THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4887 (S.C. Ct. App. filed September 7, 2011)

Rebecca West..Petitioner/Respondents.

v.

Todd Morehead, Columbia City Paper, LLC, and Paul Blake............Respondents/ Petitioner,

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rebecca West, Respondent,

v.

Todd Morehead, Columbia City Paper, LLC, and Paul Blake, Appellants.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4887
Heard June 8, 2011 – Filed September 7, 2011

AFFIRMED IN PART AND REVERSED IN PART

Kirby D. Shealy, III and Evan Brook Bristow, both of Columbia, for Appellants.

S. Jahue Moore, Sr., of West Columbia, for Respondent.

FEW, C.J.: In this appeal from a jury verdict in favor of Rebecca West for actual and punitive damages on a defamation claim, we address the "fair report privilege" and whether West introduced sufficient evidence of Appellants' fault. We find the trial court properly handled the fair report privilege and properly submitted to the jury the question of whether West presented sufficient evidence of fault as to actual damages. We also find the

trial court acted within its discretion in ruling on issues regarding a "clarification" published by Appellants. We therefore affirm the jury's award of actual damages. As to punitive damages, however, we find as a matter of law that the evidence was insufficient to support a finding of actual malice, and we reverse the award of punitive damages.

I. Facts and Procedural History

On October 24, 2007, the Columbia City Paper published an article entitled "Adieu M'Armoire:[1] Whit-Ash Co. linked to bizarre divorce case, other prominent figures implicated." The subject of the article was the divorce of Stella and Whit Black and a lawsuit Stella Black filed against Whit's divorce attorney, Rebecca West. In particular, the article addressed allegations Black[2] made in an affidavit and motion filed in the divorce case, and in the complaint filed in the civil lawsuit, to support Black's claim that West should not be permitted to represent Whit. In the civil lawsuit against West, Black alleged causes of action for civil conspiracy, breach of fiduciary duty, fraud, negligent misrepresentation, and malpractice. Paul Blake, a reporter for City Paper, reviewed the public record of Black's civil suit against West, which included Black's affidavit and motion in the divorce case. Todd Morehead, another City Paper reporter, wrote the article based on Blake's review of the public record and interviews Blake conducted. Neither Blake nor Morehead attempted to speak with West before publishing the article.

West sued City Paper, Blake, and Morehead for defamation. West, who was mentioned by name in the article, alleged the following two statements in the article defamed her: (1) "[I]t had all the ingredients of a

[1] In French, "adieu" means "farewell" or "goodbye," and "armoire" means "wardrobe" or "furniture." "Adieu, Mi Armoire" means, quite literally, "goodbye, my wardrobe." The Concise Oxford French-English Dictionary 14, 57 (1968). Todd Morehead testified he intended the title to be a play on the opera "Adieu, M'Amour," because Stella Black is an aspiring opera star, and Whit Black owns a furniture store..

[2] For simplicity, we refer to Stella Black as "Black" and Whit Black as "Whit."

cheap detective novel: . . . two-bit lawyers who'll even turn on their own clients if the retainer is juicy enough"; and (2) "[W]hen they think back to the tense days of the Black divorce many won't care about the corruptible attorneys or ETV property." At trial, Morehead admitted the statements refer to West. He also admitted he chose "adjectives" to describe West that do not appear in the public documents. However, both he and Blake testified the article was based exclusively on allegations Black made in the public documents. Morehead testified the article was written in "narrative literary style" and did not reflect his or City Paper's opinion of West.

The jury found in favor of West and awarded her $10,000.00 in actual damages and $30,000.00 in punitive damages.

II. Legal Background

The law of defamation permits a plaintiff to recover "for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Under the law of defamation, however, certain communications give rise to qualified privileges, including the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability. See generally Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982) (discussing fair report privilege); Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968) (same); see also 2 Rodney A. Smolla, Law of Defamation § 8:3 (2d ed. 2010). The applicability of this "fair report privilege" and the sufficiency of proof on the fault element, both as to actual and punitive damages, are the primary issues in this appeal. We discuss each in turn.

III. The Fair Report Privilege

"Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged." Jones, 250 S.C. at 487, 158 S.E.2d at 913. Appellants contend they were entitled to a directed verdict on the basis that the fair report privilege immunized them from liability. We disagree. "Under this defense [of qualified privilege], one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts § 593 (1977)). Whether the occasion is one which gives rise to a qualified privilege is a question of law. 334 S.C. at 485, 514 S.E.2d at 134. Because the article relates to the content of public files on judicial proceedings, the trial court correctly ruled that the publication of the article is subject to the fair report privilege. However, "[t]he privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." Jones, 250 S.C. at 487, 158 S.E.2d at 913. Where there is conflicting evidence,[3] "the question whether [a qualified] privilege has been abused is one for the jury." Swinton Creek, 334 S.C. at 485, 514 S.E.2d at 134. In this case, the evidence is subject to more than one inference as to whether the privilege was abused. In particular, there is conflicting evidence as to whether the article is a "fair and substantially true account" of allegations Black made in family and circuit courts. See Padgett, 278 S.C. at 31, 292 S.E.2d at 33 (stating the "[fair

[3] In Swinton Creek, the supreme court cited Woodward v. South Carolina Farm Bureau Insurance Co., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981), for this proposition: "While abuse of [the conditional] privilege is ordinarily an issue [reserved] for the jury, . . . in the absence of a controversy as to the facts, . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." Swinton Creek, 334 S.C. at 485, 514 S.E.2d at 134 (bracketed language omitted in Swinton Creek); see also Padgett, 278 S.C. at 33, 292 S.E.2d at 34 (reversing the denial of a directed verdict motion based on fair report privilege where the "record conclusively show[ed] that the articles . . . were accurate reports of the documents as they were filed in the litigation").

report] privilege consists of making a fair and substantially true account of the particular proceeding or record"). Thus, the trial court properly submitted to the jury the question of whether Appellants' use of narrative journalism and their choice of words other than those used in court documents was an abuse of the privilege.

IV. Proof of Fault

Appellants also contend the trial court erred in not granting them a directed verdict on the element of fault, as to both actual and punitive damages.

a. Actual Damages

The trial judge charged the jury that the standard for proving fault in order to recover actual damages is common law malice. Neither party objected. A plaintiff may prove common law malice by showing "the defendant acted with ill will toward the plaintiff, or acted . . . with conscious indifference of the plaintiff's rights." Erickson, 368 S.C. at 466, 629 S.E.2d at 665. Our standard of review as to the factual finding of common law malice allows us only to correct errors of law. 368 S.C. at 464, 629 S.E.2d at 663-64 (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)). "[A] factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Id. In making this review, we must view the evidence and the inferences that can be drawn from it in the light most favorable to the prevailing party. Swinton Creek, 334 S.C. at 476, 514 S.E.2d at 130; see also Erickson, 368 S.C. at 463, 629 S.E.2d at 663 ("The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. . . . If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.").

There is conflicting evidence in this case as to whether West met her burden of proving Appellants acted with common law malice. In particular, we find some evidence exists as to whether the use of the phrases "two-bit lawyers" and "corruptible attorneys" to characterize the allegations contained in the public record amounted to conscious indifference to West's rights, and

thus to common law malice. The trial court properly submitted this question of fact to the jury.

b. Punitive Damages

Appellants contend the trial court should have granted a directed verdict on the question of punitive damages. We agree. "[I]n order to recover punitive damages from a media defendant, a private-figure plaintiff[4] must prove by clear and convincing evidence that the defendant acted with constitutional actual malice." Erickson, 368 S.C. at 466-67, 567 S.E.2d at 665. A plaintiff may meet this burden in either of two ways: (1) by proving "the defendant published the statement with knowledge it was false," or (2) by proving "the defendant published the statement . . . with reckless disregard of whether it was false." Id. In this case there was no evidence Appellants knew any of the statements were false. We therefore focus on whether there is sufficient evidence in the record that Appellants acted with reckless disregard of the falsity of the statements. Our supreme court has stated:

> A "reckless disregard" for the truth . . . requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." There must be evidence the defendant had a "high degree of awareness of . . . probable falsity."

Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968), and Garrison v. Louisiana, 379 U.S. 64, 74 (1964)); see also Elder, 341 S.C. at 114, 533 S.E.2d at 902 (stating "there must be evidence at least that the defendant purposefully avoided the truth"); Holtzscheiter, 332 S.C. at 513 n.9, 506 S.E.2d at 503 n.9 (stating that in order to prove reckless disregard, a plaintiff must prove the defendant had "serious reservations" about the truthfulness of the article).

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[4] The parties agree West is a private-figure plaintiff.

Unlike our review of the other factual findings of the jury, we review the jury's determination of actual malice as a question of law. Elder, 341 S.C. at 113, 533 S.E.2d at 901-02.

> Whether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury. When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. This review is necessary due to the "unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged."

Erickson, 368 S.C. at 477, 629 S.E.2d at 670-71 (citing Elder, 341 S.C. at 113, 533 S.E.2d at 901-02, and quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989)).

West argues Appellants' failure to investigate the legitimacy of Black's allegations is evidence of actual malice. West also contends Appellants did not call her to verify Black's allegations. However, the mere failure to investigate an allegation is not sufficient to prove the defendant had serious doubts about the truth of the publication. Elder, 341 S.C. at 114, 533 S.E.2d at 902 ("Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."). The media has no duty to verify the accuracy or measure the sufficiency of a party's legal allegations. The Constitution does not require that the press "warrant that every allegation that it prints is true." Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir. 1991) (en banc).

We must therefore analyze whether there is evidence in the record that Appellants had a "high degree of awareness of probable falsity" concerning

the characterizations of West as a "two-bit lawyer" and a "corruptible attorney," or whether Appellants otherwise "entertained serious doubts as to the truth" of the characterizations. The phrase "two-bit" means cheap, mediocre, inferior, or insignificant. Webster's New World College Dictionary 1547 (4th ed. 2008). Applying the term to a lawyer in its most defamatory sense, the phrase means not a good lawyer, below par in performance, and not worthy of respect. The word "corruptible" means subject to bribery and to change from morally sound to morally unsound or debased. Webster's New World College Dictionary 327 (4th ed. 2008). Applying the term to West in its most defamatory sense, the phrase means West is not devoted to her clients, she is willing to forsake the best interests of her clients, she is subject to being bribed, and she is a crooked lawyer.

In determining whether Appellants had a high degree of awareness of probable falsity of those characterizations, or whether they entertained serious doubts as to their truth, we must compare the terms "two-bit lawyer" and "corruptible attorney" to the terms Black used in her affidavit filed in family court and in the complaint filed in her civil lawsuit. In her affidavit, Black made the following statements:

- "I have been most concerned about conflicts of interest that have arisen due to my lawyer, Rebecca West, sharing privileged communications about my business dealings concerning which she represented me prior to my institution of this action."
- "Beginning in 2005, I was represented by Rebecca West . . . about a number of issues dealing with my business . . . . The next thing I knew, Ms. West was listed as one of my husband's attorneys of record . . . ."
- "There is no question in my mind that since Rebecca West represented me in matters substantially related to this case, her representation of my husband in this action is an absolute conflict of interest."
- "[T]he matters for which Rebecca West . . . represented me are substantially related to the very same issues that are at the very heart of this pending litigation. . . . [T]he same transactions and issues . . . are matters about which I am now being questioned extensively in this divorce action. [This] makes me most

concerned that Rebecca West, who did this work for me and to whom I imparted confidences, made this information available to [my husband's other lawyers]."

- "I also have concern that Ms. West . . . did not perform a number of services that I requested of her in a timely fashion, if at all, especially after my husband left me . . . ."
- "I believe she has used and passed along information I provided to her in confidence to [my husband's other lawyers]."

In the complaint for her civil lawsuit, Black made the following statements:

- [My husband paid] legal fees generated by West . . . for representing [me], all with the underlying goal of benefitting [my husband] . . . without [my] knowledge or consent."
- "West . . . did not follow through on representation of [me], . . . all in an effort to damage [my] career opportunities."
- "West, . . . having been paid by [my husband's company], furnished privileged and confidential information about [me] to [my husband] . . . for the purpose of assisting [him] in efforts to economically detriment [me] in the marital litigation."
- "West . . . gave publicity to matters that are private to [me]."
- "[West] breached [her] fiduciary duties . . . by disseminating her private business and personal matters to [my husband] without . . . authorization."
- "[West] breached . . . fiduciary duties by not only taking [my] private information to [my husband] . . . , but also by . . . sharing documents and information about [me] without proper disclosures to or securing waivers from [me], and . . . going so far as to appear as an attorney of record for [my husband] in the matrimonial proceeding wherein confidential information gained by West during her representation of [me] is directly at issue."
- "West made false representations to [me] about assisting [me] and about [her] own true interests with the knowledge that those representations were false or in reckless disregard of the falsity of those representations."

Beyond these quotes from the affidavit and the complaint, the gist of the publicly filed allegations Black made against West is that West is not a good lawyer, and that in this particular instance West intentionally and deceitfully abused her position of confidence with Black for the purpose of harming Black and benefiting Black's husband so that West would realize financial gain. When we compare these publicly made allegations with the statements in the article that West is a "two-bit lawyer" and a "corruptible attorney," we find West has not proven by clear and convincing evidence that Appellants believed their characterization of the allegations Black made against West were not accurate. Therefore, West has failed to prove actual malice. We find the trial court erred as a matter of law in denying Appellants' directed verdict motion. Accordingly, we reverse the jury's award of punitive damages.

V. Issues Regarding the "Clarification"

Appellants allege three errors relating to a "clarification" published by City Paper on October 26, 2007, two days after the article was published. First, Appellants contend the trial judge should have granted a mistrial when West's counsel mentioned the clarification in his opening statement. Second, Appellants contend the trial judge erred in admitting the clarification as evidence. Third, Appellants contend they should have been permitted to call West's trial counsel as a witness to testify concerning a letter he wrote to City Paper seeking a retraction. We find the first two issues are not preserved, and the trial judge did not err in refusing to allow Appellants to call West's trial counsel as a witness.

We find the first and second issues unpreserved because the only objection made to the use of the clarification in the opening statement or the admission of it as evidence was based on Rule 407, SCRE. Rule 407 does not apply to this situation. The rule provides that evidence of subsequent measures "which, if taken previously, would have made the event less likely to occur" is not admissible for the purpose of proving culpable conduct. Rule 407, SCRE. City Paper could not possibly have issued a clarification of the article before the article was printed. Thus, Rule 407 could not be the basis on which the opening argument could have been limited, or on which the evidence could have been excluded. Appellants make arguments and cite authorities in their briefs that were not presented to the trial court. These

arguments are not preserved. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (finding evidentiary argument was not preserved for review because the issue was never raised to or ruled upon by the trial judge).

Appellants also argue the trial court erred in not allowing them to call West's trial counsel as a witness. In an offer of proof, Appellants questioned whether the letter written by West's counsel to City Paper was a threat to file a defamation lawsuit regardless of any retraction, and whether the letter was a strategic attempt to set up the lawsuit. The proffer contained no more than a discussion of what counsel was attempting to accomplish in writing the letter. The trial court indicated it would allow the letter into evidence. However, the court denied the request to call counsel as a witness, stating "there is no need to put him up there and question his trial tactics, which is all you want to do. That he wrote the letter is in evidence. That they responded to it is in evidence. The rest of it, forget it." The trial court essentially ruled that the letter speaks for itself, and counsel's reasons for writing the letter were not relevant. We find the trial court's ruling was within its discretion. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413, 697 S.E.2d 558, 561 (2010) ("The admission of evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion.").

VI. Conclusion

We find the trial court properly submitted to the jury the factual questions of whether Appellants abused the fair report privilege and whether West met her burden of proving common law malice. We affirm the trial court's rulings regarding the clarification. However, we find the evidence is not sufficient to establish constitutional actual malice, and therefore West may not recover punitive damages. The judgment below is

AFFIRMED IN PART AND REVERSED IN PART.

PIEPER and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008-CP-40-00074

Rebecca West, ... Respondent,

v.

Todd Morehead, Columbia City Paper, LLC, and Paul Blake, ... Appellants.

APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 221, *SCACR*, Todd Morehead, Columbia City Paper, LLC, and Paul Blake (Appellants) respectfully petition for rehearing of the appeal in the above-captioned action in which the Court filed its Opinion No. 4887 on September 7, 2011. This petition is based upon the following points:

1. The Court misapprehended the application of the Fair Report Privilege by affirming the trial's court's decision to submit to the jury the question of whether Appellants abused the Fair Report Privilege in their description of court documents.

Based on this Court's ruling, whenever a party asserts the Fair Report Privilege as a defense and has paraphrased statements contained in public documents, it will be a jury question as to whether the party abused its privilege. In other words, if the media

rephrases language used in judicial proceedings ***at all***, it is a jury question as to whether the paraphrase conveyed a meaning that was more defamatory than the words used in the public documents. Additionally, using the court's analysis, the same evidence of paraphrasing creates a jury question as to whether the defendant consciously disregarded the Plaintiff's rights. Appellants respectfully submit that the First Amendment provides greater protection concerning matters of public interest than this Court's analysis would yield.

Until now, no South Carolina opinion has held that a trial court should submit to the jury the issue of whether the Fair Report Privilege has been abused. In its opinion, this Court found that whether a qualified or conditional privilege has been violated is a jury question when there is ***conflicting evidence*** and cited *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 514 S.E.2d 126 (1999). Appellants respectfully submit that the facts of this case demand a different analysis than that used in *Swinton Creek*. Although *Swinton Creek* involved a qualified privilege because of the occasion and the relationship between the parties, it did not involve the Fair Report Privilege that was at issue here. *Id.* at 485, 514 S.E.2d at 131 ("[W]hether an occasion gives rise to a qualified or conditional privilege is one of law for the court").

In *Swinton Creek*, a representative of Edisto Farm Creek Credit ("EFC"), Huggins, made representations to a potential buyer about the buyer's loan application. Specifically, Huggins wrote the following to the buyer in a letter after discussing the deal and learning information from the seller about the business venture: "*This is extremely important since the projected income for the nursery is not supported by a successful earnings trend. In fact, the operation you are purchasing has been under financial*

duress." *Id.* at 474, 514 S.E.2d at 129 (emphasis in original). This letter became the basis of Seller's suit against EFC. *See id.* After finding that Huggins had a conditional privilege, the trial court granted EFC's directed verdict. The Supreme Court reversed based on factual disputes in the record, namely whether Huggins' disclosures to buyer exceeded the scope of his privilege given their relationship. In its analysis the *Swinton Creek* Court held:

> Assuming the occasion did give rise to a conditional privilege, we believe a question existed for the jury as to whether the privilege was exceeded or abused. First, the scope of the privilege extended only as far as EFC's interests and duties required. *See Fulton, supra.* It is questionable whether a specific comment about Swinton Creek's financial status was required to protect any interest or duty covered by the privilege. EFC contends it wrote the letter for the sole purpose of guiding Buyer into a successful loan application. Yet, Buyer was only seeking to buy some of Owner's assets, not the entire Swinton Creek operation. Moreover, if EFC wanted to convey to Buyer the difficulties of running a nursery in a small town, it could have simply made a general statement without specifically referring to Owner. Thus, even if EFC acted in good faith to assist Buyer, the jury might conclude that the "financial duress" comment was unnecessarily defamatory under these circumstances.
>
> Additionally, there was evidence suggesting EFC acted in reckless disregard of Owner's rights so as to constitute actual malice. *See Holtzscheiter, supra.* Huggins testified that the financial duress comment was based solely on his observations of Swinton Creek and his "side bar conversation" with Owner. However, Owner denied having any conversation with Huggins at the nursery. Further, even if a conversation did take place, EFC had a banking relationship with Owner at the time Huggins visited Swinton Creek. These are all factors relevant in determining whether there was actual malice.

Id. at 486-87, 514 S.E.2d at 135.

The present case is distinguishable from *Swinton Creek* because the facts here are not conflicting and a wholly different privilege is at issue. In other words, the *Swinton Creek* court held the jury should determine: (1) the scope of Huggins' privilege and (2) whether his disclosure to buyer exceeded the scope. Here, the questions are: (1) whether

the article was a fair and substantially true account of the particular proceeding or record and (2) whether evidence exists that Appellants acted with ill-will toward West or with conscious disregard of her rights.

The facts here more closely resemble those in *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982). There, the court ruled as a matter of law that "the articles published by appellant were fair and accurate reports of the contents of the documents filed in these judicial proceedings and, as such, are privileged, unless actual malice is shown." *Id.* at 31, 292 S.E.2d at 33. The *Padgett* court went on to define "actual malice" to mean that the declarant acted "with ill-will towards the plaintiff, or that it acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights," and requires that "at the time of his act or omission to act the tort-feasor be conscious, or chargeable with consciousness of his wrongdoing." *Id.* at 32, 292 S.E.2d at 34. Based on its findings that (1) the article was a fair and accurate report of the documents filed in the judicial proceedings and (2) the record was devoid of evidence that the reports were published with actual malice, the *Padgett* court held the trial court should have granted a directed verdict rather than submit the case to the jury. *Id.* at 33, 292 S.E.2d at 34. In other words, the *Padgett* court held that the trial court rather than the jury should determine both whether the declaration was a fair and substantially true account of the particular proceeding or record and whether evidence exists that the declarant acted with actual malice.

Since filing briefs in this appeal, the Supreme Court of New Jersey issued an opinion analyzing the Fair Report Privilege and noting that the privilege is distinct from traditional conditional privileges. *Salzano v. N. Jersey Media Group Inc.*, 993 A.2d 778,

795 (N.J. 2010) *cert. denied,* 131 S. Ct. 1045 (U.S. 2011) ("[Restatement section 600 comment c] recognizes that the fair-report privilege is distinct from traditional conditional privileges"). The *Salzano* Court noted that it is a court's function to determine whether the report is a full, fair, and accurate account as a matter of law. *Id.* at 792. Under the *Salzano* Court's analysis, a jury will not determine whether the Fair Report Privilege was abused.[1]

Appellants recognize that this Court is constrained to follow extant precedent, but Appellants submit that the *Swinton Creek* analysis is inappropriate when the Fair Report Privilege is asserted as a defense. Both *Padgett* and *Salzano* support this thesis.

Whether words convey one meaning or another is not an issue of "conflicting evidence," it is a matter of law for the Court. *See e.g., McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009) ("It is a question of law for the court whether the language of a contract is ambiguous"); *Hardee v. McDowell*, 372 S.C. 413, 417, 642 S.E.2d 632, 634 (Ct. App. 2007) *aff'd as modified,* 381 S.C. 445, 673 S.E.2d 813 (2009) (finding determining the meaning of a statute is a question of law); *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000) ("Whether a communication is reasonably capable of conveying a defamatory meaning is a question of law for the trial court to determine"). For these reasons Appellants request that the Court reconsider its finding

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[1] Later the court recognized that some courts hold a plaintiff may overcome the privilege by demonstrating statements were published with actual malice (as we do in South Carolina). *Id.* at 796. However, the *Salzano* court held that the only relevant inquiry should be for the court to determine whether the report is full, fair, and accurate, and if this condition is met the inquiry ends. *Id.* at 796-97. Therefore, the *Salzano* court adopted an analysis that eliminates the "actual malice" inquiry that South Carolina embraced in *Padgett.*[1] *See id.* Such a holding is in line with *Gertz v. Robert Welch, Inc.*, where the United States Supreme Court held that publishers generally are not liable for defamatory statements in the absence of negligence. 418 U.S. 323, 347-48 (1974). Thus, no negligence attaches when a publication is full, fair, and accurate.

that "conflicting evidence" existed and hold that the determination of whether a report is full, fair, and accurate as a matter of law.

2. Based on the Court's misapprehension of the Fair Report Privilege's application, it erred in finding that Appellants paraphrasing of the allegations in the public documents is itself evidence of actual malice.

This Court should have found as a matter of law that "two-bit" and "corruptible attorneys" were fair and substantially true characterizations of the allegations in the pleadings. West's entire case against Appellants boils down to whether the allegations contained in the public record are akin to the characterizations of those allegations that Appellants used in their article. In legal terms, the dispositive question was whether the statements made in the article had the same "gist" or "sting" as the allegations made within the court filings. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) ("The essence of that inquiry, however, remains the same whether the burden rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified'"). When the gist of the two reports have substantially the same meaning, there is no actual malice. *See id.* ("Put another way, the statement is not considered false unless it would have a different effect on the mind of the reader from that which the pleaded truth would have produced") (internal citation omitted).

In the case of *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 557 (D.S.C. 2008), a South Carolina District court ruled as a matter of law that if a statement was not completely accurate in regards to a particular detail, that the discrepancy was

immaterial. "[E]ditorial paraphras[ing]" was authorized there provided that the paraphrase was not inaccurate. *Id.* at 555. Furthermore, the *Cobin* court relied on the "gist" or "sting" test and noted that so long as a statement is substantially true, "minor inaccuracies will not give rise to a defamation claim." *Id.* (internal citations omitted); *see also PBM Products, LLC v. Mead Johnson Nutrition Co.,* 678 F. Supp. 2d 390, 402 (E.D. Va. 2009) *aff'd sub nom. PBM Products, LLC v. Mead Johnson & Co.*, 639 F.3d 111 (4th Cir. 2011) ("[T]he sting of Statement 2, as communicated by a fair reading of the Press Release as a whole, is substantially true. Therefore, it cannot be the basis of a defamation claim"); *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) ("The falsity of a statement and the defamatory 'sting' of the publication must coincide-that is, where the alleged defamatory 'sting' arises from substantially true facts, the plaintiff may not rely on minor or irrelevant inaccuracies to state a claim for libel"); *AIDS Counseling & Testing Centers v. Group W Television, Inc.*, 903 F.2d 1000, 1004 (4th Cir. 1990).

Here, "two-bit" and "corruptible attorneys" have the same gist or sting as the allegations in the pleadings as a matter of law. Therefore, there is no evidence of actual malice to support an award for actual damages. Accordingly, the court should reconsider its decision to affirm the trial court's submission of plaintiff's defamation to the jury. Another result could have a chilling effect that would be antithetical to the First Amendment's protection of free speech on matters of public concern.

CONCLUSION

Because the Court misapprehended the application of the Fair Report Privilege and should have ruled as a matter of law that "two-bit" and "corruptible attorneys" have the same gist or sting as the allegations in the pleadings such that there is no evidence of

actual malice as defined and interpreted in defamation law.

Respectfully submitted,

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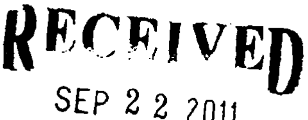
September 22, 2011.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas



J. Ernest Kinard, Jr., Circuit Court Judge **SC Court of Appeals**

Case No. 2008-CP-40-00074

Rebecca West,..Respondent,

v.

Todd Morehead, Columbia City Paper, LLC, and Paul Blake, ... Appellants.

PROOF OF SERVICE

I, Teresa K. Todd, an employee of Baker, Ravenel & Bender, L.L.P., attorneys for the Appellants do hereby certify that I have this 22nd day of September 2011, served all counsel of record with a copy of the Appellants' Petition for Rehearing by mailing said copies by United States Mail, first class postage pre-paid, to said counsel at the following address:

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Teresa K. Todd

September 22, 2011.

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September 22, 2011

VIA HAND DELIVERY
The Honorable Tanya A. Gee, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Rebecca West vs. Todd Morehead et al
C.A. No.: 2008-CP-40-00074
Court of Appeals No.: 2009136467

Dear Ms. Gee:

Enclosed please find for filing in the above-referenced matter, and original and seven (7) copies of Respondent Rebecca West's Petition for Rehearing and Rehearing *En Banc.* Please file the original and necessary copies and return the clocked in extra copy to our Courier. I have enclosed a Firm Check for the filing fee. Under cover of this letter I am serving opposing counsel with a copy of the Petition.

Thank you in advance for your assistance.

Respectfully Yours,

John C. Bradley, Jr.

JCB/jcbjr.
Enclosure
cc w/encl: Kirby D. Shealy, III, Esquire

•Fellow of the American Academy of Matrimonial Lawyers
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas Court

J. Ernest Kinard, Circuit Court Judge

Case No. 2008-CP-40-0074

Rebecca West..Respondent,

v.

Todd Moorehead, Columbia City Paper, LLC, and Paul Blake...Appellants.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Respondent Rebecca West hereby files this Petition for Rehearing and Rehearing *En Banc*. Respondent respectfully submits that rehearing and/or issuance of a new opinion affirming the trial court's decision as to both actual and punitive damages is warranted on the grounds that the Panel's opinion overlooked or misapprehended matters of law and fact.

INTRODUCTION

In Opinion No. 4887, filed September 7, 2011, a Panel of this Court affirmed the lower court's award of actual damages to Respondent Rebecca West and reversed the jury's award of punitive damages. More specifically, the Panel's opinion held that

Respondent failed to prove actual malice and that the Trial Court erred as a matter of law in denying Appellants' Motion for a Directed Verdict as to Punitive Damages. Respondent respectfully submits the Panel overlooked or misapprehended matters of law and fact in rendering this Opinion. As a result this Court should grant rehearing and/or rehearing *en banc* in this matter as to the Panel's opinion regarding actual malice and punitive damages.

ARGUMENT

I. The Panel's Opinion Misapprehends and Misapplies South Carolina Case Law regarding Actual Malice and Disregarded the Facts Presented at Trial

In concluding that as a matter of law the Respondent had failed to adequately establish constitutional actual malice, the Panel's decision misapprehended and misapplied South Carolina law setting forth the requirements for actual malice by adopting a test for actual malice much narrower than the test adopted in prior decisions of the South Carolina Court. Further, the Panel's decision ignored and misconstrued the facts presented at trial.

In order to recover punitive damages from a media defendant, a private figure plaintiff must prove that the Defendant acted with constitutional actual malice. *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 629 S.E.2d. 653 (2006). A Plaintiff may meet this burden in either of two ways: (1) by proving the defendants published the statement with knowledge it was false or (2) by proving the defendant published the statement with reckless disregard of whether it was false. *Id.* Under South Carolina law, "reckless disregard" for the truth requires more than a departure from reasonable prudent conduct. There must be either sufficient evidence to permit the conclusion that the Defendant in

fact entertained serious doubts as to the truth of his publication or evidence that the Defendant had a high degree of awareness of probably falsity.

As the panel's opinion correctly stated, failure to investigate before publishing even when a reasonably prudent person would have done so is not in and of itself sufficient to establish reckless disregard. Reckless disregard may also be established, however, where one fails to investigate prior to publishing an article and there are obvious reasons to doubt the veracity of the informant or the information upon which the article is based. Under South Carolina law, a subjective awareness of probably falsity can be shown if there are obvious reasons to doubt the veracity of the informant or accuracy of his report. *Elder v. Gaffney Ledger,* 341 S.C. 108, 533 S.E.2d. 899 (2000). *Erickson v. Jones St. Publishers, LLC,* 368 S.C. 444, 629 S.E.2d. 653 (2006); *Anderson v. Anderson,* 365 S.C. 589, 619 S.E.2d. 428 (2005).

The case of *Erickson v. Jones St. Publishers, LLC,* 368 S.C. 444, 629 S.E.2d. 653 (2006), is on point with the facts of this case. In *Erickson,* a Guardian ad Litem brought suit against a media defendant, after the paper published an article accusing her of impropriety arising out of a Court Appointed case. On appeal the South Carolina Supreme Court affirmed the Jury's finding of Constitutional Actual Malice. The Court cited evidence upon which the lower court could have found actual constitutional malice which included the fact that the newspaper based its article on the allegations a single, admittedly "incensed" individual; failed to contact the Appellant in that case or any other individual to confirm or verify the allegations upon which the news article was based; and failed to obtain court documents which could have potentially confirmed or denied their story. The *Ericksen* Court concluded that this evidence went beyond a mere failure

to investigate. The Court held that these factors constituted a failure to investigate when the media defendant had reasons to doubt the veracity of the information upon which the news article was based and which also indicated the media defendant's subjective awareness of probably falsity of the report, both of which supported the jury's finding of actual malice.

The Panel's decision misconstrued and misapplied authority for reckless disregard by merely holding that Respondent failed to establish actual malice. The Panel's opinion ignored the fact that under South Carolina Law, reckless disregard for the facts may be established by means other than a showing that Appellants failed to investigate prior to publishing their story.

Further, the Panel opinion ignored and misapprehended the evidence presented at trial by Respondent. Like the evidence relied upon by the South Carolina Supreme Court in the *Ericksen* case, the evidence presented at Trial by Respondent does not indicate a mere failure to investigate prior to publication. This evidence constitutes a failure to investigate before publishing an article when there were obvious reason so doubt the veracity of the informant, and the allegations contained in the alleged sources of Appellants' news article. The evidence clearly indicates Appellants' subjective awareness of probably falsity of the report and is sufficient to support the Trial Court's denial of Appellant's Motion for a Directed Verdict and the submission of punitive damages to the jury.

The record in this case is replete with evidence that Respondent's had obvious reasons to doubt the veracity of the information that they used to write their article. Todd Moorehead, the reporter who wrote the article did not personally conduct any interviews

prior to writing the Article (R. 82, Lines 12-17). Although he recognized from his review of the Court documents that the underlying divorce action was "bizarre," he did not conduct any interviews prior to writing the story (R. 82, Lines 12-17) (R. 90, Lines 21-25) He did not speak to any of the "sources" for the article but merely sat in the same room while someone else spoke to them (R. 80, Lines 1-10) (R. 82, Lines 12-17). Appellants did not interview Stella Black who made the allegations in her affidavit and complaint. (R. 83, Lines 4-6). Appellants did not speak with her Attorney prior to writing and publishing their article (R 83, Lines 7-9). Mr. Moorehead testified that he did not know Respondent at the time he wrote the article describing her as a "two bit" or "corruptible" attorney (R. 94, Lines 18-20). He had no knowledge as to her reputation in the legal community (R. 127, Lines 20-25; R. 128, Lines 1-12). However, he despite the fact that he knew nothing about her, he did not speak to her prior to writing or publishing this article. In fact, he made no effort to speak to Respondent prior to writing the article (R. 92, Lines 5-7; (R. 95, Lines 20-25; R. 96, Lines 1-4). He made no effort to contact her after writing the article but before it was published (R. 106, Lines 21-25; Lines R. 107, Lines 1-8). In fact Appellant Moorehead admitted that he saw no need to try and verify any of the allegations made against Respondent prior to publishing the article describing her as a "two bit" or "corruptible" attorney. (R. 127, Lines 13-17).

Appellants published their article in October of 2007. Two months prior to the publication of the article, the Family Court had rejected Stella Black's allegations that Respondent had any conflict of interest and denied Ms. Black's motion to recuse her from the case. (R.179, Lines 3-13). This Order refuting the very allegations upon which Appellant's allegedly based their article and their description of Respondent as a "two

bit" and "corruptible" lawyer was on file at the Richland County Courthouse two months prior to the publication of Appellants' article. Even a cursory review of the public records would have revealed that the allegations had been considered and rejected by the Court in that action.

The Court misapprehended and misapplied prior South Carolina authority setting forth the test for actual malice. The Panel's opinion also ignored and misapplied the facts presented at Trial, warranting a grant of rehearing and/or rehearing *en banc* in this matter.

II. The Panel's Opinion Disregarded and Misapprehended Evidence that Appellants Knew their Allegations were False

The Panel concluded that, "in this case there was no evidence Appellant's knew any of the statements were false." This conclusion disregards the evidence presented at Trial. There was ample evidence presented at Trial upon which the Trial Judge and ultimately the jury could conclude that Appellants knew their characterization of the Respondent was false. Appellant Todd Moorehead testified that prior to writing the news article he did not know the Respondent. He did not have any knowledge as to her reputation or her legal abilities. Based solely on language contained in certain documents filed at the Courthouse, he wrote the article describing her as a "two bit lawyer" and "corruptible attorney," words that described her as a lawyer, "not devoted to her clients...willing to forsake the best interests of her clients...subject to being bribed...a crooked lawyer." (Opinion dated September 7, 2011).

While he claimed that his article only set forth the facts that were alleged in Stella Black's affidavit and the Complaint, the language he used to describe Respondent does not appear anywhere in the Court documents he claims his article merely describes.

Nowhere in his article did he identify that the sources of information were allegations in Court documents. Nowhere in his article use quotation marks to show that information in his article had been taken from documents filed in Court. Instead he chose his "own words" to describe the public documents upon which he allegedly based his article. He admitted repeatedly at trial that despite the fact he published the article as a "news article" and not as an opinion piece, the words he used to describe Respondent were his own and appeared nowhere in the documents on file at the Courthouse (R. 124, Lines 23-25; R. 125, Lines 1-4) (R. 100, Lines 8-25; Page 81, Lines 1-15) (R. 104, Lines 1-15) (R. 105, Lines 11-17) (R. 114, Lines 22-25; R. 115, Line 1) (R. 117, Lines 16-25). Appellant Moorehead admitted at trial that he had no information that the allegations used to write his article were actually, in fact true. (R. 115, Lines 1-22).

Further, by his own admission at trial, some of the allegations that were reported as fact were fabrications and not based on any concrete evidence. In part of the article Appellant Moorehead described the "juicy retainer fee" that caused Respondent to turn on her own clients." (R. 108, Lines 11-15). The amount or even existence of Respondent's alleged retainer fee does not appear anywhere in the Court documents on which Appellants claimed their story was based. (R. 109, Lines 10-14) (R. 111, Lines 10-19). In fact, the Court documents do not even state that Respondent got a fee in the underlying divorce action. (R 109, Lines 19-25). Respondent Moorehead admitted at Trial that he simply made up this part of the story (R. 110, Lines 1-6).

The Panel concluded that, "in this case there was no evidence Appellants knew any of the statements were false." This conclusion disregards the evidence presented at Trial. There was ample evidence presented at Trial upon which the Trial Judge and

ultimately the jury could conclude that Appellant's knew their characterization of the Respondent were false. The Panel misapprehended and misapplied this evidence in holding the Respondent failed to prove actual malice and that the Trial Court erred in denying Appellants' Motion for a Directed Verdict. This warrants a grant of rehearing and/or rehearing *en banc* in this matter.

III. The Panel's Opinion misconstrues the nature of the defamation alleged by the Respondent.

The Panel's opinion misconstrued the nature of the defamation alleged by the Respondent in her Complaint and proven by Respondent at Trial. This is not merely a case where Appellants' reported facts that ultimately were proven to be false. In the case before the Court, the Appellants did not merely report facts that were uncovered in an "investigation," but allegedly took facts from public court documents and misstated and misconstrued them in such as way as to defame the Respondent. While he claimed that his article only set forth the facts that were alleged in Stella Black's affidavit and the Complaint, the language Respondent Moorehead used to describe Respondent in his article do not appear anywhere in the Family Court documents (R. 124, Lines 23-25; R. 125, Lines 1-4) (R. 100, Lines 8-25; R. 81, Lines 1-15) (R. 104, Lines 1-15) (R. 105, Lines 11-17) (R. 114, Lines 22-25; R. 115, Line 1) (R. 117, Lines 16-25). Nowhere in the article did he identify that the sources of information were allegations in Court documents. Nowhere in his article use quotes to show that information in his article had been taken from documents filed in Court. Instead he chose his "own words" to describe the public documents upon which he allegedly based his article. He admitted at trial that the words he used in the article were his own

The Panel misapprehended the nature of the action brought against Appellants. The Appellants did not merely publish doubtful and unverified allegations contained in Family Court Pleadings, but they published them as fact. Further they embellished them to the extent that they actually "made up" part of their story in such as way as to defame her. The Panel overlooked and misapprehended the nature of Respondent's action, warranting a grant of rehearing and/or rehearing *en banc* in this matter.

IV. The Panel's Reliance on Public Filings was misplaced.

The Panel placed great reliance on the allegations contained in the affidavit filed by Stella Black in Family Court. Based in part on these this document, the Panel found that "West has not proven by clear and convincing evidence that Appellants believed their characterization of the allegations Black made against West were not accurate." (Opinion dated September 7, 2011).

The Panel's reliance on the affidavit was misplaced and ignored the fact that these allegations had been repudiated prior to the article being written or published. Appellants published their article in October of 2007. Two months prior to the article the Family Court had completely rejected Stella Black's allegations that Respondent had any conflict of interest and denied Ms. Black's motion to recuse Respondent. (R.179, Lines 3-13). Therefore the Panel's reliance on the affidavit filed by Stella Black was misplaced.

V. The Panel's Opinion overlooked the overwhelming evidence presented at Trial

The Panel's Opinion concluded that Respondent failed to prove actual maice and that the Trial Judge erred as a matter of law in denying Appellants directed verdict motion. This conclusion completely and totally misapprehends and overlooks the evidence presented at trial. Respondent Columbia City Paper is a bi-weekly paper with a

print circulation of 30,000 to 40,000. (R. 76, Lines 21-23). The paper is also published in full online with a national and international circulation, (R. 75, Lines 18-20). In addition to print and online circulation, the paper maintains a blog online that allows readers to discuss and comment on articles for several months after publication of the printed paper. (R. 78, Lines 3-8). The paper's target demographic is college-educated readers between the ages of 18-35, who live in the midlands of South Carolina. (R. 78, Lines 1921).

At the time of the article which forms the basis of this action, Respondent was a 32 year old lawyer practicing in Columbia, South Carolina, practicing in the same general area as the Appellant's paper, trying to reach the same target market. (R. 78, Lines 22-25; R. 79, Lines 1-5).

September 22, 2011.

Moorehead's article "Adieu M'Armoire" was published in the Columbia City Paper in print and online on October 24, 2007. (R. p. 368). Appellants' article referred specifically to one attorney, the Respondent Rebecca West. Respondent's article was published as a news piece and not as a satire or opinion piece. In the article Appellant's described Respondent as a "two bit lawyer" "who'll turn on their own clients if the retainer is juicy enough." The article also described Respondent Black as a "corruptible attorneys" (R, p. 368).

At the time he wrote his article Appellant Moorehead did not know Respondent, had never met her. He knew nothing about her reputation (R. 94, Lines 18-20) (R. 127, Lines 20-25; R. 128, Lines 1-12). He made no effort to contact her prior to writing the article (R. 92, Lines 5-7) (R 95, Lines 20-25; R. 96, Lines 1-4). He did not speak to anyone prior to writing the article prior to writing the article. He made no effort to

contact Respondent prior to publishing the article. (R. 106, Lines 21-25; R. 107, Lines 1-8). He did not personally interview anyone connected with the Family Court action prior to publishing his article. (R. 82, Lines 12-17) (R. 90, Lines 21-25). In sum, Appellants made absolutely no effort to verify the facts of their story prior to publishing it. Appellant Moorehead admitted at trial that he had no information that the allegations used to write his article which were reported as fact were actually, in fact true. (R. 115, Lines 1-22).

Although Appellants maintained at trial that their article merely described documents on file at the Courthouse in what they recognized and described as a "bizarre" domestic action, nowhere in their article did Appellants identify the source of their information as allegations in Court documents. No where did they put the allegations of Stella Black in quotation marks (R. 100, Lines 13-14). The contents of the Family Court file were reported as straight up facts. The words they used to describe Respondent Black based on these Court pleadings were their own. (R. 124, Lines 23-25; R. 125, Lines 1-4) (R. 100, Lines 8-25; R. 81, Lines 1-15) (R. 104, Lines 1-15) (R. 105, Lines 11-17) (R. 114, Lines 22-25; R. 115, Line 1) (R. 117, Lines 16-25).

Further, Appellants took liberties with the language contained in the Court filings to the extent that they embellished them in such a way as to show Respondent in an even poorer light. Appellant Morehead admitted that the words he used were his own and not words found in the court papers on file at the Courthouse (R. 100, Lines 20-23). No where in the article did they attribute these allegations to those alleged in Court Documents. Nowhere did they put these in quotation marks. Instead they reported them as true.

In part of the article Appellant Moorehead described the "juicy retainer fee" that caused Respondent to turn on her own clients." (R. 108, Lines 11-15). The amount or even existence of Respondent's alleged retainer fee does not appear anywhere in the Court documents on which Appellants claimed their story was based. (R. 109, Lines 10-14) (R. 111, Lines 10-19). In fact, the Court documents do not even state that Respondent got a fee in the underlying divorce action. (R 109, Lines 19-25). Respondent Moorehead admitted at Trial that he simply made up this part of the story (R. 110, Lines 1-6).

Finally, even a cursory investigation would have lead Appellants' to discover that the allegations against Respondent in the Family Court action were not true. Appellants published their article in October of 2007. Two months prior to the publication of the article, the Family Court had rejected Stella Black's allegations that Respondent had any conflict of interest and denied Ms. Black's motion to recuse her from the case. (R.179, Lines 3-13). This Order refuting the very allegations upon which Appellant's allegedly based their article and their description of Respondent as a "two bit" and "corruptible" lawyer was on file at the Richland County Courthouse two months prior to the publication of Appellants' article. . Even a cursory review of the public records would have revealed that the allegations had been considered and rejected by the Court in that action.

On appeal the Court has a constitutional duty to exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. It does not mean

clear and unequivocal. *Peeler v. Spartan Broadcasting,* 324 S.C. 261, 478 S.E.2d. 282 (1996).

In the case before the Court, the Respondent has presented clear and convincing evidence of actual malice. The Trial Court correctly denied Appellant's Motion for a Directed Verdict as to punitive damages. The Panel misapplied South Carolina authority and overlooked, ignored and misapplied the facts of this case in ruling that Respondent failed to prove actual malice as a matter of law. Respondent respectfully submits that this Court should reverse the Panel decision as to actual malice and reinstate Respondent's punitive damages award.

CONCLUSION

Based on the foregoing, Respondent Rebecca West respectfully requests that this Court grant rehearing or rehearing *en banc* as to the Court's opinion in this matter.

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Attorneys for the Appellants

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Common Pleas Court

J. Ernest Kinard, Circuit Court Judge

Case No. 2008-CP-40-0074

Rebecca West...Respondent,

v.

Todd Moorehead, Columbia City Paper, LLC,
and Paul Black...Appellants.

PROOF OF SERVICE

I, the undersigned of the law offices of Moore, Taylor & Thomas, P.A, attorneys for Respondent, do hereby certify that I have served all parties in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same as indicated below:

Pleadings:

Petition for Rehearing and Rehearing *En Banc*

Parties Served:

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John C. Bradley, Jr.
Attorney

September 22, 2011

The South Carolina Court of Appeals

Rebecca West, Respondent,

v.

Todd Morehead and Columbia City Paper, LLC, and Paul Blake, Appellants.

The Honorable J. Ernest Kinard, Jr.
Richland County
Trial Court Case No. 2008-CP-40-00074

ORDER DENYING PETITIONS FOR REHEARING

Appellants and Respondent have each filed a petition for rehearing. After reviewing the petitions, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and there is no basis for granting a rehearing.

It is, therefore, ordered that Appellant's petition for rehearing and Respondent's petition for rehearing be denied.

_____________________ C. J.

_____________________ J.

_____________________ J.

Columbia, South Carolina

cc: Evan Brook Bristow
Kirby Darr Shealy, III
S. Jahue Moore, Jr.

FILED
December 12, 2011