THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Opinion No. 5375 (S.C. Ct. App. Filed January 13, 2016)

Mark Kelley .....Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certify that their Petition for Rehearing was filed on February 5, 2016 and denied by the Court of Appeals on March 4, 2016.

QUESTIONS PRESENTED

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II. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE PLAINTIFF IN THAT THERE WAS NOT SUFFICIENT EVIDENCE THAT THE STATEMENTS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE?

III. DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTION FOR A NEW TRIAL BASED UPON ADMISSION OF OPINION TESTIMONY FROM AN EXPERT WITNESS (1) REGARDING PETITIONERS' CONFORMANCE WITH STANDARDS OF PROFESSIONAL JOURNALISM, AND (2) REGARDING THE ACTUAL SUBJECTIVE STATE OF MIND OF PETITIONERS, ALL FOR THE PURPOSE OF PROVING CONSTITUTIONAL ACTUAL MALICE?

STATEMENT OF THE CASE

Respondent, Mark Kelley, a registered lobbyist, initiated a libel action in 2012 against McClatchy Newspapers, Inc., d/b/a *The Sun News* and reporter David 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 Kelley 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)

After discovery, 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 this 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, 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. On May 12, 2014, Wren and the newspaper moved for judgment notwithstanding the verdict or a new trial. These motions were denied without written order. It is from the matters and rulings described above that this appeal was taken. On January 13, 2016, the Court of Appeals affirmed the trial court verdict. On February 5, 2016, Wren and the newspaper filed their Petition for Rehearing with the Court of Appeals. The Court of Appeals denied the Petition by its March 4, 2016 order.

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. 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 companies had said they did not know of the contributions or the source of funds for the contributions. (R. p. 398 line 4 - p. 399 line 13)

In May of 2010, Wren was pursuing leads from various political sources 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. Wren received emails from a former campaign aide to Barrett which provided details of the meeting involving Dean, Barrett and Kelley. Barrett confirmed to Wren his 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 - 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 May 21, 2010 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)

In continuing to report on these campaign contributions, Wren wrote and the newspaper published a May 23, 2010 news report under the headline "Bad debt adds to donor mystery" which reported that one of the limited liability companies that had been identified as a source of the campaign funds, Garden City Partners, 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)

This news report also reiterated that Dean had delivered 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)

Robert Kelley, the president of the group questioning the source of these funds, 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. 640-41)

The newspaper reported Robert Kelly's comments in its May 25, 2010 news report.

Wren testified that when he wrote the sentence in the May 23, 2010 article, "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 15-23)

Wren testified that when he was quoting Robert Kelley in the May 25, 2010 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 - p. 413 line 22; pp. 640-41)

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 9-10), that he did not report that Kelley delivered the envelope or touched the envelope with contributions (R. p. 417 lines 8-18), that he had no bias or prejudice against Kelley (R. p. 444 lines 12-16),

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 5-14) Wren testified that he telephoned Kelley prior to publication of the article to seek comment from him, but that Kelley did not return his call. (R. p. 417 lines 22-25) Kelley testified that he did not return Wren's call because he does not return Wren's calls. (R. p. 92 lines 10-24)

Wren testified that he had never received a call from Kelley or heard from him in any way in the two years between the publication of the articles in 2010 and Kelley's filing of the lawsuit in 2012. Wren also testified that he had not received any communication from anyone complaining that anything in the news reports was inaccurate. (R. p. 417 line 22 - p. 419 line 3)

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 - p. 291 line 7)

Notwithstanding the objection that this testimony would introduce irrelevant standard of care issues – relating to the issue of objective negligence -- into a constitutional actual malice case – involving the issue of the reporter's subjective state of mind -- 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 21-23), that Wren wasn't careful (R. p. 338 lines 13-14), and that the newspaper deviated from

standards. (R. p. 351 line 18 - p. 352 line 4) Lee also offered his opinions about Wren's actual subjective state of mind at the time the articles were published, stating that Wren was "disregarding the truth of what [Wren] was writing" (R. p. 355 lines 15-17) and that Wren "knew that [the publication] was false." (R. p. 349 line 11)

GROUNDS FOR PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of the final decision of the Court of Appeals pursuant to Rule 242, SCACR because this decision: (1) presents novel questions of defamation law in a constitutional context, (2) is in conflict with prior decisions of the United States Supreme Court and this court, and (3) directly involves substantial questions of constitutional law relating to the scope of First Amendment protections for speech about public figures engaged in core political activity. As this court has observed, "[t]he confusion in South Carolina defamation law has been compounded by the fact that this Court's opinions have not completely taken into consideration the impact of decisions by the United States Supreme Court" reflecting "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Holtzscheiter v. Thomson Newspapers*, 332 S.C. 502, 517, 506 S.E.2d 497, 505 (1998) (*Holtzscheiter II*) (Toal, J., concurring). Petitioners respectfully submit that, in affirming the trial court, the Court of Appeals failed to properly apply these First Amendment protections.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE PLAINTIFF IN THAT THERE WAS NOT SUFFICIENT EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT WAS PUBLISHED BY PETITIONERS CONCERNING PLAINTIFF.

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 II*, 332 S.C. at 531, 506 S.E.2d at 513. 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, in a defamation case brought by a public figure plaintiff, the court's threshold task is to determine if a statement alleged to be libelous is capable of a false and defamatory meaning. 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. v. Sullivan*, 376 U.S. 254, 285, 84 S. Ct. 710, 729, 11 L. Ed. 2d 686, 709 (1964) (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S. Ct. 680, 683, 9 L. Ed. 2d 697 (1963)).

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,[1] 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.

This court has long held 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 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).

This court 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), this Court affirmed a directed verdict for a newspaper defendant despite the publication of an untrue

[1] 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)

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. This 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.

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, Mark Kelley introduced into evidence three news articles authored by 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 of Appeals 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.**" This portion of the article again makes clear that it was Dean, not someone else, who delivered the campaign contributions.

- The fourth paragraph 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, 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.

• <u>The May 23, 2010 Article</u> (R. p. 639):

- This article 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 the Court of Appeals focused in its opinion: "Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June."

- 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 non-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 Hazelwood 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 Hazelwood, the commission's general counsel." (R. p. 638)

The Second Circuit's decision in *Tavoulareas* offers specific guidance on the constitutionally mandated review of defamatory meaning and evidence of falsity in a public figure libel case. *The Washington Post* published a 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 over $2 million in 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 considered "both the words themselves and the entire context in which the statement occurs." *Id.* at 779. The court rejected the plaintiff's characterization of the article's meaning – that the "set up" language meant the entire relationship between Mobil and the other business entities was a "nepotistic act." *Id.* at

780. After rejecting that defamatory implication, the court held, as a matter of law, that no reasonable jury could find that the "set up" allegation was false. *Id.* at 786.

Petitioners respectfully submit that the Court of Appeals, in performing "the quintessential function of the court in defamation actions" brought by public figures, erred by failing to consider "all parts of" the publications at issue, in their full context, when determining if the statement concerning Plaintiff was false and defamatory. Its decision is in direct conflict with the long-standing precedent established by the United States Supreme Court and by this court.

II. THE COURT OF APPEALS ERRED IN AFFIRMNG THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT IN THIS LIBEL ACTION BROUGHT BY A PUBLIC FIGURE PLAINTIFF IN THAT THERE WAS NOT SUFFICIENT EVIDENCE THAT THE STATEMENTS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

A. The Court of Appeals Erred by Inventing an Actual Malice Standard That Conflicts with the First Amendment Standard Required by the Decisions of the United States Supreme Court and This Court.

Both the United States Supreme Court in *New York Times Co.* (and its progeny) and this court in *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000) have clearly described what a plaintiff must prove 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 by substituting its own novel 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 there was clear and convincing evidence that 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 specifically asked a different question: **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 criminal libel conviction; 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).

This novel formulation of the constitutional actual malice standard – invented for this case by the Court of Appeals and unsupported in its opinion by any legal authority – directly conflicts with the standard consistently enunciated and applied by the United States Supreme Court and by this court. *See Garrison*, 379 U.S. at 74, 85 S. Ct. at 216; *St. Amant*, 390 U.S. at 731, 88 S. Ct. at 1325; *Elder*, 341 S.C. at 114, 533 S.E.2d at 902; *Fleming v. Rose*, 350 S.C.488, 495, 567 S.E.2d 857, 861 (2002).

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 Wren should have known the statement at issue "could be interpreted" to accuse Mark Kelley of delivering the contributions, the Court of Appeals improperly substituted an 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 demonstrating by clear and convincing evidence serious doubts on Wren's part, the emails instead 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.

The Court of Appeals thus erred by applying this novel and constitutionally unsupportable characterization of the "reckless disregard" standard in affirming the trial court, thereby materially diluting the subjective standard long mandated by the First Amendment and by the decisions of the United States Supreme Court and of this court.

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.

There can be no finding on this record that 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." 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 5-10; p. 118 lines 17-24; p. 146 lines 20-24; p. 171 lines 23-25; p. 197 lines 8-12) While one may argue that a person taking ordinary care might have used different phrasing, that objective analysis is not the First Amendment test required when the speech at issue involves a public figure.

A similar misapplication of the actual malice standard was rejected by the 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, the engineer said he believed, at the time the article was published, that the "about the room" statement meant the same as "along the wall." The district court, however, 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. *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, 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)

Id.

As in *Bose,* this record does not support a finding by clear and convincing evidence that 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.

Petitioners respectfully submit that the Court of Appeals, in conducting its *de novo* review, erred in its application of the constitutional "actual malice" standard.

III. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTION FOR A NEW TRIAL BASED UPON ADMISSION OF OPINION TESTIMONY FROM AN EXPERT WITNESS (1) REGARDING PETITIONERS' COMFORMANCE WITH STANDARDS OF PROFESSIONAL JOURNALISM, AND (2) REGARDING THE ACTUAL SUBJECTIVE STATE OF MIND OF PETITIONERS, ALL FOR THE PURPOSE OF PROVING CONSTITUTIONAL ACTUAL MALICE.

A. Pursuant to Rule 403, SCRE, and the First Amendment, 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).

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; p. 291 line 7) Petitioners 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) Once qualified as an expert, 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 Wren was careful in his reporting, and that Wren was "blowing smoke." (R. p. 321 lines 21-23; p. 338 lines 13-14; 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 the First Amendment requires.

Courts addressing this precise 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 expert's 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").

For these reasons, Dr. Lee's testimony regarding objective standards of journalism should not have been admitted to prove the subjective "high degree of awareness of probable falsity" on the part of Petitioners required by the First Amendment.

B. Pursuant to Rule 702, SCRE, and the First Amendment, Plaintiff's Expert Witness Testimony as to 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 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) This use of his testimony to somehow divine and explain Wren's subjective state of mind was an impermissible departure from both evidentiary and constitutional standards.

In determining whether expert testimony would help the jury, Rule 702, SCRE "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).

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 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; p. 349 lines 8-14; p. 354 lines 14-24), or that Wren "knew that [the publication] was false." (R. p. 349 line 11)

Courts have long rejected attempts to have such journalism expert witnesses 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) ("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 [his] opinion relates to a reckless disregard for a standard of objectivity, not for the truth.").

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.

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 v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). 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.

Dr. Lee's expert testimony regarding Wren's actual 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. Petitioners are aware of no case in which an expert witness on standards of journalism has been permitted to provide his opinion as to the actual state of mind of a news reporter in a public figure libel case. Here, the Court of Appeals expressly held that such testimony was "the crux of Dr. Lee's testimony." The

First Amendment, and Rule 702, SCRE require that Dr. Lee's opinions about what Wren subjectively knew or believed about the truth of the articles should have been excluded from evidence.

CONCLUSION

The Court of Appeals, in its decision, erred by disregarding the First Amendment protections for speech about public figures embodied in decades of decisions by the United States Supreme Court and by this court and by adopting novel, but erroneous, interpretations of the law of defamation under South Carolina law.

For the reasons set forth herein, Petitioners respectfully ask this court to grant their Petition for Writ of Certiorari.

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