

STATE OF MICHIGAN  
IN THE SUPREME COURT

DERITH SMITH,  
Plaintiff-Appellant,

-vs-

DONALD BARROWS, JOHN STANEK,  
and NOEL FLOHE,

Defendants-Appellees,

and

AN ANONYMOUS JOINT ENTERPRISE  
including GEORGE PRESTON, MARY  
BARROWS, and THE VILLAGE OF SUTTONS  
BAY and CHARLES STEWART,

Defendants.

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Supreme Court Nos.  
138456, 138457, 138458

Court of Appeals  
Nos. 275297, 275316, 275463

Leelanau County Circuit Court  
No. 05-6952-CZ

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

CERTIFICATE OF SERVICE

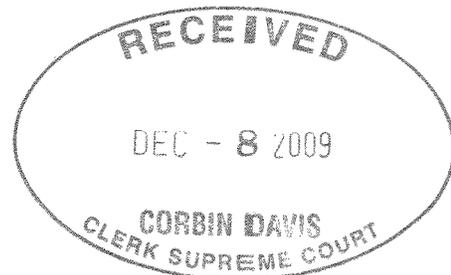
\*\*\* ORAL ARGUMENT REQUESTED \*\*\*

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**TABLE OF CONTENTS**

	<u>Page</u>
INDEX OF AUTHORITIES .....	iii
STATEMENT OF QUESTIONS PRESENTED .....	vi
STATEMENT OF MATERIAL PROCEEDINGS AND FACTS .....	1
ARGUMENT .....	18
I.    THE COURT OF APPEALS ERRED IN REVERSING THE JURY’S VERDICT IN THIS CASE ON THE GROUND THAT MS. SMITH DID NOT PRESENT SUFFICIENT EVIDENCE OF ACTUAL MALICE TO SUPPORT HER CLAIM OF DEFAMATION .....	18
A.    Appellate Review Of The Jury’s Determination Of Actual Malice .....	19
B.    The Evidence Of Actual Malice .....	25
II.   THE COURT OF APPEALS PATENTLY ERRED IN DETERMINING THAT THE DEFENDANT’S STATEMENTS INCLUDED ON THE AUGUST 2005 MEMORANDUM WERE “INCAPABLE OF DEFAMATORY MEANING.” .....	44
RELIEF REQUESTED .....	48
CERTIFICATE OF SERVICE	

## INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anderson v Liberty Lobby, Inc.</i> , 477 US 242 (1986) .....	20
<i>Anderson v The Augusta Chronicle</i> , 365 SC 589; 619 SE2d 428 (2005) .....	26
<i>Ball v E. W. Scripps Co.</i> , 801 SW2d 684 (Ky 1990) .....	22
<i>Battaglieri v Mackinac Center for Public Policy</i> , 261 Mich App 296; 680 NW2d 915 (2004) .....	26
<i>Beale v Bangor Publishing Co.</i> , 714 A2d 805 (1998) .....	22
<i>Bentley v Bunton</i> , 94 SW3d 561, 45 Tex Sup Ct J 1172 (2003) .....	21
<i>Bose Corp v Consumers Union of United States, Inc.</i> , 466 US 485 (1984) .....	19
<i>Celle v Filipino Reporter Enterprises, Inc.</i> , 209 F.3d 163 (2 <sup>nd</sup> Cir. 2000) .....	25
<i>Connaughton v Harte-Hanks Communications, Inc.</i> , 842 F.2d 825 (6 <sup>th</sup> Cir 1988) .....	38
<i>Derderian v Genesys Health Systems</i> , 263 Mich App 364; 689 NW2d 145(2004) .....	45
<i>DiBella v Hopkins</i> , 403 F.3d 102 (2 <sup>nd</sup> Cir. 2005) .....	21
<i>Duffy v Leading Edge Pools</i> , 44 F3d 308 (5 <sup>th</sup> Cir. 1995) .....	43
<i>Eastwood v National Enquirer</i> , 123 F3d 1249 (9 <sup>th</sup> Cir. 1997) .....	21
<i>Families Achieving Independence and Respect v Nebraska Department of Social Services</i> , 111 F.3d 1408 (8 <sup>th</sup> Cir. 1997) .....	21
<i>Faxon v Michigan Republican State Central Committee</i> , 244 Mich App 468; 624 NW2d 509 (2001) .....	19
<i>Harte-Hanks Communications, Inc. v Connaughton</i> , 491 US 657 (1989) .....	20
<i>Herbert v Lando</i> , 441 US 153 (1979) .....	25
<i>Herbert v Lando</i> , 441 US 153 (1979) .....	25
<i>Holbrook v Cassaza</i> , 204 Conn 336; 528 A2d 774 (1987) .....	43

<i>Hurley v Irish-American Gay, Lesbian and Bi-Sexual Group of Boston</i> , 515 US 557 (1995) ..	21
<i>Ireland v Edwards</i> , 230 Mich App 607; 584 NW2d 632 (1998) .....	46
<i>Lawrence v Will Darrah &amp; Associates</i> , 445 Mich 1; 516 NW2d 43 (1994) .....	45
<i>Levan v Capital Cities/ABC, Inc.</i> , 190 F.3d 1230 (11 <sup>th</sup> Cir. 1999) .....	20
<i>Mandel v The Boston Phoenix</i> , 456 F.3d 198 (1 <sup>st</sup> Cir. 2006) .....	21
<i>New York Times v Sullivan</i> , 376 US 254 (1964) .....	15, 18, 19, 25
<i>Newton v National Broadcasting Co</i> , 930 F.2d 662 (9 <sup>th</sup> Cir. 1991) .....	21
<i>People v Kent</i> , 194 Mich App 206; 486 NW2d 110 (1992) .....	45
<i>Prozeralik v Capital Cities Communications, Inc.</i> , 82 NY2d 466; 626 NE2d 34 (1993) .....	18
<i>Schiavone Construction Co v Time, Inc.</i> , 847 F2d 1069 (3 <sup>rd</sup> Cir. 1988) .....	20
<i>Schiavone Construction v Time, Inc.</i> , 847 F2d 1069 (3 <sup>rd</sup> Cir 1988) .....	25
<i>Slater v Ann Arbor Public Schools</i> , 250 Mich App 419; 648 NW2d 205 (2003) .....	45
<i>Smith v An Anonymous Joint Enterprise</i> , 485 Mich ____; 771 NW2d 796 (2009) .....	17
<i>Solano v Playgirl, inc.</i> , 292 F.3d 1078 (9 <sup>th</sup> Cir. 2002) .....	26
<i>St. Amant v Thompson</i> , 390 US 727 (1968) .....	25
<i>Suzuki Motor Corp v Consumers Union of United States</i> , 330 F3d 110 (9 <sup>th</sup> Cir. 2003) .....	43
<i>Swindlehurst v Resistance Welder Corp</i> , 110 Mich App 693; 313 NW2d 191(1981) .....	45
<i>Veilleux v National Broadcasting Co</i> , 206 F.3d 92 (1 <sup>st</sup> Cir 2000) .....	21
<i>Yee v Shiawasee Board Of Commissioners</i> , 251 Mich App 379; 651 NW2d 756 (2002) .....	45

**Statutes**

MCL 15.231 .....	19
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MCL 600.2911(3) .....	16
MCL 600.2911(6) .....	18

**STATEMENT OF QUESTIONS PRESENTED**

- I. DID THE COURT OF APPEALS ERR IN SETTING ASIDE A VERDICT IN FAVOR OF PLAINTIFF IN THIS DEFAMATION ACTION AND AWARDING JUDGMENT AS A MATTER OF LAW TO THE DEFENDANTS ON THE GROUND THAT THERE WAS INSUFFICIENT PROOF IN THE TRIAL RECORD ON THE QUESTION OF ACTUAL MALICE UNDER THE SUPREME COURT OF THE UNITED STATES' DECISION IN *NEW YORK TIMES V SULLIVAN*, 376 US 254 (1964)?

Plaintiff-Appellant says "Yes".

Defendants-Appellees say "No".

- II. DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE MEMORANDUM WHICH THE DEFENDANTS DISTRIBUTED WAS "INCAPABLE OF DEFAMATORY MEANING"?

Plaintiff-Appellant says "Yes".

Defendants-Appellees say "No".

## STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In April 2001 Derith Smith was hired by the Village of Suttons Bay's Manager, Phil Hanburg, as the Village's Clerk. (App., pp. 382a, 384a). In that part-time job, Suttons Bay issued Ms. Smith a W-2 and took various withholdings from her pay. *Id.* Beginning in 2002 or 2003, Suttons Bay also agreed to extend health insurance benefits to Ms. Smith. (App., p. 385a).

In August 2003, Mr. Hanburg, the person who had hired Ms. Smith to work for Suttons Bay, was replaced as the Village's Manager by Charles Stewart. (App., p. 49a). While Ms. Smith was never subject to any discipline during the entire period of time that she worked for Suttons Bay, she believed that her new supervisor, Mr. Stewart, did not like her. (App., pp. 58a, 386a, 403a).

In April 2004 Suttons Bay appointed a new Clerk. (App., p. 386a). After the appointment of the new Village Clerk, Ms. Smith continued working for Suttons Bay, performing the same job duties she had previously. (App. p. 61a). However, while Ms. Smith had been employed as the Village's Clerk, she signed paychecks for Suttons Bay's employees including herself. (App., p. 388a). After the new Clerk was appointed, Ms. Smith went to her supervisor, Mr. Stewart, and told him that she was no longer comfortable approving the Village payroll or writing payroll checks. (App., pp. 63a, 95a). As a result, Ms. Smith was no longer assigned the task of signing any of the Village's payroll checks, including her own. (App., p. 63a).

Prior to the appointment of the new Village Clerk, Ms. Smith was paid \$21.74 per hour by Suttons Bay. After April 2004 when the new Clerk was appointed, Ms. Smith went to the Suttons Bay President, Larry Mawby, to discuss her pay rate. (App., pp. 400a-402a). Mr. Mawby advised Ms. Smith that her rate of pay would continue to be the same, \$21.74 per hour. *Id.* For every pay period which followed during the remainder of her employment with Suttons Bay, Ms. Smith

prepared an hours verification report which reflected the fact that she was being paid at the rate of \$21.74 per hour. (App., pp. 387a-388a). Each of these verification reports were approved by her supervisor, Mr. Stewart. (App. pp. 60a-61a; 387a-388a).

Ms. Smith was active in local politics. From 1988 to 2000, she was the elected Clerk of Elmwood Township. (App. pp. 379a, 406a). In 2003 she was part of a group of citizens that unsuccessfully attempted to recall all of the members of the Elmwood Township Board of Trustees. (App., p. 252a). Two of the Board members who were the subject of this recall campaign were John Stanek and Noel Flohe. (App., pp. 252a, 407a-408a).

The following May, while still employed by Suttons Bay, Ms. Smith filed papers to run in an election for the position of Elmwood Township Supervisor. (App., p. 389a-390a). The Republican Party primary for the Supervisor position took place on August 3, 2004. Ms. Smith won that primary over two other candidates, including the incumbent, Noel Flohe. (App., pp. 181a, 390a). A second member of the Township Board, John Stanek, was also voted out of office in the August 2004 primary. (App., p. 252a). Because of the nature of Elmwood Township politics, Ms. Smith's victory in the Republican primary essentially assured her success in the general election which took place three months later. (App. p. 376a). Thus, in November 2004, Ms. Smith was elected to the position of Elmwood Township Supervisor, overcoming a write-in candidacy mounted by the person whom she had defeated in the primary, Noel Flohe. (App., p. 181a, 377a).

Meanwhile, in August 2004, only days after Ms. Smith won the Republican primary for Elmwood Township Supervisor, Charles Stewart, her Suttons Bay supervisor, prepared a memorandum for the Village's Personnel Committee pertaining to Ms. Smith's employment. (App. pp. 21a-28a). In preparing this memorandum, Mr. Stewart was operating under several

misapprehensions regarding the nature of Ms. Smith's employment. For example, his August 2004 memorandum indicated that Ms. Smith was not an employee of Suttons Bay and that she had never received a W-2 from the Village. (App. p. 21a). Because Stewart was of the view that Ms. Smith was not a Village employee, he indicated in his August 2004 memorandum to the Personnel Committee that Ms. Smith had improperly received fringe benefits which should only have been available to employees. (App. p. 21a). The Stewart memorandum further indicated that, since the April 2004 appointment of a new Village Clerk, Ms. Smith was supposed to be paid at the rate of \$17.00 per hour in her Suttons Bay job, not the \$21.74 which she had been receiving. Despite this purported decrease in her wage rate, the August 2004 memorandum that Mr. Stewart prepared indicated that "she is currently paying herself \$21.74 per hour." (App. p. 23a).

The Suttons Bay Personnel Committee received Mr. Stewart's memorandum in conjunction with its August 10, 2004 meeting. Following that meeting, the Committee voted to dismiss Ms. Smith. (App. p. 96a). Ms. Smith, who at the time knew nothing of the Stewart memorandum, had already decided after her August 2004 primary victory that she was leaving her position with Suttons Bay. (App. pp. 391a, 404a). Ms. Smith did not dispute her termination. She did, however, later file a request for unemployment compensation. (App. p. 96a). Suttons Bay, on the basis of Mr. Stewart's recommendation, initially challenged Ms. Smith's request for these benefits. (App., p. 56a).

During the course of the litigation which ensued over Ms. Smith's claim for unemployment benefits, Mr. Stewart discovered that certain statements which he had made in his August 2004 memorandum were incorrect. He found that, contrary to what he had written in his memorandum to the Personnel Committee, Ms. Smith actually had been an employee of Suttons Bay and that she

had received a W-2 during her entire period of employment with the Village. (App., p. 56a). Mr. Stewart was to later testify at the trial in this case that between August 2004 when he drafted the memorandum for the Personnel Committee and the scheduled hearing on Ms. Smith's unemployment benefit claim in February 2005, "we discovered many things . . . which either were incorrect in the memo or that we discovered later not to be founded or true." (App., p. 93a). After Mr. Stewart performed this additional investigation, Suttons Bay dropped its objection to Ms. Smith's request for unemployment benefits. (App. pp. 67a, 91a).

Following the 2004 general election Ms. Smith assumed her new duties as Elmwood Township Supervisor on November 20, 2004. (App., p. 182a). Even before the date that she was sworn in to that position, a group of citizens that had opposed her election began laying plans to have her removed from office. (App., pp. 182a-183a). This group of citizens included three individuals who were later named as defendants in this case, Donald Barrows, Noel Flohe and John Stanek.

The group which sought to oust Ms. Smith as Township Supervisor was interested in acquiring information which it could use against her in a recall campaign. On a number of occasions, Donald Barrows spoke to Jerry Vanhuystee, the Treasurer of Suttons Bay. Barrows wanted to know whether Ms. Smith had done anything illegal while she was employed by Suttons Bay. (App., pp. 123a-124a; 182a-183a). At the trial in this case, Mr. Vanhuystee testified that Barrows asked him on at least five different occasions whether Ms. Smith had been involved in anything illegal while a Village employee. (App., pp. 127a-128a). Mr. Vanhuystee told Barrows on each one of these occasions that he had no knowledge of Ms. Smith being involved in any illegal conduct. (App. pp. 126a-128a).

After being prodded by Barrows, Mr. Vanhuystee asked Suttons Bay's Manager, Mr. Stewart,

for a copy of the August 2004 memorandum which he had written about Ms. Smith. (App., p. 90a). Since Mr. Vanhuystee was the Village's Treasurer, Mr. Stewart supplied him with a copy of the memorandum. *Id.* However, in providing him with a copy of the memorandum, Mr. Stewart advised Mr. Vanhuystee that many things contained in that memorandum had later proved to be false. (App., pp. 91a-93a). In an attempt to stop Barrows from repeatedly asking him about Ms. Smith's employment with Suttons Bay, Mr. Vanhuystee supplied a copy of the August 2004 Stewart memorandum to Barrows. (App., pp. 128a-129a).

The informal citizens group which was opposed to Ms. Smith held a number of meetings. (App., p. 188a). One of these meetings took place in early May 2005 at a shop owned by one of the defendants, John Stanek. (App. pp. 133a-134a). This meeting was attended by a number of individuals, including Barrows, Flohe and Stanek. (App., p. 134a-135a). At this meeting, the participants discussed, among other things, the possibility of recalling Ms. Smith. (App. pp. 150a-151a; 161a). At this meeting copies of the August 2004 Stewart memorandum were distributed and the meeting's participants discussed the idea of publically disseminating this memorandum in an effort to advance a recall campaign against Ms. Smith. (App., pp. 135a-136a). Some of the individuals attending this meeting voiced the view that the contents of the Stewart memorandum should be made public because they felt that this memorandum implicated Ms. Smith in criminal activity, which should be investigated further. (App., pp. 173a-174a). Others at the meeting expressed a contrary view. (App. pp. 216a-217a).

One of the individuals who was at this May 2005 meeting at Stanek's shop was George Preston, a former Traverse City police officer and retired Michigan State Trooper. (App., p. 131a). When several people at the meeting advocated the public distribution of the Stewart memorandum,

Mr. Preston spoke against that idea. He told the rest of the group that the public distribution of this memorandum was not a good idea because no one within the group had any knowledge as to whether the contents of this memorandum were true. (App., pp. 135a-138a; 154a). Mr. Preston therefore suggested that the group delay any decision to disseminate the memorandum until he had the opportunity to investigate its contents to determine whether they were accurate. (App., pp. 135a, 138a-139a; 153a-154a). Mr. Preston volunteered to speak directly to the author of the memorandum, Charles Stewart, to determine if the information contained therein was accurate. (App., p. 139a).

Shortly after this meeting took place, Mr. Preston followed through on his promise to speak to Mr. Stewart about the memorandum which had been drafted nine months before. Mr. Preston telephoned Mr. Stewart and explained to him that a group of citizens had acquired a copy of Mr. Stewart's August 2004 memorandum regarding Ms. Smith's employment and that they intended to send a copy of that memorandum to every resident of Suttons Bay in an attempt to pressure Village authorities to prosecute Ms. Smith. (App., pp. 79a-80a). During his telephone conversation with Mr. Preston, Mr. Stewart became very upset that his memorandum, which had been intended solely for use within his office, might be publically disseminated. (App., pp. 139a-140a).

Mr. Stewart made it very clear to Mr. Preston that the memorandum should not be used in the way the anti-Smith group was contemplating since this memorandum was drafted before the Village's examination of Ms. Smith's employment status had been finalized. (App., p. 82a). Mr. Stewart also advised Mr. Preston that when Ms. Smith's employment had been more closely examined, Mr. Stewart found that the memorandum which he had drafted contained errors. (App., p. 82a). Mr. Stewart also told Mr. Preston that, after reviewing the matter further, he concluded that Ms. Smith had not been responsible for any wrongdoing or illegal conduct in conjunction with the

issues raised in the August 2004 memorandum. (App., p. 99a). In his telephone conversation with Mr. Preston, Mr. Stewart left no doubt about the fact that the contents of the memorandum should not be publically disseminated, and he assumed when this conversation was over that any plan to use his memorandum in an attack on Ms. Smith would be abandoned. (App., p. 83a).

Mr. Preston reported back to Stanek on the substance of his telephone conversation with Mr. Stewart. After a meeting of the Elmwood Township Board which both attended, Mr. Preston told Stanek that the Stewart memorandum must not be distributed. (App., pp. 164a, 166a). Mr. Preston was aware that the informal citizens group which sought to recall Ms. Smith wanted the Stewart memorandum publically disseminated because it may have suggested criminal activity on the part of Ms. Smith. (App., p. 173a-174a). But, Mr. Preston advised Stanek that the memorandum could not be used for this purpose since law enforcement officials had looked into the substance of Stewart's memorandum and had determined that there was no illegality in what Ms. Smith had done while employed by Suttons Bay. *Id.*

Despite Mr. Preston's admonition against the public dissemination of the Stewart memorandum, Barrows went to a local copy shop and made 500 copies of the first five pages of Mr. Stewart's August 2004 memorandum. (App., pp. 207a-208a). Before copying the document, a handwritten statement was added to the top of the first page of the memorandum. That handwritten statement provided: "ATTENTION: SUTTONS BAY VILLAGE ALLEGED MISUSE OF VILLAGE TAXPAYER FUNDS?" (App. p. 29a). The final page of the document included a summary of Ms. Smith's wages from February 2 through August 25, 2004, while she was an employee of Suttons Bay. (App. p. 33a).

After making 500 copies of this document, Barrows, with the assistance of Flohe and Stanek,

mailed a copy to each resident of Suttons Bay on May 16, 2005. (App., pp. 206a-207a; 239a-240a; 252a-253a). Barrows also obtained the names of every Supervisor or Clerk in Leelanau County, the County in which Elmwood Township is located, and mailed a copy of the document to each of these individuals as well. (App., p. 208a). Copies of this document were also posted on the Township hall's bulletin board and Ms. Smith witnessed Barrows and Stanek distributing copies of the document at Township meetings. (App., p. 394a).

The modified version of the Stewart memorandum did not identify who was responsible for its dissemination. Nor was there a return address on the envelopes in which the document was enclosed when it was mailed to every Suttons Bay resident. After this memorandum was mailed, Mr. Preston, who had previously warned Stanek against the public dissemination of the contents of the Stewart memorandum, attempted to find out who had been responsible for the May 16, 2005 mailing. Mr. Preston contacted both Barrows and Stanek and asked them if they had mailed the document. (App., p. 148a). Both Barrows and Stanek lied to Mr. Preston; both assured him that they had no involvement in the mailing of the memorandum. (App., pp. 148a-149a, 218a).

The mailing of the Stewart memorandum drew a significant amount of public attention in Leelanau County. (App., p. 392a). When news of its public dissemination reached Mr. Stewart, he immediately drafted a letter to Donald and Mary Barrows. (App. p. 34a). Based on advice supplied by Suttons Bay's legal counsel, Mr. Stewart's May 17, 2005 letter was never mailed. (App., pp. 69a-70a; 97a). Nevertheless, at trial Mr. Stewart confirmed that the contents of this undelivered letter were accurate. (App., p. 73a).

In his May 17, 2005 draft, Mr. Stewart strongly objected to the use of his August 2004 memorandum to support an effort to recall Ms. Smith. Mr. Stewart noted in his letter that he

specifically told Mr. Preston prior to the May 16, 2005 mailing that the issues discussed in the August 2004 memorandum regarding Ms. Smith's employment were "in fact properly followed-up by the Village's Council [*sic*] and by a separate attorney and both their findings were that during Ms. Smith's tenure with the Village there was no criminal actions. It was strongly urged to Mr. Preston that this letter not be used since it did not provide the official end result of the Village's inquiry of Ms. Smith." (App. p. 34a).

After the May 2005 distribution of his memo, Mr. Stewart also wrote an e-mail to Ms. Smith. (App. p. 35a). In that e-mail, Mr. Stewart again made note of the fact that prior to May 16, 2005, he had strongly advised against the public dissemination of the memorandum which he had prepared nine months earlier: "It was specifically stated to them the concerns outlined in the letter was [*sic*] followed-up and it was found that there was no criminal action on your part at anytime during your employment with the Village." (App. p. 35a).

In July 2005, Ms. Smith instituted this action in the Leelanau County Circuit Court. Originally, Ms. Smith's Complaint named five defendants, Donald and Mary Barrows, George Preston, Charles Stewart and the Village of Suttons Bay. Several months later, the Complaint was amended to include claims against Noel Flohe and John Stanek. As to Barrows, Flohe and Stanek, Ms. Smith alleged a defamation claim based on the May 2005 public dissemination of the Stewart memorandum as well as a cause of action based on alleged violations of her constitutional rights.

Each of the defendants later filed motions for summary disposition. Following full briefing and oral argument, the circuit court addressed the issues raised in the defendants' summary disposition motions in a written decision dated June 21, 2006. (App. pp. 36a-48a). The circuit court ruled in that Opinion that Ms. Smith's claims against Suttons Bay and Mr. Stewart were to be

dismissed. The circuit court also dismissed Ms. Smith's constitutional claims against Barrows, Flohe and Stanek. (App. pp. 43a-44a). However, the circuit court ruled that there were genuine issues of material fact precluding summary disposition with respect to Ms. Smith's defamation claim against Barrows, Flohe and Stanek. (App., pp. 44a-47a).

A jury trial on the remaining defamation claim began on October 24, 2006. At trial, plaintiff called as witnesses both George Preston, the retired police officer who volunteered to undertake the task of ascertaining whether the in the August 2004 memorandum was accurate, and the author of that memorandum, Charles Stewart.

Mr. Preston, who knows Barrows and Stanek and described them as "good neighbors" (App. p. 149a), testified that all three of the defendants were at the May 2005 meeting at Stanek's shop. (App. pp. 134a-135a). At that meeting, a number of copies of the Stewart memorandum were distributed. These copies did not contain the handwritten statement that was added to the memorandum before the May 16, 2005 mailing. (App. p. 135a). Mr. Preston described at trial the discussion that took place at the meeting regarding the public dissemination of Stewart memorandum.

Mr. Preston advised the group that this "probably wouldn't be a good idea at the time, based on the fact that no one had any real knowledge if in fact this document was true or not." (App. p. 135a). He told the group "to ensure it was truthful that we should contact Mr. Stewart." (App. pp. 153a-154a). He further told the group that Mr. Stewart should be contacted about the memorandum because "someone could have did this just out of spite and put Charles Stewart's name on it." (App. p. 154a). Mr. Preston estimated that there were less than ten people assembled in Stanek's shop when he volunteered to speak directly to Mr. Stewart about the memorandum's contents. (App. p.

138a). Mr. Preston indicated that the entire group unquestionably heard what he had to say about contacting Mr. Stewart to determine if the contents of the memorandum were accurate and there was general agreement at the meeting that this was an appropriate thing to do under the circumstances. (App. pp. 139a, 176a).

Mr. Preston also testified at trial about the 20 to 30 minute telephone conversation he had with Mr. Stewart regarding the August 2004 memorandum. (App. p. 139a-140a). Mr. Preston's version of that conversation differed somewhat from that provided at trial by Mr. Stewart.

Mr. Stewart testified that during his telephone conversation with Mr. Preston, he specifically told Mr. Preston that there were factual inaccuracies in his August 2004 memorandum. Mr. Stewart testified:

I explained to him and stressed not to use the memo, that that memo, the date it was drafted was not the final conclusion of the concerns addressed in the memo, and that there was later found to be misinformation in that memo.

(App. p. 82a).

Thus, Mr. Stewart testified that he told Mr. Preston that there were errors in his August 2004 memo and that he strongly represented to Mr. Preston that Ms. Smith had not engaged in any wrongdoing while employed by Suttons Bay. (App. p. 99a). But, Mr. Stewart did not go into specifics with Mr. Preston as to the various mistakes in the memorandum.

Mr. Preston recalled the conversation somewhat differently. He testified that Mr. Stewart never told him that "there was anything false in the memo." (App. p. 155a). Because, Mr. Preston testified that, Mr. Stewart never told him that there was anything false in the memorandum, Mr. Preston did not relay such information to Stanek when he later spoke to him about the conversation with Mr. Stewart. (App. p. 166a). But, while Mr. Preston did not directly tell Stanek that there was

something in the memorandum that was false, he did relay to Stanek “based on what I had investigated that [the memorandum] should not be definitely . . . sent out.” (App. p. 172a). Mr. Preston advised Stanek that the memorandum should not be distributed because it “has no substance . . . as far as a criminal aspect.” (App. pp. 173a-174a).

All three of the defendants testified at trial. Barrows confirmed in his trial testimony that it was he who got a copy of the Stewart memorandum from Jerry Vanhuystee, the Suttons Bay Treasurer. (App. p. 184a).<sup>1</sup> Barrows also confirmed that he must have talked to Mr. Vanhuystee at least five times before getting a copy of the memorandum, requesting information showing any illegal conduct on the part of Ms. Smith. (App. p. 183a).

Barrows acknowledged that he was at the May meeting at which the Stewart memorandum was brought up and that at that meeting Mr. Preston volunteered to talk directly to Mr. Stewart about the memorandum’s contents. (App. pp. 203a-206a; 230a). Barrows testified that Mr. Preston’s mission to speak directly to Mr. Stewart “wasn’t anything of real interest to me,” (App. p. 206a), and he dismissed Mr. Preston’s offer to look into the accuracy of the Stewart memorandum: “what the hell does it mean to me.” (App. p. 210a). He also testified that, after agreeing to speak to Mr. Stewart about the memorandum, Mr. Preston never reported back. (App. pp. 204-205a).

Barrows acknowledged that he did nothing to determine whether the Stewart memorandum were true and he never intended to do anything to ascertain the accuracy of its contents. (App. p. 248a). Barrows insisted that he and his fellow defendants enjoyed a constitutional right to ignore

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<sup>1</sup>Barrows acknowledged in his trial testimony that he obtained a copy of the Stewart testimony from Mr. Vanhuystee. Barrows’ trial testimony must, however, be contrasted with his own deposition testimony in which he testified under oath that the Stewart memorandum “just showed up” at the May 2005 meeting of the anti-Smith group. (App. p. 192a).

the concerns that Mr. Preston expressed as to the accuracy of the Stewart memorandum:

Q. So, did you do anything to investigate the original concern that Mr. Preston had?

A. Under the constitution we have no obligation to do it.

Q. As a good citizen also you want to make sure you are not sending a lie out?

A. We have no obligation under the United States Constitution to check it out to see whether it's factual or not. A man who is administrator of Suttons Bay wrote this, I have every belief he wrote it and have every obligation to send it out and let them know.

(App. pp. 209a-210a).

Thus, Barrows expressed the view that “the obligation . . . to check out reliability [of the Stewart memorandum] it's not for me.” (App. p. 247a). He further claimed that at the time he mailed the version of the memorandum that he did, he had no reason to believe that anything contained in that memorandum was false. (App. pp. 227a-228a).

Stanek was also called as a witness in Ms. Smith's case in chief. Stanek stated in his trial testimony that, as far as he knew, Ms. Smith “has never done anything illegal involving taxpayer money” and that “the facts have not been proven that [Ms. Smith's] done anything illegal . . .” (App. pp. 279a-280a; 292a). He testified that he did not know whether the Stewart memorandum was true or false and that he “had no proof of anything other than I had to assume that Mr. Stewart's memo was true.” (App. pp. 257a; 278a-279a).

Stanek admitted that he attended the May meeting at his shop during which the public dissemination of the Stewart memorandum was discussed. (App. pp. 281a-283a). Stanek also agreed that Mr. Preston was at that meeting. However, Stanek's version of what happened at that meeting differed markedly from the testimony previously provided by both Mr. Preston and a co-

defendant, Barrows. In his trial testimony Stanek denied that Mr. Preston spoke at this meeting or that he volunteered to speak directly to Mr. Stewart concerning the accuracy of his memorandum. (App. pp. 301a-302a). Stanek also testified that when Mr. Preston later spoke to him, Mr. Preston never indicated that there was anything false in the Stewart memorandum. (App. p. 296a). Thus, Stanek told the jury that he had no knowledge that anything in that document was false. (App. p. 297a).

The third defendant, Flohe, also testified. In his original response to Ms. Smith's complaint, Flohe categorically denied that he had any involvement whatsoever in the May 16, 2005 mailing of the Stewart memorandum. (App. pp. 326a, 332a, 339a). Flohe, however, later testified in a deposition that someone delivered fifteen to thirty envelopes to his home and he addressed them and put stamps on them. But, because these envelopes were sealed, Flohe claimed that he had no personal knowledge of what was in the envelopes that he prepared for mailing. (App. p. 340a). According to Flohe, it never occurred to her to ask what was in the envelopes. (App. p. 343a).

Flohe's testimony with respect to his participation in the mailing of the memorandum differed substantially from the testimony of his co-defendants. Both Barrows and Stanek testified that they and Flohe met together at Stanek's office for several hours on a Saturday to address and put stamps on the envelopes containing the memorandum. (App. pp. 214a, 239a-243a; 287a-290a). Stanek further testified that the box of envelopes the three were working on was situated next to extra copies of the Stewart memorandum. (App. pp. 289a-290a). Flohe insisted that no such meeting took place. He told the jury that someone brought sealed envelopes to his home and he addressed 15 to 20 of the envelopes while at home. (App. pp. 339a-344a).

Flohe also testified at trial that he made no effort to determine whether the contents of the

memo were true or untrue. (App. pp. 348a-349a). He indicated that he had “no knowledge whatsoever about [the] truthfulness or untruthfulness” of the memorandum. (App. p. 354a).

At the conclusion of plaintiff’s proofs, the defendants requested a directed verdict on several issues, including the question of actual malice. (App., pp. 409a-416a). The trial court denied the defendants’ motion based largely on the testimony provided at trial by George Preston and the credibility questions which the jury would have to resolve:

The standard of proof, of course, is that there be a demonstration that the communication was published knowing it to be false or at the time of the publication it was done with reckless disregard as to its falsity. By definition, this motion would require the Court to weigh and assess the evidence and the credibility of the witnesses, something the Court is precluded from doing; however, I can understand the basis for the motion, at least as it relates to actual knowledge. Viewed most favorably from the point of view of the plaintiff, if Mr. Preston’s testimony is to be believed and the timing is determined to have been prior to the May 16<sup>th</sup> mailing, then if Mr. Preston is to be believed then Mr. Stanek may have had actual knowledge that the document was false. There is no testimony that Mr. Preston spoke directly to Mr. Flohe or to Mr. Barrows; however, again viewed most favorably from the plaintiff’s point of view, if Mr. Preston was correct in his testimony that Mr. Flohe and Mr. Barrows were also present with this group that included Mr. Stanek when he volunteered to go off and visit with Mr. Stewart, there is an inference that they might have acted with reckless disregard. Certainly at this stage of the proceedings the Court doesn’t believe there is a complete absence of evidence with regard to a particular element, and that the Court is precluded from weighing and assessing it.

(App. pp. 422-423a).

The jury was charged on Ms. Smith’s defamation claim in a manner consistent with the actual malice standard established by the United States Supreme Court in *New York Times v Sullivan*, 376 US 254 (1964).<sup>2</sup> Thus, the jury was instructed that it could find for Ms. Smith on her defamation

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<sup>2</sup>While all of the defendants argued on appeal to the Court of Appeals that there was insufficient evidence to submit Ms. Smith’s defamation claim to the jury, none of the defendants argued that the instructions provided to the jury on the defamation claim were deficient in some respect.

claim only if it found clear and convincing evidence that defendants either knew that the memorandum which they made public was false or that the defendants acted “with reckless disregard as to whether the statement was false.” (App., p. 432a). “Reckless disregard” in this context was defined by the trial court as follows: “the defendant must have made the statement with a high degree of awareness of its probably falsity or must have entertained serious doubts as to the truth of the statement.” *Id.*

On the fifth day of trial, the jury returned its unanimous verdict. (App. pp. 433a-441a). The jury concluded that Ms. Smith had established by clear and convincing evidence that the defendants either had knowledge that the material they published was false or that they acted in reckless disregard of its falsity. The jury concluded that Barrows, Flohe and Stanek had each defamed Ms. Smith and it assessed damages against each defendant. *Id.*

The jury completed the verdict form which was provided to it. However, as to each of the defendants, the jury included an addition to that verdict form. The jurors indicated that, as part of the non-economic damages it was assessing, each defendant “must publish a public apology to Derith Smith in the form of a legal notice in both the Traverse City Record Eagle and the Leelenau Enterprise . . .” (App. pp. 435a, 438a, 441a).

The circuit court issued judgments consistent with the jury’s verdict on December 11, 2006.

The defendants appealed the circuit court judgment to the Michigan Court of Appeals. On appeal, the defendants contended that the jury verdict rendered against them had to be set aside because the proofs at trial did not establish sufficient evidence of actual malice.<sup>3</sup>

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<sup>3</sup>The defendants further argued on appeal that their publication of the Stewart memorandum was protected by a Michigan statute, MCL 600.2911(3), the so-called fair reporting privilege. The Court of Appeals did not reach this issue in its February 3, 2009

On February 3, 2009, a panel of the Court of Appeals issued a decision reversing the judgment entered in favor of Ms. Smith and remanding the case for entry of a judgment in favor of Barrows, Flohe and Stanek. (App. pp. 443a-447a). The Court of Appeals opinion in this case is a testament to judicial economy. The Court of Appeals statement of the relevant facts was confined to a single paragraph. (App. p. 443a). After this brief summary of the facts, the panel ruled in a single sentence that the evidence presented at trial did not support a finding of actual malice: “Defendants cannot be held liable for the reliance on this written memorandum and the failure to investigate the allegations contained within the document does not constitute the reckless disregard that underlies actual malice.” (App. p. 446a).

The Court of Appeals proceeded in its February 3, 2009 Opinion to address an issue which defendants had not even raised - that the memorandum which they disseminated along with handwritten references to Ms. Smith’s possible criminal activity, was not capable of “defamatory meaning.” (App. pp. 446a-447a).

Ms. Smith filed an application for leave to appeal in this Court. On September 16, 2009, the Court issued an order granting that application. (App. p. 448a). *Smith v An Anonymous Joint Enterprise*, 485 Mich \_\_; 771 NW2d 796 (2009).

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decision.

## ARGUMENT

### **I. THE COURT OF APPEALS ERRED IN REVERSING THE JURY'S VERDICT IN THIS CASE ON THE GROUND THAT MS. SMITH DID NOT PRESENT SUFFICIENT EVIDENCE OF ACTUAL MALICE TO SUPPORT HER CLAIM OF DEFAMATION.**

Since the Supreme Court of the United States' landmark 1964 decision in *New York Times v Sullivan*, 376 US 254 (1964), defendants who are sued for defamation in actions brought by public officials are entitled to several defenses grounded in the First Amendment to the United States Constitution. Foremost among these defenses is the "actual malice" standard developed in *New York Times*. As expressed in that case, the First Amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice', that is, with knowledge that it is false or with reckless disregard of whether it was false or not." 376 US at 279-280.<sup>4</sup>

Defamation claims which involve appellate review of the sufficiency of proofs under the *New York Times* actual malice standard present "complex, difficult and sensitively nuanced controversies." *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 478; 626 NE2d 34, 41 (1993). Yet, remarkably, the Court of Appeals in its February 3, 2009 opinion was able to confine its statement of the facts of relevance to this case to a single paragraph. (App. p. 443a). Perhaps even more remarkably, the Court of Appeals' entire analysis of the actual malice issue was contained in a single, conclusory paragraph:

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<sup>4</sup>The constitutional standard established in *New York Times* has been statutorily incorporated into Michigan law. See MCL 600.2911(6). MCL 600.2911(6)'s operative language, requiring in a defamation case brought by a public official clear and convincing evidence that the defamatory falsehood was "published with knowledge that it was false or with reckless disregard of whether it was false or not," is virtually a verbatim restatement of the *New York Times* test. 376 US at 279-280.

In the present case, defendants disseminated a memorandum that was prepared by plaintiff's then supervisor, Stewart, the manager of the Village of Suttons Bay. This memorandum was placed in plaintiff's personnel file and was subject to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* There was no allegation that defendants illegally obtained or secreted the information from plaintiff's personnel file. The document contained Stewart's concerns that plaintiff was not an employee of the village, was not entitled to employee benefits, and was receiving more compensation than approved for the position held. The personnel committee voted to terminate plaintiff from her employment, and she applied for unemployment benefits. Stewart recommended that the village fight the request for benefits. However, the village withdrew its objection to the benefits after learning that plaintiff was an employee, was issued a W-2 form, was entitled to health benefits, and was submitting her time sheets with her rate of compensation approved by Stewart. Thus, the memorandum at issue was not prepared by defendants and contained Stewart's subjective and erroneous view of the status of plaintiff's employment.

(App. p. 446a).

After citing these limited facts, the Court of Appeals announced its conclusion: "Defendants cannot be held liable for the reliance on the written memorandum and the failure to investigate the allegation contained within the document does not constitute the reckless disregard that underlies actual malice." *Id.*

The Court of Appeals decision in this case on the subject of actual malice was woefully deficient and fundamentally wrong. For the reasons which follow, this Court should reverse.

#### **A. Appellate Review Of The Jury's Determination Of Actual Malice**

Before examining why the Court of Appeals' conclusions regarding actual malice should be reversed, plaintiff would note that there is no dispute that Ms. Smith, as the elected Supervisor of Elmwood Township, is a public official for purposes of the *New York Times* actual malice standard. Plaintiff further acknowledges that under the governing case law, Ms. Smith was compelled to prove actual malice by clear and convincing evidence. *Bose Corp v Consumers Union of United States, Inc.*, 466 US 485, 511 (1984); *Faxon v Michigan Republican State Central Committee*, 244 Mich

App 468, 474; 624 NW2d 509 (2001); cf 600.2911(6). The jury was so instructed. (App. p. 1090a).

Plaintiff would also acknowledge that under Supreme Court precedents, the question of whether the evidence in this case is sufficient to support a finding of actual malice represents a question of law. *Harte-Hanks Communications, Inc. v Connaughton*, 491 US 657, 685 (1989); *Bose Corp*, 466 US at 510-511. Thus, the Supreme Court has recognized that, because of the significant First Amendment concerns associated with defamation actions filed by public officials, the courts are charged with the responsibility to “review the evidence to make certain that these principles have been constitutionally applied.” *New York Times*, 376 US at 285. This requirement of independent appellate review represents a rule of federal constitutional law. *Bose Corp*, 466 US at 510.<sup>5</sup>

While the Supreme Court has embraced the notion that an appellate court is to engage in an independent review of the evidence bearing on actual malice, the precise scope of that independent review is open to significant debate. *See Levan v Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239, n. 27 (11<sup>th</sup> Cir. 1999) (describing the law on this subject as “unsettled”); *see generally* 2 Smolla, *The Law of Defamation* (2<sup>nd</sup> ed), §12:86. What is clear is that the independent review of evidence

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<sup>5</sup>The concept of independent judicial review in First Amendment cases appears to be an aspect of *appellate* review. In *Anderson v Liberty Lobby, Inc.*, 477 US 242 (1986), a libel action, the Supreme Court ruled that a federal district court presented with a summary judgment motion raising the sufficiency of plaintiff’s evidence on the *New York Times* actual malice standard, was compelled to examine the evidence to determine if a material dispute remained on whether the plaintiff established actual malice by clear and convincing evidence. 477 US at 252-254. Yet, in reaching this result, the *Anderson* Court held that the general standards applicable to summary judgment motions still applied. Thus, in addressing a summary judgment motion raising actual malice, “credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences” are for the jury and “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.*, p. 255. Thus, *Anderson* offers firm support for the view that, in contrast to the independent appellate review discussed in *New York Times* and subsequent cases, this level of judicial scrutiny does not extend to a trial court’s decision on a motion for summary judgment. *See Schiavone Construction Co v Time, Inc.*, 847 F2d 1069, 1090-1091 (3<sup>rd</sup> Cir. 1988).

bearing on actual malice is not the equivalent of *de novo* review. *Bose*, 466 US at 514, n. 31; *see also Veilleux v National Broadcasting Co*, 206 F.3d 92, 107 (1<sup>st</sup> Cir 2000); *Families Achieving Independence and Respect v Nebraska Department of Social Services*, 111 F.3d 1408, 1411 (8<sup>th</sup> Cir. 1997); *Newton v National Broadcasting Co*, 930 F.2d 662, 670, n. 10 (9<sup>th</sup> Cir. 1991).

Perhaps the most significant question with respect to an appellate court's obligation to independently review the trial record on the issue of actual malice is the deference which is to be accorded a jury's verdict, particularly where that verdict is dependent on the jury's assessment of the credibility of witnesses. The Supreme Court has indicated in at least two cases that the independent judicial review of the facts in a defamation case is subject to the usual deference to be given the trier of fact in assessing credibility. *Harte-Hanks*, 491 US at 688; *Hurley v Irish-American Gay, Lesbian and Bi-Sexual Group of Boston*, 515 US 557, 567 (1995) ("the requirement of independent appellate review . . . does not limit our deference to the trial court on matters of witness credibility."). This view has also been expressed in the decisions of various federal courts of appeal. *See Eastwood v National Enquirer*, 123 F3d 1249, 1252 (9<sup>th</sup> Cir. 1997) ("This does not mean we give jury findings no weight; on questions of credibility, which the jury is uniquely qualified to answer, we defer."); *DiBella v Hopkins*, 403 F.3d 102, 116 (2<sup>nd</sup> Cir. 2005) (in conducting judicial review of actual malice evidence, the court "accord[s] traditional deference to the jury's underlying credibility determinations."); *Mandel v The Boston Phoenix*, 456 F.3d 198, 208 (1<sup>st</sup> Cir. 2006) ("purely factual determinations (such as credibility calls) remain subject to the usual degree of deference.")

Moreover, as the courts in several other states have recognized, appellate courts are simply not equipped to make the credibility assessments which an independent review of the entire record might entail. This view was well expressed in the Supreme Court of Texas' decision in *Bentley v*

*Bunton*, 94 SW3d 561, 45 Tex Sup Ct J 1172 (2003):

The independent review required by the First Amendment is unlike the evidentiary review to which appellate courts are accustomed in that the deference to be given the fact finder's determinations is limited. Indeed, the Supreme Court has stated that “[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.” On questions of law we ordinarily do not defer to a lower court at all. But the sufficiency of disputed evidence to support a finding cannot be treated as a pure question of law when there are issues of credibility. *No constitutional imperative can enable appellate courts to do the impossible—make crucial credibility determinations without the benefit of seeing witnesses’ demeanor. If the First Amendment precluded consideration of credibility, the defendant would almost always be a sure winner as long as he could bring himself to testify in his own favor.* His assertions as to his own state of mind, if they could not be disbelieved on appeal, would surely prevent proof of actual malice by clear and convincing evidence absent a “smoking gun”—something like a defendant's confession on the verge of making a statement that he did not believe it to be true. The First Amendment does not afford even a media defendant such protection. In the Supreme Court's words, “[w]e have not gone so far ... as to accord the press absolute immunity in its coverage of public figures or elections.” The independent review on appeal required by the First Amendment does not forbid any deference to a fact finder's determinations; it limits that deference. How far is the difficulty.

94 SW3d at 597-598 (emphasis added). *see also Ball v E. W. Scripps Co*, 801 SW2d 684, 688 (Ky 1990) (“we accept the jury’s findings as to disputed facts when there is supporting evidence because we claim no superior ability to divine the truth by reason of judicial office, and we question the good judgment of any judge who thinks he has such special powers.”); *Beale v Bangor Publishing Co*, 714 A2d 805, 808 (1998).

The jury in this case was called upon to make a significant number of credibility determinations and, for very good reasons, it obviously disbelieved the testimony provided by the defendants. The defendants’ estrangement from the truth began before this case was filed. Mr. Preston, after learning that the information he obtained from Mr. Stewart had not been heeded, confronted both Barrows and Stanek, demanding to know if they were responsible for the mailing.

Both Barrows and Stanek told Mr. Preston that they had no involvement in the mass mailing. (App. 148a-149a, 218a).

When the complaint was served on Flohe, he responded in his answer that he had no involvement in the mailing of the Stewart memorandum. (App. 332a-334a). Flohe's answer undoubtedly called his credibility into question since he later had to acknowledge that he assisted in the labeling of the envelopes.

The events leading to the mailing of the Stewart memorandum also demonstrated that at least one of the defendants was not telling the truth at trial. Both Barrows and Stanek testified that they and Flohe met on a Saturday at Stanek's office and the three worked together for several hours addressing and putting stamps on the envelopes. (App. pp. 214a, 239a-243a; 287a-290a). Flohe, however, told the jury that this testimony provided by his two co-defendants was inaccurate. He testified at trial that he never met with Barrows and Stanek to address the envelopes. Rather, one of the two delivered a number of sealed envelopes to Flohe's house and, without inquiring into their contents, he prepared them for mailing. Under the circumstances, it is not particularly surprising that the jury did not believe Flohe when he testified that he had no knowledge of what was in the envelopes that he helped prepare.

But it was not only Flohe's credibility which was challenged at trial. Barrows was one of the first witnesses deposed during the discovery phase of this case. (App. pp. 191a-192a). In his deposition, Barrows was asked how the anti-Smith citizens group came into possession of Stewart's memo. Barrows testified under oath that the memo "just showed up" at the May 2005 meeting held at Stanek's shop. (App. p. 192a).

What later came to light was that Barrows himself communicated with some frequency with

a Suttons Bay official, Jerry Vanhuystee, trying to get something that could be used against Ms. Smith. Prodded by Barrows, Mr. Vanhuystee secured a copy of the Stewart memo and he made the necessary arrangements to deliver that copy directly to Barrows.

Barrows knew exactly how the group seeking the recall of Ms. Smith came to acquire a copy of Stewart's memo. He admitted all of these facts at trial. (App. pp. 182a-194a). Yet, at an early stage in this case, Barrows tried to conceal his involvement by asserting under oath that the memorandum "just showed up." (App. p. 192a). Once again, it is not particularly surprising that the jury did not give considerable weight to Barrows testimony that he neither knew of factual inaccuracies in the Stewart memorandum, nor did he entertain doubts about its accuracy.

Finally, Stanek represented a crucial witness in this case because he is the defendant whom Mr. Preston reported back to after speaking to Mr. Stewart about his August 2004 memorandum. Stanek sought to diffuse Mr. Preston's testimony by claiming at trial that Mr. Preston never offered at the May meeting to speak to Mr. Stewart about the memorandum. (App. 301a-302a). In offering this highly dubious testimony, Stanek not only contradicted the explicit testimony of a disinterested witness, Mr. Preston,<sup>6</sup> he also provided testimony directly at odds with that given by Barrows, who confirmed the substance of what Mr. Preston told the anti-Smith group at the May 2005 meeting.

It is obvious from the outcome of this case that the jury disbelieved all three defendants. The jury's collective sense of outrage over the defendants' conduct in this case is reflected in the fact that, without either a request by plaintiff or instructions from the Court, the jury attached an addendum to their verdict form, demanding that each of the defendants issue a published apology

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<sup>6</sup>The Court should be aware of the fact that Mr. Preston, who was a critical witness at trial because of his conversation with Mr. Stewart, was a somewhat reluctant plaintiff witness. Mr. Preston acknowledged that Barrows and Stanek were his "good neighbors." (App. p. 149a).

to Ms. Smith. The jury had good reason to discount or disregard the testimony provided by defendants.

**B. The Evidence Of Actual Malice**

The *New York Times* actual malice standard can first be satisfied by evidence that the defendants had actual knowledge that the Stewart memorandum contained false information. In its February 3, 2009 decision, the Court of Appeals considered only the alternative basis for establishing actual malice - proof of the defendants' reckless disregard of the publication's truth. The Court of Appeals completely failed to consider whether there was actual knowledge of the document's falsity.

At trial, all three defendants testified that they did not have actual knowledge of the falsity of the information contained in the Stewart memorandum. But, as the Supreme Court recognized in *St. Amant v Thompson*, 390 US 727, 732 (1968), the defendants' denial of such knowledge is not, in and of itself, sufficient to defeat plaintiff's claim that they had the requisite knowledge to support a defamation claim. As expressed in *St. Amant*:

The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith.

*Id.* at 732.

The Supreme Court has also made it clear that in establishing the *New York Times* actual malice standard "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks*, 491 US at 668; *cf Schiavone Construction v Time, Inc.*, 847 F2d 1069, 1076 (3<sup>rd</sup> Cir 1988) ("circumstantial evidence can override defendant's protestations of good faith and honest belief . . ."); *Celle v Filipino Reporter Enterprises, Inc.*, 209 F.3d 163, 183 (2<sup>nd</sup> Cir.

2000). Moreover, as the Supreme Court recognized in *Herbert v Lando*, 441 US 153, 170 (1979), circumstantial evidence *must* be used to prove the *New York Times* actual malice standard since “plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself.” *See also Solano v Playgirl, inc.*, 292 F.3d 1078, 1087 (9<sup>th</sup> Cir. 2002) (“we have yet to see a defendant who admits entertaining serious doubt about the authenticity of an article it published”); *Bentley*, 94 SW3d at 596-597; *Prozeralik*, 82 NY2d at 475-476; *Anderson v The Augusta Chronicle*, 365 SC 589; 619 SE2d 428, 431-432 (2005); *Battaglieri v Mackinac Center for Public Policy*, 261 Mich App 296, 306; 680 NW2d 915 (2004).

Contrary to defendants’ argument, there was evidence in this record establishing that defendants had actual knowledge that the August 2004 memorandum that they distributed contained false information. Of considerable significance in this respect is the trial testimony provided by Jerry Vanhuystee, the Suttons Bay Treasurer. Mr. Vanhuystee testified that following Ms. Smith’s election as Elmwood Township Supervisor, he was repeatedly asked by Barrows whether Ms. Smith had been involved in any illegal activity during the course of her employment with the Village of Suttons Bay. (App., pp. 123a-124aa). At trial, Mr. Vanhuystee described Barrows as so insistent on this point that he asked Mr. Vanhuystee five different times whether Ms. Smith had done anything illegal while employed by the Village. Each of these times that Barrows asked this question, Mr. Vanhuystee told him that there was no evidence of any illegal conduct on the part of Ms. Smith during her Suttons Bay employment. (App., pp. 127a-128a).

Mr. Vanhuystee further confirmed in his trial testimony that each one of these five occasions in which he assured Barrows that Ms. Smith had not been involved in any illegal conduct occurred *before* May 16, 2005, the date that Barrows, Flohe and Stanek mailed the Stewart memorandum to

every Suttons Bay resident. Mr. Vanhuystee testified:

Q. Did you tell Mr. Barrows that Deri Smith had done anything illegal?

A. Did I tell her she had done anything illegal?

Q. Yeah.

A. No, just the opposite.

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Q. This is before [the Stewart memorandum] was mailed out, right?

A. Yes.

Q. Well before?

A. In some cases, yes, at least twice of the five times well before.

Q. Did you tell – do you mean to tell me on five different occasions you told Mr. Barrows Deri Smith had done nothing illegal?

A. Yes.

Q. *On two times you told him that, those times were prior to the mailing, correct?*

A. *All five were.*

(App. pp. 126a-127a) (emphasis added)

Mr. Vanhuystee was aware of Charles Stewart's August 2004 memorandum regarding Ms. Smith's employment and he asked Mr. Stewart for a copy of that document. (App., p. 90a). Mr. Stewart provided Mr. Vanhuystee with a copy of his August 2004 memorandum. But, in providing a copy of this document to Mr. Vanhuystee, Mr. Stewart specifically told him that "the information that we found in there just was not substantiated." (App., p. 91a). In his trial testimony Mr. Stewart recounted his conversation with Mr. Vanhuystee as follows:

The conversation I had with Mr. Vanhuystee as to why we did not proceed forward with the claims, lot of it during the background, between the time of the termination and the time of the hearing [for unemployment benefits], we discovered many things that were aligned in which either were incorrect in the memo or that we had discovered later not to be founded or true. In addition to, quite frankly, the Village erred in the way they handled their employment policies.

(App. p. 93a).

The jury in this case had unequivocal evidence that Barrows, one of the defendants engaged in the plan to publically disseminate the memorandum which accused Ms. Smith of illegal activity, had been told on five separate occasions by an official of Suttons Bay that Ms. Smith had engaged in no illegal conduct while employed by Suttons Bay. The jury also had before it the testimony of Mr. Stewart in which he confirmed that he directly told Mr. Vanhuystee, the person who five times advised Barrows that no illegal activity occurred, that some of the statements contained in the August 2004 memorandum were not true.

There was, therefore, direct evidence in this record that one of the three men responsible for the public dissemination of a memorandum, which they portrayed as demonstrating illegal conduct on the part of the plaintiff during her employment at Suttons Bay, was expressly advised on five different occasions that no such criminal misconduct existed. The jury could also derive from Mr. Stewart's testimony that Mr. Vanhuystee, the person who advised Barrows five times that Ms. Smith had engaged in no illegal conduct, was fully aware of the fact that the memorandum which the defendants decided to send to every resident of Suttons Bay was inaccurate. From this evidence the jury could infer that the three defendants had actual knowledge that the memorandum which they were intent on distributing was not accurate, particularly on the essential question of whether Ms. Smith had engaged in any criminal misconduct while an employee of Suttons Bay, the precise point

which defendants tried to reinforce with the handwriting which was added to the first page of the memorandum.

But Mr. Vanhuystee's testimony regarding his five different conversations with Barrows did not represent the only evidence bearing on the defendants' actual knowledge of the falsity of the August 2004 memorandum. The idea of publicly disseminating the Stewart memo first surfaced at a May 2005 meeting of a group of citizens which was exploring a potential recall of Ms. Smith. At that meeting George Preston advised against such a course of action because he had concerns about the accuracy of the statements contained in that memorandum. (App., pp. 135a-137a; 154a). Mr. Preston, therefore, proposed that the memorandum not be mailed out until he had an opportunity to confirm the accuracy of the statements contained in it. *Id.* Mr. Preston volunteered to speak to the author of that memorandum, Mr. Stewart, to confirm its accuracy. (App., pp. 139a).

Mr. Preston then had a twenty minute telephone conversation with Mr. Stewart in which he explained that the citizens group opposed to Ms. Smith had obtained a copy of his August 2004 memorandum and was considering sending a copy of this memorandum to every resident of Suttons Bay. (App., p. 80a). Mr. Stewart, who became upset by the prospect of his private memorandum being distributed publically, unequivocally advised Mr. Preston that the memorandum contained errors and that, after it had been drafted, further investigation revealed that Ms. Smith had not been involved in any illegal conduct while employed by Suttons Bay. (App., pp. 82a, 99a). During his trial testimony, Mr. Stewart confirmed that he told Mr. Preston both that the memorandum which he wrote should not be used in an attack on Ms. Smith *and* the reason why the memorandum should not be used in this way - because that memorandum contained inaccuracies:

Q. During your conversation with Mr. Preston, did you just simply say, don't use

the memo and let it go at that?

A. No.

Q. What did you say?

A. I explained to him and stressed not to use the memo, that that memo, the date it was drafted was not the final conclusion of the concerns addressed in the memo, and that there was later found to be misinformation in that memo.

(App., p. 82a).

Mr. Preston later spoke to Stanek about the substance of his telephone conversation with Mr. Stewart. Mr. Preston told Stanek that, based on what Stewart had told him, the group should definitely not be sending out the August 2004 memorandum. (App., p. 172a). Mr. Preston testified that he never expressly told Stanek that there was something false in the Stewart memorandum. (App., pp. 155a, 166a). Yet, Mr. Preston did testify that he communicated to Stanek that the events recounted in the August 2004 memorandum would not support the view that it documented illegal conduct on the part of Ms. Smith. Mr. Preston testified about his conversation with Stanek as follows:

A. [Stanek's] concern was mostly for the criminal aspect. I think a lot of people thought there was criminal activity afoot here and it should have been investigated. And, I think the question was why shouldn't she be prosecuted on it and the answer is apparently some law enforcement looked at it, felt not enough substance to advocate prosecution and that's what I told Stanek. I'm not saying I told him exactly that, but the basis of them wanting to know why not is there is no criminal investigation. ***So as far as I'm concerned, this has no substance to it as far as a criminal aspect, don't send it, don't send out that letter and I made that perfectly clear.***

(App. pp. 173a-174a) (emphasis added).

This testimony from Mr. Preston establishes that, before Stanek, Barrows and Flohe decided to distribute the Stewart memorandum, they were aware of the fact that the critical thrust of that

document from their perspective - that it indicated that Ms. Smith had engaged in criminal misconduct while an employee of Suttons Bay - *was not true*. Thus, at the time that the defendants took steps to publically distribute the Stewart memorandum, defendants had been expressly advised through Mr. Preston that there was “no substance” to any claim that it accurately documented illegal activity on the part of Ms. Smith while employed by Suttons Bay. (App., p. 174a). To the contrary, Mr. Preston expressly advised Stanek that this document could not truthfully be presented as describing illegal conduct by the plaintiff.

Based on the testimony provided by Mr. Preston, the jury had before it clear and convincing evidence that defendants had knowledge that the aspersions of criminal misconduct which they sought to convey through the dissemination of the Stewart memorandum were false. Here, despite defendants’ express denial of knowledge of any falsity in the memorandum, other evidence presented at trial completely supported the jury’s conclusion that defendants were liable in this case under the *New York Times* actual malice standard. What the jury heard in this case is that there was some delay in the public distribution of this document which the anti-Smith group had acquired while Mr. Preston went about checking into its accuracy. After discussing its contents with the author of the memorandum, Mr. Preston reported back to Stanek that the memorandum could not be used in the manner in which the group contemplated because it “has no substance . . . as far as a criminal aspect . . .” (App., p. 174a). Despite that knowledge, Stanek and the other two defendants distributed the memorandum anyway. This represents clear and convincing evidence of actual knowledge of the documents falsity to satisfy the actual malice standard.

All of this evidence bearing on the actual knowledge aspect of the actual malice standard went completely unaddressed in the Court of Appeals’ February 3, 2009 decision. The jury could,

under the record established at trial, properly conclude that the defendants disseminated the information contained in the Stewart memorandum with actual knowledge of its falsity. On this basis alone, the verdict rendered in this case should be upheld.

Yet, even if there was not clear and convincing evidence in this record to establish *actual* knowledge of falsity, there was sufficient evidence to establish the alternative basis for a finding of actual malice under *New York Times* -“reckless disregard of whether it was false or not.” 376 US at 280. The Supreme Court of the United States has noted that the “reckless disregard” component of the actual malice test “cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication . . .” *St. Amant*, 390 US at 730; *Harte-Hanks*, 491 US at 667. The Supreme Court has, however, recognized that the reckless disregard of the truth standard is satisfied by proof that the defendant made a defamatory statement with a “high degree of awareness of . . . probable falsity,” or the defendant must have “entertained serious doubts as to the truth of his publication.” *Harte-Hanks*, 491 US at 667.<sup>7</sup>

Even if the evidence discussed above were not sufficient to establish the defendants’ *actual*

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<sup>7</sup>This case differs from most other defamation actions in that the defendants were more than willing to testify at trial as to their personal indifference to the accuracy of the material which they were disseminating. None of the defendants did anything to determine if the Stewart memorandum was accurate. Moreover, Barrows and Stanek testified that they enjoyed a constitutional right to remain oblivious to the accuracy of the memorandum. (App. pp. 209a-210a; 270a-271a). Barrows also testified that when Mr. Preston volunteered to speak to Mr. Stewart regarding the memorandum’s accuracy, Preston’s effort to determine the truth of the contents of the memorandum, “wasn’t anything of real interest to me.” (App. p. 206a). Another defendant, Stanek, acknowledged that he did not know if the Stewart memorandum was true or false. (App. pp. 278a-279a) and that he was left to assume that it was true. (App. p. 257a). The third defendant, Flohe, conceded that he had no knowledge whatsoever about the “truthfulness or untruthfulness” of the memorandum. (App. p. 354a). All of this evidence supported the view that all three defendants neither knew nor cared whether the document which they were publishing was factually accurate.

knowledge of the falsity of the Stewart memorandum, the evidence submitted at trial was more than sufficient to support a verdict in Ms. Smith's favor on this alternative prong of the actual malice standard. Here, the primary thrust of the document which the three defendants distributed was that it implicated Ms. Smith in criminal misconduct associated with her prior employment with Suttons Bay. Yet, one of the defendants responsible for the broad public dissemination of this document, Barrows, had been expressly told not once but *five times* by a Suttons Bay official that there was no criminal misconduct on the part of Ms. Smith while she worked for that Village. Moreover, all three of the defendants were at a meeting where their proposal to distribute the memorandum was first raised and Mr. Preston, a former law enforcement officer, volunteered to talk directly to the author of the memorandum to determine if it was accurate. Mr. Preston reported back to Stanek that the memorandum could not be used for the purposes which the group had in mind because the memorandum "has no substance to it as far as a criminal aspect." (App., p. 174a).

This testimony was more than sufficient to support the jury's conclusion that there was clear and convincing evidence of actual malice. This evidence supported the conclusion that defendants distributed the memorandum with a "high degree of awareness of . . . probable falsity," or that they "must have entertained serious doubts as to the truth of his publication." The Court of Appeals treatment of Mr. Preston's testimony at trial deserves particular attention. The substance of Mr. Preston's trial testimony is nowhere to be found in the body of the Court of Appeals' February 3, 2009 opinion. The text of the Court of Appeals opinion contains no mention of Mr. Preston's insistence at a meeting of the anti-Smith group that public distribution of the substance of the memorandum be delayed, while he investigated its accuracy. The text of the Court of Appeals opinion also contains no mention of the fact that Mr. Preston talked with Mr. Stewart directly, who

advised him that the memorandum contained inaccuracies and should not be used in a recall effort involving Ms. Smith. And, the text of the Court of Appeals' opinion contains no mention of the fact that Mr. Preston repeated this fact to Stanek *before* the defendants decided to make the memorandum public anyway.

The only mention of Mr. Preston's trial testimony is to be found in a footnote 1 of the Court of Appeals' opinion. In that footnote the Court of Appeals noted that in his trial testimony, Mr. Preston "opined" that "he advised defendants before the mailing that Stewart's assertions in the memorandum were unfounded." (App. p. 446a). Nevertheless, the Court of Appeals rejected the plaintiff's argument that what Mr. Preston told Stanek bore directly on the "reckless disregard" component of the actual malice standard. According to the Court of Appeals, the fact that Mr. Preston advised Stanek of inaccuracies in the memorandum which Stanek and his co-defendants shortly thereafter made public had no bearing on whether their publication of that document was in reckless disregard of the truth because the standard in question is entirely subjective: "whether the publisher in fact 'entertained serious doubts concerning the truth of the statements published.'" (App. p. 446a). After describing this standard, the Court of Appeals ruled that this subjective standard was not met by Mr. Preston's trial testimony: "in the present case, defendants clearly declined to entertain any opinion regarding the content of the memorandum . . ." *Id.*

This statement represents a completely misguided formulation of the actual malice standard. What the Court of Appeals apparently concluded is that the defendants were entitled to an absolute defense because they were able to take the stand and testify that, despite what Mr. Preston has explicitly conveyed to them regarding the Stewart memorandum, they personally harbored no doubts as to the accuracy of the Stewart memorandum at the time they mailed it to every resident of Suttons

Bay. Under the view of the law expressed by the Court of Appeals, as long as a defendant in a case governed by the actual malice standard is able to testify that he neither knew of the falsity of the publication and that he “declined to entertain any opinion” regarding its accuracy, that defendant has an absolute defense.

As noted previously, the defendants’ state of mind in a defamation action can be proved through circumstantial evidence. *Harte-Hanks*, 491 US at 668; *Herbert*, 441 US at 160. Moreover, in defamation actions, as in every other type of action, circumstantial evidence of “reckless disregard” can overcome a defendants’ testimony concerning his/her own knowledge. *Cf. Schiavone*, 847 F2d at 1076; *Battaglieri*, 261 Mich App at 306 (noting that because “it would be rare for a defendant to admit actual malice . . . circumstantial evidence may be considered.”). What the Court of Appeals posited in this case is the rather ludicrous notion that a defendant in a public figure defamation action could, in essence, vest himself with immunity from suit simply by testifying, even in the face of direct information of falsity, that he “declined to entertain any opinion regarding the content of the memorandum . . .” (App. p. 446a).

The Court of Appeals in its February 3, 2009 opinion also made note of the fact that the reckless disregard prong of the actual malice standard is not established merely by proof that a party failed to investigate a statement’s accuracy before making that statement public. *Id.*, see generally, *Harte-Hanks*, 491 U.S. at 688; *Faxon*, 244 Mich App at 474. However, the Supreme Court of the United States has recognized that “recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.” *St. Amant*, 390 US at 732. Here, based on the information directly relayed to two of the defendants by Mr. Vanhuystee and Mr. Preston, there was an obvious reason to doubt the accuracy of the Stewart memorandum, insofar as

it purported to describe the criminal misdeeds of Ms. Smith.

The Court of Appeals' decision with respect to the actual malice standard is notable for its complete failure to discuss the central evidence presented at trial bearing on that standard. But, this failure to discuss the substance of the evidence presented in support of Ms. Smith's claim is not the most glaring omission in the Court of Appeals' decision. That distinction belongs to the Court's complete failure to include even a single mention of the one United States Supreme Court precedent bearing on the actual malice standard applicable to this case. That precedent is the Supreme Court's 1989 decision in *Harte-Hanks*.<sup>8</sup>

In *Harte-Hanks*, the plaintiff who sued for defamation, Daniel Connaughton, was a candidate for an elected judicial office. Shortly before the election in which he sought to unseat an incumbent judge, Connaughton uncovered evidence of a bribery scheme involving Billy Joe New, a member of the incumbent judge's staff. Connaughton located a witness to that bribery, Patsy Stephens, and he tape recorded a four hour interview which he conducted of Ms. Stephens. During that interview she detailed numerous instances of bribery committed by New. Eight people were present during Connaughton's recorded interview of Stephens, including Stephens' sister, Alice Thompson.

Approximately one month after Connaughton's interview of Stephens, reporters for the Journal News, a local newspaper which supported Connaughton's opponent in the upcoming

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<sup>8</sup>The Supreme Court has acknowledged that the reckless disregard component of the *New York Times* actual malice standard is difficult to encapsulate in a single definition and that its limits would have to be "marked out through case-by-case adjudication." *St. Amant*, 390 US at 730. But, the number of United States Supreme Court decisions applying the actual malice standard - cases which represent *the* definitive interpretation of the contours of this standard - are extraordinarily rare. In these circumstances, where there *is* a United States Supreme Court decision which is applicable to these facts, it is truly extraordinary that the Court of Appeals omitted all mention of that case.

election, arranged a meeting with Alice Thompson to discuss whether Connaughton had engaged in improper conduct during his campaign for the judicial seat. In the course of meetings between Journal News reporters and Ms. Thompson, she asserted that Connaughton had promised her and her sister, Patsy Stephens, gifts and other consideration in exchange for Stephens' statements implicating New in the bribery scheme.

After the Journal News interviewed Thompson, the newspaper's managing editor assembled a group of reporters and told them to interview all of the people who were present when Connaughton interviewed Stephens, with one exception. The one person that the Journal News' staff did not interview was Stephens herself.

Before printing an article concerning Thompson's allegations against Connaughton, reporters for the Journal News interviewed Connaughton himself. Connaughton categorically denied Thompson's assertions that he had offered an inappropriate *quid pro quo* for Stephens' information. Connaughton also provided the Journal News reporters with access to the tape recordings which he had made of his lengthy interview with Stephens. While these audio tapes were made available to representatives of the Journal News, no one at the newspaper took the time to listen to them.

On November 1, 1983, the lead story in the Journal News was Thompson's charge that Connaughton had offered Thompson and Stephens jobs and other gifts in exchange for their cooperation in building a bribery case against New. Thus, the Journal News' article related Thompson's accusation that Connaughton had used "dirty tricks" to gain her and her sister's cooperation in the bribery probe.

Connaughton later sued the Journal News in federal court for libel associated with its publication of the November 1, 1983 article. Connaughton's defamation claim proceeded to a jury

trial which resulted in a verdict in his favor. The Journal News appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit. In that appeal, the Journal News contended, among other things, that Connaughton had not presented clear and convincing evidence of actual malice to support the jury's verdict. The Sixth Circuit affirmed the district court's judgment. *Connaughton v Harte-Hanks Communications, Inc.*, 842 F.2d 825 (6<sup>th</sup> Cir 1988). The Supreme Court granted *certiorari* to consider whether the lower courts had properly applied the *New York Times* actual malice standard to the facts of that case.

The Supreme Court in *Harte-Hanks* engaged in extensive review of the relevant facts. 491 US at 668-682. The Court recognized that the jury's verdict in favor of Connaughton was premised on credibility determinations: "They found that Connaughton was telling the truth and that Thompson's charges were false." *Id.* at 681. This credibility determination, however, did not in and of itself resolve the Court's review of the actual malice issue. The Court noted, "difference of opinion as to the truth of the matter . . . does not alone constitute clear and convincing evidence that the defendant acted with knowledge of falsity or with a high degree of awareness of . . . probable falsity." *Id.*

Nevertheless, the Supreme Court in *Harte-Hanks* went on to conclude that there was clear and convincing evidence to support for jury's verdict in favor of Connaughton based on "several critical pieces of information that strongly support the inference that the Journal News acted with actual malice in printing Thompson's false and defamatory statement." *Id.* at 681-682. Among the critical pieces of evidence establishing actual malice cited by the Supreme Court in *Harte-Hanks* consisted of the Journal News unexplained failure to confirm the truth of Thompson's charges against Connaughton in the simplest way possible - by talking to Thompson's sister, Patsy Stephens.

The Supreme Court observed in *Harte-Hanks*:

On October 27, after the interview with Alice Thompson, the managing editor of the Journal News assembled a group of reporters and instructed them to interview all of the witnesses to the conversation between Connaughton and Thompson with one exception - Patsy Stephens. *No one was asked to interview her and no one made any attempt to do so . . .* It is utterly bewildering in light of the fact that the Journal News committed substantial resources to investigating Thompson's claims, *yet chose not to interview the one witness who was most likely to confirm Thompson's account of the events.* However, *if the Journal News had serious doubts concerning the truth of Thompson's remarks, but was committed to running the story, there was good reason not to interview Stephens - while denials coming from Connaughton's supporters might be explained as motivated by a desire to assist Connaughton, a denial coming from Stephens would quickly put an end to the story.*

\* \* \*

By the time the November 1 story appeared, six witnesses had consistently and categorically denied Thompson's allegations, yet the newspaper chose not to interview the one witness that both Thompson and Connaughton claimed would verify their conflicting accounts of the relevant events.

*Id.* at 682-683 (emphasis added).

The *Harte-Hanks* Court also cited as proof of the defendant's actual malice the fact that the Journal News had access to the audiotape of Connaughton's interview with Stephens, a review of which would have confirmed or refuted portions of what Thompson told the newspaper's reporters. But, defendant's reporters failed to listen to that tape before publishing Thompson's accusations. *Id.* at 683-684. The Supreme Court recognized in *Harte-Hanks* that, "one might reasonably infer in light of this broader context that the decision not to listen to the tapes was motivated by a concern that they would raise additional doubts concerning Thompson's veracity." *Id.* at 684.

In summarizing the clear and convincing evidence of actual malice contained in the trial record, the Supreme Court in *Harte-Hanks* ruled:

It is also undisputed that Connaughton made the tapes of the Stephens interview

available to the Journal News and that no one at the newspaper took the time to listen to them. Similarly, there is no question that the Journal News was aware that Patsy Stephens was a key witness and that they failed to make any effort to interview her. Accepting the jury's determination that petitioner's explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. *Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.*

*Id.* at 692 (emphasis added); *see also Faxon*, 244 Mich App 476 (“we recognize that ‘purposeful avoidance of the truth’ can constitute actual malice.”).

The analysis employed and conclusions reached by the Supreme Court in *Harte-Hanks* should have been fatal to the defendants' assertion that there was insufficient evidence of actual malice in this record. The actual malice defense offered by the defendants in this case was premised on their trial testimony that they had no knowledge of the fact that the Stewart memorandum contained false information. Defendants insisted at trial that they had no direct knowledge, from any source, including Mr. Preston, of inaccuracies in the memorandum. As discussed, *supra*, the jury had the evidence it needed to reject the defendant's self-serving statements as to their knowledge of the memorandum's falsity. But, even if one blindly accepts the testimony given by the three defendants as to their *actual* knowledge, the fact remains that under the analysis employed by the Supreme Court in *Harte-Hanks*, there was clear and convincing evidence of reckless disregard.

In this case, as in *Harte-Hanks*, there was a simple, readily available method for confirming the accuracy of their intended message - that Ms. Smith had engaged in the unlawful use of public funds while an employee of Suttons Bay. The defendants could have done precisely what Mr. Preston did, by contacting the author of the memorandum directly. The failure to do so constitutes the “purposeful avoidance of the truth” discussed in *Harte-Hanks*.

But, the facts of this case are significantly worse for the defendants than those in *Harte-Hanks* in one important respect. The Supreme Court found in *Harte-Hanks* that the Journal News' conscious decision not to interview the one person who could verify the accuracy of what Thompson told the newspaper's staff, could be construed by the trier of fact as reckless disregard of the truth since it represented "the purposeful avoidance of the truth." Here, by contrast, there *was* a conscious decision made within the group which was plotting the recall of Ms. Smith to speak to the person most capable of confirming the truth or falsity of the August 2004 memorandum. Mr. Preston impressed on the group at its meeting in early May 2005 that the memorandum should not be distributed until its accuracy could be verified. He then spoke to Mr. Stewart, the one person who best knew whether the contents of that document were accurate. Mr. Stewart unequivocally advised Mr. Preston that the memorandum could not be used for the purposes which Barrows, Flohe and Stanek envisioned.

Mr. Preston reported back to Stanek and, as noted previously, he related to Stanek that any suggestion in Stewart's memorandum regarding criminal conduct on the part of Ms. Smith "has no substance to it." (App., p. 174a). The defendants have ignored this critical component of Mr. Preston's testimony and they have argued that Mr. Stanek, in essence, only obtained Mr. Preston's advice that the memorandum not be distributed, not that it contained inaccurate information. Yet, even if one were to accept this version of the operative facts, it does the defendants no good in light of the United States Supreme Court's clear holding in *Harte-Hanks*.

Even if one accepts the view that Mr. Preston's conversation with Stanek did not provide Stanek with actual knowledge of the falsity of the Stewart memorandum, the fact remains that Mr. Preston had previously advised the anti-Smith group, which included Barrows, Flohe and Stanek,

that he was going to the source of the memorandum to determine whether it was accurate. Even viewing Mr. Preston's testimony in a light most favorable to the defendants, after volunteering to determine the accuracy of the Stewart memorandum and speaking directly to the author of that memorandum, Mr. Preston returned to Stanek and told him only that the memorandum could not be used for the purposes that the group planned. Having bluntly been told by Mr. Preston that the memorandum could not be used as the group had planned, Stanek chose to be oblivious as to precisely *why* Mr. Preston was telling him not to distribute the contents of the memorandum. Thus, even if one believes Stanek's view of these critical facts, this was not simply a failure to investigate the accuracy of the Stewart memorandum, his "inaction was a product of the deliberate decision not to acquire knowledge of the facts that might confirm the falsity" of the memorandum. *Harte-Hanks*, 491 US at 692.

Finally, plaintiff would note at least two other pieces of evidence inferentially supporting the jury's verdict with respect to the actual malice reckless disregard standard. Mr. Preston testified at trial that he unequivocally advised Stanek that the Stewart memorandum not be made public. (App., p. 172a). After the memorandum was sent out, Mr. Preston spoke directly to both Barrows and Stanek to find out who was responsible for mailing the memorandum. (App., pp. 148a-149a). Both Barrows and Stanek lied to Mr. Preston; both flatly denied that they had been responsible for mailing the Stewart memorandum. *Id.*

This obvious prevarication provides additional support for the conclusion that these defendants were conscious of the mistake which they had made in making this factually incorrect memorandum public and that they were attempting to hide their involvement in its publication. The fact that these two individuals refused to acknowledge their own participation in the mailing

provides further support the jury's conclusion that they entertained serious doubts as to the accuracy of the information which they had made public.

Finally, plaintiff acknowledges that the *New York Times* actual malice standard is not to be confused with the concept of malice, meaning bad motive or ill will. Thus, actual malice in a public official defamation case, "may not be inferred alone from evidence of personal spite, ill will or intention to injure . . ." *Harte-Hanks*, 491 US at 667, n. 7. However, while such personal ill will *alone* cannot give rise to a finding of actual malice, the United States Supreme Court has ruled that "it cannot be said that evidence concerning motive . . . never bears any relation to the actual malice inquiry." *Harte-Hanks*, 491 US at 668. *See also Celle*, 209 F3d at 182; *Suzuki Motor Corp v Consumers Union of United States*, 330 F3d 110, 1136 (9<sup>th</sup> Cir. 2003); *Duffy v Leading Edge Pools*, 44 F3d 308, 315 n. 10 (5<sup>th</sup> Cir. 1995); *Bentley*, 94 SW3d at 591, 602; *Holbrook v Cassaza*, 204 Conn 336; 528 A2d 774, 779 (1987).

The evidence in this case demonstrated that, even before Ms. Smith assumed her position as Elmwood Township Supervisor, a determined group of citizens was already taking steps to remove her from that office. The distribution of the inaccurate Stewart memorandum was motivated by the defendants' avowed opposition to Ms. Smith. While the ill will which the defendants had for Ms. Smith did not by any means represent the *sole* evidence in this case pertaining to actual malice, the fact remains that this ill will could provide additional support for the conclusion that the defendants disseminated the memorandum despite the fact that they knew its contents to be inaccurate or that they distributed it despite a "high degree of awareness of . . . probable falsity" and despite

“entertain[ing] serious doubts as to [its] truth.”<sup>9</sup>

The Court of Appeals’ erred in concluding that the proofs in this case did not support the jury’s determination that there was clear and convincing evidence of actual malice. While a court may have a greater role to play in reviewing the evidence presented in a defamation action brought by a public official, a reviewing court is not empowered to simply ignore all of the evidence presented in support of the plaintiff’s claim supportive of a jury’s verdict with respect to the element of actual malice.

**II. THE COURT OF APPEALS PATENTLY ERRED IN DETERMINING THAT THE DEFENDANT’S STATEMENTS INCLUDED ON THE AUGUST 2005 MEMORANDUM WERE “INCAPABLE OF DEFAMATORY MEANING.”**

In the penultimate paragraph of its February 3, 2009 opinion, the Court of Appeals offered what appears to be an alternative basis for recovering the jury’s verdict in favor of Ms. Smith. The

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<sup>9</sup>The trial court in this case ruled that, because ill will could not, by itself, support a finding of *New York Times* actual malice, it would not allow plaintiff to introduce evidence of defendants’ ill will toward Ms. Smith. (App. p. 159a). Based on this (erroneous) ruling, the defendants were spared the introduction of evidence which would have reflected on their malice toward the plaintiff. Despite this highly favorable ruling by the trial judge, the defendants could not leave well enough alone. Two of the defendants, Stanek and Flohe, felt compelled to tell the jury under oath that they had *no* ill will or bad feelings toward Ms. Smith. (App. p. 347a).

This testimony was, in a word, unbelievable. Here are two men who, while holding public office, were subject to a recall campaign that Ms. Smith was part of. While both Stanek and Flohe survived that recall, in 2004 they were voted out of office by a slate of candidates led by Ms. Smith. Even before she was sworn into that office, steps were being taken to remove her from office. Indeed, after the publication which is the subject of this case Barrows took the lead in drafting a recall petition against Ms. Smith. Flohe, whose bitterness over his August 2004 primary defeat was still palpable at trial, told the jury that he “detests” Ms. Smith’s governing style. (App. p. 361a). Yet, these two men, who had no need to delve into their personal attitudes toward Ms. Smith in light of the trial court’s evidentiary ruling, were more than willing to completely undermine their own credibility by gratuitously declaring that they bore no bad feelings toward the plaintiff.

Court of Appeals wrote in that final paragraph:

The document contained a handwritten caption added to the document that provided, “Attention: Suttons Bay Villagers Alleged (sic) Misuse of Village Taxpayer Funds?” and “Subject: Personnel meeting scheduled for August 10, 2004 Derrick [sic] Smith”. Defendants claimed to be unaware of the author of the handwritten caption added to the memorandum. However, irrespective of authorship, as a matter of law, the statement alone is incapable of defamatory meaning. The handwritten caption acknowledges that any misuse of village taxpayer funds was only alleged and was followed by a question mark as punctuation. Thus, the writer of the caption did not definitively conclude that plaintiff had engaged in illegal or criminal wrongdoing, and the caption served as an expression of opinion. *See Masson, supra; Chmura, supra*. As noted above, political speech by its nature may have unpalatable consequences and therefore, misleading or distorted statements are subject to protection to ensure uninhibited, robust, and wide-open debate.

(App. pp. 446a-447a).

Thus, the Court of Appeals offered the view that judgment should be entered in defendants’ favor because the handwritten statement “is incapable of defamatory meaning.” What is first noteworthy is that the contents of this paragraph address issues which were not raised by the defendants on appeal. On appeal the defendants raised the question of whether there was sufficient evidence of actual malice to support a verdict under the actual malice standard. The defendants further argued the substance of Michigan’s fair reporting privilege, MCL 600.2911(3). The defendants did not contend that the entire memorandum with its handwritten message, sent to every resident of Suttons Bay, was “incapable of defamatory meaning.” It is a basic principle of appellate law that where an appellant fails to raise an issue on appeal, that issue is deemed abandoned. *Slater v Ann Arbor Public Schools*, 250 Mich App 419, 423, fn1; 648 NW2d 205 (2003); *Derderian v Genesys Health Systems*, 263 Mich App 364, 381; 689 NW2d 145(2004); *Yee v Shiawasee Board Of Commissioners*, 251 Mich App 379, 406; 651 NW2d 756 (2002), *Lawrence v Will Darrah & Associates*, 445 Mich 1, 5 and fn 2; 516 NW2d 43 (1994), *People v Kent*, 194 Mich App 206, 209;

486NW2d 110 (1992), *Swindlehurst v Resistance Welder Corp*, 110 Mich App 693, 701; 313 NW2d 191(1981). While a court has additional review responsibilities in a defamation action filed by a public official, these responsibilities do not include raising and deciding legal issues which the parties have neglected to raise.

There is, moreover, a very good reason why the defendants did not contend that the entirety of the memorandum and the words which the defendants wrote in that document before disseminating it were “incapable of defamatory meaning.” Once Ms. Smith was elected to the Supervisor position, the defendants went in search of information which might be used to show that she had engaged in illegal activity. This was the predicate for the defendant’s interest in acquiring a copy of Mr. Stewart’s August 2004 memorandum. When the substance of this document was discussed at a May 2005 meeting of the group which sought Ms. Smith’s removal, the group members spoke in support of the public dissemination of this document precisely because of the view that it implicated Ms. Smith in illegal activity.

Having been advised in advance of the decision to disseminate the memorandum that Ms. Smith did not engage in any illegal conduct while a Suttons Bay employee, the defendants proceeded with their plan to make the memorandum public. The defendants further punctuated the impact of the memorandum by handwriting a notation that this memorandum contained evidence that Ms. Smith had engaged in a misuse of taxpayer funds.

Even the single authority cited by the Court of Appeals in its decision on this point, *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998), is unresponsive of that Court’s conclusion that defendants’ statement is “incapable of defamatory meaning.” As indicated in *Ireland*, “a communication is defamatory if it tends to lower an individual’s reputation in the community or

deters third persons from associating or dealing with the individual.” (App., p. 301a). The defendants wanted to disseminate the memorandum widely within the local community to suggest that Ms. Smith, while a public employee, had improperly misused taxpayer funds. That message, under the basic test of defamation outlined in *Ireland*, would have the effect of lowering Ms. Smith’s reputation in the community.

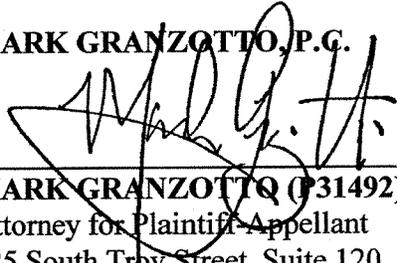
The Court of Appeals seriously erred in adding this additional basis for reversing the circuit court’s judgment.

**RELIEF REQUESTED**

Based on the foregoing, plaintiff-appellant, Derith Smith, respectfully requests that this Court reverse the Court of Appeals' February 3, 2009, decision and remand this matter to that Court for consideration of certain legal issues raised in that Court, but not addressed in the panel's decision.

Respectfully submitted,

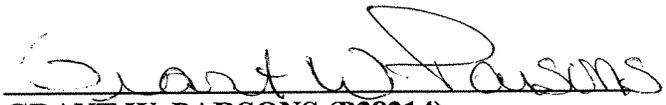
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