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

Case No. 2008-CP-40-00074

Rebecca West,.....Respondent,

v.

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

FINAL BRIEF OF APPELLANTS

Kirby D. Shealy III
BAKER, RAVENEL & BENDER, L.L.P
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHEN RESPONDENT DID NOT SHOW ANY EVIDENCE OF FAULT?**

II. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHEN APPELLANTS WERE PROTECTED UNDER THE FAIR REPORT PRIVILEGE?**

III. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHEN RESPONDENT DID NOT SHOW ANY EVIDENCE OF CONSTITUTIONAL ACTUAL MALICE?**

IV. **DID THE TRIAL COURT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE WHEN PREJUDICIAL ERRORS WERE MADE?**

STATEMENT OF THE CASE

On January 4, 2008, Respondent Rebecca West ("West") filed a summons and complaint alleging a cause of action for defamation against Appellants, Columbia City Paper, LLC ("Paper") and its assistant editor, Todd Morehead ("Morehead"). Appellants timely answered. After discovery had commenced, West filed an amended complaint on March 20, 2009, which added Appellant Paul Blake ("Blake"), the publisher of the Paper, as a party. Again, Appellants timely answered. Prior to trial, Appellants moved for summary judgment on the grounds that: (1) West had failed to adduce evidence of common law malice; and (2) Appellants were protected by the fair report privilege. Following a hearing conducted immediately prior to trial, the trial court denied Appellants' motion.

The case was tried from June 1-2, 2009. The jury found for West, awarding

$10,000.00 in actual damages and $30,000.00 in punitive damages. On June 10, 2009, Appellants moved for judgment notwithstanding the verdict, or alternatively, for a new trial absolute. The trial court denied Appellants' motions by order filed on July 29, 2009. On August 17, 2009, Appellants timely filed a notice of appeal from the judgment as well as from the order denying the post trial motions.

STATEMENT OF THE FACTS

The Columbia City Paper is a free, biweekly newspaper that currently prints between ten thousand and fifteen thousand newspapers. (R. p., 76, lines 21-23; R. p. 249, lines 5-6; R. p. 253, lines 8-13). The newspaper generally targets the eighteen to thirty-five year old demographic and uses a more narrative style in its articles than would larger local newspapers. (R. p. 76, lines 13-15; R. p. 143, lines 15-25). The newspaper is co-owned by Blake and Morehead and is funded solely by advertisements. (R. p. 249, lines 11-19).

In the fall of 2007, Blake received a tip on a story which involved allegations that publicly-funded video cameras had been placed on a former Columbia city councilman's garage to spy on private citizens. (R p. 86, lines 4-19; R. p. 251, lines 1-5). The tip led Blake to investigate a legal proceeding involving a local businessman, Harold "Whit" Black, and his wife, Stella Black. (R. p. 251, line 6-11; R. p. 252, line 6). To investigate this tip, Blake went to the Richland County Courthouse to review and copy the contents of a civil case file. (R. p. 251, line 6-11; R. p. 252, line 21). He never reviewed the family court's file regarding the Black divorce. (R. p. 252, lines 7-21). The civil case file contained an Affidavit of Stella Black in Support of her Motion to Disqualify Counsel from a divorce proceeding involving the Blacks, captioned as *Stella K. Black v.*

Harold Whitney Black and bearing docket number 2006-DR-40-0163 (R. p. 372-74), and an Amended Complaint, captioned as *Stella K. Black v. Harold Whitney Black, Whit-Ash Furnishings, Inc., Jim Edwards, Amanda Phillips, Rebecca West, The Masella Law Firm, and Spector Soft Corporation*, bearing civil action number 2007-CP-40-2204 (R. p. 375-94; R. p. 251, lines 12-20; R. p. 252, l. 13). Those documents contained various allegations, some of which were made directly against West. Blake passed these court records to Morehead to aid him in writing the story. (R. p. 79, lines 17-25; R. p. 82, lines 1-15; R. p. 251, line 6-11; R. p. 252, line 21).

West is an attorney who represented Whit Black in his divorce from Stella Black. (R. p. 183, lines 4-5; R. p. 188, lines 5-18). In her amended complaint, Stella Black alleged that "[i]n approximately 2004, [she] was introduced to West, an attorney at law with Masella Law Firm. [She] engaged West and her firm to represent [her] in securing certain copyrights, handling other parts of her legal work, and helping to posture and promote [her] career." (R. p. 375-94, ¶ 13). According to Stella Black, the scope of West's representation of her included "reviewing and preparing contracts, publishing, business structures, copyrights, intellectual property, and other business related matters." (R. p. 372-74, ¶ 2).

Soon thereafter, a divorce action was filed. Stella Black alleged that despite the representation, during the divorce proceedings, "Ms. West was listed as one of [her] husband's attorneys of record when his original attorney, James C. Long, III, was replaced." (R. p. 372-74, ¶ 3). Stella Black claimed that she was "shocked to see Ms. West sitting across the table with [her] husband's new counsel" and that "since Rebecca West represented [her] in matters substantially related to [the] case, [West's]

representation of [her] husband . . . [was] an absolute conflict of interest." (R. p. 372-74, ¶ 4). Stella Black then filed a motion to disqualify West as counsel in the divorce proceeding. (R. p. 191 line 25; R. p. 192, line 4).

Subsequently, Stella Black filed a civil complaint. (R. p. 198, lines 3-6). As to West, Stella Black asserted causes of action for invasion of privacy, conspiracy, breach of fiduciary duty, "conspiracy and tortious interference with business relationship and contract," fraud, negligence/negligent misrepresentation, and malpractice. (R. p. 375-94, ¶¶ 37-45). In her amended complaint, Stella Black alleged that West had "furnished privileged and confidential information about [her] to [Whit] Black, his investigators, and his counsel for the purpose of assisting [Whit] Black and Whit-Ash in efforts to economically detriment [sic] [her] in the marital litigation. (R. p. 375-94, ¶ 24). Stella Black also alleged that "[a]t no time did West . . . either disclose to [her] or secure a waiver from [her] regarding simultaneous representation of [Whit] Black and Whit-Ash. At no time did [she] authorize West . . . to publish her information except to Phillips acting as [her] agent." (R. p. 375-94, ¶ 13).

To get more information about the allegations contained in the court records, Morehead and Blake conducted several interviews. (R. p. 79, lines 20-25; R. p. 91, lines 1-5). Morehead attempted to interview Jan Warner, Stella Black's attorney, but he did not respond to Morehead's inquiry. (R. p. 95, lines 20-22).

The article that forms the predicate for this lawsuit was published in the October 24, 2007, issue of the Columbia City Paper and was entitled *Adieu M'Armoire: Whit-Ash Co. linked to bizarre divorce case, other prominent figures implicated.*

The article begins:

There's a lot of old money in Columbia. Some of the more glaring displays of that gilded elite are tucked away where the city's eastern edge rubs shoulders with Forest Acres. Here narrow avenues, inaccessible to thru traffic, seem to fold back on themselves through a labryrinth of rolling hills and large spotlit mansions with ornate black iron gates. People don't ask too many questions in this neighborhood and if, say, a local furniture baron goes nuts and tacks up hidden cameras so he can spy on his estranged wife, well, that's his business. There's an understanding in these big money circles that divorce is often messy and only those with the upper hand tend to walk away with the family fortune intact. The neighbors know, too, if said wife begins to throw all manner of allegations into sworn affidavits and subpoenas start to fly that it's best to just pull the shades until it all blows over. But even this neighborhood wasn't prepared for the bizarre divorce proceedings of Harold "Whit" Black and his wife, Stella.

By the time it was finally hauled into court last year, it had all the ingredients of a cheap detective novel: the millionaire husband of a seductive singer and the P.I. he's paying to tail her; hidden (and possibly tax payer-funded) cameras; hacked computers; two-bit lawyers who'll even turn on their own clients if the retainer is juicy enough; and at the heart of it all, lots of money up for grabs. The case is still in litigation, the attorneys and litigants tight-lipped, and what can't be deduced from the public record at the courthouse is left to swirl in the air of bridge club gossip.

(R. p. 366-69).

West's name is mentioned in four paragraphs of the article:

Stella was employed by Whit-Ash Furniture when, according to her testimony, Whit encouraged her to leave the business to pursue her dream: a music career in operatic pop or "Popera." Her affidavit also alleges that Whit-Ash hired Amanda Phillips to manage her music career in 2003 and claims that the furniture company funded the bulk of her musical endeavors. She and Black, according to testimony, claimed the related deductions on their joint income tax return as a Schedule C business. In 2004, Stella was introduced to Rebecca West, an attorney with the Masella law firm. West was asked to handle the legal arm of Stella's music career and, like Phillips, was paid by Whit.

* * * *

And when the preliminary divorce proceedings were underway, Stella looked up to see none other than her entertainment lawyer, Rebecca West, representing Whit. She believes it had been planned all along.

* * * *

> "At no time did West or Masella either disclose to [Stella Black] or secure a waiver from [her] regarding simultaneous representation of Black and Whit-Ash," Stella's affidavit states. "At no time did [Stella Black] authorize West or Masella to publish her information except to Phillips acting then as [her] agent."
>
> * * * *
>
> Stella motioned [sic] to have West disqualified as Whit's counsel due to the conflict of interest and has filed suit against Whit-Ash, Masella law firm, Jim Edwards, Amanda Phillips and the Spectorsoft software corporation.

(R. p. 366-69).

West filed the case at bar in response to concerns regarding two phrases within the article. The first phrase is contained within preliminary paragraphs set forth above: "it had all the ingredients of a cheap detective novel: . . . *two-bit lawyers who'll even turn on their own clients if the retainer is juicy enough.*" (R. p. 368) (emphasis added).

The second allegedly defamatory phrase is at the end of the article:

> After the smoke clears and the cases are settled, things will return to normal in the tea rooms and on the tennis courts of Forest Acres. Reputations will be left largely unsullied and folks in the neighborhood will stop peering through the blinds for paralegals with subpoenas or reporters snooping in the azaleas. And when they think back to the tense days of the Black divorce[,] *many won't care about corruptible attorneys or ETV property*; there are far worse secrets here for sure. They'll most likely remember the case for Whit Black's utter neglect of his bottom line. After the court fees and lawyers and the ex wife and private detectives and their expenses are all paid[,] Black has, by some estimates, spent more than he would had he quietly settled and coughed up the alimony. But that's just how divorce goes around here.

(R. p. 369) (emphasis added).

Morehead testified at trial that he had never met West, did not know her or know of her. (R. p. 94, lines 18-20; R. p. 104, lines 16-19; R. p. 141-42, line 25-3; R. p. 142,

line 6). West testified to the same effect as to Morehead. (R. p. 199, lines 15-19). Morehead also testified that the article was not based on any of his opinions; it was only based upon Stella Black's allegations. (R. p. 88, lines. 10-18; R. p. 94, lines 5-9; R. p. 140, lines 13-18; R. p. 141, line 7). When Morehead submitted the article to Blake for editorial review, no concern was raised about anyone's behavior, or the quality of the article, or of the reporting during the editorial process. (R. p. 85, lines 23-25; R. p. 66, lines 1-3). West did not deny that Stella Black had made allegations against her on which the article was based. (R. p. 200, line 5-16; R. p. 223, line 12-13).

During trial, West introduced an order into evidence that had been entered in the Black divorce proceeding which denied Stella Black's motion to disqualify West.[1] (R. p. 193, lines 4-15; R. p. 371). However, there was no testimony establishing that the order had ever appeared in the civil case file, the contents of which were the basis of Appellants' article. Rather, testimony from Blake and Richland County Deputy Clerk of Court Patricia Falcone was consistent in establishing that family court and civil court files are housed in different parts of the courthouse and that the public's access to them is not identical. (R. p. 251, lines 12-20; R. p. 252, lines 7-21; R. p. 289, line 14-22; R. p. 290, line 25).

During his opening statement, West's counsel made the following observation:

> The evidence will show . . . that after the article was run, my client came and got me, and we wrote a letter and asked for a retraction.
> Instead of a retraction, the evidence will show that the editors of the City Paper put something in the newspaper which they now will sit on the witness stand and tell you was a bald-faced lie. The evidence will show this.

(R. p. 54, lines 4-11). Appellants objected and asked for a mistrial at the first

[1] West had never produced the order to Appellants prior to trial, despite receiving a discovery request for "any and all orders or other documents relating to this litigation." (R. p. 195, line 9-11; R. p. 196, l.14).

opportunity. (R. p. 60, lines 11-19; R. p. 66, line 5-18; R. p. 68, line 15). Appellants also objected to West's initial attempt to elicit testimony concerning West's request for a retraction. (R. p. 130, lines 10-18). The trial court denied the request for a mistrial and likewise overruled the objection to questioning about the requested retraction. However, the court would not allow Appellants to call West's counsel as a witness before the jury to be examined about his request for a retraction. (R. p. 241, line 3-25; R. p. 246, Lines 11-21).

ARGUMENT

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The freedom of the press guaranteed by the First Amendment is one of the most basic tenets upon which our nation was founded.[2] Thomas Jefferson, like the other Founding Fathers, recognized that as a nation, "our liberty depends on the freedom of the press, and that cannot be limited without being lost." Specifically, the concept of a free press represents the "'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). It is this commitment that serves as the root of the protections that apply to defamation claims, which is critically important when the speech

[2] "In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 36 (1990) (Brennan, J., dissenting) (citations omitted).

relates to matters of public concern. That is particularly true in modern society, where people have only "limited time and resources with which to observe at first hand the operations of [the] government," and therefore, they "[depend] necessarily upon the press to bring to [them] in convenient form the facts of those operations. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491 (1975). After all, if the public were "[w]ithout the information provided by the press[,] most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." *Id.* at 492.

This case presents an opportunity for this Court to reaffirm these values and to provide further clarification to the law of defamation. There is no question that for a long time, South Carolina courts have struggled with this area of the law. Then Associate Justice Jean Toal explained this struggle in her concurring opinion in *Holtzscheiter v. Thomson Newspapers, Inc.*:

> It has been written that "there is a great deal of the law of defamation which makes no sense." This statement is particularly applicable to certain areas of South Carolina defamation law, which are mind-numbingly incoherent. Case law in this state presents no clear analytical system for resolving defamation questions. Because a clear framework is lacking, the resolution of disputes often turns on chance, on whatever aspect of defamation law happens to arrest the parties' or court's attention in that case. As a result, the law lacks consistency and predictability, and confounds the bench, the bar, members of the general public, and media personnel who have to make important decisions based on court precedent.

332 S.C. 502, 516-17, 506 S.E.2d 497, 505 (1998) (Toal, J., concurring). With that challenge in mind, the present case raises important issues: the appropriate standard of proof to be applied to matters public concern that implicate private figure plaintiffs, the application of the fair report privilege to court documents, and the proper standard for

constitutional actual malice so as to allow for the recovery of punitive damages.

I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE RESPONDENT DID NOT SHOW ANY EVIDENCE OF FAULT.

Generally, a motion for judgment notwithstanding the verdict pursuant to Rule 50(b) of the *South Carolina Rules of Civil Procedure* should be granted if the plaintiff either fails to meet the burden of proof on one element of her case, or if the evidence supports only the conclusion that the non-moving party cannot recover. *Title Insurance Co. v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976); *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 439 S.E.2d 266 (1993). However, because this case is a defamation action, "the court must review the evidence using the same substantive evidentiary standard of proof the jury is required to use in a particular case." *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 464, 629 S.E.2d 653, 663 (2006). "Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" 20 S.C. Jur. *Libel and Slander* § 97 (2008) (emphasis added) (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485, 511 (1984)). Thus, "[r]ather than construing the evidence in the light most favorable to the plaintiff, as would usually be the case, the [appellate] court should independently review the evidence relating to the constitutional defenses." *Id.* (emphasis added); *see Reveley v. Berg Publications, Inc.*, 601 F. Supp. 44, 46 (W.D. Tex. 1984) ("In ruling on the motion for judgment n.o.v., this court considers its constitutional responsibility of insuring that speech found libelous by the jury is

indeed outside the protection of the first amendment.").

By asserting a cause of action for defamation, West was required to prove that Appellants were at fault in publishing a false and defamatory statement concerning her to a third party that either caused her special harm or was actionable irrespective of harm. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). Because West is a private figure, Appellants are members of the media, and the subject matter of the publication is a matter of public concern, the First Amendment bears upon the evidence West had to adduce at trial.[3] She had to prove common law malice (rather than relying upon malice being implied by the nature of the publication itself) and actual injury in the form of general or special damages. *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). She also had to prove that the published statement was false. *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

The first burden that West faces in prevailing on her defamation claim is proving that Appellants were at fault. The "fault" that West had to prove was that Appellants' publication was made with common law malice. For Appellants to be deemed to have acted with common law malice, West had to show that were "actuated by ill will in what [they] did, with the design to causelessly and wantonly injure [West]; or that the statements were published with such recklessness as to show a conscious indifference toward [West's] rights." *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909, 914 (1968) (citation omitted). This standard has been further refined to require a showing that at the time of publication, Appellants were "conscious, or chargeable with consciousness of

[3] The parties do not dispute West's status as a private figure, Appellants' status as members of the media, or that the publication was a matter of public concern.

[their] wrongdoing." *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). The trial court correctly determined that West had introduced no evidence that Appellants' actions were motivated by ill will. (R. p. 238-39, lines 23-25 and lines 1-3). He sent the case to the jury because he felt that there was a genuine issue of material fact as to whether Appellants were consciously indifferent to West's rights. (R. p. 238-39, lines 23-25 and lines 1-3).

West presented no evidence that at the time of publication Appellants were conscious, or chargeable with consciousness, of any wrongdoing. Morehead testified that the article was not based on any of his opinions; it was based upon Stella Black's allegations. (R. p. 88, lines 10-18; R. p. 94, lines 5-24; R. p. 141, line 25; R. p. 142, lines 4-6). Testimony showed that Blake had gotten the documents from the clerk of court and conducted interviews with Morehead. (R. p. 79, lines 20-25; p. 250, lines 20-23; R. p. 252, line 6). When Morehead submitted the article to Blake for editorial review, Blake raised no concern about anyone's behavior, or the quality of the article or of the reporting during the editorial process. (R. p. 84, lines 19-25; R. p. 86, line 3).

Further, West did not present evidence that Appellants acted with a conscious indifference towards her rights. She offered no proof that at the time of publication Appellants were aware of an error in the publication or that Stella Black's allegations were untrue. Her only effort to demonstrate Appellants' "conscious indifference" was to introduce an order from the Black divorce proceeding that dismissed Stella Black's motion to disqualify West as counsel. West posited that Appellants should have found that order and incorporated it into the article. However, West never established that this order was in the Black civil case file at the time of publication. She merely established

that such an order existed and had been filed in the family court prior to the publication of the article.

Meanwhile, Appellants established that the affidavit in support of the motion to disqualify that was originally filed in the family court was also in the civil court file, as an attachment to a civil filing. (R. p. 289, lines 14-22). Appellants also showed that they did not have the same access to the family court file as they did to the civil case file, because the clerk of court tends to resist giving access to family court files to members of the general public. (R. p. 290, lines 11-24). They further established that the only file they reviewed was the civil file that named West as a defendant. (R. p. 251, line 21-25; R. p. 252, line 21).

Because West failed to carry her burden to prove the requisite degree of fault on the part of Appellants, the trial court erred in denying Appellants' motion for judgment notwithstanding the verdict.

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE APPELLANTS WERE PROTECTED UNDER THE FAIR REPORT PRIVILEGE.

Because of the public's dependence on the media for information, "[g]reat responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975). In most states, including South Carolina, the media's responsibility for providing fair and impartial reports of matters of public interest is counterbalanced with an evidentiary privilege when they do so-- the "fair report" privilege. *White v.*

Wilkerson, 328 S.C. 179, 493 S.E.2d 345 (1997); *Jones v. Garner*, 250 S.C. 479, 158 S.E.2d 909 (1968).

The Supreme Court of South Carolina has held that "[f]air reports of what is shown on public records may be circulated freely and without liability." *Herring v. Retail Credit Co.*, 266 S.C. 455, 460, 224 S.E.2d 663, 665 (1976). The privilege "protects those who accurately report the substance of public proceedings or records that turn out to be false and defamatory; as long as the report is a fair and accurate summary of the proceeding or record, the person reporting it does not have to investigate the underlying truth of the matter, nor may he be held liable for the negligence or bad faith of the person who was the source of the defamatory charge." 20 S.C. Jur. *Libel and Slander* § 76 (1993). Among such public records and proceedings are judicial proceedings and court records, where "the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Cox Broadcasting Corp.*, 420 U.S. at 492.

Courts records include many kinds of allegations, and in the marketplace of ideas, it is true that false allegations add little to public debate; indeed, they detract from it. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 53 (1988). Obviously, "[i]t would be ideal if the truth or falsity of every charge could be instantly determined by the press. Unfortunately, however, truth or falsity is often not instantly ascertainable." *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 717 (4th Cir. 1991). In what has been described as the "hurly burly" of public debate, "some false (or arguably false) allegations fly" and litigation is not exempt from this. *See id.* However, the Constitution and the common law of defamation do not require that the press "warrant that every

allegation that it prints is true." *Id.* (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)). "If this burden were imposed through the law of defamation, news organizations would become ever more officious referees in the ring of robust debate, and the free exchange of views would be diminished to the public detriment." *Id.* (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-73 (1986)). "Ignorance, without more, has never served to defeat freedom of speech." *Milkovich*, 497 U.S. at 35 (Brennan, J., dissenting). This is why the First and Fourteenth Amendments to the United States Constitution "command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox Broadcasting Corp.*, 420 U.S. at 495. "At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records." *Id.* at 496. Therefore, the fair report privilege is not measured by the legal sufficiency of the charges made in the judicial proceedings or the truth of those charges, but the privilege instead consists of making a fair and substantially true account of the particular proceeding or record. *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982).

The determination of whether a report on a public record is substantially true or not is measured by the 'gist' or 'sting' test, which asks whether a reasonable person, comparing the court documents and the article as a whole, could conclude that the article was a fair and accurate rendition of the court documents. *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 557 (D.S.C. 2008). If the reader could conclude that the article carries with it a materially greater "sting" than what the court documents say, then the fair report privilege has been abused and is thus forfeited. *Id.* In reporting

the contents of public records, a media defendant has the right to paraphrase, because the fair report privilege does not require that the published report be a verbatim recitation of the court documents. *Id.* at 554.

Media defendants also enjoy a protection as to their particular use of style and wording in reporting on issues of public concern, including litigation. Restatement (Second) of Torts § 611, comment f; 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 155 (2008). "[T]he 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." *Boone v. Sunbelt Newspapers, Inc.*, 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001) (citation omitted); *see Cobin*, 561 F. Supp. 2d at 552 (in making its determination, the court looks at context and presentation). Additionally, as long as "the gist or 'sting' of a statement is substantially true, 'minor inaccuracies will not give rise to a defamation claim.'" *Cobin*, 561 F. Supp. 2d at 557.

Here, there is no question that Appellants were protected under the fair report privilege. As members of the press, Appellants are not liable for defamation so long as they provide a fair report of what it shown in public records. 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. It is undisputed that Stella Black did not use the terms "two bit" or "corruptible" in either her affidavit or her amended complaint. However, Appellants submit that Stella Black's allegations can be fairly characterized using those terms and that Appellants' use of them

was therefore privileged as a matter of law.

The article's reliance upon the court documents is self-evident. Throughout the article, the court documents were cited: "according to one affidavit," "according to her testimony . . .," "Her affidavit also alleges . . .," "according to testimony . . .," "according to court documents . . .," "Stella Black's affidavit repeatedly refers to . . .," "According to court documents...", and "Stella claims...." (R. p. 372-74).

Although the article is replete with such references, it was further tempered from the beginning with the following language:

> The neighbors know, too, if said wife begins to throw *all manner of allegations into sworn affidavits* and subpoenas start to fly that it's best to just pull the shades until it all blows over.
>
> * * * *

(R. p. 369) (emphasis added). *See Milkovich*, 497 U.S. at 31 (Brennan, J., dissenting) ("when the reasonable reader encounters cautionary language, he tends to 'discount that which follows'"). This tempering makes clear that the article contains various allegations from the court documents.

The specific allegations were that West served as Stella Black's lawyer while being paid by Whit Black, but that secretly, West was committing fraud against Stella Black. (R. p. 390-91, ¶¶ 71-77). Stella Black also alleged that West furnished confidential information about her to Whit Black in order to disadvantage her in the divorce. (R. p. 381, ¶ 24). While Morehead admitted to choosing the terms "two-bit" and "corruptible," he testified that he did so in a rhetorical and satirical fashion to describe the allegations made by Stella Black. (R. p. 94, lines 5-24; R. p. 120, line 2-10; R. p. 122, line 20). Again, Morehead paraphrased the court documents, which he is

permitted to do. The word "corruptible" means "capable of being corrupted, as by bribery or depravity."[4] To "corrupt" means to "destroy or subvert the honesty or integrity of."[5] The amended complaint filed by Stella Black against West and others, on which the article was based, alleged a cause of action for fraud. (R. p. 390-91, ¶¶ 71-77). Fraud encompasses dishonesty. *See* Restatement (Second) of Torts § 526 (a misrepresentation is fraudulent if the maker knows or believes that the matter is not as represented, does not have the confidence in the accuracy of the representation as stated or implied, or knows that he or she lacks a basis for the representation stated or implied).

The term "two-bit" is an informal, slang term for "mediocre" or inferior."[6] Stella Black's amended complaint contained a cause of action for malpractice against West, which alleged that West's representation of her fell below the applicable standard of care and that it violated several Rules of Professional Conduct. (R. p. 392, ¶ 87).

At trial, West presented evidence that the allegations in the court documents were not true via an order that dismissed Stella Black's motion to disqualify. (R. p. 193, lines 9-20; R. p. 371). However, the family court order did not dispose of Stella Black's civil suit for fraud and legal malpractice, which was still pending at the time that the article was published. Evidence demonstrated that the family court order that West introduced was filed in the divorce action. *Id.* West never established that the family court order was ever in the civil court file. Appellants accurately reported what the documents in the civil court file alleged, and as a result their motion for judgment notwithstanding the verdict should have been granted.

---

[4] The American Heritage Dictionary 327 (2d coll. ed. 1985).
[5] *Id.*
[6] Webster's New World Dictionary of the American Language 1537 (2d coll. ed. 1976).

III. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE WEST DID NOT SHOW ANY EVIDENCE OF CONSTITUTIONAL ACTUAL MALICE.

Defamation actions allow for the recovery of punitive damages when certain facts are present. The standard to make this determination was established by the Supreme Court of the United States for application in libel claims brought by public officials and public figures. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This standard has been called several things, including actual malice, the *New York Times* standard, or the constitutional actual malice standard. *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 506 S.E.2d 497 (1998). Constitutional actual malice exists when a statement is made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80. The standard is no longer limited to public officials and public figures; it has been extended to private figure plaintiffs who seek to recover punitive damages in claims involving statements about matters of concern to the public. In such cases, a plaintiff must prove by clear and convincing evidence that at the time of the publication complained of, the publisher either knew that the publication was false or the publisher had a reckless disregard for the publication's potential falsity. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Deloach v. Beaufort Gazette*, 281 S.C. 474, 316 S.E.2d 139 (1984). This standard requires clear and convincing proof that the publisher realized that the published statement was false or that the publisher subjectively entertained serious doubt as to the truth of the statements. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n. 30 (1984); *accord, Peeler v. Spartanburg Herald-Journal Div. of New York Times Co.*, 681 F. Supp. 1144, 1147 (D.S.C. 1988); *Holtzscheiter*, 332 S.C. at 502, 506 S.E.2d at 497 (1998).

A showing of a "reckless disregard for the truth" requires more than "a departure from reasonably prudent conduct," as there must be sufficient evidence to permit the conclusion that the publisher "entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000). The plaintiff must show that there was an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). There must be evidence that the defendants had a "high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). "It is insufficient to show the defendant made an editorial choice or simply failed to investigate or verify information; there must be evidence at least that the defendant purposefully avoided the truth." *Elder*, 341 S.C. at 114, 533 S.E.2d at 902; *see St. Amant*, 390 U.S. at 733 (relying solely on an affidavit of a union member whose reputation for veracity the publisher does not know and failing to verify the information does not prove reckless disregard, as the failure to investigate "does not in itself establish bad faith"); *Peeler v. Spartan Radiocasting*, 324 S.C. 261, 478 S.E.2d 282 (1996) (finding erasure of a tape recording when done as part of a routine practice is not evidence of actual malice).

Here, the trial court erred in denying Appellants' motion for judgment notwithstanding the verdict as to punitive damages because West failed to prove by clear and convincing evidence that Appellants either knew the statements were false or had serious reservations about their truthfulness when the article was prepared and published. In fact, irrespective of the "clear and convincing" standard of proof, West did not present *any* evidence that Appellants acted with constitutional actual malice in publishing the

article.

At trial, West tried to show that Appellants failed to investigate or verify the allegations; that the notes and recordings used by Appellants were erased; and that Appellants did not contact West to question her about the allegations prior to publication. Such evidence is "patently insufficient" to demonstrate that Appellants "in fact entertained serious doubts as to the truth of the publication." *See Elder*, 341 S.C. at 115, 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."); *St. Amant*, 390 U.S. at 733 ("Failure to investigate does not in itself establish bad faith.").

West introduced no evidence that Appellants knew that the allegations of the court documents were false or had serious doubts as to the truth of the allegations. Testimony showed Morehead and Blake had no concerns about the article, or about anyone's behavior in its publication, or of the quality of the article or of the reporting during the editorial process. (R. p. 85, lines 1-25; R. p. 86, line 3).

To allow a recovery of punitive damages without a showing of constitutional actual malice would render the protections of free speech established in *New York Times Co.* and *Gertz* meaningless. Thus, the trial court erred in denying judgment notwithstanding the verdict to Appellants; consequently, this Court should reverse the trial court's order.

IV. THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ABSOLUTE BECAUSE PREJUDICIAL ERRORS WERE MADE DURING THE TRIAL

Rule 59 of the *South Carolina Rules of Civil Procedure* does not enumerate

specific grounds on which the court may order a new trial. It simply states that, after a jury trial, a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law . . . ." One common reason for granting a new trial is an erroneous admission of improper evidence. *See Howard v. State Farm Mut. Auto. Ins. Co.*, 316 S.C. 445, 448-49, 450 S.E.2d 582, 584 (1994) (where new trial was ordered where testimony concerning the adjuster's handling of the claim after litigation commenced was irrelevant and prejudicial to bad faith claim). A new trial may also be ordered where the opposing counsel committed misconduct at trial by making prejudicial statements. *See id.* at 449-50, 450 S.E.2d at 585 (finding prejudicial remarks by counsel may constitute basis for new trial); *see also Bowers v. Watkins Carolina Express Inc.*, 259 S.C. 371, 192 S.E.2d 190 (1972).

Appellants submit that if this Court determines that they are not entitled to an outright judgment in their favor, they should be granted a new trial absolute.

A. Failing to Grant a Mistrial and Admitting Evidence of Post-Publication Conduct Was Error.

The decision to grant or deny a mistrial is within the sound discretion of the trial court. *State v. Stanley*, 365 S.C. 24, 33-34, 615 S.E.2d 455, 460 (Ct. App. 2005). A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. *Id.* On appeal, the decision of the trial court will not be overturned unless there has been an abuse of discretion. *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 621 S.E.2d 363 (Ct. App. 2005). When an objection is timely made to improper remarks of counsel, the judge should rule on the objection, give a curative charge to the jury, and instruct offending

counsel to desist from improper remarks. *McElveen v. Ferre*, 299 S.C. 377, 381, 385 S.E.2d 39, 41 (Ct. App. 1989).

During his opening argument, West's counsel made the following statements:

> As a matter of fact, you are going to hear one of their witnesses tell you he stands by his story, thinks it was pretty good to put those sorts of things in the newspaper about a lady like this.
>
> The evidence will show, however, that after the article was run, my client came and got me, and we wrote a letter and asked for a retraction.
>
> Instead of a retraction, the evidence will show that the editors of the City Paper put something in the newspaper which they now will sit on the witness stand and tell you was a bald-faced lie. The evidence will show this. And if it doesn't please judge the case on what you hear from the witness stand, not on what I say.

(R. p. 53, line 25; R. p. 54, lines 1-13). Immediately following the conclusion of this opening statement, Appellants moved for a mistrial. (R. p. 60, lines 12-19; R. p. 66, lines 3-18). That motion was denied. (R. p. 68, lines 2-4). Later, West introduced evidence of Appellant's conduct after the initial publication over Appellants' objection. (R. p. 130, lines 10-18; R. p. 135, line 24). During his closing argument, West's counsel made the following prejudicial statements:

> So what they basically did was they attempted to cover up what they hadn't done. At the same time they refused to correct that which they had done. And they hunkered down and they said, sue us, sue us. If you think you're right, then go ahead and sue us. What they did was try to cover themselves.
>
> I would respectfully submit to you that the article itself is bad enough, but their reaction to that article is inexcusable. Totally inexcusable.
>
> Didn't think at least owe this young lady an apology? If you trash somebody in front of 10 to 30,000 people, can't you at least own up to the truth and say I'm sorry?
>
> They wrote something that was untrue two years ago. This order has been on the record since August of 2007. They know the story is not right.

> And as we sit here in June of 2009, nobody once has even bothered to say I'm sorry, much less go to the media and try and correct the damages that they did.

(R. p. 304, lines 5-25).

The Supreme Court of South Carolina has held that a defendant's retraction of a defamatory statement may be considered in the mitigation of damages. *See Rogers v. Florence Printing Co.*, 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958); S.C. Jur. *Libel and Slander* § 447 (2007). It has never held that post-publication conduct may be considered to determine the existence of malice. On the other hand, this Court has indicated in dicta that "refusal to retract an exposed error tends to support a finding of actual malice." *Anderson v. Augusta Chronicle*, 355 S.C. 461, 488, 585 S.E.2d 506, 520 (Ct. App. 2003) (quoting *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066 (5th Cir. 1987). The *Anderson* opinion runs contrary to the general rule.

"[I]t is hornbook libel law that post-publication events have no impact whatsoever on actual malice . . . since the existence or non-existence of such malice must be determined as of the date of publication." *Secord v. Cockburn*, 747 F. Supp. 779, 792 (D.D.C. 1990); *see Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (evidence must establish that defendant "realized the inaccuracy at the time of publication"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964) (malice must be shown "at the time of publication"); *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982) (alleged tortfeasor must be conscious, or chargeable with consciousness, of his wrongdoing at the time he acts); *see also D.A.R.E. America v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1287 (C.D. Cal. 2000) (publisher cannot be liable for defamation based upon failure to retract a statement "upon which grave doubt is cast after

publication"); *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501 (D.C. Cir. 1996) (same); *Rountree v. WBNS TV, Inc.*, 1999 WL 1054882, *7 (Ohio Ct. App. 1999) ("[A]ction or inaction after the fact has no relevance to whether [defendant] possessed malice at the time the statement was [made]."); *Ramada Inns, Inc. v. Dow Jones & Co., Inc.* 1988 WL 15825, *4 (Del. Super. 1988) (where publisher had "no obligation to retract or correct a statement thereafter which he learns to be in error").[7]

Although this Court's opinion in the *Anderson* case (on which the trial court relied in denying Appellants' post-trial motions) is at least some authority for the notion that post-publication conduct is relevant to the element of malice, the majority rule appears to hold that such conduct is irrelevant to the issue of whether malice existed at the time of publication. Moreover, such evidence, in the context that it was introduced here, violates Rule 407 of the *South Carolina Rules of Evidence*, which provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

"This rule permits admission of subsequent remedial measures only when necessary to demonstrate such things as ownership, control, impeachment, or feasibility of precautionary measures, if contested." *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 615 S.E.2d 440 (2005). Additionally, the post-publication conduct evidence that West introduced in this case also potentially violates Rule 408 of the *South Carolina Rules of*

[7] It is worth noting that the record is devoid of any evidence that West presented Appellants with the family court order that denied Stella Black's motion to have her disqualified as part of her efforts to have Appellants print a retraction. In fact, the record indicates that Appellants only learned of the existence of such an order at trial. (R. p. 195, lines 9-24; R. p. 196, line 13).

Evidence, which provides in pertinent part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

In other words, in South Carolina evidence relating to settlements is not admissible to prove liability. *Hunter v. Hyder*, 236 S.C. 378, 114 S.E.2d 493 (1960).

Here, the trial court erred in not granting Appellants' request for a mistrial after West's counsel discussed Appellants' conduct in response to his request for a retraction in his opening statement. The court likewise erred in allowing substantive evidence of such conduct to be introduced during West's case-in-chief, as it was unconstitutional and violated the rules of evidence. Because counsel discussed Appellants' post-publication conduct in his opening statement even before the evidence was erroneously admitted, the only appropriate remedy was to grant Appellants' request for a mistrial. The subsequent admission of post publication conduct evidence, and the submission of the case to the jury based in part on that evidence, necessitates the granting of a new trial absolute.

B. Disallowing Appellants from Examining Plaintiff's Counsel Was Error.

Otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008).

Here, West presented evidence that Appellants ran a clarification regarding the original article in response to a demand by West's counsel. Assuming that such evidence was properly admitted, which Appellants deny, then it was error for the trial court not to

allow Appellants to examine West's counsel concerning the context and substance of West's demand for a retraction. If this Court's comment in *Anderson v. Augusta Chronicle*, 355 S.C. 461, 488, 585 S.E.2d 506, 520 (Ct. App. 2003) that "[r]efusal to retract an exposed error tends to support a finding of actual malice" is indeed the law, then Appellants should have been allowed to probe whether West "exposed an error" when she demanded a retraction or whether, as in this case, she was instead attempting to set up arguments that could be used to the Appellants' detriment irrespective of how they responded to the demand. *See* R. p. 243, lines 14-25; R. p. 224, line 13. Because the trial court refused to allow Appellants to make such a showing, they should be granted a new trial absolute.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the order of the trial court.

Respectfully submitted,

Kirby D. Shealy III
BAKER, RAVENEL & BENDER, L.L.P
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Attorneys for Appellants

August 12, 2010.

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No. 2008 CP 40 0074

Rebecca West,.....Respondent,

vs.

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

FINAL BRIEF OF RESPONDENT

S. Jahue Moore, Esquire
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia SC 29171
(803) 796-9160
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court properly deny Appellants' Motion for Judgment Notwithstanding the Verdict based on Respondent's alleged failure to show any evidence of fault?

II. Did the trial court properly deny Appellant's Motion for Judgment Notwithstanding the Verdict based on Appellant's assertion that it was protected by the "fair report" privilege?

III. Did the trial court properly deny Appellants' Motion for Judgment Notwithstanding the Verdict based on Respondent's alleged failure to show any evidence of constitutional actual malice?

IV. Did the trial court properly deny Appellant's request for a new trial absolute?

STATEMENT OF THE CASE

Respondent Rebecca West ("West") commenced this action against Appellants, Columbia City Paper, LLC ("Paper") and its assistant editor, Todd Morehead ("Morehead") on January 4, 2008, alleging that Appellants defamed her in a newspaper article published in the Paper and online on October 24, 2007. After conducting discovery, West amended her pleadings adding Paper publisher Paul Blake ("Blake") as a Defendant. Appellants filed responsive pleadings in a timely manner. Prior to trial, Appellant argued a motion for summary judgment which was denied. Trial was held on June 1-2, 2009. The jury found for West awarding her $10,000.00 in actual damages and $30,000.00 in punitive damages. Appellants filed a Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for New Trial Absolute Pursuant to the Thirteenth Juror Doctrine and Rule 59(a), S.C.R.C.P., wherein Appellants raised the issues from which they appeal. The motion was denied in whole. Appellants timely filed a Notice of Appeal.

STATEMENT OF FACTS

Paper is a free bi-weekly newspaper with a print circulation of 30,000 to 40,000. (R. p. 76, lines 2-7). The Paper is also published in full online and has a national and international online circulation. (R. p. 76, lines 8-20). In addition to print and online circulation, the Paper maintains a blog online that permits people to comment online for several months after the publication of the printed paper. (R. p. 78, lines 3-8). The Paper's target demographic is college-educated readers between the ages of 18 and 35 who live in the Columbia, South Carolina area. (R. p. 78, lines 9-21). At the time of publication, Rebecca West was 32 years old and a practicing lawyer in Columbia, South Carolina.

The Paper's philosophy is to engage in "alternative journalism" which was described by Morehead vaguely as having a "narrative style" and containing "more literary elements." (R. p. 125, lines 5-8--p. 123, lines 19-25). Blake and Morehead claimed to be "very passionate about the First Amendment" and Blake testified that they began publishing the Paper because they wanted to promote freedom of speech. (R. p. 250, lines 8-13). Blake testified that he published articles "that aren't done by the other newspapers" and he believed the Paper tended to "hold people accountable and sometimes they're not very happy about it." (R. p. 250, lines 16-19).

Morehead wrote an article entitled "Adieu M'Armoire" which was published by the Paper in print and online on October 24, 2007. (R. p. 368). Morehead referred specifically to one attorney in the article, Rebecca West. *Id.* Morehead claimed that he was reporting on the fact that Stella Black alleged Rebecca West had a conflict of interest in her family court representation of Stella's husband, Whitney Black. At trial, the

Appellants maintained that they were merely reporting the allegations made by Stella Black against Rebecca West in documents filed by Black in the family court and circuit court action pending in Richland County. However, Morehead and Blake testified that they used the following language in the article, which was not contained in the documents filed with the court:

"-**two-bit lawyers** who'll even turn on their own clients if the retainer is juicy enough."

"-And when they think back to the tense days of the Black divorce many won't care about **corruptible attorneys**..." (R. p. 368)

West alleged that the statements were defamatory. She further alleged that Morehead and Blake improperly failed to report that there was an order in the family court file denying Black's motion to disqualify West from the litigation finding that West did not have a conflict of interest at the time of publication. West alleged that she suffered actual damages as a result of the defamatory publication and requested an award of punitive damages.

STANDARD OF REVIEW

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418-419 (Ct. App. 2000). "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* [The Appellate Court should] "reverse the trial court only when there is no evidence to support the ruling below." *Id.* "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Id.* (citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). "The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. *Id.* at 419.

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonable supports the jury's findings." *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 629 S.E.2d 653, (2006) (citing *Townes Assoc., Ltd. V. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE RESPONDENT SHOWED EVIDENCE OF FAULT ON THE PART OF APPELLANT.

Given that West showed evidence of fault on the part of Paper, the trial court correctly permitted the case to be presented to the jury and refused to grant the Paper's motion for JNOV.

"The tort of defamation allows 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, 506 S.E.2d 497, 501 (1998). Libel is a written defamation or one accomplished by actions or conduct. *Id.* "In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006)

"A publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Fleming v. Rose* 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). "[I]n a case involving an issue of public controversy or concern where the libelous statement is published by a media defendant, the common law [presumes] the

defendant acted with common law malice and the plaintiff suffered general damages do not apply. *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 466, 629 S.E.2d 653, 665 (2006). "Instead, the private-figure plaintiff must plead and prove common law malice and show 'actual injury' in the form of general or special damages. *Id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 246-50, 94 S.Ct. 2997, 3010-12, 41 L.Ed.2d 789, 809-11 (1974); *Holtzscheiter II*, 332 S.C. at 512, 506 S.E.2d at 503 (plurality opinion); *Holtzscheiter II*, 332 S.C. at 519-520, 506 S.E.2d at 506-507 (Toal, J., concurring).

"Common law actual malice has...been defined as meaning 'the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious indifference towards plaintiff's rights.'" *Jones v. Garner,* 250 S.C. 479, 488, 158 S.E.2d 909 (1968). "Malice may be proved by direct or circumstantial evidence." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) (citing *Smith v. Smith,* 194 S.C. 247, 9 S.E.2d 584 (1940). "Proof that statements were published in an improper and unjustified manner is sufficient evidence to submit the issue of actual malice to a jury." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997) (citing *Mains v. K Mart,* 297 S.C. 142, 375 S.E.2d 311 (Ct.App.1988).

The newspaper article was a combined effort of Blake and Morehead. (R. p. 84, lines 19-25—p. 85, lines1-25). Morehead testified that the phrase, "two bit lawyers who will even turn on their clients if the retainer is juicy enough" were his words and not contained in any court document. (R. p. 104, lines 9-15). Blake admitted that on or about October 16, 2007, he went to the Clerk of Court's office to look at the documents

related to the civil court litigation. Blake obtained documents from the court file and gave the documents to Morehead who wrote the story. (R. p. 265, lines 24-25). The family court file contained an order denying Stella Blacks motion to disqualify filed on August 16, 2007, more than two months prior to the publication of the article. (R. p. 178, lines 12-25—p. 291, lines 16-25—p. 292, lines 1-8). Blake and Morehead knew that Stella Black and Whitney Black were involved in divorce litigation and that their case was on file with the Richland County Family Court. (R. p. 140, lines 5-25—p. 252, lines 1-21—p. 368). According to a deputy clerk of Court for the Courtroom, the Order denying the motion for disqualification was not concealed or hidden from the public and could have been obtained by a member of the public. (R. p. 292, lines 9-25—p. 293, lines 1-7). Blake testified that he believed family court documents were more difficult to obtain than circuit court documents. (R. p. 270, lines 2-7). Blake acknowledged that, at the time he researched the court file for the article an order existed finding that West did not have a conflict of interest. (R. p. 267, lines 11-23). Blake admitted that "if we had additional documents it may be a different story written." (R. p. 270, lines 15-20). Blake believed that if he had viewed the order contained in the record that he would have mentioned that Ms. Black's motion regarding West's alleged conflict of interest had been denied but the judge. (R. p. 271, lines 2-23) According to Blake, such a fact was a "very good fact" that may have warranted a follow up story. *Id.* Clearly, the Order was available to Blake at the time he researched the story and prior to his publication of the story. Blake and Morehead simply chose not to report the contrary facts contained in the circuit court and family court files.

Blake approved the article in question prior to publication on October 24, 2007.

(R. p. 268, lines 20-23). The parties acknowledge that, at the time of publication, documents in both the family court and circuit court files indicated that a judge found Stella Black's allegations regarding the conflict of interest and disqualification to be without merit. (R. p. 222, lines 4-20). The documents in both files also indicated that West vehemently defended the allegations made by Ms. Black. (R. p. 187, lines 10-19).

In addition to ignoring court orders that disproved Stella Black's allegations, Morehead made a conscious decision not to speak to West prior to printing the story. (R. p. 92, lines 5-9). Morehead did not warn West that he planned to run a story in the Paper referring to her as "corruptible or two bit." (R. p. 106, lines 21-25—p. 107, lines1-8). Despite stating that the lawyer referred to in the article was willing to turn on her client if the "retainer was juicy enough," Morehead never sought information from West regarding her fee for representation in the family court matter. Had he inquired, he would have learned that West received $5,000.00 for her representation, compared to a total of over $400,000.00 received by the other attorneys in the case. (R. p. 189, lines 3-9). Morehead also stated that the attorneys in the family court matter were "tight-lipped." (R. p. 368). Testimony at trial revealed that Morehead and Blake only attempted to contact a single attorney, that being Stella Black's attorney, who refused to speak to the publisher. (R. p. 92, lines 5-18).

The defamatory statements were published with the very "recklessness as to show a conscious indifference toward [West's] rights" that defines common law malice. Blake and Morehead had access to all of the information necessary to disprove Stella Black's allegations and consciously avoided publishing the information. Morehead made the decision not to interview or contact West prior to publication. Under the *Jones* and

Padgett standard, Blake and Morehead were certainly "chargeable with consciousness of [their] wrongdoing." *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982).

II. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE APPELLANTS' REPORT WAS NOT PROTECTED BY THE FAIR REPORT PRIVILEGE.

It is uncontroverted that "fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged." *Jones v. Garner*, 250 S.C. 479, 487, 158 S.E.2d 909, 913 (1968). "However, the privilege attending the publication of a news report arises by reason of the occasion of the communication, and a communication or statement which abuses or goes beyond the requirement of the occasion, loses the protection of the privilege. *Id.* (citing *Cullum v. Dun & Bradstreet, Inc.*, 228 S.C. 384, 90 S.E. 2d 370. If a plaintiff shows that the publisher acted with actual malice, that is, "with ill-will towards the plaintiff, or that it acted recklessly or wantonly, meaning with conscious indifference toward plaintiff's rights," the privilege does not apply. *Padgett v. Sun News,* 278 S.C. 26, 31, 292 S.E.2d 30, 34 (1982). To show actual malice, the plaintiff must also show that the publisher was conscious or chargeable with consciousness of his wrongdoing." *Id.* "The privilege extends only to a report of the contents of the public record..." *Id.* [A]ny matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." *Id.*

There can be no better example of "going beyond the requirement of the occasion" than the article published by Paper. By Blake and Morehead's own admissions, they practiced "alternative journalism" and wrote in "narrative style." According to the Oxford English Dictionary, the word "narrative" means "to recount in story form." During his testimony, Morehead relied heavily on his belief that the fair

report privilege applied in this case because he was simply reporting allegations made by Stella Black and contained in a court file. However, by his own admission, Morehead described the allegations made in the court record in a way that mimicked a dime store detective novel. (R. p. 124, lines 17-23). Morehead then went on to state that the article was intended to be a news article. (R. p. 124, lines 24-25—p. 125, line 1).

Information that would have disproven Ms. Black's allegations, or at the very least, called into serious question the validity of her assertions was available to Blake and Morehead prior to publication of the article. Furthermore, individuals including West and other attorneys for Whitney Black were available to Blake and Morehead prior to the publication of the article. Blake and Morehead's decision to avoid this part of the public record along with West herself demonstrates conscious indifference toward West's rights.

The purpose of the fair report privilege is to permit the free circulation of public records without liability for the publisher. It is impossible for Blake and Morehead to claim that they were simply reporting or summarizing a court proceeding or record when the writer and publisher acknowledged creating and inserting the very language that is defamatory. Appellants are asking this Court to expand the fair report privilege to include embellished, one-sided interpretations of public records published at the expense of the subject's reputation.

The trial court echoed this notion in the denial of the Appellant's motion for directed verdict when the judge said of Morehead's actions: "If he had said ['Jbased on documents filed in the court...[but] he does not say that. And I understand he says he does it in narrative form. Well, he should...he is taking some license and he pays the consequences because she has suffered collateral damage from anybody that read it, in

the light most favorable to [Plaintiff]." (R. p. 235, lines 23-25—p. 236, lines 1-4).

III. THE TRIAL COURT CORRECTLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE RESPONDENT SHOWED EVIDENCE OF CONSTITUTIONAL ACTUAL MALICE.

Respondent agrees with Appellant's assertion that, in order for a private figure plaintiff seeking to recover punitive damages in claims involving statements about matters of concern to the public, the plaintiff must prove by clear and convincing evidence that at the time of the publication, the publisher either knew that the publication was false or the publisher had a reckless disregard for the publication's potential falsity.

"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." *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 477, 629 S.E.2d 653, 670 (citing *Elder v. Gaffney Ledger*, 341 S.C. 108, 113, 533 S.E.2d 899, 901-902 (2000). The *Erickson* Court reaffirmed its decision in *Elder*, when it wrote, "Actual malice is a subjective standard testing the publisher's good faith belief in the truth of his or her statements. The constitutional actual malice standard requires a public official to prove by clear and convincing evidence that the defamatory falsehood was made with the knowledge of its falsity or with reckless disregard for its truth...There must be evidence the defendant had a high degree of awareness of...probable falsity...Actual malice may be present, however, where one fails to investigate and there are obvious reasons to doubt the

veracity of the informant." *Id.*

The jury's award of punitive damages was supported by substantial evidence of actual malice. Much like the facts in *Erickson*, the publishers in this case conducted a limited investigation prior to publishing the article. Morehead testified that one attempt was made to speak to an attorney associated with the case and that was Stella Black's attorney. The attorney refused to speak to him. (R. p. 95, lines 20-25). Morehead nor Blake made any attempt to contact West or any other attorney involved in either case. Also, like the facts in *Erickson*, Morehead and Blake did not even try to obtain the publicly recorded order denying Black's motion to disqualify West though Black's motion was specifically referenced in the article and the order denying the motion had been in the public record for nearly two months. Morehead's description of the divorce litigation as "bizarre" is evidence of Blake and Morehead's high degree of awareness of probable falsity and reasonable doubt of the veracity of the informant.

IV. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE BECAUSE APPELLANT FAILED TO SHOW THAT PREJUDICIAL ERRORS OCCURRED DURING TRIAL.

Appellant's position that the trial court committed error by admitting evidence of post-publication conduct and refusing to permit direct examination of Respondent's counsel is incorrect.

The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger,* 298 S.C. 221, 379 S.E.2d 296 (Ct.App.1989). *See also Boozer v.*

Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct.App.1988) (Court of Appeals has no power to review trial court's ruling unless it rests on basis of fact wholly unsupported by evidence or is controlled by error of law). In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Umhoefer, supra.*

The admissibility of evidence is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion or the commission of legal error prejudicing the defendant. *State v. Mansfield,* 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App.2000) (*citing State v. Patterson,* 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct.App.1999)). The trial court has wide discretion in determining the relevancy of evidence, and its decision to admit or reject evidence will not be reversed on appeal absent an abuse of that discretion. *Moore v. Moore,* 360 S.C. 241, 257-58, 599 S.E.2d 467, 476 (Ct.App.2004) (*citing Hoeffner v. The Citadel,* 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993); *Davis v. Traylor,* 340 S.C. 150, 155, 530 S.E.2d 385, 387 (Ct.App.2000); *Hawkins v. Pathology Assocs. of Greenville, P.A.,* 330 S.C. 92, 108, 498 S.E.2d 395, 404 (Ct.App.1998)). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; *see Haselden v. Davis,* 341 S.C. 486, 497 n. 12, 534 S.E.2d 295, 301 n. 12 (Ct.App.2000); *Hunter v. Staples,* 335 S.C. 93, 101-02, 515 S.E.2d 261, 266 (Ct.App.1999). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.,* 368

S.C. 557, 568, 629 S.E.2d 690, 696 (Ct.App.2006) (*cert.pending*). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg,* 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); *see Am. Fed. Bank, FSB v. No. One Main Joint Venture,* 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996); *Timmons v. S.C. Tricentennial Comm'n.,* 254 S.C. 378, 405, 175 S.E.2d 805, 819 (1970); *Powers v. Temple,* 250 S.C. 149, 162, 156 S.E.2d 759, 765 (1967).

A. It was not error to deny Appellant's motion for a mistrial because Appellant failed to show that admitting the "Clarification" into evidence was error that resulted in prejudice.

The parties acknowledge that Respondent made a written demand for the Paper to issue a retraction. Morehead and Blake made a "joint decision" to decline Respondent's request and issue a "Clarification" instead. (R. p. 130, lines 10-25). The "Clarification" was published in the Paper by itself and on the Paper's website located directly above the article at issue. (R. p. 278, lines 4-6).

The Appellant is asking this Court to grant a new trial so that evidence of additional publications can be shielded from the jury. The trial court recognized that the Paper's "Clarification" was not a retraction at all. In ruling on the Appellant's request for a mistrial, the court stated: "And that they didn't retract it is clearly evidence in the case. And he can argue that, but I won't charge it....If they publish something, it should come in. They didn't retract at all. He's going to argue that and maybe hammer you with it. But that's tough luck." (R. p. 287, lines 9-19). The article remained online at the time

the "Clarification" was published. (R. p. 278, lines 4-6). The facts of the case at hand are similar to *Anderson v. Augusta Chronicle*, 355 S.C. 461, 585 SE2d 506 (Ct. App. 2003). The Court discussed the facts as follows:

> "*The Chronicle*'s publication of a "Clarification" on October 29, 1997 is susceptible of an inference bolstering a finding of reckless disregard. The clarification was published nearly a month after the editorial defaming Anderson. Although it also noted Anderson's assertion he had been misquoted in the June 2 article by Bray, this was six weeks after Anderson told Boyette about the mistake. Inferentially, a jury could find *The Chronicle*'s lackluster "clarification" was merely an attempt to avoid liability for "Let the liar run" rather than a sincere effort at rectifying the harm done to Anderson's reputation. *See, e.g., Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 46, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971) ("Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story."). The reasonableness of such a conclusion is buttressed by the fact the "Clarification" did not clarify anything; it failed to put the issue in context by referencing either the editorial or previous articles by Boyette and Bray. More important, it was neither a correction nor a retraction of the allegedly false statements. *See Zerangue,* 814 F.2d at 1071 ("Refusal to retract an exposed error tends to support a finding of actual malice.")." *Anderson v. Augusta Chronicle*, 355 S.C. 461, 487, 585 SE2d 506, 520.

The Appellate fails to demonstrate that it was prejudiced by the jury viewing, but not receiving instructions regarding, the "Clarification."

B. The trial court did not err in denying Appellant's motion for a new trial absolute based on its refusal to permit Respondent's counsel to testify at trial.

The trial court disagreed with Appellant's contention that Respondent's counsel

made himself a witness when he wrote a letter demanding a retraction. (R. p. 246, lines 1-19. It is uncontroverted that Respondent's counsel wrote a letter to the Paper and demanded a retraction. The Paper's response to the letter is also in evidence along with a "Clarification" issued by the Paper and published only on their website. *Id.* The trial court heard Mr. Moore's testimony proffered by Appellant and determined, correctly, that the examination elicited testimony regarding Mr. Moore's trial tactics and did not clarify or add to information that was already in evidence.

CONCLUSION

"The right of a free press is not absolute in a society that demands social responsibility and personal integrity...In the interests of justice, we will not allow a publication to go so unchecked as to promote the tyrannical imposition of false and misleading information—the very concern our forefathers sought to eliminate in demanding the press be free." *Erickson v. Jones Street Publishers, L.L.C.* 368 S.C. 444, 629 S.E.2d 653 (citing *Anderson*, 365 S.C. at 599-600, 619 S.E. 2d at 433).

The jury's verdict of actual and punitive damages in favor of Respondent should stand. The trial court correctly denied Appellant's motions for a JNOV and new trial absolute.

Respectfully submitted,

S. Jahue Moore, Esquire
Moore, Taylor & Thomas, P.A.
P.O. Box 5709
West Columbia SC 29171

August 19, 2010

ATTORNEY FOR RESPONDENT