

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. 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)

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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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**BRIEF OF THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE  
EXPRESSION, THE SOCIETY OF PROFESSIONAL JOURNALISTS, THE  
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AND 7 OTHER NEWS  
MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR  
CERTIORARI BY DAVID WREN AND SUN PUBLISHING CO., INC., D/B/A *THE SUN  
NEWS***

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**TABLE OF CONTENTS**

INTRODUCTION .....1

ARGUMENT.....2

    I.    THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT A  
          SINGLE AMBIGUOUS PHRASE IN OTHERWISE ACCURATE NEWS  
          COVERAGE CANNOT MAKE THAT NEWS COVERAGE  
          SUBSTANTIALLY FALSE.....2

    II.   THE COURT SHOULD GRANT CERTIORARI TO ENFORCE ITS OWN  
          RULINGS THAT DEFINE THE HEIGHTENED BURDEN ON PUBLIC  
          FIGURES ATTEMPTING TO SHOW ACTUAL MALICE.....4

CONCLUSION.....6

APPENDIX A: LIST OF *AMICI CURIAE*.....8

**TABLE OF AUTHORITIES**

*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984).....4

*Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000)..... 5-6

*Garrison v. Louisiana*, 379 U.S. 64 (1964) .....4

*Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968).....3

*New York Times v. Sullivan*, 376 U.S. 254 (1964).....6

*Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1996) ..... 4-6

*Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) ..... 1, 2-4

## INTRODUCTION

This case will determine whether public figures in South Carolina are permitted to sue the press and collect damages based on one arguably imprecise phrase cherry-picked from news coverage that, taken as a whole, is unquestionably accurate. The controlling libel decisions of this Court, as well as five decades of libel jurisprudence from the United States Supreme Court, forbid the imposition of liability in such circumstances. The decision below contravenes these binding precedents for two reasons: (1) the Court of Appeals found that a series of news articles was substantially false despite the fact that the articles themselves explicitly and repeatedly stated the exact opposite of the supposedly false implication, and (2) the Court of Appeals failed to heed this Court's mandates about the quantity of evidence needed for a plaintiff to meet his burden of showing, by clear and convincing evidence, that a journalist published intentional falsehoods or possessed serious subjective doubts about what he was publishing.

On behalf of a broad spectrum of South Carolina and national press organizations, *amici* write separately not to repeat the arguments in the Petition for Writ of Certiorari, but to emphasize the impact of this case on the ability of the press to perform its recognized function in a democracy.<sup>1</sup> If the decision below were allowed to stand, it would muddle the existing law of defamation in South Carolina and would chill essential journalism about issues of serious public concern, including the issue that was the subject of the journalism in this case: the influence of money in politics. Under Rule 242, SCACR, certiorari is imperative for three reasons:

- The decision below directly conflicts with the seminal decision of the United States Supreme Court on falsity—*Philadelphia Newspapers, Inc. v. Hepps*—which made clear that inconclusive or ambiguous questions of falsity must be resolved in favor of the defendant.

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<sup>1</sup> For a full list of *amici*, and their statements of interest, see Appendix A.

- The decision below directly conflicts with the foundational decisions of this Court—*Peeler v. Spartan Radiocasting, Inc.* and *Elder v. Gaffney Ledger*—that have defined the contours of “actual malice” in public-figure defamation actions.
- More broadly, the case substantially implicates the First Amendment and conflicts with an emphatic body of law that guarantees robust protections for the very sort of good-faith journalism that the defendants were engaged in here.

In short, a grant of certiorari would rectify two foundational principles: first, that a plaintiff cannot prevail on a defamation claim unless he proves that the articles at issue, taken as a whole and read in context, were unambiguously and substantially false; and second, that a public figure, such as a lobbyist, cannot prevail on a defamation claim unless he offers clear and convincing evidence that the journalist subjectively entertained serious doubts about the truth of what he was publishing.

### ARGUMENT

#### **I. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT A SINGLE AMBIGUOUS PHRASE IN OTHERWISE ACCURATE NEWS COVERAGE CANNOT MAKE THAT NEWS COVERAGE SUBSTANTIALLY FALSE.**

In the seminal United State Supreme Court decision on falsity in defamation cases, the Court made clear that, in order to “ensure that true speech on matters of public concern is not deterred,” the plaintiff bears the burden of proving that a challenged work of journalism is factually false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). Writing for the Court, Justice O’Connor recognized that the question of truth or falsity is often “ambiguous,” and placing the burden of proof on the plaintiff acts as a sort of tie-breaker in those situations. *Id.* “There will always be instances when the factfinding process will be unable to resolve conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive.” *Id.* In other words, when the meaning of a particular phrase is inconclusive or

ambiguous, the defendant must prevail—despite the fact that such an outcome “will insulate from liability some speech that is false, but unprovably so.” *Id.* at 778.

This Court has had few occasions to apply this key aspect of *Hepps*, but it now must do so in the interest of the coherency of South Carolina’s defamation law. The finding of falsity by the Court of Appeals rested solely on a single phrase plucked from one article in a series of articles about campaign contributions. That phrase—“along with chamber lobbyist Mark Kelley”—is subject to infinitely arguable interpretations, even when read in isolation (as the Court of Appeals read it). But the truth or falsity of the phrase cannot, of course, be assessed in isolation. As the Petition for Certiorari makes clear, this Court has long held that “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). And as the Petition also makes clear, the articles that were challenged in this case, when read in totality and read in context, repeatedly convey the point that Brad Dean, not Mark Kelley, delivered the campaign contributions at issue.

By fixating on a single, isolated phrase and declining to resolve any ambiguity or imprecision in favor of the defendants, the Court of Appeals failed to adhere to the *Hepps* mandate about providing breathing space for inconclusive or ambiguous speech. Such a ruling, if allowed to stand, would pose grave dangers to the practice of journalism. News articles are not great works of poetry, with every phrase polished to a perfect sheen. Coverage of complex and rapidly developing news events must be produced quickly and accurately, and even the most circumspect journalist is not always able to identify, edit, and resolve every conceivable linguistic ambiguity prior to publication. Courts cannot be allowed to impose liability based on

the premise that a single ambiguity makes an otherwise entirely truthful package of news coverage substantially false.

**II. THE COURT SHOULD GRANT CERTIORARI TO ENFORCE ITS OWN RULINGS THAT DEFINE THE HEIGHTENED BURDEN ON PUBLIC FIGURES ATTEMPTING TO SHOW ACTUAL MALICE.**

When faced with defamation claims brought by public figures, this Court has repeatedly followed the United States Supreme Court’s directive that courts conduct “an independent examination of the whole record” in order to ascertain whether the plaintiff has put forward the requisite “clear and convincing” evidence of actual malice. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984). This showing, of course, requires proof of the journalist’s state of mind at the time of publication—proof that he had a “high degree of awareness of [the publication’s] probably falsity.” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964).

In its two leading decisions involving defamation suits by public figures, this Court has explained that even substantial evidence of bad faith and bad journalism on the part of defendants cannot clear the exceedingly high bar that the Constitution sets for public figure plaintiffs. In *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282 (1996), a television station falsely accused a politician of committing forgery. This Court recounted how the television station:

- misquoted its sources and misrepresented the content of interviews,
- aired an “ambiguous” statement that arguably conveyed the false accusation, and
- destroyed tapes containing the newscasts at issue.

The Court ridiculed the television station for, “[a]t best,” practicing “sloppy journalism,” but it nonetheless concluded that there was not sufficient evidence of actual malice to impose liability.

*Id.* at 267, 478 S.E.2d at 285. Similarly, in *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000), a former police chief sued a newspaper over an article that falsely suggested that drug dealers were bribing the police chief. The evidence showed that:

- the newspaper’s editor had published the false information based on an anonymous call without investigating or verifying it,
- the newspaper subsequently erased the recording of the anonymous call,
- the editor had exhibited ill will toward the police chief’s family.

This Court found that all of that evidence was “patently insufficient” for the plaintiff to meet his burden of showing that the editor “in fact entertained serious doubts.” *Id.* at 115, 533 S.E.2d at 902. In both *Peeler* and *Elder*, the Court of Appeals had denied the defendants’ motions for judgment notwithstanding the verdict, and in both cases, this Court rightly reversed the Court of Appeals based on a *de novo* review of the evidence of actual malice.

Here, the decision by the Court of Appeals flies in the face of the controlling law established by *Peeler* and *Elder*. The Court of Appeals, in fact, barely discussed those decisions. If it had, the court would have realized that the evidence of actual malice in those two cases far exceeds the slim inferences of actual malice present on the record here. Indeed, the court’s reasoning about actual malice here, while far from clear, seems to rest on the premise that because the journalist, David Wren, had “diligently pursued” the story, he must have understood that the ambiguous phrase could be interpreted as an accusation of illegality. Of course, the opposite conclusion is far more likely. In fact, it never dawned on Wren that anyone could interpret the phrase to suggest illegality, because the first article he published (and everything else he published on the topic) made clear that Kelly had not acted illegally. It simply is not

plausible—let alone clear and convincing—that Wren entertained serious doubts when the alleged “falsity” did not even occur to him.

*Peeler* and *Elder* require far more evidence than is present here before an appellate court may uphold a jury finding of actual malice. Those leading decisions, in turn, are based on five decades of United States Supreme Court jurisprudence on actual malice, starting with *New York Times v. Sullivan*, 376 U.S. 254 (1964). By ignoring this case law and focusing solely on whether a single phrase “would be read” by readers as a false accusation, the Court of Appeals in effect converted the subjective actual malice test into an objective “reasonableness” standard. This Court should grant certiorari to correct the confusion that the decision below creates in South Carolina law.

#### **CONCLUSION**

For the foregoing reasons, *amici* respectfully ask this Court to grant Petitioner’s Writ of Certiorari.

May 6, 2016

Respectfully Submitted,



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## APPENDIX A: LIST OF AMICI CURIAE

### **Thomas Jefferson Center for the Protection of Free Expression**

Located in Charlottesville, Virginia, the Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan institution whose sole mission is the protection of the First Amendment rights of free speech and free press. Since its founding in 1990, the Center has pursued its mission in a variety of ways, including the filing of *amicus curiae* briefs in federal and state courts across the country.

### **Society of Professional Journalists**

The Society of Professional Journalists (“SPJ”) is dedicated to improving and protecting journalism. It is the nation’s largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

### **Reporters Committee for Freedom of the Press**

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

### **Associated Press**

The Associated Press (“AP”) is a news cooperative organized under the Not-for-Profit Corporation Law of New York, and owned by its 1,500 U.S. newspaper members. The AP’s members and subscribers include the nation’s newspapers, magazines, broadcasters, cable news

services and Internet content providers. The AP operates from 300 locations in more than 100 countries. On any given day, AP's content can reach more than half of the world's population.

**Gannett Co., Inc., and *The Greenville News*, a division of Gannett GP Media, Inc.**

Gannett Co., Inc. is an international news and information company that publishes 108 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

**National Newspaper Association**

The National Newspaper Association is a 2,400 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Columbia, Missouri.

**Newspaper Association of America**

The Newspaper Association of America ("NAA") is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for nearly 90% of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. The Association focuses on the major issues that affect today's newspaper industry, including protecting the ability of the media to provide the public with news and information on matters of public concern.

**Osteen Publishing Company, d/b/a *The Sumter Item***

Osteen Publishing Company and *The Sumter Item* were founded by Hubert Graham Osteen on October 15, 1894, in Sumter, South Carolina. The company owns several newspapers in Florida, Alabama and New Mexico.

**TEGNA Inc.**

TEGNA Inc. owns or services (through shared service agreements or other similar agreements) 46 television stations in 38 markets.

**Georgia Association of Broadcasters, Inc.**

The Georgia Association of Broadcasters, Inc. (“GAB”) is a Georgia corporation. GAB is a trade association which represents the interests of Georgia broadcasters. GAB’s members include television and radio stations throughout the State of Georgia. GAB is interested in the appeal in this action because GAB believes that the legal issues presented are of great importance to all publishers and broadcasters.

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CERTIFICATE OF SERVICE

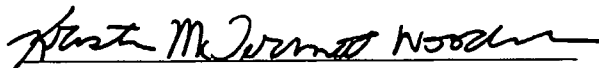
The undersigned certifies that, on May 6, 2016, the foregoing Brief of the Thomas Jefferson Center for the Protection of Free Expression et al. as *Amici Curiae* in Support of Petitioner for Certiorari by David Wren and Sun Publishing Co, Inc., d/b/a *The Sun News*, was served on counsel for the Petitioners and Respondent by United States mail, first class, postage prepaid, addressed to:

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