 L.Ed.2d 789 (1974). This assumption presupposes that a public plaintiff would act as Kelley’s witness Alan Clemmons said he would act, by calling the person responsible for the publication he considered in error. (R. p. 119 lines 8 to 14) Kelley chose not to avail himself of the opportunity the Supreme Court has identified as the substitute for damages.

III. THE TRIAL COURT’S ADMISSION OF TESTIMONY FROM AN EXPERT WITNESS RELATING TO THE STANDARDS OF PROFESSIONAL JOURNALISM CONSTITUTED PREJUDICIAL ERROR REQUIRING A NEW TRIAL.

Over the objection of Wren and the newspaper, the trial court qualified Dr. William Lee as an expert witness to give testimony on standards of journalism to be followed by responsible publishers:

Q: With regards to your expected testimony so His Honor will be able to make a correct ruling, what is the area you intend to testify to?

A: The testimony would focus on whether The Sun News, David Wren and the editor acted in accordance with standards that would be followed by a responsible publisher.

(R. p. 282 lines 14-19)

The Supreme Court of South Carolina in its opinion in *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 211, 478 S.E.2d 282 (1996), cert. denied, 520 U.S. 1275, 117 S.Ct. 2455, 138 L.Ed.2d 212 (1997), involving an action for defamation by a public figure, included a statement of the “professional standards rule,” stating that “to establish recklessness, there must be an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers,” but departure from professional standards has never been the measure of

actual malice established by the United States Supreme Court. The language in *Peeler* is taken from a plurality opinion of the United States Supreme Court in *Curtis Publishing Co. v. Butts*, *supra*; however, “this proposed standard was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule.” *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989). More than an extreme departure from professional standards or an examination of the motivation of the publisher must be shown to establish actual malice as the United States Supreme Court said in *Harte-Hanks*, *supra*:

[A] public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper’s motive in publishing a story—whether to promote an opponent’s candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice.

Harte-Hanks, *supra*, 491 U.S. 657, 665, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562.

Clearly, the admission of expert testimony on professional standards of journalism was in error as it provided testimony that did not constitute a part of the actual malice standard. The policies of the newspaper were offered to demonstrate that a departure from those policies constituted actual malice, when, if the policies would ever be relevant, it would be to establish negligence, not actual malice. *Madison by Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006). The admission of this expert testimony allowed Kelley to recover on a showing much less rigorous than the constitutional actual malice standard required for public figure plaintiffs.

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANTS A NEW TRIAL IN THAT THE AWARD OF DAMAGES IS SO GROSSLY EXCESSIVE THAT IT INDICATES THE JURY WAS MOTIVATED BY PASSION, CAPRICE, PREJUDICE OR OTHER CONSIDERATION NOT FOUNDED IN THE EVIDENCE.

Kelley's evidence established that he remained a lobbyist for numerous public and private clients, that an \$18,000 pay raise had been delayed two years, but was awarded in full in recognition of his outstanding lobbying work for Coastal Carolina University. (R. p. 213 line 15 to p. 215 line 24) Kelley testified that his lobbying firm had fewer clients following the death of one of his partners and the publications of which he complains, but he could not apportion the cause of the loss of clients or attribute it to the publications. (R. p. 254 line 11 to p. 255 line 14; p. 265 lines 11-12) Significantly, no dollar value was assigned to the loss of clients. One of Kelley's witnesses testified that he told a firm that had inquired about using Kelley as a lobbyist that Kelley was "toxic." (R. p. 128 line 9 to p. 129 line 24) Kelley chooses to blame his not being hired by that firm on the publications rather than the "recommendation" provided by a friend. For these injuries the jury awarded Kelley \$400,000 actual damages and \$250,000 punitive damages. These awards are so grossly excessive and so disproportionate to Kelley's injuries that they indicate the jury acted arbitrarily and out of passion, caprice, prejudice or some other considerations not founded on the evidence. In such circumstances, 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).

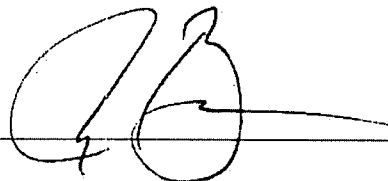
V. THE PUNITIVE DAMAGE AWARD IS IN VIOLATION OF THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRING A NEW TRIAL.

The award of punitive damages against Wren and the newspaper is inconsistent with the First and Fourteenth Amendment protection for a free press in that such awards serve only to

punish speech the jury does not like which will promote self-censorship and diminish the flow of information to the public on matters of public interest such as the campaign financing activities disclosed by Wren and the newspaper. *Gertz v. Robert Welch, Inc., supra*; *New York Times v. Sullivan, supra*. A new trial should have been ordered. *Holtzschietter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998).

CONCLUSION

For the foregoing reasons and upon the foregoing authorities, Wren and the newspaper submit that the judgment of the circuit court should be reversed and judgment entered for them or the case remanded for a new trial.



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January 28, 2015

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
Civil Case No. 2012-CP-26-3804

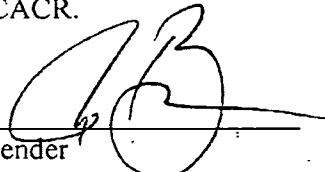
Mark Kelley,.....Respondent.

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the final briefs of appellants comply with Rule
211(b), SCACR.



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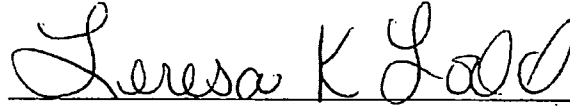
v.

Mark Kelley,.....Respondents.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant's Final Brief, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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A handwritten signature in cursive script, reading "Teresa K Todd", written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Mark Kelley, ... Respondent,

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. WAS THERE EVIDENCE THAT THE APPELLANTS PUBLISHED A FALSE AND DEFAMATORY STATEMENT OF FACT OF AND CONCERNING THE RESPONDENT.
- II. WAS THERE CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.
- III. DID THE TRIAL COURT ERR IN ALLOWING TESTIMONY OF AN EXPERT WITNESS ON ISSUE OF ACTUAL MALICE AS IT RELATED TO PROPER METHODS OF INVESTIGATIVE JOURNALISM?
- IV. DID THE EVIDENCE SUPPORT THE JURY'S AWARD OF ACTUAL DAMAGES?
- V. IS THERE A BAR TO AWARDED PUNITIVE DAMAGES AGAINST A MEDIA DEFENDANT IF THE REQUISITE CONSTITUTIONAL STANDARD FOR PUBLIC OFFICIALS OR FIGURES IS MET.

STATEMENT OF THE CASE

Respondent adopts Appellants' Statement of the Case.

STATEMENT OF THE FACTS

Respondent, Mark Kelley (Kelley), became a lobbyist in 2003 (R. p. 70, lines 8-9), one year after retiring from the South Carolina House of Representatives in 2002 where he served from 1992 to 2002. (R. p. 70, lines 16-21). Kelley's retirement from the legislature was voluntary because he wanted to get back to his personal private life and spend more time with his family. (R. p. 71, line 22 to p. 79, line 15). In 2010, his clients were Coastal Carolina University, Horry County Schools, Grand Strand Business Alliance, Alltel, Progress Energy, Waste Management Systems, Greenville Hospital System, GlaxoSmithKline and others. (R. p. 73, lines 18-24). Kelley had worked

untiringly to establish an impeccable reputation as a lobbyist who legislators could consult and obtain a clear and unbiased view of proposed legislation – a lobbyist who a legislator could rely upon and trust to give the pro's and con's of a proposed bill. (R. p. 114, lines 6-20; R. p. 115, line 21 to p. 116, line 10).

While in the South Carolina House of Representatives, Kelley served on many committees, including being elected by his fellow legislators to the Ethics Committee. (R. p. 70, line 23 to p. 71, line 17). He was instrumental in the passage of the present ethics law (R. p. 71, lines 14-15; p. 85, lines 2-4) and, as such, was very familiar with its requirements. He was well respected among his peers and his constituency and was never defeated in any election for the House seat he held for 10 years.

After his retirement from the legislature, Kelley worked tirelessly for his clients as a lobbyist and kept out of the public light because he felt that to be an effective lobbyist, he had to avoid any publicity. (R. p. 72, lines 18-24).

Kelley was successful in avoiding any publicity for himself and his clients until 2010, an election year when four (4) candidates for Governor were running in the Republican primary: Gresham Barrett, Nikki Haley, Henry McMaster, and Andre Bauer.

In June 2009, Brad Dean, President of the Myrtle Beach Chamber of Commerce, arranged a luncheon with Gresham Barrett at Sid & Roy's Restaurant in Myrtle Beach for June 20, 2009. Brad Dean, being a friend of Kelley, knew that Barrett was a friend of Kelley and that they had served in the South Carolina House of Representatives together. Dean called Kelley and invited him to the luncheon which Kelley accepted because he wanted to see his friend.

Gresham Barrett, after receiving Dean's luncheon invitation, issued an email on June 15, 2009, to three (3) members of his campaign staff advising them where he would be on Saturday, June 20, 2009. (R. p. 652, Pl. Ex. 10). One of Barrett's campaign staff members was a man named Justin Stokes (Stokes). Stokes later left the Barrett campaign after having two mental breakdowns and joined the Nikki Haley campaign as a campaign staffer. (R. p. 175, line 16 to p. 177, line 1). When Stokes left the Barrett Campaign, he took copies of emails with him from the Barrett campaign and gave them to Nikki Haley's campaign manager, Tim Pearson. While working for the Haley campaign, Stokes, along with Tim Pearson (Haley's campaign manager), began sending emails to the Appellant, David Wren (Wren), an investigative reporter for the Appellant, Sun Publishing Company, Inc. (The Sun News). (R. p. 652, Pl. Ex. 10; p. 690, Pl. Ex. 15).

Wren was working on a story concerning campaign donations from several LLC's in Myrtle Beach to various candidates for state office, including but not limited to Gresham Barrett and was trying to determine who was behind the donations.

When Kelley attended the luncheon on Saturday, June 20, 2009, in attendance were Gresham Barrett, Brad Dean and Drea Byers, a campaign consultant to Barrett. (R. p. 81, lines 13-16). Kelley was seated with Brad Dean to his left, Barrett to his right and Byers across the table. (R. p. 82, lines 2-7). During the luncheon, Brad Dean handed an envelope containing campaign donations across the table to Barrett who handed it to Byers. (R. p. 83, lines 3-5). Kelley had no prior knowledge that campaign donations would be given. (R. p. 80, lines 9-11). Kelley did not touch the envelope or look inside the envelope. (R. p. 82, line 21 to p. 83, line 7; p. 83, lines 9-10).

Moreover, Kelley had no knowledge as to the source of the donations or the amount. (R. p. 80, lines 12-14). After the envelope was passed from Dean to Barrett, the parties discussed their families and discussed what each had been doing since they had last seen each other. (R. p. 83, lines 14-21). They finished their lunch, said their goodbyes and departed Sid & Roy's. (R. p. 83, line 24 to p. 84, line 5). Kelley thought no more of the luncheon meeting with his friends until he began to read his name in several news articles, beginning almost a year later on May 21, 2010, shortly before the Republican Primary. The articles were written by Wren, several of which accused Kelley of a crime.

The first Article was Plaintiff's Exhibit 1 (R. p. 638). In that Friday, May 21, 2010 article, entitled "Dean handed over envelope of \$84,000", Wren described the delivery of the money to Barrett during a meeting arranged by Dean "last year." In mentioning Kelley's name, the article specifically stated:

Mark Kelley, a lobbyist for the chamber of commerce, also attended that meeting, according to Barrett. Kelley did not return a telephone call Thursday.

There are strict rules that forbid lobbyists from facilitating campaign donation for statewide candidates; however, 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 Hazelwood, the commission's general counsel. "He [Kelley] is not supposed to touch the envelope or hand over the envelope."

Kelley testified that he was not the lobbyist for the Myrtle Beach Chamber of Commerce. (R. p. 75, lines 14-20).

The next article was dated Sunday, May 23, 2010, and was entitled "Bad debt adds to donor mystery." (R. p. 639, Pl. Ex. 2). Kelley complains that this article accuses

him of a crime in violation of the South Carolina Ethics Law, S.C. Code of Laws, § 2-17-80 which prohibits a lobbyist from offering, soliciting, facilitating, or providing to any statewide officer holder or candidate for said office any contributions, lodging, transportation, entertainment, food, meals, beverages, money or any other thing of value.

The article, in mentioning Kelley, stated as follows:

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

The next article, which Kelley maintains defamed him, was an article dated Tuesday, May 25, 2010 (R. p. 641, Pl. Ex. 4) and entitled "Donations Tied to MB Chamber Blasted". The language of the article quotes Robert Kelley, president of a political group called BOOST (Business Owners Organized to Support Tourism):

In the past, the chamber has denied any involvement in this 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, said Robert Kelley, who is not related to the lobbyist.

The next article of which Kelley complained was actually an editorial entitled "Absence of Evidence" which was published Sunday, May 30, 2010. (R. pp. 642-643, Pl. Ex. 5). The entire editorial is a discussion of the absence of evidence the newspaper has against Kelley, Dean, Barrett and others. It tacitly admits accusations against Kelley, Dean, and Barrett were and are unsupported by any evidence but implies that they are guilty "no matter what the un-provable truth is". It also states that "there is no evidence disproving this statement [by Dean], but the circumstances make it difficult to believe."

The language Kelley complains is as follows:

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.) (R. pp. 642-643, Pl. Ex. 5).

In order to prove Wren's subjective state of mind when writing the articles, Kelley introduced several of Wren's emails (R. pp. 652-661, Pl. Exs. 10, 11; pp. 670-680, Pl. Exs. 13A, 13B, 13C, 13D, 13E, 13F, 13G, 13H; p. 690, Pl. Ex. 15) which showed that Wren sought evidence to show Kelley had violated the above-cited section of the South Carolina Ethics statute. The time line of the emails *vis a vis* the dates of the articles written by Wren is very revealing.

On May 3, 2010, at 2:14 p.m., Wren wrote an email to Tracy Edge with the subject line of "I called Trey Walker and he denied knowing anything about it." Trey Walker was identified as the campaign manager for Henry McMaster, candidate for governor. Evidently, Wren communicated with Edge about the donations from the LLC's and Edge told Wren to call Walker. After talking with Walker, Wren wrote Edge back:

I told him we had talked about the chamber of commerce checks and he flat out denied ever saying anything to you and I asked him if he was working with John O'Connor at The State and he denied that as well. I wonder what's up? (R. p. 660, Pl. Ex. 10).

After getting an email from Edge asking if Walker had mentioned Edge in the conversation, Wren wrote Edge another email at 2:30 p.m. on May 3, 2010, stating, in part, the following:

Yeah, you told me it would be ok if I mentioned we had talked so I told him 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*. (Emphasis added). (R. p. 659, Pl. Ex. 10).

The same email ended up with the following revealing verbiage:

.....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.* (Emphasis added). (R. p. 659, Pl. Ex. 10).

Thereafter, Wren contacted Tim Pearson, Nikki Haley's campaign manager, concerning his investigation into the campaign donation to Barrett. Wren produced an email dated Wednesday, May 19, 2010, from Tim Pearson which forwarded the email of June 15, 2009, from Barrett to Stokes and other campaign staffers about the June 20, 2010, luncheon at Sid & Roy's. (R. pp. 652-654; Pl. Ex. 10). By May 19, 2010, Stokes had already left Barrett's campaign and gone to Nikki Haley's campaign and turned over emails he kept from the Barrett campaign to Haley's campaign manager, Tim Pearson.

On Thursday, May 20, 2009, at 9:02 a.m. (the day before the first article mentioning Kelley's name), Pearson emailed Wren and told him, "maybe go ask Gresham directly who gave him the money." (R. p. 652, Pl. Ex. 10). Pearson also sent Wren a link to an internet site announcing that Barrett was to "make a major announcement in Myrtle Beach Thursday".

At 10:34 a.m., Thursday, May 19, 2010, Wren wrote Eddie Dyer, attorney for Coastal Carolina University, requesting the "lobbying contract" with Mark Kelley to lobby federal legislators as well as state legislators. (R. pp. 673-674, Pl. Ex. 13C). At 12:52 p.m., Mr. Dyer responded by stating, in part, that the Nelson Mullins Law Firm performed the federal lobbying for CCU and that Mark Kelley was actually paid as a CCU employee and there was no contract between CCU and Kelley or his firm, KSMO. This was confirmed by Martha Hunn, CCU's director of news and public affairs, by her email of 1:37 p.m. that same day. (R. pp. 673-674, Pl. Ex. 13C).

That same day, Wren received an email from Justin Stokes at 4:29 p.m. revealing that Wren was asking Stokes for either confirmation or documentation that Kelley had “set up the meeting”:

Any luck? Looking for any other emails now. *But I don't think I don't think I have anything documenting.* Will keep thinking *how else to document he set up the meeting.* (Emphasis added). (R. p. 690, Pl. Ex. 15).

The above emails were one to two days before the first article of May 21, 2010, and show the subjective state of mind of Wren in his investigative reporting. Wren testified that he actually wrote the May 23, 2010 article on Thursday (May 20, 2010) or Friday (May 21, 2010). When asked if he had stated in his deposition if he had written the May 23rd article at the early part of the week, he said, “I don’t recall”. (R. p. 449, lines 7-17).

The subjective state of mind of Wren became crystal clear in the following email dated Sunday, May 23, 2010, at 10:15 a.m. from Wren to Stokes and Pearson in which he forwarded links to the May 21 and May 23, 2010 articles and stated, in pertinent part, as follows:

I wanted to pass along links to a couple of articles that have been published in The Sun News over the past few days and see if you can help me unravel this mystery a little more.....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 *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.

I’m trying to piece together who raised all the money, how they were funneled through the various LLCs and why and why the chamber picked Barrett as the candidate they were going to endorse (could it be anything besides the fact that Kelley is the chamber lobbyist and a big supporter of Barrett?)

Any help or insight you can give me would be appreciated. Also, if there are *any e-mails or documents that show ... Kelley's role in setting up the Barrett meeting* would be a great help. Thanks again. The links to the stories are below. (Emphasis added). (R. p. 661, Pl. Ex. 11).

Four days later on Thursday, May 27, 2010, at 9:57 a.m., Wren again revealed his subjective mindset in the following email from Wren to Tim Pearson:

I wanted to check back with you and see if there is any way that we can use the e-mails from Barrett's campaign that seem to *show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others*. I can definitely protect the source of the e-mails but would say something to the effect that they came from the Barrett campaign after the AP started asking questions in October. Recent events have overshadowed the campaign funding issue and I'm looking for ways to move that story forward. (Emphasis added). (R. p. 677, Pl. Ex. 13E).

Finally, the following email from Wren to Brad Dean on Wednesday, July 28, 2010, at 5:38 p.m. shows that Wren knew he had no evidence that Kelley raised money for candidates or in Barrett's campaign when he wrote his articles of May 21, 23 and 25, 2010:

Why would Mark Kelley be familiar with contributions and their funding source? *Did Mark Kelley play any role in raising money for candidates or in Barrett's campaign?* (Emphasis added). (R. p. 670, Pl. Ex. 13A).

Wren testified that his articles were reviewed and approved by the editor of The Sun News before they are published and that he was acting as the agent for The Sun News and within the scope of his authority. (R. p. 436, lines 5-24; p. 437, lines 6-19).

At trial, Wren admitted that his investigation revealed Kelley had nothing to do with the LLCs or the money allegedly coming from the LLCs (R. p. 439, lines, 19-23). Wren also admitted that he no evidence of Kelley setting up the meeting with Barrett. (R. p. 439, line 24 to p. 440, line 4).

Wren also admitted that no one told him by email, by telephone, by letter, or by whatever method that Kelley set up the meeting, raised the money or handed the campaign donations to either Barrett or anyone. (R. p. 451, line 23 to p. 452, line 13).

Kelley produced six (6) witnesses, all of whom testified that the complained of articles led them to believe that the Appellants accused Kelley of the crime of violating the South Carolina Ethics Law by setting up a meeting and delivering campaign contributions to Barrett. They also understood that the editorial of The Sun News on May 30, 2010, as stating that their reporter, Wren, had no evidence of Kelley committing the crime above stated but that Barrett and Dean were lying and stated that it was an “unprovable truth” that Kelley was guilty of violating the Ethics Law.

Kelley called an expert witness, William E. Lee, who taught and trained investigative journalist for many years (R. p. 302, lines 5-10) and co-authored a text book, which was in its ninth edition, used in the College of Journalism where he taught at the University of Georgia, as well as in a hundred other colleges and universities throughout the United States. (R. p. 302, lines 11-25). He had been an expert in about twenty-eight (28) cases and qualified as an expert in the Federal Courts of New York; Chicago, Illinois; St. Paul, Missouri; Kansas City, Missouri; Sacramento, California; and four courts in the state of Georgia. (R. p. 308, lines 14-25).

Lee testified that Wren had no evidence that Kelley set up the meeting with Barrett or handed him the campaign donations. (R. p. 333, lines 5-14) To the contrary, he had evidence from three sources that told him Kelley was not involved in setting up the meeting or giving the campaign donations. (R. p. 333, lines 5-15). He opined that the above information would give Wren knowledge that Kelley had nothing to do with

setting up the meeting or giving campaign donations to Barrett. (R. p. 333, lines 15-22). Lee asserted that Wren should have looked carefully and with skepticism at Stokes and Pearson as reliable sources because they were in an opposing campaign camp, especially since Wren wrote in his email that all campaign managers have no ethics. (R. p. 338, lines 1-14). He also stated that the articles accused Kelley of setting up the meeting and giving Barrett campaign donations and that Wren had no basis for making that claim because Wren's sources were suspect, Wren had no documentation to prove the accusation made against Kelley, and Wren knew that it was false. (R. p. 349, lines 1-19). Lee confirmed that the facts revealed that Wren knew there was no evidence from any source against Kelley, but Wren wrote the article of May 23rd anyway accusing him of a crime with a reckless disregard as to whether it was true or false. (R. p. 356, lines 2-8). Lee also stated that Wren's one call to Kelley was inadequate when accusing someone of a crime, i.e., Wren should have sent an email to Kelley, made a follow-up phone call, or met Kelley in person. Lee pointed out that Wren's editor, O'Connor, admitted in her deposition that one phone call by Wren to Kelley was probably inadequate. (R. p. 323, lines 1-7).

The only witnesses called by the Appellants were Wren, the reporter, and Patricia O'Connor, the editor. Appellants produced no witness to agree with their position that the articles written about Kelley meant that he was just sitting beside Dean when the donations were given to Barrett. None of the sources relied upon by the Appellants were called as witnesses.

The jury charges by Judge Hyman were thorough and the Plaintiff was required to prove *all elements of the tort of defamation/libel by clear and convincing evidence*. The

forms of verdict as to both actual and punitive damages required that the jury find for the Plaintiff only if he proved each element of his case by clear and convincing evidence. The form of the actual damage verdict also required that the jury find for the Plaintiff only if he proved by clear and convincing evidence that the “statement was published with actual malice, i.e., the statement was made with knowledge of its falsity or reckless disregard of its truth or falsity”. The charges to the jury and the forms of the verdict complied with the requirement that the Plaintiff prove “constitutional actual malice” as set forth in New York Times v. Sullivan, 376 U.S. 293, 84 S.Ct. 733, and its progeny.

After approximately 4 hours of deliberation the jury returned a verdict for Kelley in the amount of \$400,000 actual damages. The Trial Judge then charged the jury on the issue of punitive damages and the jury brought in a verdict of \$250,000 punitive damages. Implicit in the jury’s verdict was the fact that the jury did not believe Wren’s and O’Connor’s explanation that the news articles did not accuse Kelley of a crime – a question of Appellants’ credibility was decided adverse to them. Also implicit in the jury’s verdict was the fact that they determined Kelley had met his burden of proof on all elements by clear and convincing evidence and that the articles were printed with “constitutional actual malice”, i.e., that the articles were printed with knowledge of their falsity or with a reckless disregard as to whether they were true or false.

STANDARD OF REVIEW

Appellants’ statement of the standard of review set forth in Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) and cited in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) is correct, as far as it goes; however, “the constitutionally based rule of independent

review” does not mean that the appellate court disregard credibility determinations of the trier of fact. Bose Corp., supra. at 499–500, 104 S.Ct. 1949; Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562 (1989) (appellate court should not disregard a jury's opportunity to observe live testimony and assess witness credibility). Deference to factual determinations that turn on credibility assessment is essential to jurisprudence because of the fact finder's unique opportunity to observe and weigh witness testimony. Harte-Hanks, 491 U.S. 688, 109 S.Ct. 2678; Newton v. Nat'l Broad. Co., 930 F.2d 662, 670–71 (9th Cir.1990).

Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966), Curtis Publishing Co. v. The Associated Press, 388 U.S. 130, 87 S.Ct. (1975), Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). The First Amendment does not accord absolute privilege to editorial process of a media defendant in a libel case brought by a public figure or public official who has burden of proving that damaging falsehood was published with “actual malice.” Herbert v. Lando, supra. Spreading false information in and of itself carries no First Amendment credentials. Herbert v. Lando, supra.

Although affirming the doctrine announced in New York Times v. Sullivan, supra. and its progeny, the U.S. Supreme Court stated in Herbert v. Lando, supra., “At the same time, however, the Court has reiterated its conviction - reflected in the laws of defamation of all of the States - that the individual's interest in his reputation is also a basic concern.” *Id.*, at 455-457, 96 S.Ct., at 966; Gertz v. Robert Welch, Inc., 418 U.S.

348-349, 94 S.Ct. 3011. Therefore, the Plaintiff in Herbert was entitled to obtain evidence which showed the subjective state of mind of the reporter and publisher.

This is exactly what Respondent did in this case by obtaining through discovery emails from and to the reporter, Wren, which (to Wren's dismay) revealed that the phrase which he now claims is an innocuous misprint or mistake was intended to accuse Respondent of a crime. His emails proved his state of mind that he sought evidence to accuse Respondent of a crime and they also proved that he knew the accusations were false and/or he wrote them with a reckless disregard for its truth or falsity because he never obtained the evidence. It also proved he had substantial doubts as the accusations truthfulness.

In determining the issue of actual malice within context of libel case involving public figure, de novo review conducted to ensure that district court applied properly governing constitutional law and that plaintiff did indeed satisfy burden of proof did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations, but rather was limited to review of ultimate conclusion of clear and convincing proof of actual malice. Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S. 907, 109 S. Ct. 257, 102 L. Ed. 2d 245 (1988) and judgment aff'd, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

The jury was in the best position to determine which testimony to believe and whether to accept Appellants' claims of good faith. The appellate court should defer to the jury's determination that Appellants were not credible when they claimed to have made their accusations in good faith. This, together with the Appellate Court's

independent review of the record should lead it to conclude that the jury was correct in finding there was clear and convincing evidence to support the inference of actual malice.

The Court in Harte-Hanks, *supra*, made the following statement which is particularly appropriate and germane to this case and the issue of appellate review:

Here, the issue of malice turns largely on the credibility of the witnesses, particularly of defendants. The jury was properly instructed on the requirement of actual malice and the ways in which it could be satisfied. The jury was told it may only find defamation in this case if the actual malice requirement was met. The question that the jury was required to answer was whether defendants were credible when they claimed they acted in good faith when they published the articles about the Plaintiff. Having had the opportunity to assess each witness' credibility, the jury was ideally suited to answer this question, and even when conducting an independent review, the appellate court must strongly defer to the jury's determinations of credibility. See Harte-Hanks, 491 U.S. at 688-89, 109 S.Ct. 2678; Newton, 930 F.2d at 670-71.¹

Therefore, in preparing to prove his case in light of the requirement on the Respondent to prove constitutional actual malice, Respondent deposed Wren at length and obtained his emails relating to the subject news articles. Respondent sought evidence which would reveal the state of mind of Wren because "the defendant's state of mind was of 'central importance' to the issue of malice in the case" and whether Wren "had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another."

¹ Recognizing the difficult position in which an Appellate Court is placed, the Ninth Circuit has noted the reviewing Court faces the "daunting task of reconciling our duty to respect the jury's fact-finding role with our duty to protect the values enshrined in the First Amendment" because the independent review standard and the clearly erroneous standard are in tension. Newton, 930 F.2d at 666. "[W]e must simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact." *Id.* at 670.

Apparently, Appellants are urging this Court to reverse the jury verdict and disregard the credibility issues in this case. To do so would usurp the Respondent's constitutional right to a jury trial which New York Times v. Sullivan, *supra*, and its progeny never intended.

Also the wide disparity between the proof of the Respondent and the Appellants in this case demonstrated with clarity that the jury verdict was firmly, if not exclusively, anchored in credibility evaluations and assessments.

From the jury's written answers to the special interrogatories attached to the verdict, the jury obviously elected to assign greater credibility to the Respondent and his witnesses and proof. In sum, the jury simply did not believe the Appellants' witnesses, its evidentiary presentations, or its arguments.

ARGUMENTS

I. THE TRIAL COURT PROPERLY DENIED THE APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOV BECAUSE THERE WAS EVIDENCE THAT THE APPELLANTS PUBLISHED A FALSE AND DEFAMATORY STATEMENT OF FACT OF AND CONCERNING THE RESPONDENT.

When deciding a motion for a directed verdict, the trial court "must view the evidence and all reasonable inferences in the light most favorable to the non-moving party." Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); *see* Bell v. Evening Post Pub. Co., 318 S.C. 558, 459 S.E.2d 315 (Ct.App. 1995). If the evidence presented yields only one inference such that the trial court may decide the issue as a matter of law, the decision to grant the motion is proper. *See Swinton*, 334 S.C. at 476, 514 S.E.2d at 130. On the other hand, a directed verdict

motion on liability for libel is properly denied where evidence exists justifying submitting the issue to the jury. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998).

The Appellants' assertion that the articles did not accuse Respondent of a crime was found to be incredible by the jury. When considering the alternatives facing the Appellants after the publications of Wren's articles, the Appellants took the only position it could in their attempt to escape liability for the defamatory articles – a position which asserted that only the Appellants could interpret the meaning of what was said in the articles. (R. p. 464, line 21 to p. 465, line 5) The absurdity of their explanation was obviously rejected by the jury and their asserted "English lesson" attempted in the courtroom was found to be laughable by the jury which obviously disregarded their explanation.

Since the jury obviously found that one or more of the articles accused Respondent of a crime, they had an easy "next step" to decide that the accusation was false since the Appellants testified they had no evidence showing Kelley either set up the meeting or delivered the donations to Barrett and its own editorial entitled "Absence of Evidence" shows that Appellants lacked proof. The next logical step in the jury's deliberation was to determine whether the defamatory statement was made by the Appellants. It was obviously published in The Sun News (which Appellants could not deny because the newspapers were in evidence).

The Appellants attempted to escape liability with its assertions that the Respondent took the articles out of context or singled out one paragraph of the entire

article. However, all articles read together, with the interpretation placed thereon by the editors, refute the Appellants' argument.

The entire thrust of Wren's investigative reporting was his veiled assertion that the donations coming from the LLCs did not accurately show who was making the donations and implied that the money came from the Chamber of Commerce from the one cent sales tax recently passed and that it was a kickback to legislators who supported the passage of the sales tax. It was obviously important for Wren to keep incorrectly stating that Respondent was the "Chamber" lobbyist when that was untrue. It was also important to Wren that his audience believe that Respondent was involved in the "donation" meeting in his capacity as the "Chamber" lobbyist because it shed light on his conspiracy theory of dark political donations, the kickback and money laundering referred to in The Sun News Editorial. Reading the articles as a whole, the jury did reasonably conclude that Wren accused Kelley of a crime in violation of the S.C. Ethics Law so he could, as he so conveniently stated to Haley's campaign manager, "keep his story moving forward." (R. p. 677, Pl. Ex. 13E). It was a question of fact for the jury, which prevented the trial judge from either directing a verdict for the Appellants or granting a judgment notwithstanding the verdict. Therefore, there was no error on the part of the trial judge in denying the Appellants' motions.

The jury found that at least one the above articles accused Respondent of a crime which made the statement libelous *per se* and consequently actionable *per se*. Since the jury found that Kelley was accused of a crime, it only had to determine whether the accusation of the crime was false. It obviously did so as shown in the jury's verdict. Wren testified several times during his testimony that he had no evidence that Kelley

either set up the meeting or gave the donations to Barrett. (R. p. 431, lines 5-20; p. 439, line 23 to p. 440, line 4).

Additionally, Wren's editor acknowledged by its editorial that they had no evidence that Kelley violated the ethics statute. The Sun News editor gave himself away in his editorial when he made the statement: "*As we now know*, based on David Wren's reporting....." If Wren's editor believed that Wren had not accused Respondent of a crime, he would most likely have said, "*As we have known all along*, based on David Wren's reporting." However, the editor gave himself away a second time in his editorial when he said: "(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 un-provable truth is.*")" (Emphasis added). The only logical explanation for the parenthetical phrase is that The Sun News and its reporter, Wren, were telling the public that Dean *and Kelley gave the donations to Barrett*, that Barrett is a liar because he is protecting Kelley when he says that only Dean gave him the donations, and that Kelley is therefore guilty of a crime but the Appellants don't have any evidence or proof. (R. p. 431, lines 5-20; p. 439, line 23--p. 440, line 4). The next paragraph attempts to refute Dean's statement that the donations came from LLCs and not from the Chamber of Commerce and effectively calls Dean a liar. Again, the Appellants say they have no proof but they certainly don't hesitate to call someone a liar when *they don't believe the people they interview*.

This is the exact type of journalistic tactics which defamation laws were enacted to prevent. The Appellants engaged in "bulverism" which is defined by competent journalists as the method of assuming something to be true (even though it is not) and

explaining how it happened or what should be done about it. Such journalist tactics was heavily criticized in Carson v Allied News Company, 529 F2d 206 (7th Cir 1976). The critical statement in Carson may be paraphrased and applied to the facts of this case as follows:

In the catalogue of responsibilities of journalists, right next to plagiarism must be a canon that a journalist does not invent evidence and attribute it innocent persons. If a writer can sit down in the quiet of his cubicle and create such evidence as 'a logical extension of what must have gone on' and dispense this as news, it is difficult to perceive what First Amendment protection such fiction can claim. In any event, St. Amant expressly gives as another example of reckless disregard for the truth any 'product of (one's) imagination.' 390 U.S. at 732, 88 S.Ct. 1323.

Because of both the completely fabricated accusations and the wholly imagined but supposedly precise evidence quoted by the Appellants, the Respondent was entitled to a jury's determination of whether actual malice existed.

Moreover, Appellants' argument overlooks the fact that the Trial Court only submitted three articles to the jury to determine whether one or more of the articles defamed Respondent. They were the article of May 21, 2010 (R. p. 638, Pl. Ex. 1); the article of May 23, 2010 (R. p. 639, Pl. Ex. 2), and the article of May 25, 2010. (R. p. 641, Pl. Ex. 4). Additionally, the forms of verdict submitted to the jury stated that the jury could return a verdict for the Plaintiff as to one or more of the three articles. Therefore, there is no way the Court can determine whether the verdict is based upon one, two, or all three articles. Since the Appellants agreed to the forms of the verdict, they cannot now complain for the first time on appeal.

This then brings us to the issues in Appellants' argument referring to articles which were not submitted to the jury. Articles in Plaintiff's Exhibits 6, 7, 8, and 9 (R. pp. 644-651) were not a part of the verdict form and therefore not considered by the jury in

its deliberation. The trial judge in submitting only the above three articles and the editorial to the jury in the form of the verdict, tacitly excluded all other articles from the jury's consideration. As such, Appellants' argument that the judge erred in failing to direct a verdict based on the contents of Plaintiff's Exhibits 6, 7, 8, 9 (R. pp. 644-651) would be an argument *dehors* the record and consequently improper.

Wren had numerous emails that evidence he had been told that Kelley was not involved with organizing, facilitating, calling, or arranging the meeting, or raising donations or handing the donations to Barrett. (R. p. 661, Pl. Ex. 11; p. 690, Pl. Ex. 15; p. 401, line 16 to p. 405, line 24; p. 431, lines 5-20; p. 439, line 23 to p. 440 line 4). Yet he refused to accept the fact that there was no evidence to "document he set up the meeting" (R. p. 661, Pl. Ex. 11; p. 690, Pl. Ex. 15) and created his own evidence of innuendo and unsupported implications. That is an impermissible violation of proper and professional journalism and one which New York Times v. Sullivan, *supra*. and St. Amant v. Thompson, *supra*, and their progeny provide no First Amendment protection.

For the above reasons, the trial court was correct in denying the Appellants' motions for directed verdict and judgment nov.

II. THE TRIAL COURT PROPERLY DENIED APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOV BECAUSE THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE PUBLICATIONS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

Appellants' entire argument is that only Wren knew what he meant when he published: "Dean, along with chamber lobbyist Mark Kelley, delivered those contributions to Barrett in June". (R. p. 464, line 21 to p. 465, line 5). That argument is

what Wren arrogantly asserted in his testimony at trial. (R. p. 464, line 21 to p. 465, line 5). After conceding that Appellants' witnesses, Alan Clemmons, Nelson Hardwick, George Hearn and William Lee, all understood that Wren's statement above accused Kelley of a crime, the following testimony took place during cross examination of Wren:

Q. Okay. Have you got anybody to come up here and testify besides yourself and your editor that you didn't accuse Mark Kelley of a crime when you wrote the articles?

A. I guess the best person to testify to that would be me and I can tell you I did not.

Q. The best person to testify to that is you?

A.. And I can tell you I did not accuse him of a crime. (R. p. 464, line 24 to p. 465, line 5).

This is also the argument of the Appellants in their brief. The fallacy of this type argument is obvious. If the only evidence to be considered on the subjective state of mind of the writer is the writer himself, there would never be a need for the jury and credibility issues would "fly out the window". The credibility of a publisher's reporter has always been of prime importance in a defamation case, even in a case of defamation against a public official or public figure – otherwise, the victim of the defamation would be deprived of his constitutional right to a trial by jury.

Logic and reason dictate that the *Bose* directed de novo review did not apply to preliminary, operative, or subsidiary factual determinations anchored in credibility determinations but rather was limited to a review of the ultimate conclusion of clear and convincing proof of actual malice. A contrary conclusion would usurp the role of the jury and burden the appellate courts with original jurisdiction in libel actions impinging a plaintiff's constitutional right to a jury trial. Connaughton v. Harte-Hanks Communications, Inc., *supra*, at 842.

Proof of actual malice requires the plaintiff to demonstrate, by clear and convincing evidence, that the publisher made the statements either knowingly or with

reckless disregard for their truth or falsity. George v. Fabri, 345 S.C. at 456, 548 S.E.2d at 876; Elder v. Gaffney Ledger, 341 S.C. at 114, 533 S.E.2d at 902. Clear and convincing evidence may be defined as “ ‘that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established’ ”. Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 269 n. 4, 478 S.E.2d 282, 286 n. 4 (1996) (citation omitted). It is an intermediate measure of proof, i.e., “ ‘more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal’ ”. *Id.*

Actual malice is “a *subjective* standard which tests the defendant's good faith belief in the truth of [its] statements.” George, 345 S.C. at 456, 548 S.E.2d at 876; *see* Peeler, 324 S.C. at 266, 478 S.E.2d at 284. Hence, absent proof of a knowing falsehood, the plaintiff must establish a defendant “ ‘in fact entertained serious doubts as to the truth of his publication’ ” or possessed a “ ‘high degree of awareness’ ” of probable falsity. George, 345 S.C. at 456, 548 S.E.2d at 876 (citations omitted); *see* Holtzscheiter, 332 S.C. at 512-13, 506 S.E.2d 503 (proving constitutional actual malice requires a showing that the publisher either “realized the statement was false” or “had serious reservations about its truth”). Recklessness presupposes “an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” Peeler, 324 S.C. at 266, 478 S.E.2d at 284.

It was obvious that Wren had serious doubts about Kelley facilitating, raising, or handing campaign donations to Barrett because all of Wren's so-called sources, even the obviously biased ones who worked for Haley's campaign, told Wren that Kelley did nothing or they knew nothing about Kelley having anything to do with the donations or

setting up the meeting. "Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the veracity of the informant."

Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653 (S.C. 2008).

Substantive evidence of Wren's subjective state of mind is clearly revealed in his emails between himself and his sources when he makes such statements as follows:

"I called Trey Walker and he denied knowing anything about it." (R. pp. 652-660, Pl. Ex. 10).

"Walker had some e-mails from the Barrett campaign that would show Mark Kelley distributed donations to him." (R. pp. 652-660, Pl. Ex.10).

"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. pp. 652-660, Pl. Ex. 10).

"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." (R. p. 661, Pl. Ex. 11).

"I asked B.J. Boling if Kelley had arranged the meeting and he quickly said, 'No, that would have been illegal.'" (R. p. 661, Pl. Ex. 11).

"if there are any e-mails or documents that show ... Kelley's role in setting up the Barrett meeting would be a great help." (R. p. 661, Pl. Ex. 11).

"I wanted to check back with you and see if there is any way that we can use the e-mails from Barrett's campaign that seem to show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others." (R. p. 677, Pl. Ex. 13E).

These emails were between Wren and a campaign manager and campaign staff worker of Haley and the campaign manager for McMaster, who Wren identified as his sources. They were obviously biased sources, all of whom advised Wren that they had no evidence that Kelley had anything to do with the campaign donations or setting up the meeting. Therefore, Wren could not have had a "good faith belief" that Kelley did

anything illegal. In fact, Wren had no evidence whatsoever that Kelley had anything to do with the LLCs, the origin or acquisition of the donations, facilitating the donations or any meeting concerning any political donations. In short, Kelley was completely outside of the subject of Wren's investigative reporting.

"The right of a free press is not absolute in a society that demands social responsibility and personal integrity..... In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information-the very concern our forefathers sought to eliminate in demanding the press be free." Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 629 S.E.2d 653 (S.C. 2008), *citing* Anderson, 365 S.C. 599-600, 619 S.E.2d at 433 (Burnett, J., concurring).

The First Amendment does not afford defamatory political speech absolute immunity. *See* George v. Fabri, 345 S.C. 440, 445, 548 S.E.2d 868, 876 (2001); Stevens v. Sun Publ'g Co., 270 S.C. 65, 71, 240 S.E.2d 812, 815 (1978) ("An individual's status as a public figure does not immunize a publisher from liability when it prints defamatory articles with malice."); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) ("We have not gone so far ... as to accord the press absolute immunity in its coverage of public figures or elections."). As the Supreme Court has stated:

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas..... Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Garrison v. Louisiana, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) (citation omitted); see Curtis Publ'g Co. v. Butts, 388 U.S. 130, 150, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) (“[T]hat dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others.”).

As stated above, the trial court was correct in denying the Appellants’ motions because, taking the evidence in a light most favorable to the Respondent (which the trial judge was required to do) and applying the standard of proof of actual malice by clear and convincing evidence, the court found that there was sufficient evidence thereof to submit to the jury.

There were also credibility issues which the court could not decide and which had to be submitted to the jury. As the Court stated in Anderson, supra. “Moreover, since ‘[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict,’ the evidence presented by Anderson is to be believed, and all justifiable inferences are to be drawn in his favor.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) (“[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.”).

Whether a plaintiff has presented evidence sufficient to constitute actual malice is, in the first instance, a question of law for the trial court. See Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899 (2000). That decision was made by the Trial Court at summary judgment, directed verdict, and judgment *nov* stages of the trial and each time it was decided in the Respondent's favor. The only thing left for determination was who was telling the truth and the Appellants lost on that ground. Since credibility issues are not subject to appellate review under New York Times v. Sullivan, *supra*, this Court should affirm the Trial Court's denial of Appellants' motions for directed verdict and Judgment *nov*.

The issue of "self-help" briefed by Appellants and citing Gertz is misplaced on the issue of constitutional actual malice. In the first place, the issue of self-help was only *dicta* and would only go to mitigation of damages if applicable. Moreover, Appellants fail to state the full test of the "self-help" issue discussed in Gertz which stated,

Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task.... See Mathers v. Bailey, 31 Media L. Rep. 2575 (2003) n.3.

All public figures are not the same and all public figures do not have the same access to public media to refute defamatory publications. There is no holding cited by the Appellants which make the issue of self-help a defense to a case of defamation.

Moreover, Respondent testified that he would not return Wren's calls because of past experiences with Wren who would not remedy incorrect publications. Respondent had experience with Wren for 10 years while he served in the House of Representatives and felt that Wren would not print his responses correctly. (R. p. 92, line 10 to p. 93,

line 7). Moreover, Respondent had been out of the public life for approximately 8 years at the time of Wren's articles and didn't feel he had the ability to convince the media to print his response to Wren's articles.

For the foregoing reasons, the Trial Court was correct in denying Appellants' motions for directed verdict and judgment *nov.*

III. THE TRIAL COURT DID NOT ERR IN ALLOWING TESTIMONY OF AN EXPERT WITNESS BECAUSE HIS TESTIMONY WENT TO THE ISSUE OF ACTUAL MALICE.

After going over the qualifications of Dr. William E. Lee, Respondents' counsel moved to admit Dr. Lee as an expert 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 getting – going past the line put down by the U.S. Supreme Court in New York Times v. Sullivan. If you report something with knowledge that it is false or with a reckless disregard as to whether it is true or false." (R. p. 290, line 21 to p. 291, line 7).

The Sixth Circuit Court in Connaughton v. Harte Hanks Communications, Inc., *supra*, stated that the "First Amendment protections do not imply a license to publish known falsehoods or to ignore elementary precautions which are demonstrative of *highly unreasonable conduct that constitutes extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers* even under circumstances involving public officials or public figures. U.S.C.A. Const.Amend. 1." Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S. 907, 109 S.Ct. 257, 102 L.Ed.2d 245 (1988) and judgment aff'd, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). (Emphasis added). The emphasized language referring to

extreme departures from standards of investigation and reporting ordinarily adhered to by responsible publishers allows a plaintiff to introduce evidence of those "standards" which an ordinary lay jury would not possess knowledge. As such, Dr. Lee was called by Respondent to testify as to those standards and how those standards would apply to the issue of actual malice.

Dr. Lee also reviewed the publications and the emails from and to Wren to determine if there was evidence of Wren's knowledge of Kelley's involvement with the luncheon and whether Wren knew Kelley did not set up the meeting or deliver the donations. These facts went straight to the heart of whether the publications were published with a knowledge of its falsity or a reckless disregard of its truth or falsity.

The extreme departure of Wren from the journalistic standards was only part of the evidence testified to by the expert. He also testified as to the emails and how they related to Wren's knowledge that what he was printing was false and/or that he printed the defamatory material with a reckless disregard as to whether it was true or false. (R p. 323, line 8; p. 325, line 20 to p. 333, line 14).

He testified as to the emails showing the subjective state of mind of Wren and the editor and how it applied to the issue of actual malice. (R. p. 333, lines 15-23; p. 334, line 7--p. 337, line 3; p. 337, line 16 to p. 338, line 23; p. 344, line 17 to p. 345, line 3; p. 348, line 10 to p. 350, line 6).

"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." Bose

Corporation v. Consumers Union of the United States, Inc., 466 U.S. 485, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984), Herbert v. Lando, 441 U.S. 153, 171–172, 99 S.Ct. 1635, 1646–1647, 60 L.Ed.2d 115 (1979).

It was this “culpability” to which the Plaintiff’s expert testified. Wren had numerous emails warning him that Kelley was not involved with organizing, facilitating, calling, or arranging the meeting, or raising donations or handing the donations to Barrett. Yet he refused to accept that fact and created his own evidence.

Contrary to Appellants’ belief, the “[m]edia is not immunized from liability for intentionally or recklessly publishing falsehoods merely because they happen to be reporting about election campaigns or potential political misconduct.” Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), cert. granted, 488 U.S. 907, 109 S. Ct. 257, 102 L. Ed. 2d 245 (1988) and judgment aff’d, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

“[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports,” such as relying on an opponent’s campaign manager. *See, St. Amant v. Thompson*, 390 U.S. at 732, 88 S.Ct. 1323. Evidence of intent to avoid the truth may also be sufficient to show actual malice such as where a reporter is told by many witnesses that a person didn’t do anything illegal. *See, Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 693, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Professions of good faith are unpersuasive when a publisher’s allegations are so inherently improbable that actual malice may be inferred from the act of putting such extreme statements in circulation. Margoles, 111 Wash.2d at 201, 760 P.2d 324; St. Amant, 390 U.S. at 732, 88 S.Ct. 1323.

Although a publisher's "[f]ailure to investigate does not in itself establish bad faith," *id.* at 733, 88 S.Ct. 1323, the Court has articulated several instances where recklessness might be shown. One of these is "where there are obvious reasons to doubt the veracity of [an] informant *or the accuracy of his reports.*" St. Amant, 390 U.S. at 732-33, 88 S.Ct. 1323 (emphasis added); *see Herbert*, 441 U.S. at 156, 99 S.Ct. 1635 (stating a court may find "'subjective awareness of probable falsity' " if " 'there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' ") (citations omitted); Harte-Hanks, 491 U.S. at 688, 109 S.Ct. 2678 (same). Respondent's expert established that Wren's sources in the Haley campaign should have been recognized as "obviously biased sources".

The South Carolina Supreme Court has declared that "actual malice may be present where the defendant fails to investigate *and there are obvious reasons to doubt the veracity of the statement or informant.*" George, 345 S.C. at 459, 548 S.E.2d at 878 (additional emphasis added); *see Zerangue*, 814 F.2d at 1070 ("[C]ourts have upheld findings of actual malice when a defendant failed to investigate a story weakened by ... apparently reliable contrary information."). The facts of this case amply demonstrate "obvious reasons to doubt" the truth of what Wren printed in the complained of articles and it was these reasons which the expert pointed out to the jury. *see also Pep v. Newsweek, Inc.*, 553 F.Supp. 1000, 1003 (S.D.N.Y.1983) (Failure to investigate or reliance on a questionable source "may tend to show that a publisher did not care whether an article was truthful or not, or perhaps that the publisher did not want to discover facts which would have contradicted his source."). The media is not granted "absolute immunity to espouse and concur in the most unwarranted attacks ... made by persons

known to be of scant reliability.” Cianci v. New Times Publishing Co., 639 F.2d 54, 69-70 (2nd Cir.1980).

The Supreme Court in Herbert v. Lando, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) charted the court’s course to resolution of its quest in the following passage:

Spreading false information in and of itself carries no First Amendment credentials. “[T]here is no constitutional value in false statements of fact.”

Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.

Lando, 441 U.S. at 171-72, 99 S.Ct. at 1646 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974)).

Apparent from the above language, a plaintiff may prove the defendant’s subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence. It was this “cumulation of evidence” to which the Respondent’s expert testified and the Trial Court properly admitted his testimony.

IV. BECAUSE AMPLE TRIAL EVIDENCE SUPPORTED THE JURY VERDICT AWARD THE TRIAL COURT DID NOT ERR OR ABUSE HIS DISCRETION IN DENYING APPELLANTS’ NEW TRIAL ABSOLUTE.

The court, in ruling on the Appellants' Motion for a New Trial Absolute², must view the damages deduced at the trial in the light most favorable to the Respondent. In so doing, the court would and should have considered the issues and facts discussed below. The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Proctor v. Dep't of Health & Env'tl. Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).

The lower court has considerable discretion regarding the amount of damages, both actual and punitive. Collins Entm't. Corp. v. Coats & Coats Rental Amusement, 355 S.C. 125, 584 S.E.2d 120 (Ct.App. 2003); Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 538 S.E.2d 15 (Ct.App.2000). Due to such discretion, the appellate court is limited to correction of errors at law. Kuznik, 342 S.C. at 611, 538 S.E.2d at 32; 311; Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct.App.2000). The appellate court is tasked with review of the evidence to see if any evidence exists to support the finding - not the task of weighing the evidence. See Hutson v. Cummins Carolinas, Inc., 280 S.C. 552, 314 S.E.2d 19 (Ct.App. 1984).

Courts also have considered that reputation is priceless. "When considering that a person's *reputation is invaluable*, we conclude that [Defendant] has failed to establish that the verdict in this matter was grossly excessive." (*emphasis added*) Miller v. City of W. Columbia, 322 S.C. 224, 230-31, 471 S.E.2d 683, 687 (1996). "Because a person's

² The Appellants also moved for a new trial *nisi remittitur* but failed to give the court the range of the *remittitur*. The Appellants have obviously abandoned its motion for a new trial *nisi remittitur* because it is not briefed.

reputation is invaluable, those who publish defamatory falsehoods with requisite culpability are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation.” Anderson v. The Augusta Chronicle, 355 S.C. 461, 461, 585 S.E.2d 506 (Ct. App. 2003) *aff’d sub nom. Anderson v. Augusta Chronicle*, 365 S.C. 589, 619 S.E.2d 428 (2005).

The loss of an “excellent” reputation is a tremendous damage to which it is difficult to set a value. Plaintiff presented ample testimony of his stellar reputation prior to the defamatory articles. (See Transcript including, but not limited to, the following: R. p. 75, lines 20-25; p. 82, lines 8-15; p. 88, lines 13-16; p. 94, lines 14-18; p. 99, lines 2-6; p. 114, lines 6-10, lines 19-20; p. 115, lines 15-23; p. 116, lines 2-7; p. 120, lines 15-18; p. 122, lines 18-22; p. 127, lines 9-13; p. 128, line 9 to p. 129, line 21; p. 178, line 4 to p. 179, line 4; p. 192, lines 5-22; p. 193, line 20 to p. 194, line 1; p. 200, lines 9-13; p. 210, lines 22 to p. 211, line 1; p. 212, line 18 to p. 216, line 2;)

Testimony of several witnesses and Plaintiff’s Exhibit 14 (R. pp. 681-689) provided sufficient evidence supporting the verdict award for the Respondents actual damages. Appellant incorrectly attempts to blame Plaintiff’s damages upon witness Alan Clemmons’ (Clemmons’) “recommendation” to a potential client that inquired about the Plaintiff. Clemmons testified he informed said potential client that the Plaintiff was toxic “at that time because of everything that had been in The Sun News” (R. p. 129, lines 20-21). However, Appellants ignore that Clemmons testified that he, knowing Plaintiff for approximately 20 years, believed Plaintiff had “an excellent reputation” (R. p. 114, lines 6-10) and prior to 2010 had never heard anything bad about the Plaintiff (T. p. 114, lines

19-20). Clemmons also testified Plaintiff's professional lobbyist company enjoyed a good reputation among Representatives and Senators (R. p. 115, lines 15-23) and that "[I]t's . . . important if you're gonna be a successful lobbyist to have a good reputation." (R. p. 116, lines 2-7). Appellants fail to acknowledge the logical conclusion that had the Appellants *not* published defamation in 2010, Clemmons could and would have highly recommended Plaintiff for the lobbyist job. Clemmons also testified that the publication had an influence on Respondent's effectiveness as a lobbyist, "I know for a fact, I had legislators approach me in the Chamber in very hushed tones, what's going on with Mark Kelley, what, what's this all about. So, it was on everybody's radar screen." (R. p. 120, lines 15-18). The poor "recommendation" was *one* sequelae of Appellants' defamation and but for the defamation would have been a recommendation to hire the Respondent.

Moreover, Plaintiff introduced Exhibit 14 (R. p. 681) which showed how much Plaintiff earned from one client annually. At the time of the trial, Plaintiff earned \$99,500 per annum from one client. Evidence also showed that Plaintiff likely lost a potential client inquiring about the Plaintiff around the time the articles were published. In considering whether that said potential client may have continued Plaintiff's employment, the verdict awarded is not grossly disproportionate.

In addition, the finder of fact should also consider the intangible damages, which are the value of his reputation and injury to that reputation and Appellants' exposing him to public hatred, contempt, ridicule, and impeachment of his honesty, integrity, and virtue. Evidence of ridicule on account of the publication was held to be admissible to show mortification of feelings in Foster-Milburn Co. v. Chinn, (1909) 134 Ky. 424, 120 S.W. 364, 34 L.R.A. (N.S.) 1137, 135 Am. St. Rep. 417. There was ample testimony of

such evidence in this case. Therefore, the \$400,000 actual damage awarded by the jury is not solely for loss of income but also for the intangible damages caused to Respondent's character and reputation.

The award of actual and punitive damages remains within the discretion of the jury, as reviewed by the trial judge. *See Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991); 231 *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d 408 (1962). Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of the appellate court to set aside the award. *Id.* Moreover, when considering whether or not the verdict is excessive, if there is substantial evidence to sustain the verdict, it will not be disturbed. The appellate court will intervene only where the verdict is so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence. *Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985); *Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953).

Also, Testimony by Alan Clemmons and David DeCenzo provided evidence that Plaintiff also suffered economical loss either by way of loss of future opportunity and loss of a raise. Additionally, defamation of one's reputation often makes it difficult and sometimes impossible for the injured victim to produce all the evidence of damage because of the likelihood that doors of opportunity close so silently the injured victim never knew they were opened at all. There was evidence of that likelihood as testified to by Clemmons; however, there most certainly were more doors of opportunity that Respondent never realized or will realize were ever opened and then closed because of the Appellants' defamation.

Plaintiff's Exhibits 11 and 13E (R. p. 661, p. 677), among other evidence, shows David Wren was informed numerous times by numerous persons that Plaintiff had not set up, facilitated the meeting, or delivered the campaign contributions. The editor of The Sun News testified that she had not taken the time to review the emails and/or

investigative evidence that David Wren conducted on the subject for which defendants published said articles. Defendant Wren's own words in his email above mentioned evidences his disregard of his own investigation, which revealed nothing but the fact that Plaintiff was a mere guest at a lunch and he did not "deliver" the campaign contribution and had not committed the crime of which Defendants accused him. Said emails are subjective proof of his relentless attempt to tie Mark Kelley into a conspiracy story that he so desired to publish regardless of the "truth" because he says "everyone" was bending over backwards to protect Mark Kelley. (R. p. 661, Pl. Ex. 11). Such evidence supports a finding that Appellants were relentless and reckless in their efforts to link Respondent to and accuse him of being criminally involved in campaign contributions regardless of "The Unprovable Truth".

Based on the forgoing case law and evidence, the trial court did not err in failing to grant Appellants' new trial because the jury verdict was supported by evidence and was not so grossly excessive to indicate that the jury was motivated by passion, caprice, prejudice or other consideration not founded in the evidence.

In order for this court to find that the trial court erred in failing to grant a new trial absolute, it would have to find the trial court abused its discretion in failing to grant the Appellants' motion for a new trial absolute. The Appellants have failed to point out any abuse of discretion on the part of the trial judge, and therefore the trial court's ruling should be affirmed.

V. THE PUNITIVE DAMAGE AWARD WAS NOT A VIOLATION OF THE FREE PRESS GUARANTEES OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION REQUIRING A NEW TRIAL BECAUSE THERE IS NO BAR TO AWARDED PUNITIVE DAMAGES AGAINST A MEDIA DEFENDANT IF THE REQUISITE

CONSTITUTIONAL STANDARD FOR PUBLIC OFFICIALS OR FIGURES ARE MET.

Contrary to Appellants' argument, neither Gertz nor New York Times gives a media defendant *carte blanche* protection from punitive damages. Prior to its decision in Gertz in 1974, the Supreme Court had provided several indications that there was no general bar to the awarding of punitive damages against media defendants if the requisite constitutional standard for public persons was met. Specifically, in the Curtis Pub. Co. v Butts decision the Court majority upheld an award of \$400,000 against a First Amendment attack,³ with Justice Harlan concluding that the state could act to protect the specific plaintiff and "safeguard all those similarly situated against like abuse"⁴ so long as the traditional common law controls on punitive damages were met.⁵ Warren, C.J., concurring in the result stated that Gertz applied a "highly unreasonable conduct standard while Butts applied New York Times. The Court affirmed the appropriateness of the Butts conclusion under a constitutional actual malice standard in Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 692-93, 109 S. Ct. 2678, 105 L.Ed.2d 562 (1989).

³ Curtis Pub. Co. v. Butts, 388 U.S. 130, 138, 156, 159-62, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967)

⁴ Butts, 388 US at 161 (Harlan, J.). He continued: "To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." 388 US at 160.

⁵ 388 US at 160-61. Justice Harlan notes that the free expression guarantees were "adequately served" by judicial control over excessive verdicts."

The Court subsequently repeatedly reiterated its Gertz view that punitive damages remain available if the New York Times threshold standard—knowing or reckless falsity by clear and convincing evidence—is met, and the Court has declined to draw any distinction with regard thereto based on plaintiff's status.⁶ One decision has provided an additional rationale for punitive damages in a libel context involving opposing candidates: "Such (outrageous) conduct, if it goes unpunished, would deter good people from participating in the political process." Newman v. Delahunty, 293 N.J. Super. 491, 681 A.2d 671, 686 (Law Div. 1994), *aff'd*, 293 N.J. Super. 469, 681 A.2d 659 (App. Div. 1996). Another decision even suggested that a contention that Gertz and its progeny render punitive damages unconstitutional is "completely without merit" and may warrant

⁶ Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 774, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986); Herbert v. Lando, 441 U.S. 153, 162, 99 S. Ct. 1635, 60 L. Ed. 2d 115, (1979); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756, 760, 763, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985); Milkovich v. Lorain Journal Co., 497 U.S. 1, 15-16, 110 S. Ct. 2704, 111 L. Ed. 2d 1, 60 Ed. Law Rep. 1061 (1990); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 661-63, 689-93, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989) [affirming an award of which \$195,000 were punitive damages]; For other decisions affirming the availability of punitive damages under the Gertz standard without distinction as to status see Brown v. Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1142-43 (7th Cir. 1987) [upholding a \$2,050,000 award]; Maheu v. Hughes Tool Co., 569 F.2d 459, 478-80 (9th Cir. 1977); Sprague v. Walter, 357 Pa. Super. 570, 516 A.2d 706, 728 (1986), appeal granted, 514 Pa. 648, 524 A.2d 495 (1987), *aff'd*, 518 Pa. 425, 543 A.2d 1078 (1988); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462, 470-71 (1982); Healey v. New England Newspapers, Inc., 555 A.2d 321, 327 (R.I. 1989); Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Carson v. Allied News Co., 529 F.2d 206, 214 (7th Cir. 1976); Anton v. St. Louis Suburban Newspapers, Inc., 598 S.W.2d 493, 495-96 (Mo. Ct. App. E.D. 1980); Sprague v. Walter, 441 Pa. Super. 1, 656 A.2d 890, 921-22 (1995) [upholding a remitted award of \$21.5 million in punitive damages]; Paul v. Hearst Corp., 261 F. Supp. 2d 303, 309 (M.D. Pa. 2002) [since punitive damages were available under the constitutional malice standard as to public persons without compensatory damages, clearly they were available as to private plaintiffs].

Rule 11 sanctions. Continental Cablevision, Inc. v. Storer Broadcasting Co., 653 F. Supp. 451, 461 (D. Mass. 1986).

In a well-reasoned Second Circuit opinion, Goldwater v. Ginzburg,⁷ the court followed time-honored state practice⁸ and upheld an award of \$1.00 nominal damages and \$75,000 in punitive damages.⁹ Holding that a constitutional actual malice finding put the defendants “beyond the pale of the First Amendment,” the court found that the award served the vindicatory function of protecting individual reputation and protected all others similarly situated against like misconduct in futuro. Where other defendants would thus be liable, a media defendant “may not then avoid any additional liability, which a libeller in a different occupation normally might incur, by claiming a special status or an entitlement to special protection under the First Amendment.”¹⁰ For other cases rejecting the requirement of substantial actual damages as a precondition to punitive damages, see Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397, 398, 400 (Ct. App. 1987).

⁷ Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969) and see Celle v. Filipino Reporter Enterprises, Inc., 209 F.3d 163, 171-72 (2d Cir. 2000).

⁸ Goldwater, 414 F.2d at 340.

⁹ 414 F.2d at 324.

¹⁰ 414 F.2d at 340. For other cases rejecting the requirement of substantial actual damages as a precondition to punitive damages, see Newspaper Pub. Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976); Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397, 398, 400 (Ct. App. 1987). And see Ayala v. Washington, 679 A.2d 1057, 1069-70 (D.C. 1996); New Jersey Steel Corp. v. Lutin, 297 A.D.2d 557, 747 N.Y.S.2d 89, 90-91 (1st Dep’t. 2002) [remitting all but \$1 in nominal damages and \$2 million in punitive damages]; Joseph v. Scranton Times, L.P., 2014 PA Super 49, 2014 WL 930812 (2014).

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In the case of Celle v. Filipino Reporter Enterprises, Inc., 209 F.2d 163 (2nd Cir 2000), the Court mirrored the protection which the requirement of proof of actual malice gives a media defendant:

Whatever evidence is relied upon, actual malice must be supported by clear and convincing proof. *See, e.g., Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 511 n. 30, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) ("clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement"); New York Times, 376 U.S. at 285-86, 84 S.Ct. 710 (must be established by "the convincing clarity which the constitutional standard demands"); *see also Gertz*, 418 U.S. at 342, 94 S.Ct. 2997 ("This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander.").

An erudite statement surrounding the reasoning for denying media defendants absolute immunity from punitive damages was succinctly stated in Sharon v. Time, Inc., 599 F.Supp. 538 (S.D. NY 1984), "Nothing in the first amendment requires that the press have absolute freedom to pass rumors off as fact..... The Supreme Court has rested its denial of absolute immunity on the fundamental premise that the constitutional value of free speech does not in all circumstances outweigh the states' interests in protecting the reputations of their citizens. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974), the Court stated that:"

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and infeasible immunity from liability for defamation. *See New York Times Co. v. Sullivan*, *supra*, 376 U.S. 293, 84 S.Ct. 733 (Black, J.,

concurring); Garrison v. Louisiana, 379 U.S. [64], at 80, 85 S.Ct. 209 at 218, 13 L.Ed.2d 125 (Douglas, J., concurring); Curtis Publishing Co. v. Butts, 388 U.S. [130], at 170, 87 S.Ct. 1975 at 1999, 18 L.Ed.2d 1094 (opinion of Black, J.). Such a rule would, indeed, obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

Although it may be that issues of “self-censorship” or “punishing free speech” may ultimately lead the U.S. Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure, to date the Court has not so held. See Buckley v. Little, 539 F.2d at 897. However, as the Buckley Court pointed out -- “absent clear word from the Court to the contrary, or an en banc, we are bound to abide by our own controlling decision in Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir.1969) (allowing award of punitive damages to a high public official), and therefore must permit such an award in the appropriate case.” Sharon v. Time, Inc., *supra*, 587. See also Buckley v. Little, 539 F.2d at 897.

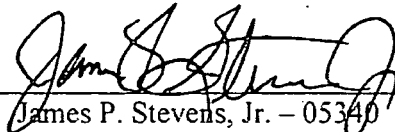
For the above reasons, the Trial Court was correct in denying Appellants’ motions and the jury’s verdict for punitive damages should be affirmed.

CONCLUSION

For the foregoing reasons stated, this Court should affirm the verdict of the jury and the post verdict rulings of the trial court denying Appellants' motions.

Respectfully submitted, .

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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

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FEB 13 2015

SC Court of Appeals

Mark Kelley, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Respondent complies with Rule 211(b),
SCACR.

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PROOF OF SERVICE

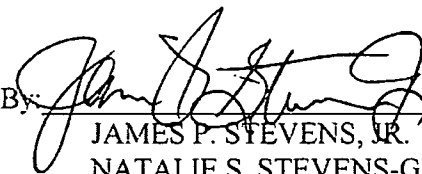
I certify that I have served the Final Brief of Respondent on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on February 12, 2015, addressed to the attorney of record, Jay Bender, Baker Ravenel Bender, Post Office Box 8057, Columbia, South Carolina 29202.

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SC Court of Appeals

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In reply to respondent's brief, appellants address three points with respect to which respondent has misapprehended most noticeably the law or the evidence:

1. Standard of review;
2. Falsity; and,
3. Actual malice.

STANDARD OF REVIEW

Respondent, relying on the Circuit Court decision in *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825 (6th Cir. 1988), argues incorrectly that an appellate court should defer to the jury's determination on "preliminary, operative, or subsidiary factual determinations," and reserve independent review to the "ultimate conclusion of clear and convincing proof of actual malice." (Resp. Br. p. 14) While respondent's position was supported by the opinion of the Court of Appeals for the Sixth Circuit, this limited standard of review was rejected emphatically on further review by the United States Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Explaining that a review of the complete factual record is required to make a determination that constitutional protections for a free press have been satisfied, the Supreme Court stated:

In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose [Corp. v. Consumers Union of U.S., Inc.]*, 466 U.S., at 499-500, 104 S.Ct., at 1958-1959, the reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see... whether they are of a character which the principles of the First Amendment ... protect," *New York Times Co.*, 376 U.S., at 285, 84 S.Ct., at 728 (quoting *Pennkamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

Harte-Hanks, supra, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989).

The fact that a jury has reached a conclusion that statements were false “does not, however, demonstrate that ...[appellants] acted with actual malice.” “Difference of opinion as to the truth of a matter...does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity or with a “high degree of awareness of ... probable falsity, “ *Garrison [v. Louisiana]*, 379 U.S., at 74, 85 S.Ct., at 215.” *Harte-Hanks, supra*, 491 U.S. at 681, 109 S.Ct. at 2693.

To fulfill its constitutional obligation with respect to the determination of whether the evidence in the record “is of the convincing clarity required to strip the utterance of First Amendment protection,” this court must independently review the record in its entirety. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 104 S.Ct. 1949, 1965, 80 L.Ed2d 502 (1984).

FALSITY

The Supreme Court of the United States “has affirmed that ‘[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.’ *Gertz [v. Robert Welch, Inc.]*, 418 U.S., 341, 94 S.Ct., at 3007.” “To provide ““breathing space,”” [citations omitted] for true speech on matters of public concern, the [United States Supreme] Court has been willing to insulate even *demonstrably* false speech from liability....” [emphasis in opinion] *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986).

Respondent’s claim of falsehood rests on his tortured interpretation of statements in news reports that respondent’s attendance at a meeting where \$84,000 in campaign contributions were passed to a candidate for governor accused him of a crime. In his Second Amended Complaint

respondent alleges in paragraph 5 that a May 23 news report accused him of delivering the campaign contribution. (R. p. 15, ¶ 5; p. 639) The language complained of by respondent stated:

Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June. Those contributions included a \$3,500 cashier's check from Garden City Partners.

It was not disputed that respondent was in attendance at the meeting where the contributions were delivered, and the news report stated clearly that "Dean said he delivered contributions to Barrett...." Even if there were ambiguity in the parenthetical "along with chamber lobbyist Mark Kelley" as to who delivered the contribution to Barrett, that ambiguity was resolved by Dean's own statement in the same news report that acknowledged he delivered the contributions. Since Dean, and not respondent, is identified as the one delivering the contributions, the news report read in its entirety, as it must be under South Carolina law, does not accuse respondent of a crime. *Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1976); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968).

Respondent argues in his brief that an editorial published on May 30, 2010 establishes that the May 23 news report stated that respondent had delivered the contributions to Barrett. (Res. Br. p. 19) The editorial, which the jury found not to be defamatory, and there is no appeal by respondent from this finding, stated unequivocally that it was Dean, with respondent at his side, who delivered the contributions to Barrett. (R. pp. 642-643) Since the factual assertions in the editorial are consistent with the May 23 news report, *i.e.*, Dean delivered the contributions in respondent's presence, the editorial does not make the previously published news report false.

Respondent argues in his brief that the jury could have found the news reports of May 21 and May 25 false. (Res. Br. 21) The May 21 news report has the headline "Dean handed over envelope of \$84,000." (R. p. 638) The report states with respect to respondent, "Mark Kelley, a

lobbyist for the chamber of commerce also attended that meeting, according to Barrett.” There is no dispute that respondent attended the meeting, and no statement that respondent passed the contributions. As to potential illegal conduct by respondent at the meeting, the news report, quoting the General Counsel of the State Ethics Commission, stated that it did not appear that any laws were violated and respondent’s “Just being in the same room is not a violation [of the law].”

The May 25 news report (R. p. 641) quotes a citizen challenging campaign contributions with a connection to the chamber of commerce who stated:

“In the past, the chamber has denied any involvement in this 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,” said Robert Kelley, who is not related to the lobbyist.

The news report also stated that Dean had arranged the luncheon at which the contributions were delivered, and repeated that the Ethics Commission general counsel had said previously that the donations appear to have been legal. Had respondent delivered the contributions, he and Barrett both would have been engaging in illegal conduct as it is unlawful for a lobbyist to make a contribution to a state candidate, and unlawful for the state candidate to receive a contribution from a lobbyist. S.C. Code Ann. §§2-17-80 and 8-13-1314 (1976). Inclusion in the news report of the statement of the Ethics Commission attorney that the contributions appear to have been legal refutes respondent’s contention that the news report accused him of delivering the contributions to Barrett.

Respondent also argues that he was incorrectly identified as lobbyist for the chamber of commerce. (Res. Br. p. 18) The reporter testified without refutation that he thought the reference to the chamber of commerce was accurate based on statements by chamber officials describing the relationship between the Grand Strand Business Alliance for which respondent was a

registered lobbyist and the chamber of commerce. (R. p. 427 line 18 to p. 431 line 3) Even if it were inaccurate to refer to respondent as lobbyist for the chamber of commerce, this inaccuracy does not accuse respondent of illegally delivering campaign contributions. Each news report states that in the opinion of the attorney for the Ethics Commission, the contributions were legal.

Interestingly, when the Ethics Commission attorney was called a witness for respondent at trial, she testified that an email forwarded by respondent to a broad list of recipients, including four of his witnesses (David DeCenzo, Alan Clemmons, George Hearn, and Nelson Hardwick), and the chamber president, was an illegal solicitation of campaign contributions by a lobbyist. (R. p. 186 line 25 to p. 207 line 18; pp. 695-696) The forwarded e-mail bore the headline, "Gresham Wins SCGOP Straw Poll," and respondent added an introductory statement, "For all that have supported and those that still can and want to this is Great News!!!!" According to the testimony of the Ethics Commission attorney, the illegality of respondent's action came from forwarding an e-mail which contained an unequivocal solicitation for campaign contributions, "**Contribute-** Whether it's \$10, \$50 or \$100, whatever you can give today will go a long way." (R. pp. 695-696; p. 186 line 10 to p. 188 line 12) While it is clear that appellants in their news reports never accused respondent of an illegal act, his own witness and his own e-mail, dispatched about a month before the publication of the first news report complained of, did establish that in the opinion of the Ethics Commission attorney, respondent had violated the prohibition against the solicitation of campaign funds by a lobbyist. In contrast to the exhibit and the testimony about the forwarded e-mail, the news reports, read in their entirety, state clearly that respondent's attendance at a luncheon where Dean passed contributions to respondent's favored candidate, was lawful.

ACTUAL MALICE

Respondent, as he did with his argument on the scope of appellate review, mistakenly relies on the opinion of the Court of Appeals for the Sixth Circuit to argue that actual malice is established by an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers. (Res. Br. p. 29) As the United States Supreme Court explained in its decision rejecting the professional standards test applied by the Supreme Court made it clear that the Court of Appeals an incorrect and diminished standard, stating:

Petitioner is plainly correct in recognizing that a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice.

The language in the Court of Appeals' opinion discussing professional standards is taken from Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts*, *supra*, at 155, 87 S.Ct., 1991. In that case, Justice Harlan had opined that the *New York Times* actual malice standard should be reserved for cases brought by public officials. The *New York Times* decision, in his view, was primarily driven by the repugnance of seditious libel and a concern that public official libel "lay close" to this universally renounced, and long-defunct, doctrine. 388 U.S., at 153, 87 S.Ct., at 1990. In place of the actual malice standard, Justice Harlan suggested that a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.*, at 155, 87 S.Ct., at 1991. This proposed standard, however, was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. See 388 U.S., at 162, 87 S.Ct., at 1995 (opinion of Warren, C.J.); *id.*, at 172, 87 S.Ct., at 2000 (Brennan, J., dissenting). Moreover, just four years later, Justice Harlan acquiesced in application of the actual malice standard in public figure cases, see *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 69-70, 91 S.Ct. 1811, 1832-1833, 29 L.Ed.2d 296 (1971) (dissenting opinion), and by the time of the Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court was apparently unanimously of this view. Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court. [Emphasis supplied]

Harte-Hanks, supra, 491 U.S. 657, 665, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989).

The “professional standards rule” is not applicable in a libel case brought by a public figure, and the admission of “expert” testimony on professional standards permitted the jury and the trial court to evaluate appellants’ fault with a much less rigorous standard than *New York Times* actual malice standard. Respondent argues that because the reporter had no information that respondent had delivered campaign contributions to Barrett, his having published that accusation amounted to actual malice. (Res. Br. p. 25) The fact that the reporter testified that he had no information to support an allegation that respondent delivered campaign contributions to Barrett is entirely consistent with what was published in the newspaper—that Dean delivered the contributions to Barrett at a luncheon attended by Kelley. Asked if he had written that respondent had delivered a campaign contribution to Barrett or intended to write that respondent had delivered a contribution to Barrett the reporter responded, “No, I did not.” (R. p. 396 lines 12-16) Asked how he would have written a news report that said respondent was involved in the delivery, the reporter testified he would have written “Dean and Mark Kelley delivered about \$84,000 of those contributions to Barrett in June.” (R. p. 408 lines 15-23)

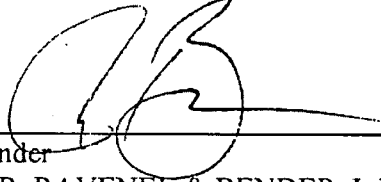
Respondent argues that the reporter’s efforts to ascertain respondent’s role in the delivery of campaign contributions to Barrett supports two conclusions: 1. The news reports stated that respondent had delivered campaign contributions, and 2. the reporter knew that the publications were false or had serious doubt about the accuracy of the reports. (Res. Br. pp. 24-25) As discussed above, the news reports cannot be read consistently with South Carolina law to state that respondent had delivered campaign contributions to Barrett, and the reporter’s inquiries about respondent’s knowledge of challenged campaign contribution were consistent with information he had received that the Barrett campaign believed respondent would have

knowledge of the campaign contributions that were the focus of public challenges and his reporting. (P. Exs. 6 and 7) What was reported was that Barrett confirmed a luncheon he attended with Dean and respondent, and confirmed that Dean had delivered the contributions at the luncheon attended by Barrett and respondent. (R. p. 167 lines 4-23) Respondent testified that he was invited to the luncheon by Dean. (R. p. 78 lines 1-24) There was no evidence that the reporter's use of "along with" to describe respondent's presence at the luncheon with Dean and Barrett was his attempt to state that respondent delivered the campaign contributions to Barrett. Even if the reporter's testimony that he would have used "and" to signify that respondent had a role in the delivery of the contributions to Barrett were not believed, disbelief of this testimony is not evidence that the reporter either knew what he was writing was false or that he had serious doubt about the accuracy of his report. *Bose, supra*. To the contrary, had the reporter intended to signify that respondent was involved in the delivery of the contributions, he would not have included in his news reports statements by Dean that he delivered the contributions or by the Ethics Commission attorney that the contributions appeared legal. There was no evidence that what was published, as distinguished from what respondent chose to read, was published with actual malice, much less clear and convincing evidence sufficient to satisfy the *New York Times* standard.

CONCLUSION

For the reasons stated in appellants' brief in chief and herein, the verdict of the trial court should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'JB' with a long horizontal stroke extending to the right, positioned above a horizontal line.

Jay Bender

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January 28, 2015

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
Civil Case No. 2012-CP-26-3804

SC Court of Appeals

JAN 29 2015

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d/b/a The Sun News,.....Appellants,

v.

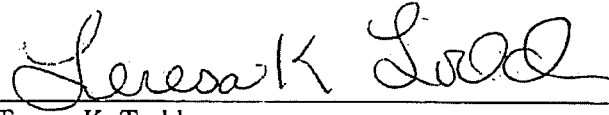
Mark Kelley,.....Respondents.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant's Final Reply Brief, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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A handwritten signature in cursive script, reading "Teresa K. Todd", written over a horizontal line.

Teresa K. Todd

January 29, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

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

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JUL 21 2015

SC Court of Appeals

Mark Kelley,.....Respondent,

v.

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

**BRIEF OF *AMICI CURIAE* THE ASSOCIATED PRESS; GANNETT CO., INC.
AND GANNETT GP MEDIA, INC. d/b/a *THE GREENVILLE NEWS*; TEGNA
INC. AND PACIFIC AND SOUTHERN, LLC d/b/a WLTX-TV; AND OSTEEN
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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

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

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

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

STANDARD OF REVIEW

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A: He would have to be.

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

A: Yes.

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

A: Yes.

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

A: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

A. Expert Testimony Is of Little Probative Value.

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

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

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

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

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

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

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

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

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

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

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

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

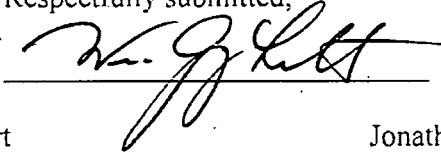
CONCLUSION

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

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

This the 20th day of July, 2015.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

Larry B. Hyman, Circuit Court Judge

Court of Appeal No. 2014-001249

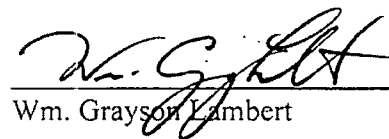
Mark Kelley,.....Respondent,

v.

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

CERTIFICATE OF COMPLIANCE

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


Wm. Grayson Lambert

THE STATE OF SOUTH CAROLINA
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CERTIFICATE OF SERVICE

The undersigned certifies that this Brief of *Amici Curiae* was served on counsel
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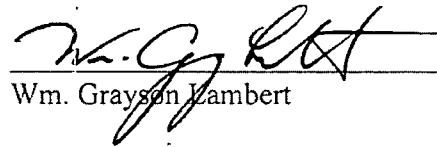
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IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
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Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2014-001249

MARK KELLEY,

Respondent,

vs.

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

Appellants.

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

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Interest of the *Amicus Curiae*

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

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

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

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

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

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

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

ARGUMENT

Summary of Argument

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

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

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

1. Journalistic Standards Are Irrelevant in Actual Malice Cases

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

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

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

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

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

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

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

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

2. Therefore, Expert Testimony on Journalistic Standards Is Inadmissible

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

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

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

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

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

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

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

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

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

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

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

A: Yes.

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

A: Yes.

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

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

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

The Georgia professor's last statement is blatantly wrong as a matter of law, and yet this misunderstanding of the legal standard pervades all of his opinion testimony. Based on his legally erroneous view of the actual malice standard, the professor testified to the jury as follows:

Q: Have you reached an opinion in this case?

A: Yes.

Q: And would you state that opinion?

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

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

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

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

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

A: Clearly ...

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

Q: Was he careful?

A: I don't believe so.

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

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

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

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

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

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

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

A: He would have to be.

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

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

A: Yes.

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

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

It should have been excluded here.

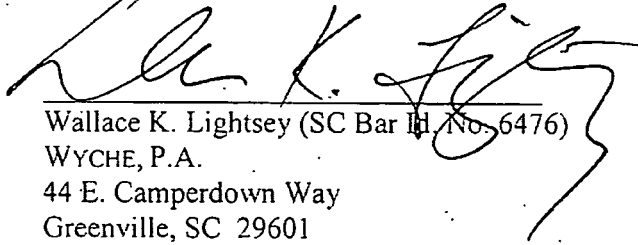
CONCLUSION

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

the judgment below, and remand for a new trial with the "expert" testimony excluded.

And even if the Court affirms, it should take the opportunity in its opinion to clarify that such testimony is irrelevant and inadmissible in actual malice cases.

Respectfully submitted,



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Certificate of Service

This is to certify that I have this date caused to be served a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF GANNETT COMPANY, INC., IN SUPPORT OF APPELLANTS AND IN FAVOR OF REVERSAL on counsel in this action by causing the same to be deposited in the United States mail, first class postage affixed, addressed as follows:

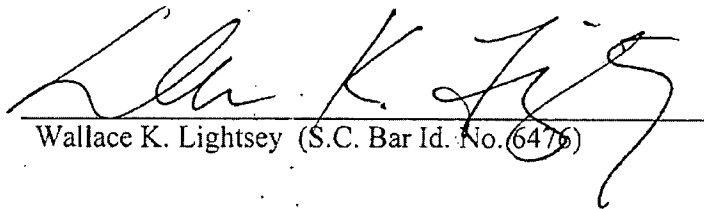
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APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

Larry B. Hyman, Jr., Circuit Court Judge

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

Mark Kelley, ...Respondent,

v.

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

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

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STATEMENTS OF INTEREST

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

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

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

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

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

INTRODUCTION

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wren testified that he believed at the time of writing that his statement about Brad Dean’s delivery of the money to the congressman “along with chamber lobbyist Mark Kelley” did *not* mean that Kelley also delivered the money, but instead was only stating that Kelley was with Dean at a lunch with the congressman. (R. p. 408, line 15 to p. 409, line 13). Wren testified that he did not actually believe that he was stating that Kelley was delivering the money illegally, and a previous article had statements to that effect, including commentary from a South Carolina ethics expert, saying that nothing illegal had transpired, thus reflecting that belief. (R. p. 27, Plaintiff’s Exhibit 4). Despite the

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

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

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

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

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

The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the *New York Times* rule applies. 401 U.S. at 292. “Realistically, ...some error is inevitable; and the difficulties of separating fact from fiction convinced the Court in *New York Times*, *Butts*, *Gertz*, and similar cases to limit liability to instances where some degree of culpability is present in order to eliminate the risk of undue self-censorship and the suppression of truthful material.” *Herbert v. Lando*, 441 U.S. 153, 171-172 (1979). “[Erroneous] statement is inevitable in free debate, and...must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need ... to survive.’” *New York Times Co. v. Sullivan*, 376 U.S. at 271-72 (citation omitted).

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

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

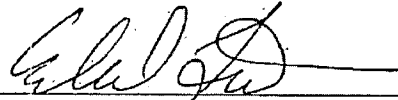
function of that marketplace of ideas is the ability to examine the conduct of our government officials and hold them accountable to their constituents. The present case, which involved reporting on the source of campaign contributions that accurately reported that a lobbyist and donor had lunch with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

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

CONCLUSION

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

Respectfully submitted,



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Reporters Committee for Freedom of the Press, National Newspaper Association, Newspaper Association of America, and Society of Professional Journalists

Dated: June 7, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mark Kelley, Respondent,

v.

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

Appellate Case No. 2014-001249

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5375
Heard December 9, 2015 – Filed January 13, 2016

AFFIRMED

Jerry Jay Bender, Baker Ravenel & Bender, LLP, of
Columbia, for Appellants.

James P. Stevens, Jr. and Natalie Shawn Stevens-
Graziani, Stevens Law Firm, PC, of Loris, for
Respondent.

FEW, C.J.: David Wren and Sun Publishing Company, Inc. appeal from a jury verdict awarding \$400,000 in actual damages and \$250,000 in punitive damages to Mark Kelley on Kelley's claims he was libeled by a series of articles Wren wrote for *The Sun News* of Myrtle Beach. We affirm.

I. Facts and Procedural History

In 2010, David Wren, an investigative reporter for *The Sun News*, obtained information that South Carolina Republican gubernatorial candidate Gresham Barrett,¹ four Myrtle Beach City Council incumbents, and seven state legislators received significant campaign contributions from multiple limited liability companies (LLCs), many of which had few assets and no revenue. In the process of investigating the contributions, Wren learned about a 2009 lunch meeting involving Barrett, lobbyist Mark Kelley, and Myrtle Beach Area Chamber of Commerce president Brad Dean. At the meeting, Dean delivered to Barrett approximately \$84,000 in campaign contributions.

Wren wrote three articles for *The Sun News* discussing various aspects of Myrtle Beach-area campaign contributions that he believed appeared unethical. Primarily, Wren's articles suggested the LLCs' contributions to Barrett and other local politicians were actually donations from the chamber of commerce, which passed the funds through the LLCs. Wren also discussed the lunch meeting involving Barrett, Dean, and Kelley in the articles. In the first article—published May 21, 2010—Wren wrote,

Mark Kelley, a lobbyist for the chamber of commerce, also attended that meeting, according to Barrett. . . .

There are strict rules that forbid lobbyists from facilitating campaign donations for statewide candidates; however, 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 . . . the commission's general counsel. "He [Kelley] is not supposed to touch the envelope or hand over the envelope."

In a second article—published May 23, 2010—Wren again mentioned the meeting and wrote, "Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett in June." On May 25, 2010, the newspaper published a third article authored by Wren that included a quote from

¹ Barrett was one of four candidates in the 2010 Republican primary for Governor. The other candidates were Henry McMaster, Andre Bauer, and the eventual winner, Nikki Haley.

the president of a Myrtle Beach-area interest group: "In the past, the chamber has denied any involvement in this 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,' said Robert Kelley, who is not related to the lobbyist." Each of the articles contains at least one statement that the contributions were—or "appear to have been"—legal.

On May 30, 2010, the newspaper published an editorial in which it admitted it had little evidence to support its allegations that the chamber of commerce made illegal campaign contributions. However, it defended itself by arguing the contributions had an appearance of impropriety:

The darkest accusation in this affair is that the money in question came directly from the Myrtle Beach Area Chamber of Commerce as a kickback for passing the 1 percent sales tax for tourism advertising, passed out to City Council members and state representatives who helped make it happen – and, inexplicably, Gresham Barrett in his bid for governor.

There is virtually no evidence to prove this allegation, but there's a host of circumstance to make it plausible. 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.)

The chamber's defense all along has been that the checks came not from the chamber, but from the companies under whose name the donations were made. Dean says now that he simply collected and delivered them. Again, there is no evidence disproving this statement, but the circumstances make it difficult to believe.

Approximately two years after the newspaper published the articles and editorial, Kelley filed a lawsuit asserting libel claims against Wren and Sun Publishing—the publisher of *The Sun News*. Kelley claimed Wren and Sun Publishing falsely accused him in the articles and editorial of violating state ethics laws by delivering campaign contributions to Barrett. The trial court found Kelley—a former member of the State House of Representatives—to be a public figure,² and a jury awarded Kelley \$400,000 in actual damages and \$250,000 in punitive damages.³

II. Law and Analysis

Wren and Sun Publishing raise five arguments on appeal: (1) the trial court erred in denying their motions for a directed verdict and judgment notwithstanding the verdict (JNOV) because Kelley presented no evidence Wren or Sun Publishing made a false and defamatory statement of fact, (2) the trial court erred in denying their motions for a directed verdict and JNOV because Kelley failed to present clear and convincing evidence Wren wrote the articles with actual malice, (3) the trial court erred in admitting expert testimony about the standards of professional journalism, (4) the trial court erred in ruling the damages awards were not so grossly excessive as to warrant a new trial absolute, and (5) the punitive damages award violates the free press guarantees of the First and Fourteenth Amendments.

A. Falsity

Wren and Sun Publishing argue the trial court erred in denying their motions for a directed verdict and JNOV because Kelley presented no evidence they made a false and defamatory statement of fact. *See Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006) (stating a plaintiff in a defamation case must prove the defendant made a false and defamatory statement). In ruling on motions for a directed verdict and JNOV on the question of falsity, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *See* 368 S.C. at 463, 629 S.E.2d at 663 (reciting the standard for a directed verdict); *see also RFT Mgmt. Co. v. Tinsley & Adams*

² *See Elder v. Gaffney Ledger*, 341 S.C. 108, 113, 533 S.E.2d 899, 901 (2000) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S. Ct. 710, 726, 11 L. Ed. 2d 686, 706 (1964)) (stating a public figure plaintiff in a defamation action must prove actual malice to recover damages).

³ The jury found Sun Publishing did not make a defamatory statement in the editorial, and thus imposed liability based only on the articles.

L.L.P., 399 S.C. 322, 331, 732 S.E.2d 166, 171 (2012) ("A motion for a JNOV is merely a renewal of the directed verdict motion."). The trial court should deny the motions where "the evidence is susceptible to more than one reasonable inference." *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663. "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.*

We find the trial court properly submitted the question of falsity to the jury. First, there is ample, unrefuted evidence in the record Kelley did not deliver campaign contributions to Barrett. At trial, Kelley testified he believed Wren and Sun Publishing accused him of delivering campaign contributions to a gubernatorial candidate, which is a crime under subsection 2-17-80(A) of the South Carolina Code (2005).⁴ Kelley insisted he did not deliver the contributions, and Barrett testified Kelley never gave him campaign contributions or organized a campaign contribution meeting. Drea Byars—Barrett's aide who also attended the lunch meeting—testified Kelley did not deliver or touch the money Barrett received. Byars also stated Kelley did not know prior to the meeting that Dean planned to deliver the contributions. Moreover, Wren admitted at trial he had "[n]o evidence that [the money] came from Mark Kelley." Accordingly, any statement accusing Kelley of delivering contributions to Barrett is false.

Second, reading the articles in the light most favorable to Kelley, a reasonable jury could determine the articles—particularly the statement in the May 23 article that "Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett"—accused Kelley of "delivering" campaign contributions and thus accused him of committing a crime. Kelley testified he believed the statement meant both he and Dean delivered contributions to Barrett. Kelley also presented several witnesses—including Barrett and State House of Representatives members Alan Clemmons, Nelson Hardwick, and George Hearn—who testified they believed Wren accused Kelley of committing a crime by delivering campaign contributions. Although Wren argues the phrase "along with" merely meant Kelley was present when Dean delivered the contributions, we find the statement in the May 23 article can reasonably be interpreted to mean Dean *and* Kelley delivered campaign contributions to Barrett. In fact, we believe a person reading the May 23 article would be far more likely to interpret the statement as an allegation of illegal

⁴ Subsection 2-17-80(A) provides, "A lobbyist . . . shall not offer, solicit, facilitate, or provide to or on behalf of any member of the General Assembly, the Governor, the Lieutenant Governor, [or] any other statewide constitutional officer . . . any of the following: . . . (5) contributions, as defined in Section 8-13-1300(7)."

conduct by Kelley than a mere statement he was present. Therefore, the issue of whether Wren accused Kelley of committing a crime by delivering contributions was a question of fact for the jury, and the trial court did not err in denying Wren's and Sun Publishing's motions for a directed verdict and JNOV.

B. Actual Malice

Wren and Sun Publishing also argue the trial court erred in denying their motions for a directed verdict and JNOV because Kelley did not present clear and convincing evidence Wren wrote the articles with actual malice.

A public figure seeking damages for defamation must "prove by clear and convincing evidence" the defendant made the statement with actual malice, which means "with the knowledge of its falsity or with reckless disregard for its truth." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (citing *New York Times Co.*, 376 U.S. at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706).

A "reckless disregard" for the truth . . . 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, 267 (1968). 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, 133 (1964).

Elder, 341 S.C. at 114, 533 S.E.2d at 902 (second alteration in original) (emphasis omitted).

"Whether the evidence is sufficient to support a finding of actual malice is a question of law." 341 S.C. at 113, 533 S.E.2d at 901-02. An appellate court in a public figure defamation case must conduct an independent review of the record to determine whether the evidence supports a jury finding by clear and convincing evidence the defendant made the statements with actual malice. 341 S.C. at 113-14, 533 S.E.2d at 901-02; *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511, 104 S. Ct. 1949, 1965, 80 L. Ed. 2d 502, 523 (1984) ("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 proof of 'actual malice.'").

In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose Corp.*, 466 U.S. at 499-500, 104 S. Ct. at 1959, 80 L. Ed. 2d at 516, the reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect," *New York Times Co.*, 376 U.S. at 285, 84 S. Ct. at 728-29, 11 L. Ed. 2d at 709.

Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688, 109 S. Ct. 2678, 2696, 105 L. Ed. 2d 562, 589 (1989) (alterations in original).

Mindful that we must consider the entire factual record, we begin our analysis of the sufficiency of the evidence of actual malice by considering the statement in the May 23 article, "Dean, along with chamber lobbyist Mark Kelley, delivered about \$84,000 of those contributions to Barrett." As discussed above in the section on falsity, this statement can be interpreted to have two different meanings. When examining the sufficiency of the evidence as to falsity, we considered the objective question of whether the evidence supports an interpretation of the statement to be an accusation that Kelley participated in the delivery of the contributions. When examining the sufficiency of the evidence of actual malice, however, we must consider the subjective question of whether the evidence clearly and convincingly supports a finding that Wren intended to accuse Kelley of delivering the contributions, or that he wrote the articles with reckless disregard of the likelihood readers would interpret the statement—and the articles in general—to be such an accusation.

If Wren meant only that Kelley was present when Dean delivered the contributions, and Wren did not recklessly disregard the likelihood the statements could be otherwise interpreted, then our standard of review would require a finding that Wren did not have actual malice. However, if Wren intended to accuse Kelley of delivering the contributions, or if he recklessly disregarded the likelihood the

articles could be interpreted to accuse Kelley of delivering the contributions, he may have had actual malice. In answering this question of what Wren meant, we have considered the entire record—including the statements in the articles that the contributions were legal. We also consider emails Wren sent to several people during his investigation into the campaign contributions. While we are careful not to find actual malice based on Wren's other actions, *see Elder*, 341 S.C. at 114, 533 S.E.2d at 902 (warning "the actual malice standard is not satisfied merely through a showing of ill will" and "[i]t is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information"), Wren's emails help us understand what Wren intended in his articles, particularly the May 23 article.

Wren first learned about the lunch meeting involving Kelley, Dean, and Barrett from state representative Tracy Edge. On May 3, 2010, Wren exchanged several emails with Edge with the following subject line: "I called [T]rey [W]alker⁵ and he denied knowing anything about it." In one of the emails, Wren stated,

I told him 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 [Barrett]. . . . 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.

On May 23, 2010, Wren sent an email to Justin Stokes and Tim Pearson.⁶ In the email, Wren stated,

[E]veryone 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]⁷ if Kelley had arranged the meeting

⁵ Trey Walker worked for McMaster's campaign.

⁶ Stokes was Barrett's former deputy campaign manager, and Pearson was Haley's campaign manager.

⁷ Boling was the communications director for the Barrett campaign.

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.

Wren also wrote in the May 23 email,

I'm trying to piece together who raised all the money . . . and why the chamber picked Barrett as the candidate they were going to endorse (could it be anything besides the fact that Kelley is the chamber lobbyist and a big supporter of Barrett?) . . . Also, if there are any e-mails or documents that show . . . Kelley's role in setting up the Barrett meeting [sic] would be a great help.

On May 27, 2010, Wren sent an email to Pearson stating,

I wanted to check back with you and see if there is any way we can use the e-mails from Barrett's campaign that seem to show the involvement of Brad Dean and Mark Kelley in raising money for Barrett and others. . . . Recent events have overshadowed the campaign funding issue and I'm looking for ways to move that story forward.

At trial, Wren admitted Dean and Barrett both told him Dean delivered the contributions. He also admitted he had no evidence Kelley delivered campaign contributions or set up a meeting at which Barrett received contributions. He testified, "I have no evidence that Mark Kelley knew what was in the envelope or where it came from and I never said he knows what's in the envelope or where it came from." Furthermore, he testified his only indication that Kelley was involved with the campaign contributions is a 2009 email from Stokes to Boling in which Stokes stated Kelley would be familiar with the contributions from the LLCs and "where they came from."

The record in this case contains no evidence Kelley participated in delivering the money to Barrett. Wren testified on cross-examination he was aware of "no evidence that [the money] came from Mark Kelley." The question before us on the sufficiency of the evidence of actual malice, therefore, is not whether Wren knew that an accusation against Kelley was false—Wren clearly knew that. The question

rather is whether Wren knew, or recklessly disregarded, that he was making the accusation. In light of the fact that Wren so diligently pursued a story about Kelley making illegal campaign contributions—and found no evidence to support such a claim—we find it difficult to believe Wren did not recognize that including the clause "along with chamber lobbyist Mark Kelley" in the second article would be read as an accusation against Kelley.

Other evidence in the record supports our conclusion. In the first article, Wren focused the reader on Kelley's involvement by citing the "strict rules" against it and quoting the ethics commission's general counsel that a lobbyist can be "in the same room" but cannot "touch the envelope." The first article, therefore, set the context—whether Kelley violated state law—for the statement in the second article. In the third article, Wren included a quote stating, "Brad Dean admits he set up the lunch with [chamber] lobbyist Mark Kelley and he handed Mr. Barrett the envelope full of checks." The quote suggests Dean meant the "he" who handed the checks to Barrett was Kelley, but Wren clearly knew Dean did not say Kelley delivered the checks.

Our supreme court has defined clear and convincing evidence as "that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996). Based on the entire record in this case, including the testimony and emails described above, we find the evidence is sufficient to support a firm belief on the part of the jury that Wren knew the statement in the May 23 article was an accusation that Kelley committed a crime Wren knew Kelley did not commit. Considering the entire record, and considering this statement in context and not in isolation, we find the evidence supporting the jury's determination that Wren acted with actual malice is clear and convincing evidence. Therefore, we affirm the trial court's denial of the motions for a directed verdict and JNOV.

C. Expert Testimony

Wren and Sun Publishing argue the trial court erred in admitting expert testimony about the "standards of professional journalism" because the evidence allowed

Kelley to prevail on a negligence standard of proof, rather than the constitutional actual malice standard.⁸

The qualification of an expert witness and admissibility of his testimony is within the discretion of the trial court. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). We find the record supports a determination that Dr. William Lee—a University of Georgia journalism professor qualified by the trial court as an expert witness—was qualified, his testimony assisted the trier of fact, and his testimony met the requirement of reliability. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (requiring as a foundation for the admission of expert testimony (1) the witness is qualified, (2) the testimony will assist the trier of fact, and (3) the method by which the witness reached the opinion is reliable). Therefore, the trial court did not abuse its discretion in admitting Dr. Lee's testimony.

Wren and Sun Publishing also argue Dr. Lee's testimony was not relevant. Specifically, they contend the testimony did not assist the trier of fact because it applied an incorrect standard of proof—negligence, instead of actual malice. 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.

Finally, Wren's and Sun Publishing's argument as to the standard of proof relates to the jury charge, not the admission of evidence. The trial court correctly charged the jury Kelley could not recover unless he proved actual malice by clear and convincing evidence, and Wren and Sun Publishing did not object to that portion of the charge.

Accordingly, we find the trial court did not abuse its discretion in admitting Dr. Lee's testimony.

⁸ Kelley argues this issue is unpreserved because Wren and Sun Publishing did not contemporaneously object to the expert's testimony. We find the issue is preserved.

D. New Trial Absolute

Wren and Sun Publishing argue the trial court erred in denying their motion for a new trial absolute.

A trial court may grant a new trial absolute "only when the verdict 'is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.'" *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011) (quoting *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000)). The trial court and this court must give "substantial deference" to the jury's determination of damages. *Id.* (quoting *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009)). Whether the verdict is so excessive as to require a new trial is within the discretion of the trial court. *Id.*

In denying the motion for a new trial absolute as to the actual damages award, the trial court considered testimony indicating the articles damaged Kelley's reputation—particularly testimony that legislators believed Kelley was "toxic" after Wren published the articles. The trial court ruled "the evidence that was presented in this case does support a verdict of \$400,000." As to punitive damages, the trial court found the jury "made specific findings of malice, clear and convincing proof of malice on the part of the reporter and the paper in this case and . . . th[e] award of \$250,000 as punitive damages is justified."

We find the trial court acted within its discretion in denying the motion. Clemmons testified that before Wren published the articles, Kelley's reputation was "excellent" and his firm had a good reputation among state legislators. However, he testified the articles damaged Kelley's personal and professional reputation. When asked whether he would want to be seen in public with Kelley after the articles, Clemmons stated, "Absolutely not." Moreover, Clemmons testified he told an organization looking for lobbyists that in his opinion, "as a lobbyist Mark Kelley was toxic at that time because of everything that had been in *The Sun News*." Hardwick and Barrett also testified the articles damaged Kelley's reputation. Additionally, Kelley testified the articles caused him significant embarrassment and stress. Therefore, we hold the trial court did not abuse its discretion in denying the motion for a new trial absolute.

E. Punitive Damages Against a Media Defendant

Wren and Sun Publishing argue awarding punitive damages against a media defendant violates the free press guarantees of the First and Fourteenth Amendments.

There is ample authority under both South Carolina and federal law that a jury can award punitive damages against a media defendant when the plaintiff meets the appropriate standard of proof. *See Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 512, 506 S.E.2d 497, 503 (1998) (holding a private plaintiff may recover punitive damages from a media defendant if he proves by clear and convincing evidence the defendant acted with actual malice); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774, 106 S. Ct. 1558, 1562, 89 L. Ed. 2d 783, 791 (1986) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50, 94 S. Ct. 2997, 3011-12, 41 L. Ed. 2d 789, 810-11 (1974)) (stating a private plaintiff must show actual malice to recover punitive damages against a media defendant). Here, the jury found Wren and Sun Publishing published the accusations against Kelley with actual malice, and we find there is clear and convincing evidence to support the finding. Therefore, an award of punitive damages in this case does not violate the constitutional rights of Wren and Sun Publishing.

III. Conclusion

The verdicts against Wren and Sun Publishing are **AFFIRMED**.

KONDUROS, J., and CURETON, A.J., concur.

THE STATE OF SOUTH CAROLINA
In the 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

RECEIVED

FEB 05 2016

SC Court of Appeals

78617

Mark Kelley Respondent,

v.

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

APPELLANTS' PETITION FOR REHEARING

David Wren and Sun Publishing Company Inc., d/b/a *The Sun News*, Appellants, respectfully petition pursuant to Rule 221 of the South Carolina Appellate Court Rules, for a rehearing of the appeal in the above entitled cause in which the Court of Appeals filed its Opinion No. 5375 on January 13, 2016.

This petition is based upon the following points:

1. 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 affirming the denial of Defendants' motions for directed verdict and for judgment notwithstanding the verdict, the Court of Appeals misapprehended its constitutional duty

in defamation cases brought by public figures to consider "all parts of the publications" at issue, in their full context.

2. In holding that there was sufficient evidence of constitutional actual malice on the part of Defendants and affirming the denial of Defendants' motions for directed verdict and for judgment on the pleadings, the Court of Appeals misapprehended the required application of the actual malice standard 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.

3. In holding that the trial court properly admitted evidence from expert witness Dr. William E. Lee to support Plaintiff's claim of actual malice and affirming the denial of Defendants' motions for directed verdict and for judgment notwithstanding the verdict, the Court of Appeals misapprehended the requirements of Rules 403 and 702, SCRE and the First Amendment and Fourteenth Amendments to the United States Constitution in upholding the admission of expert witness testimony (1) regarding Defendants' failure to conform with journalistic standards, and (2) as to Defendants' actual subjective state of mind regarding the falsity of the statements published.

4. 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, the Court of Appeals overlooked the fact that the damages awards were unsupported by Plaintiff's evidence and were therefore grossly excessive and so

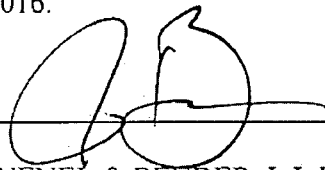
disproportionate that the jury clearly based them on considerations not founded on the evidence.

5. In holding that the award of punitive damages did not violate the free press guarantees of the First and Fourteenth Amendments to the United States Constitution and denying Defendants a new trial on that ground, the Court of Appeals misapprehended the First Amendment's protections found in the "of the press" clause.

Appellants' memorandum in support of this Petition for Rehearing is submitted herewith.

WHEREFORE, Appellants respectfully urge that this Petition for Rehearing be granted and that the judgment of the Circuit Court be, upon further consideration, reversed and judgment entered for Defendants, or, in the alternative, that the case be remanded for a new trial.

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



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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
Civil Case No. 2012-CP-26-3804

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

v.

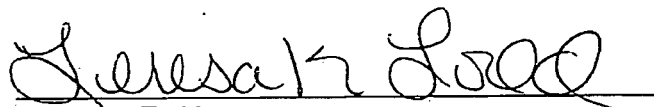
Mark Kelley,.....Respondents.

CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellants' Petition for Rehearing and Memorandum in Support of Appellants' Petition for Rehearing, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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February 5, 2016


Teresa K. Todd

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)); *Tavoulareas 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.” *Tillon*, 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.

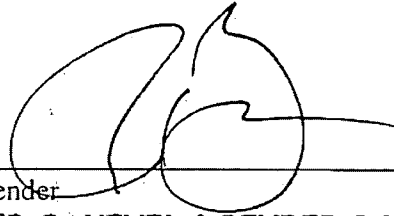
CONCLUSION

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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The South Carolina Court of Appeals

Mark Kelley, Respondent,

v.

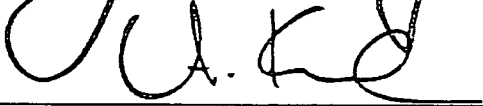
David Wren and Sun Publishing Company Inc., d/b/a
The Sun News, Appellants.

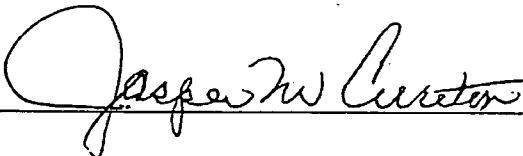
Appellate Case No. 2014-001249

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C.J.


J.


A.J.

Columbia, South Carolina

FILED

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march 4, 2016

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The Honorable Larry B. Hyman, Jr.