THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Opinion No. 5375 (S.C. Ct. App. Filed January 13, 2016)

Mark Kelley ……..Respondent,

v.

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

BRIEF OF THE SOUTH CAROLINA PRESS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GEORGIA ASSOCIATION OF BROADCASTERS, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AND OTHER NEWS MEDIA ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS DAVID WREN AND SUN PUBLISHING CO., INC., D/B/A *THE SUN NEWS*

Edward T. Fenno, Esquire
FENNO LAW FIRM, LLC
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3747
Attorney for *Amici Curiae*

Kristen McDermott Woodrum
BAKERHOSTETLER LLP
1170 Peachtree Street, NE, Suite 2400
Atlanta, GA 30309-7512
(404-459-0050)
Attorney for Amici Curiae

Of Counsel:
Bruce W. Sanford

Mark I. Bailen
Stephen Derek Bauer
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW, Suite 1100
Washington, DC 20036

STATEMENT OF INTEREST

The interests of the proposed *amici* are discussed below.

INTRODUCTION

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

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

- The decision below directly conflicts with the seminal decision of the United States Supreme Court on falsity—*Philadelphia*

Newspapers, Inc. v. Hepps—which made clear that inconclusive or ambiguous questions of falsity must be resolved in favor of the defendant.

- The decision below directly conflicts with the foundational decisions of this Court—*Peeler v. Spartan Radiocasting, Inc.* and *Elder v. Gaffney Ledger*—that have defined the contours of "actual malice" in public-figure defamation actions.

- More broadly, the case substantially implicates the First Amendment and conflicts with an emphatic body of law that guarantees robust protections for the very sort of good-faith journalism that the defendants were engaged in here.

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

ARGUMENT

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

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

conclusively whether the speech is true or false; it is in those cases that the burden of proof is dispositive." *Id.* In other words, when the meaning of a particular phrase is inconclusive or ambiguous, the defendant must prevail—despite the fact that such an outcome "will insulate from liability some speech that is false, but unprovably so." *Id.* at 778.

This Court has had few occasions to apply this key aspect of *Hepps*, but now must do so in the interest of the coherency of South Carolina's defamation law. The finding of falsity by the Court of Appeals rested solely on a single phrase plucked from the fourteenth paragraph of one article in a series of articles about campaign contributions. That phrase—"along with chamber lobbyist Mark Kelley"—is subject to infinitely arguable interpretations, even when read in isolation (as the Court of Appeals read it). But the truth or falsity of the phrase cannot, of course, be assessed in isolation. As the Petition for Certiorari makes clear, this Court has long held that "all of the parts of the publication must be considered in order to ascertain the true meaning, and words are not to be given a meaning other than that which the context would show them to have." *Jones v. Garner*, 158. S.E.2d 909, 912 (S.C. 1968). And as the Petition also makes clear, the articles that were challenged in this case, when read in totality and read in context, repeatedly convey the point that Brad Dean, and not Mark Kelley, delivered the campaign contributions at issue.

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

circumspect journalist is not always able to identify, edit, and resolve every conceivable linguistic ambiguity prior to publication. Courts cannot be allowed to impose liability based on the premise that a single ambiguity makes an otherwise entirely truthful package of news coverage substantially false.

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

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

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

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

The Court ridiculed the television station for, "[a]t best," practicing "sloppy journalism," but it nonetheless concluded that there was not sufficient evidence of actual malice to impose liability. *Id.* at 285. Similarly, in *Elder v. Gaffney Ledger*, 533 S.E.2d 899 (S.C. 2000), a former police chief sued a newspaper over an article that falsely suggested that drug dealers were bribing the police chief. The evidence showed that:

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

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

Here, the decision by the Court of Appeals flies in the face of the controlling law established by *Peeler* and *Elder*. The Court of Appeals, in fact, barely discussed those decisions. If it had, the court would have realized that the evidence of actual malice in those two cases far exceeds the slim inferences of actual malice present on the record here. Indeed, the court's reasoning about actual malice here, while far from clear, seems to rest on the premise that because the journalist, David Wren, had "diligently pursued" the story, he must have understood that the ambiguous phrase could be interpreted as an accusation of illegality. Of course, the opposite conclusion is far more likely. In fact, it never dawned on Wren that anyone could

interpret the phrase to suggest illegality, because the first article he published (and everything else he published on the topic) made clear that Kelly had not acted illegally. It simply is not plausible—let alone clear and convincing—that Wren entertained serious doubts when the alleged "falsity" did not even occur to him.

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

CONCLUSION

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

Respectfully Submitted,

Edward T. Fenno, Esquire (SC Bar # 68517)
FENNO LAW FIRM, LLC
171 Church Street, Suite 160
Charleston, SC 29401
(843) 720-3747
Attorney for *Amici Curiae*

Kristen McDermott Woodrum

S.C. Bar No. 74220
BAKERHOSTETLER LLP
1170 Peachtree Street, NE, Suite 2400
Atlanta, GA 30309-7512
Tel: (404-459-0050)
Fax: (404-459-5734)

Attorney for Amici Curiae

Of Counsel:
Bruce W. Sanford
Mark I. Bailen
Stephen Derek Bauer
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW, Ste. 1100
Washington, DC 20036

Dated: May ___, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Opinion No. 5375 (S.C. Ct. App. Filed January 13, 2016)

Mark Kelley . . . . . .Respondent

v.

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

---

CERTIFICATE OF SERVICE

The undersigned certifies that this Motion For Admission *Pro Hac Vice* of Bruce W. Sanford, Mark I. Bailen, and Stephen Derek Bauer was served on counsel for the Appellants and Respondent by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

Jay Bender
Baker, Ravenel, & Bender, L.L.P.
P. O. Box 8057
Columbia, South Carolina 29202
Counsel for Appellants

James P. Stevens, Jr.
Natalie Stevens-Graziani
Stevens Law Firm, P.C.
P. O. Drawer 127
Loris, South Carolina 29569
Counsel for Respondent

This the ____ day of May, 2016

_____
Kristen McDermott Woodrum