# OPINIONS

**OF**

# THE SUPREME COURT

**AND**

# COURT OF APPEALS

**OF**

# SOUTH CAROLINA

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**ADVANCE SHEET NO. 33**

**August 22, 2005**

**Daniel E. Shearouse, Clerk**
**Columbia, South Carolina**
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**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Jessie Peterson and Vanessa Peterson, Appellants,

v.

National Railroad Passenger Corporation, CSX Transportation Inc., and Southco Sweeping and Maintenance, Co., Defendants,

of whom National Railroad Passenger Corporation and CSX Transportation, Inc., are, Respondents.

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Appeal from Florence County
James E. Brogdon, Jr., Circuit Court Judge

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Opinion No. 26030
Heard March 15, 2005 - Filed August 22, 2005

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**AFFIRMED IN RESULT**

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Stephen L. Brown, of Young Clement Rivers, of Charleston; and James R. Holland, of Wettermark, Holland & Keith, of Jacksonville, Florida, for Appellants.

Charles Craig Young, of Young & Phillips, of Florence; and John C. Millberg, of Millberg, Gordon & Stewart, of Raleigh, North Carolina, for Respondents.

William McBee Smith, of Smith & Haskel Law Firm, of Spartanburg, for Amicus Curiae The Association of American Railroads.

Stephen L. Brown, of Young Clement Rivers, of Charleston, James R. Holland, of Wettermark, Holland & Keith, of Jacksonville, Florida, and Michael J. Warshauer, of Thomas, Thorton & Rogers, of Atlanta; for Amicus Curiae The Association of Rail Labor Attorneys.

**CHIEF JUSTICE TOAL:** Jessie Peterson was injured while traveling on a train that derailed. Jessie and Vanessa Peterson (Appellants) brought the underlying action pursuant to the Federal Employer's Liability Act (FELA).[1] The trial court granted summary judgment in favor of Respondents, National Railroad Passenger Corporation (Amtrak) and CSX Transportation, Inc. (CSX). Appellants appealed. This matter was certified from the court of appeals pursuant Rule 204(b), SCACR. We affirm in result.

## FACTUAL/PROCEDURAL BACKGROUND

In August 2000, Peterson was working as a service attendant on a train that derailed in Lake City, South Carolina. CSX owns the line of track, and Amtrak owns the train.

A short time before the derailment, Ervin Lucky, an employee of Southco Sweeping and Maintenance Co. (Southco), fell asleep while operating a street sweeper on a nearby street. As a result, the sweeper ran through a stop sign, jumped a curve, crossed a small grassy area, and collided with the track's crossties. According to one of CSX's engineers, the impact of the sweeper knocked the track several inches out of alignment. The estimated speed of the sweeper at the time of the collision was forty-seven miles per hour.

[1] 45 U.S.C. §§ 51-60 (2000).

Minutes after the collision, the train, with Peterson aboard, crossed the area where the sweeper hit the track's crossties. The train derailed. As a result Peterson was severely injured. Four eyewitnesses testified in deposition that no one had time to warn CSX or Amtrak before the train arrived.

Appellants claim that Respondents did not properly maintain the area of the track where the derailment occurred. Appellants further assert that, but for Respondents' negligence, the sweeper would not have misaligned the track to such a degree that the train would have derailed. In support of this argument, Appellants presented expert testimony that Respondents violated federal track safety standards and their own internal policies.[2] The trial court granted summary judgment in favor of Respondents. Appellants appealed.

The following issues have been raised on appeal:

I. Did the trial court err in granting Respondents' motion for summary judgment?

   A. Did the trial court err in ruling that Appellants' claims were preempted by federal law?

   B. Did Respondents violate federal law?

   C. Did the trial court err in striking the expert testimony?

II. Did the trial court err in awarding costs to Respondents?

[2] CSX's internal track maintenance policy is outlined in a manual entitled "The Maintenance Way of Instructions."

## LAW/ANALYSIS

## I. Summary Judgment

Appellants argue that the trial court erred in granting summary judgment in favor of Respondents. We disagree.

Actions brought pursuant to FELA are governed by federal standards. *Rogers v. Norfolk S. Corp*., 356 S.C. 85, 91, 588 S.E.2d 87, 89 (2003). Under the federal standard, a trial judge must view the evidence in the light most favorable to the non-moving party. *Id.* However, unlike the state standard, the federal standard requires this Court to determine whether the evidence is of such a quality and weight that reasonable and fair-minded jurors, in the exercise of impartial judgment, could return a verdict in favor of the non-moving party. *Id.* at 92, 588 S.E.2d at 90 (citing *Crinkley v. Holiday Inns*, 844 F.2d 156, 160 (4th Cir. 1988)). To avoid summary judgment, the evidence must demonstrate that the employer's negligence[3] "played any part, even in the slightest, in producing the injury . . . for which damages are sought." *Id.* (citing *Rogers v. Missouri Pac. R.R. Co*., 352 U.S. 500, 506 (1957)).

### A. Preemption

Appellants argue that Respondents' deviation from their own internal track maintenance policies is relevant to the issue of negligence. But Respondents argue that the policies are not admissible because they are preempted by federal law. We agree with Appellants.

[3] FELA claims are evaluated as if they were common law negligence claims. *Rogers*, 356 S.C. at 91, 588 S.E.2d at 90.

The trial judge ruled that the standard of care is established by federal law[4] and granted summary judgment on the basis of, among other things, preemption. Based on this ruling, the trial court did not consider evidence of Respondents' deviation from their own internal track maintenance policies. We agree that the standard of care is established by federal law; however, we do not agree that this prevents the court from considering evidence that Respondents violated their own internal polices.

Although federal regulations provide the standard of care, Respondents' deviation from their own internal policies is, nevertheless, admissible as evidence that Respondents deviated from that standard of care. *Cf. Ybarra v. Burlington N., Inc*., 689 F.2d 147, 150 (8th Cir. 1982) (holding that when the evidence shows that the railroad customarily does not enforce a safety rule, the jury is entitled to consider whether that custom constituted negligence and whether it caused, in whole or in part, the plaintiff's injury). Accordingly, we hold that the trial court erred when it held that Appellants' claims were preempted by federal law. Further, we hold that evidence of Respondents' deviation from their internal maintenance policies is admissible to show the element of breach. *See Rogers*, 356 S.C. at 91, 588 S.E.2d at 90 (FELA claims are evaluated as if they were common law negligence claims, and therefore the plaintiff is responsible for demonstrating each element of negligence); *See also Assoc. Mgmt., Inc. v. E. D. Sauls Constr. Co.*, 279 S.C. 219, 221, 305 S.E.2d 236, 237 (1983) (evidence that tends to establish or to make more or less probable some matter at issue and to bear directly or indirectly thereon is relevant and admissible).

## B. Violation of Federal Law

Appellants argue that Respondents violated federal law by not properly maintaining the tracks. We disagree.

[4] The Federal Railroad Administration, an agency under the Department of Transportation, promulgated regulations that provide for proper maintenance of railroad tracks. The relevant regulations are found under 49 C.F.R. § 213.103 and 49 C.F.R. § 213.133.

The Federal Railroad Administration regulations governing the maintenance of ballast provide:

> Ballast; general
>
> Unless it is otherwise structurally supported, all track shall be supported by material which will-
>
> (a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;
>
> (b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;
>
> (c) Provide adequate drainage for the track; and
>
> (d) Maintain proper track crosslevel, surface, and alinement.

49 C.F.R. § 213.103.

We find no evidence in the record that the ballasts at the site of the derailment were inadequate to "maintain proper alignment" under normal conditions. Moreover, we do not interpret this provision to mean that the ballast must be maintained in such a way so as to prevent misalignment in situations where the track is struck with great force. Therefore, we find that Respondents did not violate the regulation.

## C. Expert Testimony

Appellants presented affidavits and deposition testimony of three experts who opined that, because the ballast around the derailment site had eroded, the track was susceptible to being knocked out of line. The trial court ruled that this evidence was inadmissible. We disagree. However, we hold that, although the evidence was admissible, the evidence did not sufficiently

establish that Respondents' acts or omissions caused or contributed to Appellants' injuries.

### 1. Admissibility

The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal. *Hofer v. St. Clair*, 298 S.C. 503, 513, 381 S.E.2d 736, 742 (1989). Evidence that tends to establish or to make more or less probable some matter at issue and to bear directly or indirectly thereon is relevant and admissible. *Assoc. Mgmt., Inc. v. E. D. Sauls Constr. Co.*, 279 S.C. 219, 221, 305 S.E.2d 236, 237 (1983).

In general, courts allow experts to testify if they are more qualified in the field than a juror on the subject. *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997). An expert witness may state an opinion based on facts not within his first-hand knowledge, and may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field. Rule 703, SCRE; *Dawkins v. Fields*, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003). Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony. *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598.

In the present case, Appellants presented the testimony of three experts. First, Donald Bowden (Bowden), a former CSX Roadmaster,[5] opined that Respondents did not comply with CSX's internal maintenance policies. In addition, Bowden testified that federal regulations do not provide "detailed specifications for ballasts," and "insufficient or substandard ballast is not always considered a direct violation of federal regulations." But if

[5] In his affidavit, Bowden stated that he became familiar with the applicable regulations and Respondents' internal policies concerning track inspection and maintenance during the time he was employed as a Roadmaster in CSX's engineering department.

Respondents had followed their own internal policies, he opined, "the street sweeper would not have struck the end of the crossties."[6]

Appellants also presented the testimony of Ray Whitehurst (Whitehurst), a former CSX machinery operator. In his affidavit, Whitehurst stated that he frequently operated a backhoe around railroad tracks, and that if the track had been properly ballasted, the track would have been able to "withstand a lateral blow from heavy machinery . . . at moderate to slow speeds[7] without (the track) coming out of alignment." In addition, Whitehurst opined that "[h]ad there been proper ballast to CSX standards, the tires of the street sweeper would have ridden up over the crossties and impacted the rail, rather than the ends of the crossties."

Finally, Appellants presented the testimony of H. T. Paton, who is a railroad safety consultant and former railroad engineer. He opined that if the ballast been properly maintained, the sweeper would not have struck the crossties, causing the train to derail.

After considering this evidence, the trial court ruled that the expert testimony was inadmissible because it was speculative and the experts were "not qualified to render such opinions, nor [had] they conducted any testing, studies, calculations, or any analysis whatsoever." We disagree and find that Appellants' experts had the necessary experience and facts to give an opinion as to whether Respondents were negligent. The experts' lack of first-hand knowledge, which could have been obtained by an on-site investigation, goes

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[6] Bowden also noted that numerous crossties were in disrepair at the site. But he conceded that his opinion was based solely on a photograph, and therefore he was unable to determine whether the applicable federal regulations were violated.

[7] Ray Whitehurst did not testify how fast he considered "moderate to slow speeds" to be. But Bowden, Appellants' other expert, noted in his deposition that the estimated speed of the sweeper at the time it struck the crossties was forty-seven miles per hour.

to the weight of the testimony, not its admissibility. Therefore, the trial court erred in striking the testimony.

## 2. Sufficiency of Evidence

Appellants argue that the expert testimony presented shows that if the tracks had more ballast, the train would not have derailed. We disagree.

The Appellants rely on expert testimony to establish the element of causation. Appellants' experts opined that if Respondents had put more ballast at the derailment site,[8] then the sweeper would have jumped the crossties instead of colliding with them. The experts also opined that if the track had a six-inch ballast shoulder, [9] then the track would have misaligned to a lesser degree; however, they have not provided how much less.

None of the experts were willing to say that, had Respondents maintained the ballast in accordance with their own internal policies, such an impact would not have affected the rail to a degree that the train would have derailed. Moreover, none of the experts testified as to the amount of force necessary to knock an identical track with a six-inch ballast shoulder out of alignment. In fact, no testimony was presented that the track would maintain the necessary alignment had the sweeper jumped the crossties and struck the rail.

Accordingly, while evidence may exist that Respondents did not comply with their own internal safety policies, there is no evidence that this noncompliance caused the train to derail. Instead, the evidence

[8] CSX's internal policies provide that ballasts are to be even with the top of the tie. In addition the ballast shoulder should extend six inches from the end of the tie to the edge of the slope of tangents and the inside of the curves, and twelve inches on the outside of curves.

[9] This is the height suggested by CSX's internal maintenance policies entitled "Maintenance Way of Instructions 105-04: Instructions for Track Inspections, Section II Procedures, Subpart E, Notes 5 and 6."

overwhelmingly shows that the cause of derailment was the impact of the sweeper.

Accordingly, we hold that the expert testimony, while admissible, fails to provide that failure to maintain the ballast in accordance with Respondents' own policies caused or contributed to the train's derailment. *See Rogers*, 356 S.C. at 90, 588 S.E.2d at 89 (to recover under a FELA, a plaintiff must prove the common law elements of negligence: duty, breach, causation, and damages). Therefore, we hold that the trial court did not err in granting summary judgment in favor of Respondents.

## II. COSTS

Appellants argue that the trial court erred in awarding deposition costs. We disagree.

An appellate court will not overturn a trial court's decision to award costs unless there has been an abuse of discretion. *Stevenson v. Stevenson*, 295 S.C. 412, 415, 368 S.E.2d 901, 903 (1998). Costs may be imposed on the losing party when permitted by statute. *Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992). A trial judge has broad discretion to award costs to the prevailing party. S.C. Code Ann. §§ 15-37-10 and 15-37-20 (1976). Once a trial judge awards costs to the prevailing party the clerk shall insert in the judgment costs of "the fees of witnesses" and "the reasonable compensation of commissioners in taking depositions." S.C. Code Ann. § 15-37-40 (1976). In addition, the Rules of Civil Procedure recognize that the prevailing party shall be allowed costs per a trial court's ruling. Rule 54(d), SCRCP.

Because summary judgment was proper, we hold that the trial court did not abuse its discretion by awarding Respondents' costs.

## CONCLUSION

For the foregoing reasons, we affirm in result, holding that the trial court did not err in granting summary judgment in favor of Respondents

because Appellants have failed to establish sufficient evidence that Respondents caused or contributed to Appellants' injuries.

**MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J., concurring in result only.**

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Tom Anderson, Respondent,

v.

The Augusta Chronicle, Morris Communications, Inc., Petitioner.

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ON WRIT OF CERTIORARI

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Appeal from Aiken County
Costa M. Pleicones, Circuit Court Judge

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Opinion No. 26031
Heard November 17, 2004 - Filed August 22, 2005

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**AFFIRMED**

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David E. Hudson, of Hull, Towill, Norman, Barrett, & Salley, of Augusta, and James M. Holly, of Hull, Norman, Barrett, & Salley of Aiken, for Petitioner.

Douglas Kosta Kotti, of Columbia, for Respondent.

Jay Bender, of Baker, Ravenel & Bender, of Columbia, for Amicus Curiae.

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**CHIEF JUSTICE TOAL:** This is a libel case brought by a public figure against a newspaper. The trial judge granted a motion for directed verdict for Petitioner, the Augusta Chronicle (the Chronicle).[1] The court of appeals reversed. *Anderson v. Augusta Chronicle*, 355 S.C. 461, 585 S.E.2d 506 (Ct.App. 2003). This Court granted the Chronicle's petition for certiorari to review that decision. We affirm.

## FACTUAL/PROCEDURAL BACKGROUND

In November 1996, Respondent Tom Anderson (Anderson) lost an election for a seat in South Carolina House District 84. The following November, District 84 had a special election, and Anderson decided to run once again.[2]

In April 1997, Chad Bray (Bray), a reporter for the Chronicle, called Anderson to interview him about the prior year's campaign and election. The parties dispute what exactly Anderson said during that interview. Anderson testified that he told Bray that during his 1996 campaign he had worked in North Carolina as an appraiser for a number of insurance companies after hurricanes Fran and Bertha. Anderson also testified that he told Bray that, while in North Carolina, he worked for the National Flood Insurance Program. But according to Bray, Anderson said he was called away to the *National Guard*, not the National Flood Insurance Program.

On April 6, 1997, just days after Bray interviewed Anderson, the Chronicle published an article about Anderson being called to serve in the National Guard during the 1996 campaign. On June 3, 1997, the Chronicle published a second article in which Bray wrote that Anderson "felt cheated for being called away to the National Guard" in the middle of his campaign. Anderson testified that he was not aware that the Chronicle had printed the

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[1] Morris Communications, the codefendant, does business as *The Augusta Chronicle*.

[2] The special election was ordered as a result of redistricting.

two articles, and had he known, he would have contacted someone at the Chronicle to notify them that they had made a mistake. Anderson first learned of the articles when he received a call from another writer for the Chronicle, John Boyette (Boyette).

Boyette called Anderson in September 1997 to ask whether Anderson was going to withdraw from the race because "it had been proven that he had not served in the National Guard." Anderson denied ever saying that he was in the National Guard. After the interview, Boyette authored and the Chronicle published an article entitled, "GOP wants Anderson Out of House Race."[3]

In response, Anderson sent Pat Willis, an employee of the Chronicle, a number of documents[4] revealing that he had worked as an appraiser, not in the National Guard. The documents, however, did not confirm whether Anderson actually told Bray that he worked as an appraiser rather than serving in National Guard.

On October 1, 1997, five days after Anderson sent the documentation of his appraisal work and a month before the special election, the Chronicle published the following editorial entitled, "Let the Liar Run" by Phil Kent (Kent):

[3] On that same day, *The Aiken Standard*, a rival local newspaper, published an article entitled "Democrat responds to misinformation," which called the Chronicle's stories about Anderson into question. Later, *The Aiken Standard* published an editorial entitled "Slithering outside the Reaches of the Facts," which accused the Chronicle of conspiring with the Republican Party to help defeat Anderson in the special election.

[4] The documents included Anderson's work certification, phone bills, hotel invoices, bank records, and checks he had written during the time he did appraisals in North Carolina.

> Clearwater Democrat Tom Anderson, running in November's court-ordered special election for South Carolina's House District 84 seat, has been exposed as a liar.
>
> He told this newspaper he was called away to National Guard duty in the last weeks of the 1996 election, his first race against incumbent state Rep. Roland Smith, R-Langley. (Anderson lost by a decisive margin.)
>
> It turns out, however, the state Guard has no record of Anderson ever serving – either then or any other time.
>
> State GOP director Trey Walker, saying Anderson has dishonored himself and the National Guard, demands that the Democrat withdraw from the race. Walker's right about the dishonor, but what about the withdrawal?
>
> If Anderson is the best the Democrats can come up with, they still have every right to run him. There's nothing in the election rules that says a political party can't nominate for public office a candidate who, in effect, lies on his resume.
>
> We are confident that an informed electorate won't vote into office a proven prevaricator. After all, he doesn't even have the long robes of one of Al Gore's Buddhist monks to hide behind!

After Anderson read the editorial, he called Kent to request that it be retracted. Kent would not take Anderson's call, but he told his assistant to tell Anderson that if he sent the Chronicle a letter, it would be printed. Accordingly, Anderson wrote a letter to the editor, and it was printed the next day, under the heading "Calls editorial 'sensational' accusations"; however, much of the letter was edited to exclude parts where Anderson criticized the editors.

Anderson brought the underlying action against the Chronicle for defamation. Anderson testified that, as a result of the damaging editorial, he cannot concentrate, has suffered depression, and has missed out on business opportunities, including an opportunity to head an insurance claims branch office in Aiken.

The trial judge ruled that Anderson failed to show that the editor responsible for publishing the article (Kent) knew that information in the article was false and, therefore, there was no issue of fact as to whether the editor acted with "actual malice." The court of appeals reversed, holding that the record included circumstantial evidence creating a question of fact as to whether Kent acted with "actual malice."

This Court granted certiorari on the following issue:

> Did the court of appeals err in reversing the trial court's order directing a verdict in favor of the Chronicle?

## LAW/ANALYSIS

### Standard of Review

When reviewing an order granting a directed verdict, this Court must view the facts in the light most favorable to the nonmoving party. *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (2004) (citing *Strange v. South Carolina Dep't of Highways & Pub Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)).

### Discussion

The Chronicle argues that the court of appeals erred in reversing the directed verdict because there is no evidence that the article was published with actual malice. We disagree.

In addition to the common law elements of defamation, a public official has the constitutional burden of proving that the defendant published the alleged defamatory material with "actual malice." *New York Times v. Sullivan*. 376 U.S. 254, 269 (1964). To prove "actual malice," the plaintiff must provide evidence that the defendant published the defamatory material (1) with the knowledge it was false or (2) with reckless disregard as to

whether it was false.[5] *Id.* at 279-280; *George v. Fabri*, 345 S.C. 440, 451, 548 S.E.2d 868, 874 (2001).

To find "actual malice," the court must use a subjective standard to test the "publisher's good faith belief of the truth of his or her statements." *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 266, 478 S.E.2d 282, 284 (1997). In addition, the plaintiff must provide evidence the defendant had a "high degree of awareness of . . . probable falsity." *Elder v. Gaffney Ledger*, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). In addition, one may recklessly disregard the falsity of alleged defamatory material by failing to investigate the truth of the material when "there are obvious reasons to doubt the veracity of the informant." *Id*. (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Anderson does not dispute that he is a public official. The parties focus their arguments on whether the Chronicle published the article with "actual malice." Accordingly, our discussion focuses on the element of "actual malice" alone.

**Reckless Disregard of the Truth**

The central issue of this case is whether any evidence exists tending to prove that Kent recklessly disregarded the truth when he published the article "Let the Liar Run." If such evidence exists, the question of actual malice is a question of fact for a jury. We find that the record includes sufficient circumstantial evidence that Kent recklessly disregarded the truth when he published the article to place the question of actual malice before the jury.

[5] This test has been supported by virtue of the doctrine of *stare decisis* in several cases following *Sullivan*: *Gertz*, 418 U.S. at 325; *Butts*, 388 U.S. at 130; *Harte-Hanks Comm.*, 491 U.S. at 666; *Fleming v. Rose,* 350 S.C. 488, 567 S.E.2d 857 (2002); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899 (2000); *Peeler v. Spartan Radiocasting, Inc*., 324 S.C. 261, 478 S.E.2d 282 (1997).

The U. S. Supreme Court has recognized that failure to investigate, alone, is insufficient to support a finding that a defendant "recklessly disregarded" the falsity of a published article. *See New York Times*, 376 U.S. at 286-288 (holding that the actual malice standard cannot be met simply by using an objective standard to find failure to investigate). South Carolina has also declined to impose rigid investigatory duties on members of the press. This Court has held that to "establish recklessness, there must be an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers." *Peeler*, 324 S.C. at 266, 478 S.E.2d at 285. Further, this Court held that the "reckless conduct contemplated by the *New York Times* standard is not measured by whether a reasonably prudent man would have . . . investigated before publishing." *George*, 345 S.C. at 456, 548 S.E.2d at 876 (internal citations and quotations omitted).

Nevertheless, the Supreme Court has recognized that a plaintiff will rarely find success in proving awareness that a statement is false "from the mouth of a defendant himself." *Herbert v. Lando*, 441 U.S. 153, 171-72, 99 S.Ct.1635, 60 L.Ed.2d 115 (1979). Therefore, any direct or indirect evidence relevant to the defendant's state of mind is admissible to prove actual malice. A plaintiff may present competent circumstantial evidence of bad faith to establish actual malice despite a defendant's contention that the publication was made "with a belief the statements were true." *St. Amant v. Thompson*, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). Furthermore, a subjective awareness of probable falsity can be shown if there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989).

The record in this case is replete with circumstantial evidence of bad faith on the part of Kent. The record also contains reasons to doubt the accuracy of Bray's recount of the interview with Anderson. First, Anderson testified he told John Boyette he had been in North Carolina working for various insurance companies, including National Flood. Boyette's September 18 article confirms both Anderson's denial and his contention that he had spent two months working in North Carolina for National Flood.

Anderson contacted *The Chronicle* to dispute Boyette's article and was led to believe the misunderstanding would be corrected.

Second, on September 26 Anderson received a call from Pat Willis, an employee of *The Chronicle*. Anderson testified Willis specifically requested proof that he was a federally-approved insurance adjuster and that he had worked in North Carolina. Anderson faxed to Willis, among other things, a letter from the supervisor of National Flood's claims field operations and a resume he prepared and used during his campaign for House Seat 84. The information contained in Anderson's resume directly contradicted Bray's initial reports in *The Chronicle*. As recited by the Court of Appeals in its opinion, the resume noted Anderson had been 1) commended for supervising flood restoration projects in four states; 2) responsible for "approximately 200 contractors, workmen and damage assessors in efforts to house 4500 flood inundated families;" 3) a program chief in Johnstown, Pennsylvania following a destructive flood; 4) a contract coordinator in Los Angeles after mudslides in 1979; 5) a work supervisor following flooding in Winslow, Arizona; and 6) an appraiser of "property damage for various insurance companies and government agencies following hurricanes Andrew, Hugo, Alicia, Freddie, Camille, [and] Betsy . . . ."

Of particular interest is the fact that Anderson's resume specifically referred to his military service in the Korean War, but made no mention of the National Guard. Military records are public and easily verifiable. A jury could have concluded *The Chronicle* should have realized Anderson's purported statement was highly questionable, particularly in light of his advanced age.[6] These facts, known to *The Chronicle* before publication of "Let the liar run," could lead a reasonable jury to infer *The Chronicle* had "obvious reasons to doubt" Bray's recollection of his conversation with Anderson.

Finally, Anderson entered into evidence an editorial published in the *Aiken Standard* on September 21, 1997. Senior Writer Carl Langley wrote:

[6] Anderson was sixty-seven at the time of trial.

> A year ago, and shortly before the November elections, Anderson, a semi-retired insurance claims adjuster, was asked by a group of independent insurance companies to help process claims from hurricane damage in North Carolina. A large number of the claims were made under the National Flood Insurance Program, *which Anderson referred to in his conversations with me and which he told me he gave to another reporter.(He not only furnished that information last year, but again this past June* after I asked him why he did not campaign before the 1996 election).

(emphasis added).

Anderson also introduced into evidence a clip from the *Aiken Standard* published on September 27, 1996 headlined "Candidate leaves area to help Fran victims." The article stated that Anderson had to break off his campaign to help process insurance claims resulting from Hurricane Fran's destruction in North Carolina. Based on this evidence, a jury could reasonably infer that Anderson had in fact said he was working with National Flood, not that he was serving in the National Guard.

Accordingly, we hold that circumstantial evidence exists as to whether Kent recklessly disregarded the truth, and therefore acted with actual malice, when he published the article "Let the Liar Run."

## CONCLUSION

For the foregoing reasons, we affirm the court of appeals' decision holding that the evidence, viewed in the light most favorable to Anderson, is sufficient to submit the question of actual malice to a jury.

**MOORE, WALLER, JJ., and Acting Justice Marion D. Myers, concur. BURNETT, J., concurring in a separate opinion.**

**JUSTICE BURNETT**: I concur in the majority's opinion and result; however, I write separately to address the serious questions this case raises about the responsibilities of journalists to the public and their audiences.

Were we to hold the egregious facts of this case are insufficient to support a reasonable jury finding that Anderson has shown actual malice, we would essentially foreclose all liability for defamers against public officials.

The Chronicle discounts the evidence in arguing a failure to investigate alone, is insufficient for a finding that a defendant "recklessly disregarded" the falsity of a published article. The Chronicle ignores a line of Supreme Court jurisprudence guiding state and lower federal courts in determining what evidence is relevant to a finding of actual malice. The Supreme Court has concluded that, although a failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in an entirely different category. See New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.E.2d 686 (1964). A reasonable jury could certainly infer that Anderson's claims of inaccuracy coupled with the circumstantial evidence outlined in the majority opinion evinces purposeful avoidance of the truth. See Harte-Hanks, 491 U.S. at 692-93, 109 S.Ct. at 2698, 105 L.E.2d at 562. To hold that a reasonable jury could find evidence of actual malice in this case would not impose, as the Chronicle suggests, a duty on a member of the press to avoid a colleague's word while investigating a story. To the contrary, allowing a jury to determine whether actual malice has been shown in the face of the considerable circumstantial evidence in this case, strikes a balance between protecting an individual's reputation and the First Amendment's protection of free speech.

The right of a free press is not absolute in a society that demands social responsibility and personal integrity. Freedom itself is conditional upon the recognition of a higher social duty to pursue truth and justice. A publication that systematically panders to sensationalism and degradation at the expense of the truth presents a cost too high for a free society to tolerate.

I believe freedom of the press is one of the greatest safeguards of liberty. This safeguard is grounded in democratic ideals promoting free thought and vigorous debate. When deliberate deception is elevated to perceived truth, the very values a free press seeks to preserve are compromised. 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. Our liberty cannot be guarded but by a free and independent press. A reckless and deceptive media poses the greatest danger to this freedom we so cherish.

For the foregoing reasons, I agree the evidence, viewed in the light most favorable to Anderson, is sufficient to submit the question of actual malice to the jury.

**THE STATE OF SOUTH CAROLINA**
**In The Supreme Court**

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Gene W. Croft, Jr., as Personal Representative of the Estate of Gene W. Croft, Sr., Plaintiff,

v.

Old Republic Insurance Company, Defendant.

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ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
Matthew J. Perry, United States District Judge

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Opinion No. 26032
Heard April 20, 2005 – Filed August 22, 2005

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**CERTIFIED QUESTIONS ANSWERED**

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Richard A. Harpootlian and M. David Scott, both of Columbia, for Plaintiff.

Clayton M. Custer, Brent O.E. Clinkscale, and Heather G. Ruth, all of Womble Carlyle Sandridge & Rice, PLLC, of Greenville, for Defendant.

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**JUSTICE BURNETT:** We accepted four questions certified by the United States District Court for South Carolina pursuant to Rule 228, SCACR. The questions involve the applicability of underinsured motorist

coverage provisions to exempt commercial policies sold to a commercial insured.

## FACTUAL AND PROCEDURAL BACKGROUND

The facts are drawn from the district court's certification order, which includes stipulated facts and findings of fact. Gene Croft, Jr. (Plaintiff), as personal representative of the estate of his father, Gene Croft, Sr. (Decedent) initiated a declaratory judgment action in state court against Old Republic Insurance Co. (Old Republic). Old Republic removed the action to federal court on the basis of diversity jurisdiction.

The underlying complaint alleges Decedent was involved in an automobile wreck while driving a semi-truck belonging to his employer, Penske Truck Leasing Co. (Penske). The driver and passenger in the other vehicle were at fault in causing the wreck. Decedent died as a result of injuries sustained in the wreck. The alleged at-fault driver and passenger had minimum liability coverage of $15,000, which has been tendered to Plaintiff in return for a covenant not to execute.

Plaintiff alleges Old Republic failed to make a required meaningful offer of optional underinsured motorist (UIM) coverage to the named insured, Penske. Plaintiff seeks to have the automobile insurance policy sold by Old Republic reformed to include UIM coverage up to the liability limit contained in the policy.

The insurance policy in question was a three-year policy, renewable on an annual basis, covering the period of January 1, 2000, to January 1, 2003. The wreck occurred January 23, 2002, within the policy's effective dates. The policy contains a deductible equal to the coverage limits contained in the policy. This type of policy is referred to in the insurance industry as a "fronting policy."

The total combined premium paid by Penske for the policy exceeded $50,000 a year. The policy provided coverage in all fifty states. Before commencing this action, Old Republic did not seek or obtain approval from the South Carolina Department of Insurance (Department) to sell the

policy as an "exempt commercial policy" as that term is defined in S.C. Code Ann. § 38-1-20(40) (2002).

From 1998 to 2001, Old Republic presented certain forms purporting to make a meaningful offer of optional UIM coverage to Penske. Penske annually rejected UIM coverage, stating, *e.g.*, in a letter to Old Republic that "our company philosophy is to purchase the ***minimum*** limits for uninsured/underinsured motorist coverage only where required by statute and reject this extra coverage when permitted by a state" (emphasis in original).

## QUESTIONS

1. Is the Old Republic/Penske policy at issue an "exempt commercial policy" as that term is defined in S.C. Code Ann. § 38-1-20(40)?

2. Assuming the answer to #1 is "yes," are automobile insurers in South Carolina required to make a meaningful offer of optional UIM coverage when selling an "exempt commercial policy" as that term is defined in Section 38-1-20(40)?

3. Are automobile insurers in South Carolina required to make a meaningful offer of optional UIM coverage when selling a "fronting policy" in which the insured's deductible limits equal the liability limits?

4. In a commercial "fronting policy," is an insurer required to comply with the requirements of State Farm Mut. Auto Ins. Co. v. Wannamaker, 291 S.C. 518, 354 S.E.2d 555 (1987), in order to make a meaningful offer of optional UIM coverage, when the insured has expressed a desire not to purchase UIM coverage?

## STANDARD OF REVIEW

In answering a certified question raising a novel question of law, the Court is free to decide the question based on its assessment of which

answer and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. art. V, §§ 5 and 9, S.C. Code Ann. §§ 14-3-320 and -330 (1976 & Supp. 2004), and S.C. Code Ann § 14-8-200 (Supp. 2004)); Osprey, Inc. v. Cabana Ltd. Partnership, 340 S.C. 367, 372, 532 S.E.2d 269, 272 (2000) (same); Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000) (same); Antley v. New York Life Ins. Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927) ("In [a] state of conflict between the decisions, it is up to the court to 'choose ye this day whom ye will serve'; and, in the duty of this decision, the court has the right to determine which doctrine best appeals to its sense of law, justice, and right.").

## LAW AND ANALYSIS

### 1. EXEMPT COMMERCIAL POLICY

Plaintiff argues the policy at issue is not an "exempt commercial policy" as that term is defined in S.C. Code Ann. § 38-1-20(40) because Old Republic never sought or obtained Department's approval before selling such a policy. Old Republic contends the policy is an exempt commercial policy under the definition in effect at the time of Decedent's death in January 2002.

The Legislature, defining the term for the first time, provided in 2000 that

> "[e]xempt commercial policies" means policies for large commercial insureds where the total combined premiums to be paid for these policies for one insured is greater than $50,000 annually and as may be further provided for in regulation or in bulletins issued by the director. Exempt commercial policies include all property and casualty coverages except for commercial property and insurance related to credit transactions written through financial institutions.

Act No. 235 § 1, 2000 S.C. Acts 1680 (effective March 7, 2000, and codified at S.C. Code Ann. § 38-1-20(40) (2002)). This provision was in effect at the time of the fatal wreck.[1]

> Act No. 235 further provided
>
> > [i]t is unlawful for an insurer doing business in this State to issue or sell in this state any exempt commercial policy, contract or certificate until it has been filed with and approved by the director or his designee. A filing that is filed with the department is deemed to have met the requirements of this chapter unless it (1) does not meet the requirements of law, (2) contains any provisions which are unfair, deceptive, ambiguous, misleading,

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[1] The Legislature has amended Section 38-1-20(40) to delete the adjective "large" from commercial insureds and to eliminate the requirement of an annual premium exceeding $50,000. The subsection in its present form provides

> > "Exempt commercial policies" means policies for commercial insureds as may be provided for in regulation issued by the director. Exempt commercial policies include all property and casualty coverages except for insurance related to credit transactions written through financial institutions.

Act No. 300 § 1, 2002 Acts 3288 (effective January 1, 2003). The Act's title stated the subsection was being amended "to expand the meaning of 'exempt commercial policies.'"

The Legislature re-enacted Section 38-1-20(40) in identical form in 2003 while revising or adding statutes relating to numerous insurance laws. Act No. 73 § 1, 2003 Acts 847 (effective June 25, 2003). The Act's title stated the subsection was being amended "to change the definition of 'exempt commercial policies' to delete the requirement that the definition include policies for which premiums for one insured is greater than fifty thousand dollars annually."

> or unfairly discriminatory, or (3) is going to be solicited by means of advertising, communication, or dissemination of information which is deceptive or misleading. If a filing is not in compliance with this chapter, the director or his designee shall issue an order specifying in detail the provisions with which the insurer has not complied and stating the time within which the insurer has to comply with the order before the filing is no longer valid. An order issued by the director pursuant to this section must be on a prospective basis only and may not affect a contract issued or made before the effective date of the order.

Act No. 235 § 4, 2000 Acts 1681 (codified at S.C. Code Ann. § 38-61-25 (2002)). Under this provision, it is apparent the Legislature intended to allow issuers of exempt commercial policies to file a policy form with Department, and it would be deemed approved unless Department subsequently issued an order to the contrary. See also Act No. 235 § 3, 2000 Acts 1680 (providing that insurers which issue exempt commercial policies are not required to obtain approval from Department before selling them) (codified at S.C. Code Ann. § 38-61-20(A) (Supp. 2004)).

The Legislature further provided that sellers of exempt commercial policies are not required to file rate schedules and plans with Department. Act No. 235 §§ 6-7, 2000 Acts 1682-83 (codified at S.C. Code Ann. §§ 38-73-340 and -520 (Supp. 2004));[2] see also Act No. 235 § 8, 2000 Acts 1683 (providing that statute requiring notice of hearings on rate increases does not apply to exempt commercial policies, which "are not subject to prior approval" by Department) (codified at S.C. Code Ann. § 38-73-910(G) (2002)).

Department has promulgated regulations which for the most part track the language of the previously cited statutes. The regulations provide

[2] The Legislature amended these sections in 2002. In pertinent part, the sections were modified to change the phrases "large commercial policies" and "exempt large commercial policies" to simply "exempt commercial policies." Act No. 300 §§ 2-3, 2002 Acts 3288.

that "[n]o insurer of exempt commercial policies will be required to file any classification, rate, rule, or rating plan, or modifications thereof, for any exempt commercial insurance line prior to its use in this state." An insurer issuing an exempt commercial policy must file the policy form with Department and must maintain a desk file of such forms for examination by Department upon request. Department, after reviewing such a policy form, may disapprove the form for continued use on a prospective basis. S.C. Code Ann. Reg. 69-64 (Supp. 2004) (effective June 27, 2003).

Lastly, the Legislature amended a provision contained in Chapter 73 of Title 38, which deals with the filing and approval of certain insurance rates. The Legislature added a subsection in the "Declaration of Purpose" provisions to state that a purpose of the chapter is to "provide for reasonable competition for commercial property and casualty insurers of insureds who make large purchases of insurance." Act No. 235 § 5, 2000 Acts 1681 (codified at S.C. Code Ann. § 38-73-10(a)(4) (2002)); see also Act No. 181 § 783, 1993 Acts 2079 (setting forth previous version of § 38-73-10(a)).

Based on the above provisions and focusing primarily on Act No. 235 which took effect in 2000, we answer Question 1 "yes," the policy at issue is an "exempt commercial policy" pursuant to S.C. Code Ann. § 38-1-20(40) (2002). The combined premium for the policy at issue exceeded $50,000 annually and the policy provided casualty coverage.

Old Republic's failure to seek or obtain Department's approval of the policy before selling it does not change the nature of the policy. Old Republic was required to file the policy form with Department, but was not required to obtain Department's approval before selling such policies. Department may impose an administrative fine on Old Republic for failing to follow the filing requirements. See S.C. Code Ann. § 38-2-10 (2002).

2. REQUIREMENT OF MEANINGFUL OFFER IN SALE OF EXEMPT COMMERCIAL POLICY

Plaintiff contends that, even if the policy at issue is an exempt commercial policy, Old Republic is required to make a meaningful offer of UIM coverage because the Legislature has not exempted such policies from

this requirement. Old Republic argues the Legislature's "creation of a special category of 'exempt commercial policies' indicates a belief that large commercial accounts do not need the same close regulation and court supervision as unsophisticated purchasers of insurance do." Thus, it was not required to offer UIM coverage to Penske.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Mid-State Automotive Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). In ascertaining the intent of the Legislature, a court should not focus on any single section or provision but should consider the language of the statute as a whole. Mid-State, 324 S.C. at 69, 476 S.E.2d at 692. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994).

S.C. Code Ann. § 38-77-160 (2002) provides "[automobile insurance] carriers shall also offer, at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist or in excess of any damages cap or limitation imposed by statute."

An automobile insurance carrier in South Carolina is required to make a meaningful offer of UIM coverage when selling an exempt commercial policy to a commercial insured. Old Republic indisputably is an automobile insurance carrier and, as such, was required to make a meaningful offer of UIM coverage to Penske.

No statutory provision exempts insurers which sell exempt commercial policies from the requirement of making a meaningful offer of UIM coverage to a commercial insured as mandated by Section 38-77-160. The only statutes addressing exempt commercial policies are those discussed in Question 1. A review of those statutes reveals the Legislature modified Department's oversight of exempt commercial policies by establishing a

system in which approval of such policies is granted upon filing, subject to later review and order by Department. The Legislature also exempted such policies from the usual rate-making and approval processes. These changes were intended to promote reasonable competition among commercial insurers, as explicitly stated by the Legislature. See Section 38-73-10(a)(4).

However, the Legislature did not similarly exempt insurers which sell such policies from complying with the usual requirements of offering UIM coverage to their commercial insureds. Old Republic's argument is based on sheer speculation about the Legislature's intentions. The Legislature could have created such an exemption in Act No. 235 in 2000 when it defined exempt commercial policies and exempted them from certain other requirements; however, it did not do so.

Moreover, the Legislature's amendment in 2002 and 2003 of three statutes addressing exempt commercial policies supports our conclusion. In redefining "exempt commercial policies" in Section 38-1-20(40), the Legislature in 2002 and 2003 changed the phrase "large commercial insureds" to "commercial insureds." The Legislature also deleted from the definition the phrase "where the total combined premiums to be paid for these policies for one insured is greater than fifty thousand dollars annually." See footnote 1.

Similarly, the Legislature in 2002 amended Sections 38-73-340 and 38-73-520 to change the phrases "large commercial policies" and "exempt large commercial policies" to simply "exempt commercial policies." See footnote 2.

These amendments mean insurers may sell exempt commercial policies to commercial insureds of all sizes, from multi-national corporations to "mom-and-pop" operations. Therefore, such a policy may be presented not only to potentially knowledgeable risk managers for large corporations, as occurred in the present case, but also to less sophisticated and knowledgeable insureds who own or manage small businesses. The Legislature apparently recognized that fact and chose not to create an exemption for exempt commercial policies from the requirements of Section 38-77-160. Accordingly, we answer Question 2 "yes," automobile insurance

carriers in South Carolina are required to make a meaningful offer of optional UIM coverage when selling an "exempt commercial policy" as that term is defined in Section 38-1-20(40).

3. REQUIREMENT OF MEANINGFUL OFFER IN SALE OF FRONTING POLICY

Plaintiff asserts the Legislature has not exempted an insurer which sells a "fronting policy" from making a meaningful offer of UIM coverage to a commercial insured. Old Republic, relying on foreign authority, argues it should not be required to make a meaningful offer of UIM coverage when selling a fronting policy to a commercial insured which wishes to reject all optional coverages. Old Republic further asserts Section 38-77-160 does not apply to its fronting policy because that policy was not "insurance" which involved a transfer of risk to Old Republic.

"Fronting policies" and related forms of partial self-insurance have become prevalent since the 1980s due to increases in insurance premiums. A fronting policy, of which there are various forms, is one or more steps removed from true self-insurance. It has been defined as a legal risk management device, typically used by large corporations operating in multiple states, in which the corporation pays a discounted premium to an insurer. The insurer maintains licensing and filing capabilities in a particular state or states, and issues an insurance policy covering the corporation in order to comply with the insurance laws and regulations of each state.

The corporation retains at least part of the risks covered under the fronting policy. One such means of retaining the risk, as seen in the present case, is by a deductible which equals the policy's liability limits. The insured usually is left to administer all claims, although the insurer may reserve this authority to itself in some instances.[3] The insured agrees to reimburse the

[3] Penske apparently does not administer its own claims process, although the limited record before us does not reveal the precise arrangement. Old Republic states in its brief that "Penske negotiates its own premiums, covers its own losses throughout the country, and pays a premium only to

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insurer for all payments it must make. See MacDonald v. Pacific Employers Ins. Co., 264 F. Supp. 2d 576, 581-83 (N.D. Ohio 2002); Lafferty v. Reliance Ins. Co., 109 F. Supp. 2d 837, 844-46 (S.D. Ohio 2000); Aerojet General Corp. v. Transport Indem. Co., 948 P.2d 909, 914 n.3 (Cal. 1997); Mark W. Flory & Angela Lui Walsh, Know Thy Self-Insurance (and Thy Primary and Excess Insurance), 36 Tort & Ins. L. J. 1005, 1006-07 (2001); Rory A. Goode, Self-Insurance as Insurance in Liability Policy "Other Insurance" Provisions, 56 Wash. & Lee L. Rev. 1245, 1257 (1999); William T. Barker, Combining Insurance and Self Insurance: Issues for Handling Claims, 61 Def. Couns. J. 352, 353 (1994); 1 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d §§ 10:1 to 10:3 (1997) (discussing self-insurance).

Some courts and commentators have stated that insureds who purchase fronting policies are in the practical sense self-insured because such policies involve no transfer of risk from the insured to the insurer. We disagree with the premise there is no transfer of risk in such policies. In a fronting policy, "[t]he insurer functions purely as a surety for the insured's ability to pay claims, and the benefit extends only to third parties in situations in which the policy holder is unable to pay a liability owed to a third party." Goode, supra at 1257; see also Barker, supra at 353 (stating same principle). Thus, Old Republic has assumed the risk – which it presumably has found acceptable based on Penske's net worth and financial capacity – that it will have to pay a claim if Penske becomes insolvent.

We find persuasive the views expressed in Gilchrist v. Gonsor, 821 N.E.2d 154 (Ohio 2004). In that case, decided on facts similar to the present case, an employee was injured in an on-the-job vehicle wreck caused by another motorist. The employee sought coverage under his employer's uninsured motorist (UM) policy, which was a fronting policy in which the employer's deductible equaled the policy's liability limit of $1 million.

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cover the vast administrative expenses associated with such an arrangement." At oral argument, counsel for Old Republic stated that claims against Penske are handled by a third-party administrator. The fact that an entity other than Penske administers the claims process lends further support to the conclusion Penske is not self-insured, but purchased an insurance policy.

The Ohio Supreme Court explained that the employer, in purchasing an insurance fronting policy, was not self-insured because it had not obtained a certificate of self-insurance under the statutory process. Instead, the employer had established proof of financial responsibility as statutorily required by purchasing a contract of insurance – the fronting policy. Under the statute then in effect, a vehicle liability policy could not be issued or delivered in Ohio unless UM coverage was offered to the policyholder. The court held this provision applied to fronting policies. Id. at 156-57; see also Couch on Insurance 3d § 10:1 (self-insurers in many states are required to comply with procedures to obtain a certificate of self insurance, and the reason for strictly enforcing such requirements is to protect the public).

A concurring justice further explained the court's reasoning. "[The employer] and [the insurer] seek to describe their contract of insurance for one purpose and as something else for another purpose. . . . It is not consistent to argue that the contract is an insurance policy for purposes of complying with Ohio's financial responsibility requirement and that the same policy is not one of insurance in order to avoid the mandatory UM/UIM offering under [Ohio law]." Gilchrist, 821 N.E.2d at 156-57 (Moyer, C.J., concurring). Furthermore, "it is clear that [the insurer] exposed itself to at least some risk. The fact [the insurer] carried some risk of loss further verifies that the arrangement in this case was an insurance policy and is therefore subject to the previous decisions of this court that create liability for UM/UIM coverage pursuant to [Ohio law]." Id.

In South Carolina, "'[i]nsurance' means a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." S.C. Code Ann. § 38-1-20(19) (Supp. 2004). A "'[p]olicy' means a contract of insurance." S.C. Code Ann. § 38-1-20(30) (Supp. 2004). "'[A]utomobile insurance' means automobile bodily injury and property damage liability insurance, including [a list of various forms of vehicle-related coverage] . . . as provided by this chapter written or offered by automobile insurers." S.C. Code Ann. § 38-77-30(1) (2002).

In the context of automobile insurance, a person or corporation in South Carolina is required to provide proof of financial responsibility for

potential accidents in order to legally operate a motor vehicle. Such financial responsibility may consist of an insurance policy or surety bond with the required or optional coverages. S.C. Code Ann. §§ 56-10-10 to -40 and 56-10-210 to -280 (1991 & Supp. 2004) (requiring proof of insurance or other acceptable security in order to register motor vehicle and establishing fines and criminal penalties for failure to do so); S.C. Code Ann. §§ 38-77-140, -150, and -160 (2002) (establishing requirements of mandatory minimum insurance limits, mandatory uninsured motorist coverage, and requiring automobile insurers to offer additional uninsured and underinsured motorist coverage, respectively).

A person, if eligible under statutory requirements, may register an uninsured motor vehicle by paying a $550 fee to the state Department of Motor Vehicles (DMV). S.C. Code Ann. §§ 56-10-510 to -540 (Supp. 2004). A company or person who has more than twenty-five motor vehicles registered in his name may qualify as a self-insurer by meeting the statutory requirements and obtaining a certificate of self-insurance from the DMV. S.C. Code Ann. §§ 56-9-60 and 56-10-510 (Supp. 2004).

Penske complied with the financial responsibility requirements by purchasing an insurance policy, not by seeking approval of a surety bond or obtaining a certificate of self-insurance from DMV as allowed by statute. Old Republic sold Penske a policy of automobile insurance as those terms are statutorily defined, *i.e.*, it sold Penske a contract of insurance which provided automobile bodily injury and property damage liability insurance. The fact Penske is required under the policy to subsequently reimburse Old Republic for claims paid up to the policy limits does not change the fact that Old Republic agreed to indemnify Penske, particularly since Old Republic has assumed the risk of Penske's insolvency, however slight.[4]

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[4] Events in recent years repeatedly have demonstrated the fallacy of the belief that a large corporation with billions of dollars in revenue or assets is an invincible operation with little risk of collapse. To understand this, one has to look no further than the accounting scandals and bankruptcies at companies such as Worldcom, Inc. ($103.9 billion in assets upon filing bankruptcy in 2002); Enron Corp. ($63.4 billion in assets upon filing in

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Moreover, the fact Penske purchased a so-called "fronting policy" does not transform Penske into a self-insured entity entitled to avoid the requirements of South Carolina law. The Legislature has not defined such policies as a form of self-insurance; nor has the Legislature established an exception for fronting policies from UIM-related requirements. Therefore, the laws of this state apply with equal force to such policies. Neither Old Republic nor Penske, while acting legitimately in their corporate self-interest to spend less money on insurance, are allowed to avoid statutory insurance requirements and unilaterally bestow upon Penske the classification of a self-insured entity. Accordingly, we answer Question 3 "yes," automobile insurance carriers in South Carolina are required to make a meaningful offer of optional UIM coverage when selling a "fronting policy" in which the insured's deductible limits equal the liability limits.

4. APPLICABILITY OF WANNAMAKER ANALYSIS IN SALE OF FRONTING POLICY

Plaintiff argues the determination of whether an insurer has made a meaningful offer of UIM coverage is an objective inquiry based on the language and form of the offer. It is neither necessary nor proper to consider the insured's subjective state of mind or wishes.

Old Republic asserts that, because Penske is a "knowledgeable, sophisticated insured" which repeatedly rejected UIM coverage, it should not have to comply with the requirements of State Farm Mutual Auto Insurance Co. v. Wannamaker, 291 S.C. 518, 345 S.E.2d 555 (1987), and its progeny. Old Republic also asks we find a meaningful offer was made in this case.

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2001); Conseco, Inc., ($61.4 billion in assets upon filing in 2002); Texaco, Inc. ($35.9 billion in assets upon filing in 1987); or Adelphia Communications ($21.5 billion in assets upon filing in 2002). See "The Largest Bankruptcies – 1980 to Present," compiled by New Generation Research, Inc. (available at http://www.bankruptcydata.com/Research/15_Largest.htm).

We recently set forth the basic principles of law regarding meaningful offers in Progressive Cas. Ins. Co. v. Leachman, 362 S.C. 344, 608 S.E.2d 569 (2005):

> The insurer bears the burden of establishing it made a meaningful offer. Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). A noncomplying offer has the legal effect of no offer at all. Hanover Inc. Co. v. Horace Mann Ins. Co., 301 S.C. 55, 57, 389 S.E.2d 657, 659 (1990). "If the insurer fails to comply with its statutory duty to make a meaningful offer to the insured, the policy will be reformed, by operation of law, to include UIM coverage up to the limits of liability insurance carried by the insured." Butler, 323 S.C. at 405, 475 S.E.2d at 760.
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> In general, for an insurer to make a meaningful offer of UIM coverage, (1) the insurer's notification process must be commercially reasonable, whether oral or in writing; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. State Farm Mut. Auto Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 345 S.E.2d 555, 556 (1987).
>
> In response to Wannamaker, the legislature enacted a statute establishing the requirements for forms used in making offers of optional insurance coverage such as UIM. The statute directs the insurer to include the following in its offer:
> (1) a brief, concise explanation of the coverage;
> (2) a list of available limits and the range of premiums for the limits;
> (3) space for the insured to mark whether the insured chooses to accept or reject the coverage, and a space to select the limits of coverage desired;
> (4) a space for the insured to sign the form, acknowledging that

> the optional coverage has been offered; and
> (5) the mailing address and telephone number of the Department, so that the insured may contact it with any questions that the insurance agent is unable to answer. S.C. Code Ann. § 38-77-350(A) (2002).
>
> An insurer enjoys a presumption it made a meaningful offer if it executes a form that complies with this statute. S.C. Code Ann. § 38-77-350(B) (2002); Antley v. Nobel Ins. Co., 350 S.C. 621, 632, 567 S.E.2d 872, 878 (Ct. App. 2002). If the form does not comply with the statute, the insurer may not benefit from the protections of the statute. Osborne v. Allstate Ins. Co., 319 S.C. 479, 486, 462 S.E.2d 291, 295 (Ct. App. 1995). Furthermore, a form does not necessarily constitute a meaningful offer simply because it was approved by the Department of Insurance. Butler, 323 S.C. at 408-409, 475 S.E.2d at 761.

Progressive Cas. Ins. Co., 362 S.C. at ___, 608 S.E.2d at 571-72.

We answer Question 4 "yes," an automobile insurer selling a fronting policy to a commercial insured is required to comply with Wannamaker and its progeny in order to make a meaningful offer of UIM coverage even though the insured has expressed a desire not to purchase such coverage. Automobile insurers offering commercial policies, including fronting policies, are not exempt from the meaningful offer requirement contained in Section 38-77-160 because the Legislature has recognized that commercial insureds, like non-commercial insureds, undoubtedly run the gamut from the ill-informed to knowledgeable purchasers.

Whether a meaningful offer was made depends on the facts and circumstances of a particular case, and the inquiry in this instance must be resolved in the federal proceeding. The impact of the insured's knowledge or level of sophistication regarding insurance matters on the determination of whether a meaningful offer was made cannot be decided on the limited record and arguments presented to us. Instead, such a decision is more appropriately resolved by a factfinder which has an opportunity to consider the entire factual record and the parties' arguments.

Evidence of an insured's knowledge or level of sophistication is not relevant when the analysis is confined to whether a particular written form complies with the statutory requirements, such that the insurer enjoys a presumption that it made a meaningful offer. That analysis simply involves a review of the written form itself.

However, evidence of the insured's knowledge or level of sophistication is relevant and admissible when analyzing, under Wannamaker, whether an insurer intelligibly advised the insured of the nature of the optional UM or UIM coverage. It is a subjective inquiry to the extent the insured may offer evidence of his understanding, or lack thereof, of the nature of UM or UIM coverage. It also is an objective inquiry because the factfinder should consider the insured's knowledge and level of sophistication in determining whether the insurer intelligibly explained such coverage to the insured. See McDowell v. Travelers Prop. & Cas. Co., 357 S.C. 118, 123-25, 590 S.E.2d 514, 516-17 (Ct. App. 2003) (affirming grant of summary judgment to insurer on issue of whether a meaningful offer was made under Wannamaker when evidence revealed commercial insured's professional risk manager was experienced in dealing with vehicle insurance coverage, was fully aware of nature and purpose of UIM coverage, and knew and was able to apply the mathematical formula for calculating UIM premiums under the policy); Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 375-76, 415 S.E.2d 406, 408-09 (Ct. App. 1992) (sophistication of insured ordinarily is an issue of fact which may be considered by jury in determining whether meaningful offer was made, and "[o]ne who is ignorant and unwary might require more explanation than a sophisticated applicant"). Whether the analysis is focused primarily on the written form, the Wannamaker analysis, or both, the purpose of requiring automobile insurers to make a meaningful offer of additional UM or UIM coverage "is for insureds to know their options and to make an informed decision as to which amount of coverage will best suit their needs." Progressive Cas. Ins. Co., 362 S.C. at ___, 608 S.E.2d at 573.

## CONCLUSION

We answer "yes" to each certified question. First, the policy at issue is an exempt commercial policy. Second, an insurer selling an

automobile insurance policy must make a meaningful offer of UIM coverage to a commercial insured because the Legislature has not established an exception for exempt commercial policies. Third, an insurer selling an automobile insurance policy, issued in the form of a fronting policy, must make a meaningful offer of UIM coverage because it is an insurance policy and the Legislature has not established an exception for such a policy. Fourth, an insurer selling an automobile insurance policy, issued in the form of a fronting policy, to a commercial insured is required to comply with Wannamaker and its progeny in order to make a meaningful offer of UIM coverage even though the insured has expressed a desire not to purchase such coverage. Whether a meaningful offer was made in the present case is a fact-intensive inquiry which must be resolved in the federal proceeding.

**CERTIFIED QUESTIONS ANSWERED.**

**MOORE, WALLER and PLEICONES, JJ., concur. TOAL, C.J., concurring in a separate opinion.**

**CHIEF JUSTICE TOAL**: I concur in all respects with the comprehensive and well reasoned analysis of the majority with one exception. I would go further in answering Question 4 and also find that the offer of optional insurance by Old Republic constituted a meaningful offer.

For an insurer to make a meaningful offer of additional coverage, (1) the insurer's notification process must be commercially reasonable; (2) the insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms; (3) the insurer must intelligibly advise the insured of the nature of the optional coverage; and (4) the insured must be told that optional coverages are available for an additional premium. *State Farm Mut. Auto. Ins. Co. v. Wannamaker*, 291 S.C. 518, 521, 345 S.E.2d 555, 556 (1987).

In the present case, in my opinion, the above requirements for making a meaningful offer were satisfied. Therefore, in my view, Old Republic made a meaningful offer.