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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

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Opinion No. 5375 (S.C. Ct. App. Filed January 13, 2016)
Appellate Case No. 2016-000697

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Mark Kelley ..... Respondent,

v.

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

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# REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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## INTRODUCTION

The decision of the Court of Appeals should be reviewed by this Court because: (1) it is in conflict with prior decisions of the United States Supreme Court and of this Court, (2) it presents novel questions of defamation law in a constitutional context, and (3) it involves substantial questions of constitutional law relating to the scope of First Amendment protections for speech about public figures engaged in core political activity.

Respondent's Return shares a fatal defect with the Court of Appeals decision. Each focuses on the same single sentence from the May 23, 2010 news report, and each fails to properly address and apply well-settled principles of South Carolina defamation law and decades of bedrock First Amendment jurisprudence. Neither acknowledges that this dispute involves the type of core political speech which demands the highest level of protection in a democratic society.

Petitioners respectfully submit that this public figure libel verdict, and the Court of Appeals decision affirming it, should be provided the full independent appellate review by this Court contemplated by First Amendment principles.

The facts at issue are undisputed. Petitioners learned that some Myrtle Beach area business owners were challenging the source of certain campaign contributions to various political candidates and had specifically questioned possible contributions from the Myrtle Beach Area Chamber of Commerce to gubernatorial candidate Gresham Barrett. (R. p. 398 line 4 – p. 399 line 13) Petitioners reported on this controversy. The three news articles, considered together by the jury, all focus on that larger controversy, not on the single sentence that is the

focus of the Court of Appeals decision.[1]

These articles[2] addressed an existing 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. Respondent Mark Kelley, a former legislator and then-legislative lobbyist was, without dispute, present at the meeting where an envelope containing $84,000 in campaign checks was passed by Chamber of Commerce official Brad Dean to the gubernatorial candidate.

The single, arguably imprecise, statement focused on by the Court of Appeals and by Respondent – when read, as required by law, in the full context of the numerous statements more precisely describing the transfer of these funds by Dean (not by Respondent) – does not support a finding, under South Carolina law and the First Amendment, of: (1) falsity, (2) the requisite clear and convincing evidence of constitutional actual malice, or (3) a $650,000 libel verdict against Petitioners. Moreover, a critical element of Respondent's evidence of constitutional actual malice were the opinions of an expert witness that: (1) Petitioners had not conformed to "standards of journalism" - - an objective test, and (2) that reporter David Wren had actually known the statement was false. Such expert opinion offered to prove a reporter's subjective state of mind is impermissible.

If allowed to stand, this verdict will without doubt chill future speech about such core political controversies. It will send a stark message to those reporting about and discussing issues of public concern vital to a well-functioning democracy: use one imprecise phrase in an

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[1] That sentence, from the May 23, 2010 article, one of the three articles submitted together to the jury, is: "[Brad] Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June."

[2] 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)

otherwise carefully written series of reports about an ongoing political dispute and you may be faced with an onerous libel verdict in favor of a public figure or public official referenced in the publication. It will send a clarion signal to news organizations and to all citizens to "steer far wider of the unlawful zone" in reporting on and discussing controversies at the heart of our democratic political system. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279, 84 S. Ct. 710, 725, 89 L. Ed. 2d 686 (1964). It will stifle the "uninhibited, robust and wide-open" debate on public issues guaranteed by the First Amendment and necessary to a vibrant, accountable democracy. *Id.* at 270, 84 S. Ct. at 721. That protected debate has long been held to include even "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. Certainly that protection extends to this single sentence of arguably imprecise speech under the circumstances of this case.

This Court – mindful of the vital importance of robust and uninhibited discussion of issues of public and political concern – has historically provided its careful, independent review of public official and public figure defamation cases to ensure that bedrock principles of South Carolina and First Amendment jurisprudence have been properly applied. *See Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000) (reversing South Carolina Court of Appeals affirmance of jury verdict against public official libel plaintiff, finding that constitutional actual malice standard was improperly applied); *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1996) (reversing jury verdict against public official libel plaintiff, finding that the constitutional actual malice standard was improperly applied). Petitioners urge this Court to provide that review in this case involving core political speech of the highest importance.

For these reasons, and those set forth more fully herein, Petitioners respectfully request

that this Court grant their Petition for Writ of Certiorari and review the decision of the Court of Appeals affirming the trial court's denial of Petitioners' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict.

## ARGUMENTS

I. THE COURT OF APPEALS, CONTRARY TO SOUTH CAROLINA LAW, FAILED TO CONSIDER THE ALLEGEDLY FALSE AND DEFAMATORY STATEMENT AT ISSUE IN THE FULL CONTEXT OF THE THREE PUBLICATIONS SUBMITTED TO THE JURY, AND INSTEAD CONSIDERED THE STATEMENT BY ITSELF, IN ISOLATION FROM ITS CONTEXT.

Respondents failed to address in any fashion Petitioners' argument or their supporting legal authority that the Court of Appeals erred by failing, in its review and analysis, to consider the statement in the May 23, 2010 article about the delivery of the campaign contributions in the full context of the publications at issue. It is a public figure libel plaintiff's constitutional burden to prove that statements complained of are false and defamatory of the plaintiff. *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*, 332 S.C. 502, 517, 506 S.E.2d 497, 505 (1998) (*Holtzscheiter II*) (Toal, J., concurring).

As set out more fully in the Petition for Writ of Certiorari (pp. 9-10), 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 separate sentences or portions or with an eye constrained to the objectionable feature alone.

50 Am. Jur. 2d *Libel and Slander* § 124 (1995). *See Ross v. Columbia Newspapers, Inc.*, 266 S.C. 75, 221 S.E.2d 770 (1996) (affirming directed verdict for newspaper defendant despite its publication of headline falsely accusing plaintiff of killing his wife). The single sentence the Court of Appeals focused on in addressing the issue of falsity was "rendered innocuous" by other specific statements in the articles. In other words, the additional language in the news reports neutralized the sting of any imprecision or negative connotation in that single sentence.

It is, after all, the duty of the court to determine if the statement at issue is reasonably capable of conveying a defamatory meaning as a matter of law. *Holtzscheiter II*, 332 S.C. at 531, 506 S.E.2d at 513. As set out fully in the Petition for Writ of Certiorari (pp. 9-14), the Court of Appeals did not consider the statement in the required context of the "entire communication" but instead viewed the publications "with an eye constrained to the objectionable feature alone." In failing to review the statement in context, the Court of Appeals failed to "perform the quintessential function of the court in defamation actions." *Tavoulareas v. Piro*, 817 F.2d 762, 777 (D.C. Cir. 1989), *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.).

For these reasons, Petitioners respectfully ask this Court to grant its Petition for Writ of Certiorari and review the decision of the Court of Appeals.

II. THE COURT OF APPEALS, IN CONDUCTING ITS REQUIRED INDEPENDENT REVIEW OF THE EVIDENCE, ERRED BY INVENTING AND APPLYING A CONSTITUTIONALLY IMPERMISSIBLE STANDARD FOR ACTUAL MALICE THAT FOCUSES ON OBJECTIVE STANDARDS INSTEAD OF THE REQUIRED SUBJECTIVE KNOWLEDGE OF THE PUBLISHER OF THE ALLEGEDLY FALSE AND DEFAMATORY STATEMENT.

It is striking that Respondent chose not to address Petitioners' arguments and analysis in its Petition for Writ of Certiorari (pp. 17-20) that, consistent with *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), this record does not support the jury's finding by clear and convincing evidence 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 probable falsity. As the Supreme Court found in *Bose*, the single sentence at issue here was just the sort of alleged "imprecise language" and "inaccuracy that is commonplace in the forum of robust debate" that will not support a finding of constitutional actual malice. *Id.* As analyzed in detail in the Petition for Writ of Certiorari, it makes no common or constitutional sense to find that an imprecisely phrased sentence that can be argued to have a false meaning can be found to have been made with actual malice simply because the author, logically, did not believe that particular unintended meaning to be true. On this basis alone, the Court of Appeals erred in its analysis and conclusion on the issue of constitutional actual malice.

Respondent also cannot avoid the fact that the Court of Appeals, in conducting its constitutionally mandated independent review of the evidence of constitutional actual malice, declared repeatedly that it was applying what is clearly an objective analysis of Wren's state of mind. The Court of Appeals described this most succinctly as follows:

> ... if he [Wren] recklessly disregarded the likelihood the articles could be interpreted to accuse Kelley of delivering the contributions, he may have had actual malice.

There can be no doubt that this novel test requires the application of an objective standard

of analysis of Wren's conduct instead of an analysis of Wren's actual subjective state of mind. The question under this newly invented test is no longer, did Wren publish a statement knowing it was false? The question instead becomes, was Wren somehow negligent or acting outside of accepted journalism standards by failing to understand the likelihood that the articles could be interpreted to accuse Respondent 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"). This test – clearly a negligence standard – is an objective test that dilutes beyond recognition the test mandated by the First Amendment. (*See* Petition for Writ of Certiorari, pp. 14-16)

The Court of Appeals for the Ninth Circuit rejected just such an application of the actual malice standard in *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).

In *Newton,* the Ninth Circuit described the district court's analysis as follows:

> Even if NBC had unintentionally left the impression that organized crime had financed Newton's purchase of the Aladdin [hotel] ... it 'should have been foreseen' by NBC and the failure to foresee it 'shows a reckless disregard for the truth.'

*Id.* at 680. Citing *Bose,* the Ninth Circuit reversed the district court's finding of actual malice, finding that the court "erred in its ruling that an interpretation of the broadcast that 'should have been foreseen' by NBC journalists can give rise to liability." *Id.* The Ninth Circuit concluded: "The district court's standard of what 'should have been foreseen' is an objective negligence test while the actual malice test of *New York Times* is deliberately subjective." *Id.*

The Ninth Circuit in *Newton,* relying expressly upon the Supreme Court's decision in *Bose,* thus explicitly rejected the very actual malice test adopted by the Court of Appeals in its decision. Contrary to the test expressly applied by the Court of Appeals, a finding of actual

malice cannot turn on whether the defendant should have understood or foreseen the allegedly defamatory interpretation. For that reason alone, Petitioners urge this Court to grant their Petition for Writ of Certiorari and review the decision of the Court of Appeals.

In applying this flawed actual malice test, the Court of Appeals nonetheless analyzed several of Wren's emails sent to various political operatives when Wren was seeking to learn as much as he could about the sources and distribution of the campaign funds. The Court of Appeals focused on statements by Wren in those emails and concluded: "... 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." Thus, the Court of Appeals expressly applied its objective test to determine not whether Wren subjectively believed the articles to be false but to determine whether he *should have* understood that the statement at issue would be interpreted as defamatory.

The Court of Appeals' reliance on the emails cited in the decision is, in any event, misplaced, as is Respondent's reliance on them. In May 2010, Wren was doing what any seasoned, professional news reporter would do in the search for information from sources – asking probing questions, testing theories of what may have happened, challenging sources who may be telling him truths, half-truths, and untruths, and comparing notes among those sources' inevitably varying versions of information and events. It is certainly clear that prior to the May 2010 articles, his sources were providing information that the person who would have knowledge about the Barrett donations from Dean was Respondent. For example, when Wren sought more information about the source of Barrett's donations, one source sent Wren an email chain with information from several Barrett campaign staffers or supporters: "All [contributors] appear to be beach developers. Cannot figure what the issue would be. Try Mark Kelley... our Horry expert

or perhaps Alan Clemmons." (R. p. 653) Another provided the following information: "Talk to Mark Kelley. He would be familiar with these contributions and the connections [to these developers]." *Id.* Wren had sound reasons to be asking hard, provocative questions about Respondent's role in the contributions, - - especially since Respondent would not talk with him - - - but those questions do not establish whether or not he believed Respondent delivered the checks. (R. p. 417 lines 22-25; R. p. 92 lines 10-24)

The Court of Appeals ignored the fact that Petitioners did not in fact publish news reports that stated that Respondent delivered any contributions to Barrett. The articles made clear, in headlines and in their text, that it was Dean who delivered the checks. They made clear that delivery of campaign funds by Respondent would have been a crime, and the news reports clearly stated no crime occurred. If Petitioners had meant to say that Respondent delivered the funds, thereby committing a crime, they would have done so clearly, not buried it in the fourteenth paragraph of the May 23, 2010 report.

What the Court of Appeals has done in its confused application of the actual malice standard is to find that this one arguably imprecise statement – read in isolation, not in the context of the three articles as required by well-established South Carolina law – was properly capable of a defamatory meaning. Wren testified that he did not believe that the articles accused Respondent of delivering contributions, and, logically, did not believe that this defamatory interpretation of his statement was true. The Court of Appeals then held that this could be evidence of actual malice. As discussed above, such a finding is inconsistent with the Supreme Court's holding in *Bose* and the Ninth Circuit's holding in *Newton.*

Perhaps aware of the Alice in Wonderland quality of this analysis, the Court of Appeals invented its own novel interpretation of the *New York Times* constitutional actual malice rule: did

Wren recklessly disregard that the articles could be interpreted to accuse Kelley of delivering the contributions? This analysis has created a diluted and constitutionally untenable finding of actual malice on the part of Petitioners.

For all of these reasons, Petitioners respectfully submit that this Court should grant the Petition for Writ of Certiorari and review the decision of the Court of Appeals.

## III. THE COURT OF APPEALS ERRED IN AFFIRMING THE ADMISSION OF OPINION TESTIMONY FROM AN EXPERT WITNESS ON JOURNALISM STANDARDS OF CARE FOR THE PURPOSE OF PROVING CONSTITUTIONAL ACTUAL MALICE.

Respondent contends that it was not reversible error to admit expert testimony from Dr. William E. Lee regarding objective journalism standards of care to support his claim that Petitioners subjectively knew the statement at issue was false or had a high degree of awareness of its probable falsity. (Respondent's Return, pp. 11-15) For the reasons set forth in the Petition for Writ of Certiorari (pp. 20-22), Petitioners submit that it was reversible error to permit opinion testimony that Petitioners failed to conform to certain objective journalism standards and that this failure was evidence of Petitioners' subjective state of mind. In short, such testimony, as the many opinions cited by Petitioners demonstrate, has simply been held to be improperly confusing to jurors in its intertwining of both subjective and objective standards, thereby diminishing the protections guaranteed by the First Amendment's mandated requirement of clear and convincing proof of subjective awareness of falsity or probable falsity.

Respondent concedes that the cases he cites permitting the admission of expert testimony regarding even egregious deviation from accepted standards of journalism hold that such evidence alone is insufficient to establish constitutional actual malice. (Respondent's Return, pp. 14-15) Respondent then attempts to buttress his case for the admissibility of such evidence by arguing that there was additional evidence of knowing falsity. (Respondent's Return, p. 14) But

analysis of the evidence cited quickly reveals that Respondent had no such other evidence, and that the expert testimony was critical to his efforts to prove constitutional actual malice.

First, Respondent contends the "admissions and emails" from Wren were evidence that he knew the critical statement about the delivery of the contributions was false. (Respondent's Return, p. 14) But this is the same sleight of hand reasoning Petitioners have previously rebutted. There is no evidence that what Petitioners published was false in its proper context. It is simply illogical to argue that the fact that Wren himself did not believe Respondent delivered the checks – when, in context, he did not assert such a claim – is evidence of knowing falsity.

Second, Respondent contends that "the testimony of Gresham Barrett and Drea Byers" that Respondent did not hand the campaign contributions to Barrett is evidence of constitutional actual malice. (Respondent's Return, p. 14) Such testimony has nothing to do with Wren's state of mind as to the truth or falsity of the statement at issue.

Third, Respondent contends that the testimony of "witnesses who read the articles and understood them as accusing Respondent of a crime" is further evidence of Wren's state of mind as to the truth or falsity of the statement at issue. (Respondent's Return, p. 14) Of course, such testimony has no relevance to what Wren may have subjectively thought.

Finally, the only other "evidence" cited by Respondent as "additional" evidence of actual malice sufficient to permit the admissibility of the expert testimony on conformance with objective journalism standards is Wren's testimony that he was "skeptical" of sources Justin Stokes and Tim Pearson. (Respondent's Return, p. 12) There is, of course, no evidence that Petitioners published a single word of the articles, much less the single statement at issue, in reliance upon either Stokes or Pearson, and such skepticism is therefore of no relevance to the issue of Wren's belief in the truth of his publication.

Respondent then stretches far to liken such "skepticism" to the evidence in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989). First, *Harte-Hanks* did not even involve the admission of expert witness testimony regarding conformance with standards of journalism care. That aside, Respondent's reliance on *Harte-Hanks* is completely misplaced because the facts of that case demonstrate just how egregious a libel defendant's acts or omissions must be to constitute circumstantial evidence of actual malice. In *Harte-Hanks,* the Supreme Court found that the newspaper defendant's choice "not to interview the one witness who was most likely to confirm" its sole source's version of events, while the other six witnesses to the critical events were interviewed and denied the source's allegations about plaintiff, was "utterly bewildering." *Id.* at 682, 109 S. Ct. at 2693. Combined with the fact that the newspaper declined to listen to a previously audiotaped interview of the one eyewitness the newspaper failed to interview itself – who could have easily "verified or disproved" much of what the newspaper's source claimed – this evidence supported plaintiff's claim of actual malice. *Id.* at 683, 109 S. Ct. at 2693. Thus, the circumstances in *Harte-Hanks* bear no relation to the facts of this case, which standing alone neither support a finding of actual malice nor justify the admission of Dr. Lee's expert testimony regarding conformance with objective standards of journalism care.

For all of these reasons, Dr. Lee's expert witness testimony regarding conformance with objective journalism standards of care should not have been admitted for the purpose of proving constitutional actual malice, and its admission was reversible error.

Even more important, Respondent simply failed to address in any fashion Petitioners' second critical point regarding the admission of such expert testimony. Petitioners pointed out that, instead of addressing directly Petitioners' argument that it was error to permit expert

testimony on objective standards of journalism care for the purpose of proving Petitioners' subjective state of mind, the Court of Appeals downplayed the expert's testimony regarding whether Petitioners had conformed to those objective standards. Instead, the Court of Appeals explained that Dr. Lee "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...." (*See* Petition for Writ of Certiorari, pp. 22-25)

The Court of Appeals thus found that "the crux of Dr. Lee's testimony" were his opinions that Wren "knew [the publication] was false" (R. p. 349 line 11) and that he was "disregarding the truth or falsity of what he was writing." (R. p. 355 lines 15-17) That is, the Court of Appeals ruled that it was proper for this journalism expert to opine what he believed Wren was thinking at the time he wrote the story. Permitting an expert in journalism standards to inform a jury in a public figure libel case that it is his professional opinion from reviewing the record that a news reporter defendant in fact subjectively knew a statement was false is inherently prejudicial. Nothing in Dr. Lee's training, experience or background qualified him to divine the state of mind of David Wren, and there can be no doubt that the force of such impermissible testimony influenced the jury's determination of actual malice. It is also telling that neither the Court of Appeals nor Respondents cited a single case from any jurisdiction in the country where such testimony has been found to be admissible.

For all these reasons, the admission of Dr. Lee's testimony regarding Wren's subjective state of mind is reversible error, and Petitioners respectfully submit that this Court should grant the Petition for Writ of Certiorari and review the Court of Appeals decision in this case.

## CONCLUSION

For the reasons set forth herein and in the Petition for Writ of Certiorari, Petitioners respectfully request that this Court grant its Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

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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 Reply to Return to Petition for Writ of Certiorari, 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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May 9, 2016