THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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SC Court of Appeals

Court of Appeals No. 2014-001249
Civil Case No. 2012-CP-26-3804

Mark Kelley,.....Respondent.

v.

David Wren and Sun Publishing Company Inc.,
d/b/a The Sun News,.....Appellants,

FINAL REPLY BRIEF OF APPELLANTS

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In reply to respondent's brief, appellants address three points with respect to which respondent has misapprehended most noticeably the law or the evidence:

1. Standard of review;

2. Falsity; and,

3. Actual malice.

STANDARD OF REVIEW

Respondent, relying on the Circuit Court decision in *Connaughton v. Harte-Hanks Communications, Inc.,* 842 F.2d 825 (6th Cir. 1988), argues incorrectly that an appellate court should defer to the jury's determination on "preliminary, operative, or subsidiary factual determinations," and reserve independent review to the "ultimate conclusion of clear and convincing proof of actual malice." (Resp. Br. p. 14) While respondent's position was supported by the opinion of the Court of Appeals for the Sixth Circuit, this limited standard of review was rejected emphatically on further review by the United States Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). Explaining that a review of the complete factual record is required to make a determination that constitutional protections for a free press have been satisfied, the Supreme Court stated:

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," *Bose [Corp. v. Consumers Union of U.S., Inc.*], 466 U.S., at 499-500, 104 S.Ct., at 1958-1959, the reviewing court must "'examine for [itself] the statements in issue and the circumstances under which they were made to see... whether they are of a character which the principles of the First Amendment ... protect,'" *New York Times Co.,* 376 U.S., at 285, 84 S.Ct., at 728 (quoting *Pennekamp v. Florida,* 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946).

Harte-Hanks, supra, 491 U.S. 657, 688, 109 S.Ct. 2678, 2696, 105 L.Ed.2d 562 (1989).

The fact that a jury has reached a conclusion that statements were false "does not, however, demonstrate that ...[appellants] acted with actual malice." "Difference of opinion as to the truth of a matter...does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity or with a "high degree of awareness of ... probable falsity, " *Garrison* [*v. Louisiana*], 379 U.S., at 74, 85 S.Ct., at 215." *Harte-Hanks, supra,* 491 U.S. at 681, 109 S.Ct. at 2693.

To fulfill its constitutional obligation with respect to the determination of whether the evidence in the record "is of the convincing clarity required to strip the utterance of First Amendment protection," this court must independently review the record in its entirety. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 511 104 S.Ct. 1949, 1965, 80 L.Ed2d 502 (1984).

FALSITY

The Supreme Court of the United States "has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.' *Gertz* [*v. Robert Welch, Inc.*], 418 U.S., 341, 94 S.Ct., at 3007.". "To provide "'breathing space,'" [citations omitted] for true speech on matters of public concern, the [United States Supreme]
Court has been willing to insulate even *demonstrably* false speech from liability...." [emphasis in opinion] *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 778, 106 S.Ct. 1558, 1564, 89 L.Ed.2d 783 (1986).

Respondent's claim of falsehood rests on his tortured interpretation of statements in news reports that respondent's attendance at a meeting where $84,000 in campaign contributions were passed to a candidate for governor accused him of a crime. In his Second Amended Complaint

respondent alleges in paragraph 5 that a May 23 news report accused him of delivering the campaign contribution. (R. p. 15, ¶ 5; p. 639) The language complained of by respondent stated:

> Dean, along with chamber lobbyist Mark Kelley, delivered about $84,000 of those contributions to Barrett in June. Those contributions included a $3,500 cashier's check from Garden City Partners.

It was not disputed that respondent was in attendance at the meeting where the contributions were delivered, and the news report stated clearly that "Dean said he delivered contributions to Barrett...." Even if there were ambiguity in the parenthetical "along with chamber lobbyist Mark Kelley" as to who delivered the contribution to Barrett, that ambiguity was resolved by Dean's own statement in the same news report that acknowledged he delivered the contributions. Since Dean, and not respondent, is identified as the one delivering the contributions, the news report read in its entirety, as it must be under South Carolina law, does not accuse respondent of a crime. *Ross v. Columbia Newspapers, Inc.,* 266 S.C. 75, 221 S.E.2d 770 (1976); *Jones v. Garner,* 250 S.C. 479, 158 S.E.2d 909 (1968).

Respondent argues in his brief that an editorial published on May 30, 2010 establishes that the May 23 news report stated that respondent had delivered the contributions to Barrett. (Res. Br. p. 19) The editorial, which the jury found not to be defamatory, and there is no appeal by respondent from this finding, stated unequivocally that it was Dean, with respondent at his side, who delivered the contributions to Barrett. (R. pp. 642-643) Since the factual assertions in the editorial are consistent with the May 23 news report, *i.e.,* Dean delivered the contributions in respondent's presence, the editorial does not make the previously published news report false.

Respondent argues in his brief that the jury could have found the news reports of May 21 and May 25 false. (Res. Br. 21) The May 21 news report has the headline "Dean handed over envelope of $84,000." (R. p. 638) The report states with respect to respondent, "Mark Kelley, a

lobbyist for the chamber of commerce also attended that meeting, according to Barrett." There is no dispute that respondent attended the meeting, and no statement that respondent passed the contributions. As to potential illegal conduct by respondent at the meeting, the news report, quoting the General Counsel of the State Ethics Commission, stated that it did not appear that any laws were violated and respondent's "Just being in the same room is not a violation [of the law]."

The May 25 news report (R. p. 641) quotes a citizen challenging campaign contributions with a connection to the chamber of commerce who stated:

> "In the past, the chamber has denied any involvement in this scandal, but now Brad Dean admits he set up the lunch with [chamber] lobbyist Mark Kelley and he handed Mr. Barrett the envelope full of checks," said Robert Kelley, who is not related to the lobbyist.

The news report also stated that Dean had arranged the luncheon at which the contributions were delivered, and repeated that the Ethics Commission general counsel had said previously that the donations appear to have been legal. Had respondent delivered the contributions, he and Barrett both would have been engaging in illegal conduct as it is unlawful for a lobbyist to make a contribution to a state candidate, and unlawful for the state candidate to receive a contribution from a lobbyist. S.C. Code Ann. §§2-17-80 and 8-13-1314 (1976). Inclusion in the news report of the statement of the Ethics Commission attorney that the contributions appear to have been legal refutes respondent's contention that the news report accused him of delivering the contributions to Barrett.

Respondent also argues that he was incorrectly identified as lobbyist for the chamber of commerce. (Res. Br. p. 18) The reporter testified without refutation that he thought the reference to the chamber of commerce was accurate based on statements by chamber officials describing the relationship between the Grand Strand Business Alliance for which respondent was a

registered lobbyist and the chamber of commerce. (R. p. 427 line 18 to p. 431 line 3) Even if it were inaccurate to refer to respondent as lobbyist for the chamber of commerce, this inaccuracy does not accuse respondent of illegally delivering campaign contributions. Each news report states that in the opinion of the attorney for the Ethics Commission, the contributions were legal.

Interestingly, when the Ethics Commission attorney was called a witness for respondent at trial, she testified that an email forwarded by respondent to a broad list of recipients, including four of his witnesses (David DeCenzo, Alan Clemmons, George Hearn, and Nelson Hardwick), and the chamber president, was an illegal solicitation of campaign contributions by a lobbyist. (R. p. 186 line 25 to p. 207 line 18; pp. 695-696) The forwarded e-mail bore the headline, "Gresham Wins SCGOP Straw Poll," and respondent added an introductory statement, "For all that have supported and those that still can and want to this is Great News!!!!" According to the testimony of the Ethics Commission attorney, the illegality of respondent's action came from forwarding an e-mail which contained an unequivocal solicitation for campaign contributions, "**Contribute-** Whether it's $10, $50 or $100, whatever you can give today will go a long way." (R. pp. 695-696;. p. 186 line 10 to p. 188 line 12) While it is clear that appellants in their news reports never accused respondent of an illegal act, his own witness and his own e-mail, dispatched about a month before the publication of the first news report complained of, did establish that in the opinion of the Ethics Commission attorney, respondent had violated the prohibition against the solicitation of campaign funds by a lobbyist. In contrast to the exhibit and the testimony about the forwarded e-mail, the news reports, read in their entirety, state clearly that respondent's attendance at a luncheon where Dean passed contributions to respondent's favored candidate, was lawful.

ACTUAL MALICE

Respondent, as he did with his argument on the scope of appellate review, mistakenly relies on the opinion of the Court of Appeals for the Sixth Circuit to argue that actual malice is established by an extreme departure from standards of investigation and reporting ordinarily adhered to by responsible publishers. (Res. Br. p. 29) As the United States Supreme Court explained in its decision rejecting the professional standards test applied by the Supreme Court made it clear that the Court of Appeals an incorrect and diminished standard, stating:

> Petitioner is plainly correct in recognizing that a public figure plaintiff must prove more than an extreme departure from professional standards and that a newspaper's motive in publishing a story—whether to promote an opponent's candidacy or to increase its circulation—cannot provide a sufficient basis for finding actual malice.
>
> The language in the Court of Appeals' opinion discussing professional standards is taken from Justice Harlan's plurality opinion in *Curtis Publishing Co. v. Butts, supra,* at 155, 87 S.Ct., 1991. In that case, Justice Harlan had opined that the *New York Times* actual malice standard should be reserved for cases brought by public officials. The *New York Times* decision, in his view, was primarily driven by the repugnance of seditious libel and a concern that public official libel "lay close" to this universally renounced, and long-defunct, doctrine. 388 U.S., at 153, 87 S.Ct., at 1990. In place of the actual malice standard, Justice Harlan suggested that a public figure need only make "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.*, at 155, 87 S.Ct., at 1991. This proposed standard, however, was emphatically rejected by a majority of the Court in favor of the stricter *New York Times* actual malice rule. See 388 U.S., at 162, 87 S.Ct., at 1995 (opinion of Warren, C.J.); *id.,* at 172, 87 S.Ct., at 2000 (Brennan, J., dissenting). Moreover, just four years later, Justice Harlan acquiesced in application of the actual malice standard in public figure cases, see *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 69-70, 91 S.Ct. 1811, 1832-1833, 29 L.Ed.2d 296 (1971) (dissenting opinion), and by the time of the Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed2d 789 (1974), the Court was apparently unanimously of this view. Today, there is no question that public figure libel cases are controlled by the *New York Times* standard and not by the professional standards rule, which never commanded a majority of this Court. [Emphasis supplied]

Harte-Hanks, supra, 491 U.S. 657, 665, 109 S.Ct. 2678, 2685, 105 L.Ed.2d 562 (1989).

The "professional standards rule" is not applicable in a libel case brought by a public figure, and the admission of "expert" testimony on professional standards permitted the jury and the trial court to evaluate appellants' fault with a much less rigorous standard than *New York Times* actual malice standard. Respondent argues that because the reporter had no information that respondent had delivered campaign contributions to Barrett, his having published that accusation amounted to actual malice. (Res. Br. p. 25) The fact that the reporter testified that he had no information to support an allegation that respondent delivered campaign contributions to Barrett is entirely consistent with what was published in the newspaper—that Dean delivered the contributions to Barrett at a luncheon attended by Kelley. Asked if he had written that respondent had delivered a campaign contribution to Barrett or intended to write that respondent had delivered a contribution to Barrett the reporter responded, "No, I did not." (R. p. 396 lines 12-16) Asked how he would have written a news report that said respondent was involved in the delivery, the reporter testified he would have written "Dean and Mark Kelley delivered about $84,000 of those contributions to Barrett in June." (R. p. 408 lines 15-23)

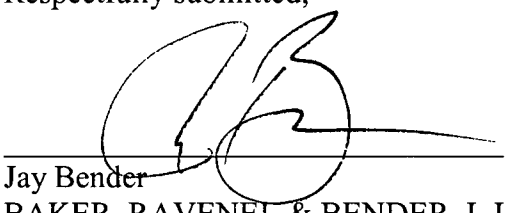
Respondent argues that the reporter's efforts to ascertain respondent's role in the delivery of campaign contributions to Barrett supports two conclusions: 1. The news reports stated that respondent had delivered campaign contributions, and 2. the reporter knew that the publications were false or had serious doubt about the accuracy of the reports. (Res. Br. pp. 24-25) As discussed above, the news reports cannot be read consistently with South Carolina law to state that respondent had delivered campaign contributions to Barrett, and the reporter's inquiries about respondent's knowledge of challenged campaign contribution were consistent with information he had received that the Barrett campaign believed respondent would have

knowledge of the campaign contributions that were the focus of public challenges and his reporting. (P. Exs. 6 and 7) What was reported was that Barrett confirmed a luncheon he attended with Dean and respondent, and confirmed that Dean had delivered the contributions at the luncheon attended by Barrett and respondent. (R. p. 167 lines 4-23) Respondent testified that he was invited to the luncheon by Dean. (R. p. 78 lines 1-24) There was no evidence that the reporter's use of "along with" to describe respondent's presence at the luncheon with Dean and Barrett was his attempt to state that respondent delivered the campaign contributions to Barrett. Even if the reporter's testimony that he would have used "and" to signify that respondent had a role in the delivery of the contributions to Barrett were not believed, disbelief of this testimony is not evidence that the reporter either knew what he was writing was false or that he had serious doubt about the accuracy of his report. *Bose, supra.* To the contrary, had the reporter intended to signify that respondent was involved in the delivery of the contributions, he would not have included in his news reports statements by Dean that he delivered the contributions or by the Ethics Commission attorney that the contributions appeared legal. There was no evidence that what was published, as distinguished from what respondent chose to read, was published with actual malice, much less clear and convincing evidence sufficient to satisfy the *New York Times* standard.

CONCLUSION

For the reasons stated in appellants' brief in chief and herein, the verdict of the trial court should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Teresa K. Todd, Legal Assistant to Jay Bender, an employee of Baker, Ravenel & Bender, L.L.P., hereby certify that I have, on the date indicated below, served counsel below with Appellant's Final Reply Brief, by mailing a copy of same via United States Mail, postage pre-paid and return address clearly indicated on said envelope, to counsel at the following address:

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Teresa K. Todd

January 29, 2015