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 13, 2016)
Appellate Case No. 2016-000697

Mark Kelley, ... Respondent,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF FACTS

Petitioner Wren admitted both in his deposition and at trial that he had no evidence that Respondent, a lobbyist, set up the meeting where campaign contributions were given to gubernatorial candidate Gresham Barrett nor did he have any evidence that Respondent gave Barrett campaign contributions during the meeting. (R. p. 349, lines 8-19; p. 417, lines 8-13; p. 424, line 23 – p. 425, line 2; p. 431, lines 11-12; p. 439, line 18 – p. 440, line 4; p. 441, line 19 – p. 442, line 3; p. 443, lines 7-10; p. 451, line 23 – p. 452, line 13; p. 454, line 18 – p. 455, line 4; p. 459, lines 12-16; p. 462, lines 18-23). Therefore, Petitioners knew that any such accusations would be false. Petitioner Wren also admitted at trial that he did not recall his supposed original source, Tracy Edge, making "any suggestion about involvement by Mark Kelley (Respondent) in that campaign contribution." (R. p. 400, lines 18-20). Petitioner Wren also knew that both setting up the meeting and handing donations to a candidate were crimes under South Carolina law. (R. p. 422, lines 1-11).

As stated by Petitioners, in May of 2010, several weeks before the Republican Gubernatorial primary, Petitioner Wren 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." Petitioners drew Respondent into their investigation solely because Respondent accepted a luncheon invitation from a friend, Brad Dean, who told Respondent that his legislative desk mate, Gresham Barrett, would be at the luncheon. That luncheon occurred eleven months earlier and was not what could be considered "hot news". Petitioner wrote several articles which Respondent maintained defamed him in his position as a lobbyist accusing him of facilitating a meeting and handing campaign contributions to Gresham Barrett, which would be a crime under South Carolina law and which would result in a fine or imprisonment or both and would result in the loss of Respondent's

lobbying license for three years. As a result of the articles, Respondent filed suit for defamation against the Petitioners.

At trial, Respondent produced evidence which clearly and convincingly proved that the Respondent had no ownership interest in the LLCs (R. p.87, line 18 – p.88, line 1; R. p.100, lines 14-18), knew nothing about the LLCs (R. p. 87, line 18 – p.88, line 1; R. p.101, lines 4-13), did not know anyone in the LLCs (R. p. 100, lines 14-20; R. p.101, lines 4-13), knew nothing about the donations or that donations were to be given to Barrett (R. p.86, lines 10-16), did not know the source of the donations (R. p.87, lines 12-14), never handled the donations (R. p.89, lines 8-22), never facilitated any campaign donation meeting (R. p.108, lines 23-25), and attended the meeting with Barrett only because he served in the South Carolina legislature with Barrett (R. p.84, line 23 – p.85, line 24). Respondent had no prior knowledge that campaign donations were going to be handed to Barrett at the luncheon. (R. 89, lines 8-22) (See also, R. p. 108, lines 9-17).

Moreover, Petitioner Wren admitted he had no evidence that Respondent was involved with the LLCs upon which Wren was investigating and reporting. (R. p. 438, lines 8-12; p. 439, lines 19-23; p. 454, line 18 – p. 455, line 4). In fact, the editor, Patricia O'Connor, admitted at trial that the "money coming from the LLCs has nothing to do with Mark Kelley." (R. p. 496, lines 11-13).

During discovery in the case, Respondent obtained Petitioner Wren's emails (R. pp. 659-661) which revealed that Petitioner Wren was trying to gather evidence to accuse Respondent of calling a meeting where campaign donations would be given to Barrett and handing Barrett the donations at the luncheon with Brad Dean, Chairman of the Myrtle Beach Area Chamber of

Commerce. These emails reveal the subjective state of mind of Petitioner Wren. An email dated May 3, 2010, from Petitioner Wren to Tracy Edge stated, in part:

> Subject: Re: I called trey walker[1] 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 Barrett campaign that would show Mark Kelley distributed donations to him[2]. ..... Walker flat out denied knowing anything about anything. Basically called you a liar. Now I'm really confused. I know campaign managers have little or no ethics, but to flat out lie about something that eventually will be shown to be true isn't going to help him. (R. p. 659).

An email from Petitioner Wren to Justin Stokes[3] and Tim Pearson[4] on May 23, 2010 further revealed Petitioner Wren's state of mind which states, in part, as follows:

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

Four days later, still trying to create evidence which he knew did not exist, Petitioner Wren wrote an email to Tim Pearson, Nikki Haley's campaign manager, an admittedly biased source[5], seeking information that Respondent was involved in raising money for Barrett and others:

> 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*

---

[1] Trey Walker was Henry McMaster's campaign manager.

[2] At trial, Petitioner Wren on direct examination stated the opposite:
Q. Did Representative Edge make any suggestion about involvement by Mark Kelley in that campaign contribution?
A. Not that I recall. (R. p. 400, lines 18-20)

[3] Stokes was a campaign worker who had left the Barrett campaign and went to work as a campaign worker for Nikki Haley.

[4] Tim Pearson was the campaign manager for Nikki Haley.

[5] Q. Were you skeptical of Justin Stokes?
A. Yes.
Q. Were you skeptical of Tim Pearson?
A. Yes. (R. p. 419, lines 8-10).

> *and Mark Kelley in raising money for Barrett and others....* (R. 677). (emphasis added).

The problem with Petitioner Wren's request was there were no such emails. Everyone Petitioner Wren had contacted told him that Respondent was not involved in the campaign donations or told him they did not know what he was talking about.

Knowing he had no evidence that Respondent was involved in the campaign donations, Petitioner Wren continued to create evidence of Respondent's involvement in the campaign donations where none existed by writing the following email to Brad Dean on July 28, 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?* (R. p. 671). (emphasis added).

At the time of writing this email, Petitioner Wren had already been told by Brad Dean that Respondent had nothing to do with the campaign donations and that Brad Dean, not Respondent, handed the campaign donations to Barrett at the June 20, 2009, luncheon. Therefore, there was no reason to ask a question to which he already had the answer.

The jury was presented with the language of the articles and was asked whether the articles defamed Respondent by accusing him of a crime. The jury agreed with Respondent that the articles accused him of a crime and it was a simple step for the jury to find that the accusations were false because the Petitioners agreed that Respondent did not call the meeting or give the campaign donations to Barrett. Petitioners agreed with Respondent repeatedly during the trial that there was no evidence of Respondent's involvement in calling the meeting and giving campaign donations.

Moreover, it was a further simple step for the jury to find that the Petitioners, who admittedly had no evidence of Respondent's involvement with the campaign donations, to find

that the articles accusing Respondent of a crime were published knowing they were false and/or with a substantial doubt of their truth which is the definition of constitutional actual malice.

The jury answered special interrogatories submitted by the trial judge in which they found (1) that the Respondent "has proven by clear and convincing evidence that the [Petitioners] made a false statement about the [Respondent] and that said statement injured [Respondent] personally and in his occupation and profession", and (2) that the [Respondent] "has proven by clear and convincing evidence that said statement was published with actual malice, which is the statement was made by the [Petitioners with] knowledge of its falsity or with reckless disregard of its truth or falsity." (R. p. 588, lines 5-16).

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT A FALSE AND DEFAMATORY STATEMENT WAS PUBLISHED BY PETITIONERS CONCERNING RESPONDENT.

Both the trial court (R. p. 623, lines 6-18) and the Court of Appeals performed their duties as gatekeepers to independently review the whole record to determine whether the statement(s) of and concerning the Respondent were false and defamatory and to assure that the judgment did not constitute a forbidden intrusion on the field of free expression. On both issues, the trial court and the Court of Appeals performed their duties according to settled precedent. The Court of Appeals discussed in its opinion that it did consider the entire record:

> 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. (emphasis added).

In its opinion, the Court of Appeals discussed and reviewed all of the articles, the admissions by Petitioners during trial that they knew the Respondent had nothing to do with the campaign donations or the LLCs and the emails written by Petitioner Wren which revealed his subjective state of mind that he wanted to accuse Respondent of involvement with the campaign donations. The Court of Appeals considered all the articles, the admissions by Petitioner Wren that he had no evidence against Respondent, Petitioner Wren's emails, and statements made to Petitioner Wren by Dean and Barrett that it was Dean, not Respondent, who handled the donations and handed them to Barrett. The Court of Appeals stated and Petitioner Wren agreed that "the record in this case contains no evidence Kelley participated in delivering the money to Barrett." The Court of Appeals correctly pointed out that:

> 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. (emphasis added).

Having performed its independent review, the Court of Appeals agreed with the trial judge's independent review and the jury's verdict that Petitioners defamed the Respondent by accusing him of a crime. The trial judge and the jury decided that Petitioner Wren's explanation of the defamatory language that "Kelley was along with Dean" rings hollow. Not only was the evidence sufficient to satisfy the requirements of an independent review, it also led the Court of Appeals to agree with the jury in finding the explanation by Wren incredible:

> 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 read as an accusation against Kelley.

As stated in the opinion of the Court of Appeals in the above quotation, Petitioner Wren, whose occupation depends upon being a "word smith", recognized that he was accusing

Respondent of a crime. His attempt to escape liability by putting a far-fetched interpretation was rejected by the trial court and the Court of Appeals and such interpretation was rightly rejected.

> It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule, as a matter of law, that it was not libelous. The court should not, however, indulge far-fetched interpretations of the challenged publication. The statements at issue should not be 'interpreted by extremes, but should be construed as the average or common mind would naturally understand [them].' (citation omitted). If the court determines that a statement is indeed capable of bearing a defamatory meaning, then whether that statement is in fact 'defamatory and false [is a question] of fact to be resolved by the jury'. Guilford Transp. Indus. v. Wilner, 760 A.2d 580 (D.C. Ct. App. 2000), *citing* Levy v. American Mut. Ins. Co., (footnote omitted).

Once the independent review is completed, the Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). 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.*

The Respondent proved that the accusations made by Petitioners were false and defamatory. The trial judge and the Court of Appeals completed their independent review of the whole record and correctly concluded that the matter did not constitute a "forbidden intrusion on the field of free expression". They also correctly concluded that it was a question to be decided by the jury.

II. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONERS' MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THERE WAS SUFFICIENT EVIDENCE THAT THE STATEMENTS COMPLAINED OF WERE MADE WITH CONSTITUTIONAL ACTUAL MALICE.

The entire thrust of Petitioners' argument is that the Court of Appeals applied an objective standard instead of a subjective standard in finding actual malice on the part of the Petitioners. Petitioners' argument tortures the wording of the Court of Appeals' opinion. In its opinion, the Court clearly applied a subjective standard in finding actual malice required by New York Times Co. v. Sullivan, 376 U.S. 293, 84 S.Ct. 733, 11 L.Ed.2d 686 (1965), and its progeny.

> 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.

The defamatory statements made by Petitioners accused Respondent of a crime; however, the Petitioners unsuccessfully attempted to convince the trial court and jury that the complained-of language meant that Respondent was only accompanying Dean at the luncheon. Such an interpretation of the complained-of language was found to be incredible by the trial court, the jury, and the Court of Appeals:

> 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.

The Court of Appeals actually found that Petitioner Wren knew the accusations made were false:

> The question before us on the sufficiency of the evidence of actual malice, therefore, is not whether Wren knew that the accusation against Kelley was false – *Wren clearly knew that.* (emphasis added).

In light of the fact that Petitioner Wren made numerous admissions that he had no evidence of Respondent's involvement with the campaign contributions, he obviously realized that the only way to escape liability for his defamatory articles was to twist the English language and try to convince the court and jury that the language he used in his article only meant that Respondent was simply sitting beside Dean. This is an extreme interpretation by Petitioner which nobody believed. As previously stated above, the statements at issue should not be "interpreted by extremes, but should be construed as the average or common mind would naturally understand [them]." Guilford, *supra.* "The objectionable words must be construed in their most natural meaning and in the sense in which they would be understood by those to whom they were addressed. Such words must be measured by the natural and probable effect on the mind of the average lay reader rather than subjected to the critical analysis of the legal mind." Digest Pub. Co. v. Perry, 284 S.W.2d 832, 834 (Ky. 1955). *See also,* Scheel v. Harris, 2012 U.S. Dist. LEXIS 121825, 2012 WL 121825 (E.D.C. Ky 2012), and Yancey v. Hamilton, 786 S.W.2d 854, 858 (Ky. 1989) (*quoting* McCall, 623 S.W.2d at 884);

It is the obligation of the Court to review all evidence of malice in the record even beyond the words actually spoken. As to whether malice was shown by the falsity of the words spoken alone, the United States Supreme Court has indicated that where the record contains substantial additional evidence, it should also be considered in an independent review. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 111 S.Ct. 2419, 115 L.Ed. 2d 477 (1991). Following the suggestions of Masson, a review of this evidence in a light most favorable to this plaintiff indicates that this Court should consider the natural and probable effect of the words on the mind of the average listener, and not subject them to "critical analysis of the legal mind". *See,* McCall v. Courier-Journal & Louisville Times Co., 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975, 102 S.Ct.

2239, 72 L.Ed.2d 849 (1982). Ky. Kingdom Amusement Co. v. Belo Ky., Inc., 179 S.W.3d 785 (Ky. 2005).

It was in this context that the Court of Appeals indicated that no reasonable person would understand the defamatory statement the way the Petitioner Wren explained its meaning. The Court of Appeals was simply stating that the "natural and probable effect of the words on the mind of the average listener" would be that Petitioner accused Respondent of giving campaign donations to Barrett. It certainly was not applying a new theory using an objective standard.

Moreover, the record contained substantial additional evidence in the form of Petitioner Wren's emails which revealed his subjective mindset to accuse Respondent of giving Barrett campaign contributions. These emails were properly considered in an independent review. *See,* Masson, *supra.* Contrary to Petitioner Wren's claim that he was asking questions of those he was emailing, he was actually making statements as though Respondent was guilty of facilitating the meeting and giving campaign donations to Barrett.

> ... I know campaign managers have little or no ethics, but to flat out lie about something that eventually will be shown to be true isn't going to help him. (R. p.659).
>
> ....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.* (emphasis added). .....
>
> Also, if there are any emails or documents that show ... *Kelley's role in setting up the Barrett meeting* would be a great help. (R. p. 661). (emphasis added).

For the above reasons, this Court should deny Petitioners' Petition for a writ of certiorari because there was sufficient evidence to support a finding of actual malice, and the trial court and Court of Appeals properly conducted an independent view and concluded there was sufficient evidence from which a jury could find by clear and convincing evidence that Petitioner Wren made the statements with actual malice. *See,* Elder v. Gaffney Ledger, 341 S.C. 108, 533 S.E.2d 899

(2009) and 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).

III. THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR A NEW TRIAL BECAUSE ADMISSIBILITY OF EXPERT TESTIMONY IS WITHIN THE DISCRETION OF THE TRIAL JUDGE, AND HE DID NOT ABUSE THAT DISCRETION.

A person may be qualified as an expert based upon "knowledge, skill, experience, training, or education." Rule 702, SCRE. "The qualification of a witness as an expert is a matter largely within the trial court's discretion and will not be reversed absent an abuse of that discretion." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997). The trial court has wide discretion in determining the qualification of expert witnesses and the admissibility of their testimony. A trial court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a *clear* abuse of discretion. Mizell v. Glover, 351 S.C. 392, 395, 570 S.E.2d 176, 177 (2002). (emphasis added).

Also, the decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and the trial court's decision will not be disturbed absent an abuse of discretion.

"[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice. (citation omitted). Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008). In the instant case, the expert's testimony was cumulative to other substantial evidence as discussed above which revealed the article was printed with actual malice. There was a plethora of other evidence which revealed that Petitioner Wren knew he had no evidence that Respondent was involved in giving campaign contributions – in fact, Appellant Wren admitted that fact numerous times during his

testimony as discussed above. Personal knowledge of a fact is subjective, not objective, and therefore, based upon Petitioner Wren's own admission, the jury was entitled to find that Respondent had proven actual malice by clear and convincing evidence. Since the independent review does not decide the credibility of the witnesses, it was for the jury to decide whether to believe Petitioner Wren's explanation of what the statements in his articles meant. The jury obviously found that his explanation was incredible.

Petitioner Wren testified that he was skeptical of his sources, Justin Stokes and Tim Pearson, and knew they were obviously biased sources. "Where there is reason to question an informant's veracity, and where newspaper editors do not interview a witness who had the same access to the facts as the informant and do not listen to tapes that revealed what actually happened, *that evidence of an intent to avoid the truth is not only sufficient to prove that there has been an extreme departure from professional publishing standards, but it is also sufficient to satisfy the more demanding actual malice standard."* Hart-Hanks Communications v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). (emphasis added).

Respondent's expert testified to evidence in the record reviewed by him which established Petitioner Wren's intent to avoid the truth.

> Q. Okay. Now, based upon your investigation and the documents that came from the Defendant, David Wren and The Sun News, did David Wren have any evidence that Mark Kelley set up the meeting, raised the money or gave the money, contributions to Gresham Barrett?
>
> A. Absolutely not. In fact, he had three sources, Gresham Barrett, Brad Dean and B. J. Boiling telling him no.
>
> Q. And also one that says I don't know what you're talking about.
>
> A. That's correct, that's Trey Walker.

Q. Would that, would that type of background investigation give a reasonable investigative reporter knowledge that Kelley had nothing to do with giving campaign donations to Gresham Barrett or setting up a meeting?

A. Absolutely. Especially since the two parties most intimately involved, Brad Dean and Gresham Barrett, both tell Mr. Wren on May 20th that Mark Kelley had nothing to do with this and Mr. Wren is not a novice, he doesn't – didn't just walk into this newsroom – (R. P. 333, lines 5-23).

* * * * *

Q. Would he be printing that without knowledge of whether it's true or false or without evidence that it's true or false?

A. He knew it was false because before he prints anything about this, on May 20th he interviews Brad Dean and Gresham Barrett and both of them tell him that Mark Kelley had nothing to do with this. *He uses that knowledge to structure an interview with Cathy Hazelwood in which he doesn't ask her about Mark Kelley handling the money. Because as he says in his deposition, I already knew he didn't handle the money; that's what Gresham Barrett and Brad Dean told me*....(Emphasis added). (R. P. 349, lines 8-18).

* * * * *

A. Again, Mark Kelley is identified by both Gresham Barrett and Brad Dean on May 20th as having nothing to do with these donations. David Wren uses that information when he talks to Cathy Hazelwood and he says, I didn't even ask her about Mark Kelley doing this because I knew he hadn't.

Q. Does it show that he was conscious of the fact that he didn't have the evidence?

A. He would have to be.

Q. Would that be disregarding the truth or the falsity of what he was writing?

A. Yes.

Q. And he was conscious of that from your reading of the emails?

A. And his deposition in which he says he knew that Mark Kelley did not – on May 20th he knew Mark Kelley did not touch this money. On May 23rd he's saying Mark Kelley did. There's no document that's been produced that shows that some piece of information came to him between the 20th and the 23rd that altered what he had been told by Brad Dean and Gresham Barrett.

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, line 1 – P. 356, line 8).

As described above, the Respondent introduced more evidence than just Petitioners' deviation from their own journalistic standards such as the admissions and emails of Petitioner Wren, the testimony of Gresham Barrett and Drea Byers who stated that Respondent did not hand the campaign contributions to Barrett, and witnesses who read the articles and understood them as accusing Respondent of a crime. Therefore, the evidence of violations of journalistic standards was not the only or sole evidence of actual malice by Petitioners. Moreover, Respondent's expert testified concerning clear admissions by Petitioner Wren that he had no evidence that Respondent did anything wrong and was not involved with the campaign contributions. This evidence, along with Petitioner Wren's emails, went to the issues of whether the Petitioners published their articles with a high degree of awareness of probable falsity, with serious doubts as to their truth, and/or with a realization the statement was false. Since Petitioner Wren admitted throughout the trial that he knew Respondent did not give the campaign contributions to Barrett, the expert's testimony simply focused on the testimony that the jury heard – that he had no evidence against Respondent and his article, which accused Respondent of a crime, was published knowing it was false or with a reckless disregard for its truth or falsity.

Relying on a breach of journalistic standards alone to prove actual malice without introducing other evidence has been held insufficient to prevail in a public figure libel action; however, that does not mean that a breach of journalistic standards is always inadmissible in

evidence. When breach of journalistic standards is introduced with other evidence relating to actual malice, it is admissible and may be considered by the jury. *See,* Harte-Hanks Communications v. Connaughton, *supra,* 491 U.S. at p. 665. ("Even a showing of an extreme departure from journalistic standards *alone* is an insufficient basis for finding actual malice, *although such evidence may be admissible to show actual malice*".); Q Int'l Courier, Inc. v. Seagraves, 1999 U.S. Dist, LEXIS 23355, 27 Media L.Rep. 1982, *citing* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 663-66, 105 L.Ed.2d 562, 109 S.Ct. 2678 (1989) ("*Standing along*, however, evidence of the defendants' failure to follow accepted journalistic standards is insufficient to show malice".); Journal-Gazette Co. v. Bandidio's, Inc., 672 N.E.2d 969, 973 (Ind. Ct. App, 1996) ("This evidence showed that the journal's conduct fell below reasonable journalistic standards and its own guidelines; however, this evidence alone does not establish actual malice. Thus, *we must look to what additional evidence supports the verdict"*.); Hinerman v. Daily Gazette Co., 188 W. Va. 157, 170, 423 S.E.2d 560, 573 (1992) ("Although egregious deviation from accepted standards of journalism *standing alone* will not carry the day for a public official libel plaintiff, egregious deviation is one important piece of circumstantial evidence which, when combined with other evidence, can lead a jury properly to find that subjective appreciation of falsity or recklessness existed at the time of publication".); Fletcher v. Mercury News, 216 Cal. App.3d 172, 187 (1989) ("Evidence of failure to follow professional journalistic standards *by itself* does not constitute actual malice".). (emphasis added).

For the above reasons, the Court of Appeals correctly ruled that the trial court properly denied the Petitioners' motion for a new trial.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

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PROOF OF SERVICE

I certify that I have served the **Return to Petition for Writ of Certiorari** on Appellants by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2016, addressed to the following attorneys of record:

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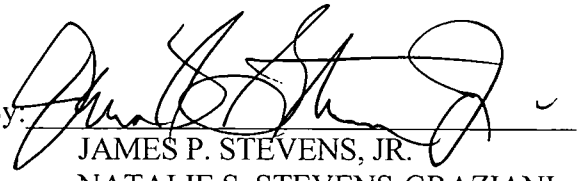
By: 

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