

STATE OF MICHIGAN
IN THE SUPREME COURT

DERITH SMITH,

Plaintiff-Appellant,

v

DONALD BARROWS, JOHN STANEK
and NOEL FLOHE,

Defendant-Appellees,
and

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

Defendants.

Supreme Court
Case No. 138456

Court of Appeals
Case Nos. 275297, 275316, 275463

Leelanau Circuit Court
Case No. 05-6952-CZ

**DEFENDANT-APPELLEE DONALD BARROWS'
BRIEF ON APPEAL**

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. SHOULD DONALD BARROWS' MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT HAVE BEEN GRANTED WHERE PLAINTIFF, A PUBLIC FIGURE, FAILED TO SUSTAIN HER BURDEN OF ESTABLISHING FACTS FROM WHICH A JURY COULD CONCLUDE, BY CLEAR AND CONVINCING PROOF, THAT BARROWS HAD PUBLISHED ALLEGEDLY FALSE AND DEFAMATORY STATEMENTS WITH ACTUAL MALICE.**

Plaintiff-Appellant says: "No".

Defendant-Appellee Barrows says: "Yes".

The Court of Appeals said: "Yes".

The trial court said: "No".

- II. SHOULD DONALD BARROWS' MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT BEEN GRANTED WHERE THE STATEMENTS PUBLISHED BY HIM WERE NOT "FALSE AND DEFAMATORY".**

Plaintiff-Appellant says: "No".

Defendant-Appellee Barrows says: "Yes".

The Court of Appeals said: "Yes".

The trial court said: "No".

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

Although the facts of this case are not complicated, plaintiff-appellant, Derith Smith, has not presented them either clearly or completely. She has omitted key points, has confused the timing of others, and has taken some statements out of context. While her argument that the record contained clear and convincing evidence of actual malice principally relies on statements made by Charles Stewart to George Preston (named defendants who were dismissed from this litigation), and statements made by Jerry VanHuystee to Donald Barrows, she does not accurately set forth either the timing or nature of those statements, thus rendering it impossible to focus on what information was actually given, to whom it was given, and when it was given.

Accordingly, before proceeding to argument concerning the import of the record as a whole, and given the independent review that is constitutionally mandated in this case, defendant Barrows will attempt to objectively set forth the pertinent facts. Moreover, although plaintiff has ignored Barrows' argument that his motion for summary disposition should have been granted, and since the opinion of the Court of Appeals is supported by the insufficiency of the record at both the pre-trial and trial stage of these proceedings, the pre-trial record is separately set forth.

A. *Procedural History*

On July 22, 2005, plaintiff-appellant, Derith Smith, commenced suit against George Preston,¹ Donald Barrows, Mary Barrows, the Village of Suttons Bay and Charles Stewart. A First Amended Complaint was filed on December 5, 2005, adding Noel Flohe and John Stanek as defendants². [A copy of the First Amended Complaint is contained within Barrows' Appellee Appendix ("Barrows Apx"), p 1b] According to the allegations of her First Amended Complaint, Derith Smith had been employed by the Village of Suttons Bay between the years of 2001 and

¹ A stipulation dismissing George Preston as a defendant was filed on December 5, 2005.

² A stipulation dismissing Mary Barrows as a defendant was filed on March 13, 2006.

2004, under the supervision of Charles Stewart and at the direction of the Suttons Bay Village Council. (First Amended Complaint, ¶ 10; Barrows Apx, pp 2b-3b) Although Smith asserted that her employment had been wrongly terminated by the Village of Suttons Bay, that termination was not contested. (First Amended Complaint, ¶ 11; Barrows Apx, p 3b) Rather, plaintiff complained that on May 16, 2005, following her November, 2004 election as Supervisor of Elmwood Township, she suffered injury as a result of the public dissemination of an August 10, 2004 report that had been prepared by Charles Stewart and directed to the [Suttons Bay] Personnel Committee [during the period she was performing services for Suttons Bay]. (First Amended Complaint, ¶¶ 12-14; Barrows Apx, p 3b) Plaintiff complained that the contents of the Stewart report were false and defamatory and “concerned inferences of criminal conduct that were subsequently proven untrue”. (First Amended Complaint, ¶¶ 14(e), 17; Barrows Apx, pp 4b-5b)

[There is no dispute that plaintiff began performing services for the Village of Suttons Bay in May, 2001, when she was hired³ to install accounting software for the village’s use. She thereafter served as the appointed village clerk from November, 2001 until March, 2004. In August, 2004, she was discharged from performing services for the village as an assistant bookkeeper/treasurer. This discharge followed consideration of a staff report prepared by the village manager, Charles Stewart. It is the subsequent publication of this report that gave rise to this litigation.]

Count I of plaintiff’s First Amended Complaint was directed against defendants Charles Stewart and Village of Suttons Bay, alleging that their disclosure of the report violated the

³ The word “hired”(and similar words) is not intended to imply that plaintiff was either an employee, an independent contractor or an appointee. No special characterization is intended by any such terms.

Bullard Plawecki Act, MCL 423.501, *et seq.* On those defendants' motions for summary disposition, this Court was dismissed in an Opinion dated June 21, 2006. The trial court rejected plaintiff's contention that this document was a disciplinary report that could not legally have been disclosed, and held that it was a public record. Granting summary disposition as to Count I, the trial court concluded: "The Stewart report was not a disciplinary report, was not required to have been destroyed and was subject to disclosure under FOIA." (June 21, 2006 Decision and Order, p 8; Appellant's Apx, p 43a)

Count II of plaintiff's First Amended Complaint, entitled "Invasion of Privacy, Defamation, Constitutional Violation of Free Speech" complained of the publication of the report by defendants Flohe, Stanek, and Barrows⁴. Plaintiff alleged that these defendants obtained and published the Stewart report (with an added caption), knowing that it contained false statements, with the intent to defame her, and in retaliation for plaintiff's exercise of her constitutional rights. (First Amended Complaint, ¶¶ 27-32; Barrows Apx, pp 6b-7b) On these defendants' motions for summary disposition,⁵ the trial court dismissed plaintiff's claims premised on an alleged constitutional violation (June 21, 2006 Decision and Order, pp 8-9; Appellant's Apx, pp 43a-44a), but allowed the defamation claim to proceed (June 21, 2006 Decision and Order, pp 9-12; Appellant's Apx, pp 44a-47a). The trial court reasoned that plaintiff was a public official, that in order to prevail on her defamation claim she would be required to establish by "clear and convincing evidence" that defamatory statements were made with "actual malice," and that the

⁴ There has been no dispute that the report was legally obtained by the village treasurer, Jerry VanHuystee, and thereafter given to defendants Flohe, Stanek and Barrows. Plaintiff complains only of its further dissemination by these defendants.

⁵ Donald Barrows filed his Motion for Summary Disposition on May 5, 2006. A hearing on this motion was held on June 5, 2006. (Barrows App, p 40b)

evidence on which plaintiff relied, “if believed by the jury, is sufficient to support Plaintiff’s claims against the individual Defendants that each knowingly participated in mailing the Stewart report and that they did so either with actual knowledge that it was false or with reckless disregard of its truth.” (June 21, 2006 Decision and Order, p 11; Appellant’s Apx, p 46a)

In so ruling, the trial court rejected defendants’ argument that their publication of a public record was privileged pursuant to MCL 600.2911(3) and *Kefgen v Davidson*, 241 Mich App 611; 617 NW2d 351 (2000), stating that “there is no privilege to publish a public record which the Defendant knows contains false statements.” (June 21, 2006 Decision and Order, pp 11, 12; Appellant’s Apx, pp 46a-47a) Barrows filed a Motion for Reconsideration of this ruling on July 5, 2006, suggesting that the evidence did not support a finding that he had, in fact, entertained serious doubts about the truth of his publication, and that the trial court erred in its interpretation of the privilege which attaches to the accurate publication of a public record. Barrows’ motion for reconsideration was denied by Order dated September 12, 2006. An application for leave to appeal to the Michigan Court of Appeals was thereafter filed, which was denied on October 20, 2006 “for failure to persuade the court of the need for immediate appellate review.” (CA # 273200)

Trial thereafter commenced on October 24, 2006. Prior to submission of the case to the jury, the trial court granted a directed verdict to defendants Barrows and Flohe on the question of “actual knowledge”, and it submitted the case to the jury as to these defendants based only on “an inference that they might have acted with reckless disregard.” (TR 10/31/06, pp 971-972; Appellant’s Apx, pp 422a-423a) The trial court also granted a directed verdict on plaintiff’s “concert of action” and “joint enterprise” allegations, and the jury was instructed to consider the liability of each defendant separately. (TR 10/31/06 - 11/01/06, pp 978, 1090; Appellant’s Apx,

pp 429a, 432a) The jury returned its verdict in favor of plaintiff and against each defendant on November 1, 2006. (Appellant's Apx, pp 433a-441a) In addition to a monetary award for "campaign expenses" and non-economic damages, the jury wrote on the verdict form as follows: "Also, as part of non-economic damages, 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 Leelanau Enterprise, within 10 business days from today, November 1, 2006." Although the trial court noted that it was not in a position to enforce the award of an apology (TR 11/1/06, p 1110; Barrows Apx, p 118b), it overruled defendants' objections to the inclusion of this award in the Judgment ultimately entered on December 11, 2006 (Barrows Apx, p 119b).

On appeal to the Michigan Court of Appeals, Barrows sought review and reversal of the trial court's denial of his motion for summary disposition, premised on the record created on that motion. See *Pena v Ingham County Rd Comm*, 255 Mich App 299, 309, 313, n4; 660 NW2d 351 (2003). Barrows also argued that he was entitled to a directed verdict at trial, and sought reversal of the Judgment entered against him, and an entry of Judgment in his favor. In the alternative, Barrows sought an order setting the December 11, 2006 Judgment aside in favor of the entry of a Judgment that omitted the reference to an ordered apology. No cross-appeal was filed on behalf of plaintiff.

Oral argument was heard on July 1, 2008. In its unpublished opinion released February 3, 2009, the Michigan Court of Appeals reversed the Judgment entered against Barrows (and Stanek and Flohe), finding the record insufficient to support the requisite finding of actual malice by clear and convincing evidence. (Appellant's Apx, p 443a-447a) It also held that the handwritten caption that had been added to the document before dissemination was incapable of defamatory meaning:

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. * * * [T]he memorandum at issue was not prepared by defendants and contained Stewart's subjective and erroneous view of the status of plaintiff's employment. 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. * * *

The document contained a handwritten caption added to the document that provided, "Attention: Suttons Bay Villagers Alledged (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. *Ireland, supra.* 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 definitely conclude that plaintiff had engaged in illegal or criminal wrongdoing, and the caption served as an expression of opinion. * * *

(Slip Opinion, p 5; Appellant's Apx, p 446a)

As noted in footnote 2 of that Opinion, given this disposition of the appeal the Court of Appeals had no need to address the other issues raised on appeal, which issues included the independent defense that the defendants' publication of a public record was protected by the provisions of the fair reporting privilege set forth in MCL 600.2911(3), as well as defendants' objection to the jury's award of an apology. (Appellant's Apx, p 447a)

B. *Record on Defendant's Motion for Summary Disposition*

In June and July of 2004, the Suttons Bay Village Manager, Charles Stewart, investigated what he thought were irregularities concerning Derith Smith's relationship to the village dating back to 2001. He testified at deposition that after plaintiff had not been reappointed village clerk

in March, 2004, he had been concerned about her status with the village, and the fact that she had continued to write her own paychecks on the basis of \$21.74 per hour in 2004. (Stewart dep, p 125; Barrows Apx, p 17b) Stewart testified that the personnel committee had offered plaintiff a bookkeeper/treasurer position in May, 2004, at a rate of \$17 per hour plus full health insurance. (Stewart dep, p 129; Barrows Apx, p 18b) According to Stewart, after the offer was made it was unclear whether plaintiff had accepted it, but she did continue to come into work. (Stewart dep, p 130; Barrows Apx, p 19b)

Stewart was, accordingly, concerned about plaintiff's status, as well as her rate of pay. He testified at deposition that when he inquired of plaintiff as to whether she had accepted the job, she responded "I am here, aren't I?" (Stewart dep, p 131; Barrows Apx, p 19b) Stewart understood this comment to be a tacit acceptance of the position, yet plaintiff had not recorded any reduction in the pay to which she was entitled. (Stewart dep, pp 131-132; Barrows Apx, pp 19b) Stewart testified that his thought was that if plaintiff was overpaying herself, this might constitute criminal activity. (Stewart dep, p 135; Barrows Apx, p 20b) Stewart was also concerned that plaintiff was attempting to cloud the issue regarding her rate of pay because she had contacted the village president about her rate of pay, although he, Stewart, was her supervisor. (Stewart dep, p 150; Barrows Apx, p 23b) He testified that he consulted with the village lawyers about these issues in July, 2004. (Stewart dep, p 142; Barrows Apx, p 21b)

Stewart thereafter wrote his concerns as part of his monthly staff report to the village personnel committee's monthly meeting in August, 2004. [Appellant's Apx, pp 21a- 28a] Stewart reported therein that plaintiff had originally been hired in 2001 not as an employee, but as an independent contractor, for a specific period of time, to install accounting software, and that she was later appointed the village clerk. He reported that when she was not reappointed

village clerk in March of 2004, the personnel committee created the position of assistant bookkeeper/treasurer and that this position had been offered to plaintiff by committee member Dwaine Schaub. However, the position included a lower rate of pay than plaintiff had been earning as village clerk. Stewart reported that plaintiff never formally accepted the job offer but that she continued to come into the village offices and essentially performed the job. He further reported that during this period of time, and without authorization, plaintiff changed her classification on the payroll system from contract laborer to employee, and continued to pay herself the higher wage of \$21.74 an hour (instead of the new position's lower wages) after communicating only part of the circumstances to the village president. Moreover, according to Stewart, plaintiff had made her salary retroactive to January, 2004 so that she would be considered an employee with taxes deducted. It was Stewart's proposal that the personnel committee reduce plaintiff's wages for the assistant bookkeeper/treasurer position as an employee, or return her position to that of independent contractor. He also raised questions about how effectively plaintiff had performed her jobs. (Appellant's Apx, pp 21a-25a)

Stewart testified at his deposition that he never completed his investigation into these matters because plaintiff was discharged shortly after submission of his report, and the village later withdrew its objection to her claim for unemployment compensation. (Stewart dep, p 146; Barrows Apx, p 22b) According to Stewart, he did not know if there had been any criminal wrongdoing, but believed that some question of potential misconduct remained. (Stewart dep, pp 147, 149-150; Barrows Apx, pp 22b-23b)

In her deposition testimony, plaintiff took issue with the accuracy of Stewart's report to the personnel committee. She testified that she was originally hired as an employee, and not as an independent contractor or consultant, and that she was never paid consultant wages. (Smith

dep, pp 50, 54-56, 74; Barrows Apx, pp 24b-26b, 30b) She further disputed Stewart's statement that she had never received a W-2 statement. (Smith dep, p 60; Barrows Apx, p 27b) Likewise, plaintiff disputed any implication that she had been hired only for the specific purpose of installing software, testifying that she had also been hired to perform other duties. (Smith dep, pp 51-52; Barrows Apx, pp 24b-25b) Also false, according to plaintiff, was the report's notion that she was hired only for 30 to 60 days, testifying that she had been hired with an open-ended term of employment. (Smith dep, p 62; Barrows Apx, p 27b) Plaintiff agreed that a village document stated that she had been hired to serve as bookkeeper for a period of 30 to 60 days, and further stated that this statement was not false, describing this as a standard review or probationary period to determine "whether they wanted me to stay". (Smith dep, pp 66-67, 129, 130, 241; Barrows Apx, pp 28b, 33b, 34b) Plaintiff disputed Stewart's statement that she should have removed herself from the office after failing to be reappointed clerk, testifying that she had been asked to stay. (Smith dep, p 71; Barrows Apx, p 29b) She also disputed his statement that she should have responded to Dwaine Schaub concerning the offer of employment as assistant bookkeeper/treasurer in May, 2004, stating that she did accept the position offered to her by showing up for the job. (Smith dep, pp 72, 82; Barrows Apx, pp 30b, 32b) Plaintiff agreed that she had not contacted the village manager, Charles Stewart, about her compensation, explaining that she contacted instead the village president, Larry Mawby, because the village council was the supervisor of the new bookkeeper position. (Smith dep, p 75; Barrows Apx, p 30b) She also disputed the report's statement that she had, without authorization, changed her classification from contractor laborer to employee, claiming that she had always been an employee. (Smith dep, pp 76-77; Barrows Apx, p 31b) While admitting that it was part of her job to enter wage rates into the accounting software and that she had changed her own hourly rate, she denied that

she had placed herself on the village payroll without the village's knowledge and approval. (Smith dep, pp 78-79, 83; Barrows Apx, pp 31b-32b)

With respect to the dissemination of the Stewart report, the village treasurer, Jerry VanHuystee, testified at his deposition that following the plaintiff's discharge in August, 2004, Donald Barrows asked him if he knew what had caused the village to discharge plaintiff and whether she had done something illegal. (VanHuystee dep, pp 12-13; Barrows Apx, pp 35b) VanHuystee then went to the village offices, asked to see plaintiff's personnel file, and obtained a copy of the Stewart report that was in the file from Stewart. (VanHuystee dep, pp 12, 16-17; Barrows Apx, pp 35b-36b) He gave the report to his sister-in-law, county commissioner Jean Watkowski, of Elmwood Township, to be picked up by her neighbor, Barrows. (VanHuystee dep, p 18; Barrows Apx, p 36b) VanHuystee testified that he believed that the memo made it clear that plaintiff had done nothing illegal. (Van Huystee dep, pp 15, 18; Barrows Apx, pp 35b-36b)

Barrows testified at his deposition that he had picked up the Stewart report from Watkowski's house. (Barrows dep, p 11; Barrows Apx, p 37b) He testified that he believed that the portion of this staff report that pertained to plaintiff should be mailed to Suttons Bay residents "because it indicated what I believed had gone on in the Village of Suttons Bay – or self-explanatory to the people of Suttons Bay." (Barrows dep, p 18; Barrows Apx, p 38b) Barrows testified that with the help of John Stanek and Noel Flohe, envelopes were addressed and stamped, and the document was mailed in May, 2005. (Barrows dep, p 20; Barrows Apx, p 39b) The mailed document was identical to that part of the Stewart staff report pertaining to plaintiff, except for the addition of the handwriting at the top of the first page reading: "Attention:

Suttons Bay Villagers Alleged [sic] Misuse of Village Taxpayer Funds?” (Appellant’s Apx, pp 29a-33a) It also added a reference to “Derrick Smith” at the end of the “Subject” line.

C. *Record at Trial*

Derith Smith had been the Elmwood Township Clerk for twelve years, from 1988 through 2000. [TR 10/31/06 (Smith), p 780; Appellant’s Apx, p 379a] She was thereafter hired by the village manager of the Village of Suttons Bay, Phil Hamburg, in a part-time position as an accountant/bookkeeper. [TR 10/31/06 (Smith), p 783; Appellant’s Apx, p 382a] She was appointed as the village clerk in 2001, and began receiving health insurance in 2002 or 2003 in lieu of a wage increase. [TR 10/31/06 (Smith), pp 785-786; Appellant’s Apx, pp 384a-385a] Charles Stewart became the village manager in August, 2003 [TR 10/24/06 (Stewart), p 222; Appellant’s Apx, p 49a] In April of 2004, plaintiff was not reappointed as the Suttons Bay clerk by the village council, at which point she assumed other duties for the Village of Suttons Bay. [TR 10/24/06 (Stewart), p 231; TR 10/31/06 (Smith), pp 786-787; Appellant’s Apx, pp 58a, 385a-386a]

According to Stewart, after plaintiff was not reappointed village clerk, plaintiff was offered a bookkeeping position at \$17 per hour, although plaintiff was actually paid \$21.74 per hour. [TR 10/24/06 (Stewart), pp 234-236; Appellant’s Apx, pp 61a-63a] He testified that plaintiff prepared but had not signed her own checks⁶, and that he had “signed off” on an hours verification report prepared by plaintiff and presented to him, which report contained the \$21.74 hourly rate, but without really looking at it. [TR 10/24/06 - 10/25/06 (Stewart), pp 231-236, 269-271, 301-302; Appellant’s Apx, pp 58a-63a; Barrows Apx, pp 95b-97b, 101b-102b] Stewart

⁶ The checks were signed by either the village treasurer, Jerry VanHuystee or the village clerk, Dorothy Prescott. [TR 10/25/06 (Stewart), p 345; Appellant’s Apx, p 106a]

testified at trial that he believed that plaintiff had been attempting to circumvent the \$17 per hour wage rate and that if she had been paying herself \$21.74 per hour for a job offered at \$17 per hour, he was concerned that she had been misusing and misappropriating taxpayer funds. [TR 10/25/06 (Stewart), pp 298-300, 336-338; Barrows Apx, pp 98b-100b, 105b-107b] Stewart testified that he eventually learned that plaintiff had spoken to the village president, Larry Mawby, about the rate of pay, although plaintiff had not told Stewart of that discussion. [TR 10/25/06 (Stewart), p 353; Appellant's Apx, p 114a] Plaintiff testified that after she had questioned Stewart why her rate of pay should be reduced, and having been referred to the personnel committee who referred her back to Stewart, she had discussed her rate of pay with Larry Mawby in Stewart's absence. [TR 10/31/06 (Smith), pp 828-830; Appellant's Apx, pp 400a-402a]⁷

Plaintiff's association with Suttons Bay was terminated on August 16, 2004, by a vote of the village personnel committee, and Stewart's investigation into plaintiff's conduct was not completed once the village withdrew its objection to plaintiff's claim for unemployment benefits. [TR 10/24/06 - 10/25/06 (Stewart), pp 268-269, 319; TR 10/31/06 (Smith), pp 780-781; Appellant's Apx, p 96a, 379a-380a; Barrows Apx, pp 94b-95b] In the meantime, in May of 2004, plaintiff had filed to run in the primary for Elmwood Township supervisor against, among others, Noel Flohe, and she won that primary in August of 2004. [TR 10/31/06 (Smith), pp 780, 791; Appellant's Apx, pp 379a, 390a] She then ran unopposed in the regular election, and won the position of Elmwood Township Supervisor in November, 2004. [TR 10/31/06 (Smith), p 779-780; Appellant's Apx, p 379a; Barrows Apx, p 115b]

⁷ These pages of Appellant's Appendix are not properly collated and read in order, would be pp 400a, 402a and then 401a.

Defendants John Stanek, Noel Flohe and Donald Barrows were residents of Elmwood Township who had been politically active in the Township. John Stanek had been a Leelenau County Commissioner from 1985 to 1994, and an Elmwood Township Trustee from 1998 to 2004. [TR 10/25/06 (Stanek), pp 515-516; Appellant's Apx, pp 251a-252a] He had survived a recall campaign in 2003 in which Derith Smith was involved, but was voted out of office in 2004, replaced by a group of candidates that included the plaintiff. [TR 10/25/06 - 10/26/06 (Stanek), pp 516, 587; Appellant's Apx, p 252a; Barrows Apx, p 111b] Noel Flohe was a former Supervisor of Elmwood Township, until he was replaced by plaintiff in 2004. [TR 10/26/06 (Flohe), p 639; Appellant's Apx, p 324a] Barrows had been informally active in politics wherever he lived, including Elmwood Township. [TR 10/25/06 (Barrows), p 444; Appellant's Apx, p 180a]

Barrows testified that after plaintiff won the Elmwood Township primary in August, 2004, he was concerned that plaintiff's performance in Suttons Bay had been similar to that of when she had previously been clerk of Elmwood Township, and he asked Jerry VanHuystee, the Treasurer of Suttons Bay, for information about any "trail" she had left in Suttons Bay. [TR 10/25/06 (Barrows), pp 447; Appellant's Apx, p 183a] Barrows did not ask VanHuystee for the Stewart memo, as he did not know it existed, but he did ask why plaintiff had been dismissed from Suttons Bay. [TR 10/25/06 (Barrows), p 488; Appellant's Apx, p 224a] Jerry VanHuystee testified that Barrows had asked him on several occasions whether plaintiff had done anything illegal while at Suttons Bay and that he had always answered that, as far as he knew, she had not done anything illegal. [TR 10/25/06 (VanHuystee), pp 368-371; Appellant's Apx, pp 125a-

128a]⁸ Indeed, VanHuystee had played no role in either the investigation or discipline of plaintiff and he confirmed that he had not been plaintiff's supervisor, and had not known the answer to Barrows' questions, one way or the other. [TR 10/25/06 (VanHuystee), pp 367, 380; Appellant's Apx, p 124a; Barrows Apx, p 109b] The following cross-examination fairly sums up his testimony in this regard:

Q. Mr. Vanhuystee, as the Village treasurer, you were not involved with oversight or supervising Ms. Smith at her work in 2004, were you?

A. No, I was not.

Q. And, you were not in any contact with Mr. Stewart about his supervision of Ms. Smith, were you?

A. No.

Q. And, were you in any contact with the Village counsel about any supervision they had of Ms. Smith?

A. No, I was not.

Q. So when you say that Mr. Barrows asked you whether Ms. Smith had done anything illegal you didn't know one way or another, did you?

A. That's correct.

Q. You told him, I don't know of anything she did illegal?

A. That's correct.

Q. But you also told him I don't have any idea?

A. That's correct.

⁸ "I told him as far as I know she hadn't done anything illegal on several occasions." [TR 10/25/06 (VanHuystee), pp 369; Appellant's Apx, pp 126a] "Q. And, in each case the question apparently was what? A. What she had done that might be illegal. Q. And, in each case your answer was what? A. As far as I know there was no illegality done." [TR 10/25/06 (VanHuystee), pp 371; Appellant's Apx, pp 128a]

Q. And, then you say that you ask – Mr. Barrows had asked you five times whether she had done anything illegal, you remember that testimony?

A. Yes.

Q. And, as a result of those five questions or five times from Mr. Barrows, you went to the Village offices to get some documentation, true?

A. Yes.

[TR 10/25/06 (Van Huystee), pp 380-381; Barrows Apx, pp 109b-110b)

As Treasurer of Suttons Bay, VanHuystee testified that he had a right to see plaintiff's personnel file at the village and that he had asked to see it in order to stop Barrows' questions. [TR 10/25/06 (VanHuystee), pp 367-368, 371; Appellant's Apx, pp 124a-125a, 128a] When he looked for the personnel file, he found the Stewart staff report. [TR 10/25/06 (VanHuystee), p 371; Appellant's Apx, p 128a] Charles Stewart testified that VanHuystee had had a legitimate right to see the memo that he, Stewart, had prepared and which was contained in the personnel file, and he had given VanHuystee access to it. [TR 10/24/06 (Stewart), p 263; Appellant's Apx, p 90a] Stewart testified that this conversation had occurred after the village had dropped its objection to plaintiff's application for unemployment benefits because the objection had not been substantiated, and that he so told VanHuystee. [TR 10/24/06 (Stewart), p 264-266; Appellant's Apx, pp 91a-93a] Stewart testified, however, that he had had no conversations with Donald Barrows, and had sent Barrows no document. [TR 10/24/06 (Stewart), p 254; Appellant's Apx, p 81a] VanHuystee copied the Stewart memo and dropped it off at his sister-in-law's home in an envelope, to be picked up by Barrows. [TR 10/25/06 (VanHuystee), pp 371-372; Appellant's Apx, p 128a; Barrows Apx, p 108b] The record contains no evidence of any conversations between VanHuystee and Barrows that occurred thereafter.

Barrows picked up the envelope that he knew to be from VanHuystee, and inside he found the “Stewart” memo and payroll information. [TR 10/25/06 (Barrows), pp 449, 450, 463; Appellant’s Apx, pp 185a, 186a, 199a] The memo he received did not contain a caption. [TR 10/25/06 (Barrows), p 450, 454; Appellant’s Apx, pp 186a, 190a] Barrows testified that he made four or five copies of the memo, and gave them to some of the people who had been attending meetings to discuss issues of interest in Elmwood Township. [TR 10/25/06 (Barrows), pp 450-454, 464-465; Appellant’s Apx, pp 186a-190a; 200a-201a] This was an informal gathering of people (not always the same people), who met on at least 10 to 12 occasions at various locations. [TR 10/25/06 (Barrows), pp 450-454; TR 10/26/06 (Stanek), p 590; Appellant’s Apx, pp 186a-190a; Barrows Apx, p 113b] After distributing the memo, Barrows left for Mexico for about a month and a half, and he testified that when he returned there were many copies of the memo floating around the Township. [TR 10/25/06 (Barrows), p 464-466; Appellant’s Apx, pp 200a-202a] Copies of the memo were available at one of the gatherings that occurred at the beginning of May, 2005 at John Stanek’s shop, and it was one of several subjects discussed by the group. [TR 10/26/06 (Stanek), p 589-590; Barrows Apx, pp 112b-113b]

George Preston testified that he was present at the gathering at John Stanek’s shop, and that it was the only time he had ever attended one of these neighborhood meetings. [TR 10/25/06 (Preston), pp 395-397, 413; Appellant’s Apx, pp 133a-135a, 151a] When asked if he was friends of Stanek and Barrows, he explained:

- A. I’m not enemies with them. They are neighbors. John Stanek is my neighbor, we’ve been good neighbors. Mr. Barrows, I really don’t know him, but he lives adjacent to some property that I used to farm and bail hay off from, he would come out and greet me and ask questions, I knew him from that type of acquaintance. * * *

[TR 10/25/06 (Preston), p 411; Appellant’s Apx, p 149a]

Preston testified that the question of mailing the Stewart memo was one of many issues raised at the meeting, and that he had expressed his opinion that it would not be a good idea to do so because no one knew if the document was true, and he volunteered to contact Charles Stewart to discuss the memo with him, to see if he had typed it, and if the information was what he had put in. [TR 10/25/06 (Preston), pp 397-399, 416, 421; Appellant's Apx, pp 135a-137a, 154a, 159a] He testified that his reaction, after reading the memo, was "that if there was some wrongdoing on behalf of Derith's part that there should have been a criminal investigation and I asked later on when I contacted Mr. Stewart, I asked him if there was a criminal investigation on that information contained within this." [TR 10/25/06 (Preston), p 400; Appellant's Apx, p 138a)

Preston testified that he volunteered to talk to Stewart, that no one had asked him to do so, and that this was the first meeting of this group that he had ever attended. [TR 10/25/06 (Preston), pp 413, 416; Appellant's Apx, pp 151a, 154a] Nor was there a vote authorizing him to talk to Stewart, although several participants expressed that they thought this would be a good idea. [TR 10/25/06 (Preston), p 437-438; Appellant's Apx, pp 175a-176a] Barrows testified that he heard Preston say that he would talk to Stewart, that he did not care if Preston did so, but that he did not recall Preston saying at the meeting that the memo should not be sent. [TR 10/25/06 (Barrows), p 467, 470; Appellant's Apx, pp 203a, 206a] Barrows further testified that Preston never attended a subsequent meeting of this group. [TR 10/25/06 (Barrows), p 469; Appellant's Apx, p 205a] Stanek testified that he was unaware that Preston was going to talk to Stewart, and that no one had asked Preston to do so. [TR 10/26/06 (Stanek), p 564, 591; Appellant's Apx, p 283a; Barrows Apx, p 114b]⁹

⁹ Flohe testified that he had not heard any discussion about Preston speaking with Stewart, and did not see the memo at the meeting. (TR 10/26/06 (Flohe), p 643; Appellant's Apx, p 328a)

Preston did, thereafter, speak with Stewart. According to Stewart, he told Preston that the report had been followed up, that the report had not been the final conclusion, that he had had some misinformation, that there were no criminal acts, and that the memo should not be used. [TR 10/24/06 (Stewart), p 244, 251-252, 255-256; Appellant's Apx, pp 71a, 78a-79a, 82a-83a] According to Stewart, Preston was the only person he spoke to about the memo and that he believed that he had made it clear to Preston that there had been no wrongdoing. [TR 10/25/06 (Stewart), pp 324-325, 339-340; Appellant's Apx, pp 98a-101a] Preston testified Stewart had been upset that the memo had gotten out because it had been intended for internal use, but that Stewart had not stated to him that anything in the memo was false. [TR 10/25/06 (Preston), pp 401-403, 417, 427-428; Appellant's Apx, pp 139a-141a, 155a, 165a-166a] Moreover, according to Preston, Stewart did not deny typing the memo, but said that there had not been enough evidence to prosecute:

Q. Then after you talked to Mr. Stewart or when you talked to Mr. Stewart, Mr. Stewart never told you there was anything false in the memo, is that true?

A. No, he did not say that what was inside here was false.

Q. All right. So you had this conversation with Mr. Stewart, and as a result of during the conversation, you and as a result of the conversation you came away from it not knowing whether there was anything true or false in the memo, was that true?

A. No. I disagree with that.

Q. All right.

A. He had indicated I had asked him if there was a police investigation, he said the police did look at it, he was advised they felt there wasn't enough in here to prosecute on it and he never denied that he typed this. He never denied the fact he typed this. Matter of fact, our conversation one could have come to the conclusion he did in fact type it because his name was on it.

Q. Sure, exactly. But he never told you there was anything false in that memo, did he?

A. He did not.

Q. As a consequence you never told anybody after that, anybody you talked to, about the conversation with Mr. Stewart. You never said to them, Mr. Stewart said there is something false in the memo?

A. That's correct, I never said that.

[TR 10/25/06 (Preston), pp 416- 417; Appellant's Apx, pp 154a-155a]

After speaking to Stewart, Preston spoke to John Stanek following a regularly scheduled Township meeting, the date of which was the subject of some dispute,¹⁰ and during which he told Stanek that the memo should not be mailed out. [TR 10/25/06 (Preston), 403-407; Appellant's Apx, pp 141a-145a] Although Preston could not recall exactly what he had said to Stanek, he believed that he had made his point – that the memo should not be sent out. [TR 10/25/06 (Preston), pp 404, 406; Appellant's Apx, pp 142a, 144a-145a] When asked if he had told Stanek about Stewart's state of mind, Preston responded, "I don't recall if I told him that, but I know that I did indicate to him, to Mr. Stanek, that there was no criminal investigation on this and that I felt that it wasn't right to send that letter out." [TR 10/25/06 (Preston), p 407; Appellant's Apx, p 145a] Placing in context plaintiff's brief and incomplete reference to the conversation between Preston and Stanek, Preston further elaborated during his trial examination:

Q. [by Mr. Grierson] Mr. Parsons asked you if you conveyed the substance of your discussion to Mr. Stanek and you said there was – that you felt it was not right to send the letter out?

A. Correct.

Q. And, you said that there was no criminal investigation?

A. Correct.

¹⁰ The question was whether the discussion with Stanek had occurred before or after the memo was mailed out on May 16, 2005, so the issue was whether Preston's discussion with Stanek had been after the May, or after the June township meeting.

Q. Okay.

A. Well, you know what – let me rephrase that. Law enforcement apparently by Mr. Stewart's statement did look at the report, if there was an investigation beyond that I don't know. But I know that Mr. Stewart told me that they looked at it and said there wasn't enough substance there to prosecute on it, that was on the phone, okay. So if the police department has a complaint on file, I couldn't tell you or not.

[TR 10/25/06 (Preston), pp 428-429; Appellant's Apx, pp 166a-167a)

* * *

Q. [by Mr. Parson] Did Mr. Stanek say why not? [why the memo should not be mailed]

A. His 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 Mr. 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.

[TR 10/25/06 (Preston), pp 435-436; Appellant's Apx, pp 173a-174a]

In sum, Preston testified that he told Stanek that there had been no criminal investigation and that it was his own opinion that the memo should not be sent out. [TR 10/25/06 (Preston), p 407, 428; Appellant's Apx, p 145a, 166a] Preston further testified that he did not tell Stanek, or anyone else, that the memo was false. [TR 10/25/06 (Preston), pp 417, 428; Appellant's Apx, pp 155a, 166a]

Stanek agreed that Preston had not told him that anything within the memo was false. (TR 10/26/06 (Stanek), p 585; Appellant's Apx, p 296a] Barrows testified that Preston never even told him that he had spoken to Stewart. [TR 10/25/06 (Barrows), p 467; Appellant's Apx, p 203a]

There was no dispute that the “Stewart” memo was mailed out on May 16, 2005, and that it was headed with an added caption. No one was able to identify who had added the caption, but Barrows testified that he had given his copy of the memo away, and had picked one up from a table after a township meeting and that it had already contained the caption. [TR 10/25/06 (Barrows), pp 453, 473; Appellant’s Apx, pp 189a, 209a] Barrows testified that he mailed the memo without knowledge that it was false [TR 10/25/06 (Barrows), p 502; Appellant’s Apx, p 238a], and that he had had no reason to investigate the memo because he knew that it came from a reliable source, that it was a public record, that it had been written by Stewart and delivered by VanHuystee, that he had no doubts as to its reliability, and no reason to believe that anything within it was false. [TR 10/25/06 (Barrows), pp 490-493, 496; Appellant’s Apx, pp 226a-229a, 232a] With regard to the caption, Barrows read it as an opinion posing a question that was fairly raised by the content of the memo. [TR 10/25/06 (Barrows), p 497; Appellant’s Apx, p 233a]

Approximately two months later, on July 22, 2005, this suit was commenced by Derith Smith against George Preston, Donald Barrows, Mary Barrows, the Village of Suttons Bay and Charles Stewart. Contrary to the implication in plaintiff’s brief, it was only after being served with suit papers against him, and not earlier, that Preston contacted various persons, including Barrows and Stanek, to ask if they had sent the letter out that was the subject of the litigation brought against him. [TR 10/25/06 (Preston), pp 410-412; Appellant’s Apx, pp 148a-150a]

At the conclusion of the proofs, defendant Barrows sought a directed verdict on the bases, *inter alia*, that there was no clear and convincing evidence of malice, or that Barrows knew anything to have been false, or that he had mailed the memo in reckless disregard of its truth or falsity, or that the privilege provided by the fair reporting statute had been avoided. [TR 10/31/06, pp 958, *et seq*; Appellant’s Apx, pp 409a, *et seq*] Moreover, Barrows had been

engaged in protected political activity. [TR 10/31/06, p 963 *et seq*; Appellant's Apx, pp 414a, *et seq*] Barrows also sought a directed verdict on plaintiff's claims of economic damage, and a dismissal of the allegations of a "joint enterprise". [TR 10/31/06, p 960; Appellant's Apx, p 411a]

The trial court granted a directed verdict insofar as the allegations of "joint enterprise" were concerned, ruling that there could be no imputation of knowledge: "* * * The Court does not believe there is a legal precedent to support a joint enterprise theory, imputing an intentional tort to members of a group based on imputed knowledge from other members of the group.* * *" (TR 10/31/06, p 978; Appellant's Apx, p 429a) The trial court also found that the request for economic damages and future loss were not sustainable, but allowed the verdict form to stand for purposes of judicial economy. (TR 10/31/06, p 979; Appellant's Apx, p 430a) No appeal was taken by plaintiff from these rulings, or any other.

However, the trial court otherwise denied the motion for directed verdict, ruling, in part:

* * * 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 16th 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.

* * *

* * * The sum and substance of that evidence [concerning the substance of the memo] would certainly suggest that while Mr. Stewart may have been well-intentioned and certainly entertained opinions when he wrote his memorandum that they were indeed based on false assumptions, however that is not a finding

the Court is going to be repeating to the jury, that seems to be the most plausible inference one can draw from the bulk of evidence derived in this case.

Having said that then, is it accurate that the law of this state would allow a knowing publication of a false public record, and you could complicate that by making it a knowing and anonymous false publication or publication of a false public record or allow it to be done with regard to reckless disregard, is this the kind of political speech that is protected by the first amendment; this Court has made a legal ruling, it well understands the Court of Appeals may disagree, but it is this Court's opinion as a matter of law that if it is known that the public record is false, if it is known that, or it is published with reckless disregard, if the caption has been added that is not fair and true, or at least a reasonable inference from reviewing the caption is it is not fair and true, then legislative intent was not to protect such speech, it may well be a form of political speech. There are all types of forms of political speech; debate may be the highest form of it and negative campaigning may be the lowest form of it, but it is not all protected, unless it falls within these very broad parameters. So while the Court does respect that one inference from the caption is it raises a question intended to generate debate about misusing potentially misusing funds within the township, another reasonable inference that one may draw from the caption is it's a declaratory statement, it's a rhetorical statement, it is a statement that Ms. Smith has misused taxpayer funds. Certainly one of the opinions Mr. Stewart offers in the memorandum is she put herself on the payroll and continued to pay herself more than she was entitled to receive; as this trial has unfolded there is no evidentiary support for either conclusion. That caption placed on top of those opinions in that memo would certainly suggest some form of criminal behavior. So, that is for the jury to determine. If the jury determines that the caption is fair and true, then there is an ability to publish a fair and true report, but it's not for the Court to make that determination.

(TR 10/31/06, pp 971-975; Appellant's Apx, pp 422a-426a)

It was defendant Barrows' position on appeal to the Michigan Court of Appeals, *inter alia*, that in so ruling, the trial court erred both in its application of the law, and in failing to properly apply the "clear and convincing" standard of proof that was required in this case. He also complained that the published statements had not been shown to be both false and defamatory.

STANDARD OF REVIEW

On appeal to the Michigan Court of Appeals, Donald Barrows sought review of the trial court's denial of his motion for summary disposition, as well as the denial of his motion for directed verdict at trial. Plaintiff, Derith Smith, is a public figure who asserted that she had been defamed as a result of Barrows' publication of a public record and the principles applicable to a review of this claim are federal constitutional standards. Pursuant to *New York Times v Sullivan*, 376 US 254, 285; 84 S Ct 710; 11 L Ed 2d 686 (1964), the standard of review calls for independent appellate review. In *Northland Wheels Roller Skating Center, Inc v Detroit Free Press*, 213 Mich App 317, 322; 539 NW2d 774 (1995), the Court of Appeals described this standard of review as follows:

When addressing defamation claims implicating First Amendment freedoms, appellate courts must make an independent examination of the record to ensure against forbidden intrusions into the field of free expression and to examine the statements and circumstances under which they were made to determine whether the statements are subject to First Amendment protection. *Garvelink v Detroit News*, 206 Mich App 604, 608-609; 522 NW2d 883 (1994). Moreover, the trial court's grant of summary disposition is reviewed de novo because this Court must review the record to determine whether the moving party is entitled to judgment as a matter of law. *Id.* at 607. * * *

One of the issues necessarily addressed by the trial court when considering a claim of defamation brought on behalf of a public figure is whether there was clear and convincing evidence to support a finding that the defendant published the allegedly false and defamatory statements with "actual malice." Whether evidence is sufficient to support such a finding is a question of law. *Bose Corp v Consumers Union of United States*, 466 US 485, 490, 510-511; 104 S Ct 1949; 80 L Ed 2d 502 (1984); *In re Chmura*, 464 Mich 58, 72; 626 NW2d 876 (2001); *Kefgen v Davidson*, 241 Mich App 611, 624-625; 617 NW2d 351 (2000).

ARGUMENT

Introduction

This defamation claim was brought by a public official against citizens of the community she serves, complaining that she was libeled when these citizens reproduced and published a staff report prepared by plaintiff's prior employer which commented on her job performance. She complains that this was done because of a desire of these citizens to secure her recall from office. As such it raises the First Amendment concerns articulated by the United States Supreme Court in *New York Times v Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964), which authority governs this litigation, as discussed in *In re Chmura*, 464 Mich 58; 626 NW2d 876 (2001).¹¹ See also, *Locricchio v Evening News Association*, 438 Mich 84; 476 NW2d 112 (1991).

Accordingly, there is no dispute that in order to prevail in this litigation pursuant to both state and federal law, it was plaintiff's burden to establish, by clear and convincing proof, that defendant Donald Barrows published the Stewart staff report with actual malice: knowledge of its falsity or with reckless disregard of same. Notwithstanding plaintiff's repeated reference to the actual malice requirement as a "defense" available to the defendants, in fact it is a heavy burden which has been imposed in defamation suits brought by public officials in order to ensure the protection of First Amendment rights. Indeed, this burden has been statutorily adopted by Michigan as a matter of state law in MCL 600.2911(6).¹²

¹¹ See also, *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468; 624 NW2d 509 (2001); *Kefgen v Davidson*, 241 Mich App 611; 617 NW2d 351 (2000); and *Ireland v Edwards*, 230 Mich App 607; 584 NW2d 632 (1998).

¹² "(6) An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false."

Factually, there is no dispute that the staff report that was circulated by the defendants was authored by Charles Stewart, the village manager of Suttons Bay, and that it was lawfully obtained by defendants. Prior to her election as the Supervisor of Elmwood Township, where the defendants reside and are politically active, plaintiff had worked in various positions in Suttons Bay. To the extent that the Stewart report contained information that was subsequently determined to be false, a central question before this Court is whether, when the defendants published the report, they did so with “actual malice”. The Court of Appeals concluded that the plaintiff had failed to sustain her evidentiary burden of proving actual malice by clear and convincing proof.¹³ In its Order granting leave to appeal, this Court has specifically directed the parties to address “whether the Court of Appeals erred in determining that the plaintiff presented insufficient evidence to support a finding of actual malice for purposes of her defamation claim.” (Appellant’s Apx, p 448a) Thus, this Court, as did the Court of Appeals, will conduct the independent review of the record which is constitutionally required in order to protect the First Amendment rights of persons, such as defendants, who exercise those rights. As explained by the United States Supreme Court in *Bose Corp v Consumers Union of United States*, 466 US 485, 510-511; 104 S Ct 1949; 80 L Ed 2d 502 (1984), while exploring the tension between such independent appellate review and the deference usually accorded to factfinders:

¹³ The Court of Appeals also ruled that judgment in favor of defendants was required because the published statements were not “false and defamatory.” This ruling, which provides an independent basis for affirming the Court of Appeals, is also before this Court. Moreover, because all that Barrows did was publish a public report, albeit a report with an added caption which stated the question posed by the report itself, it was absolutely privileged speech under MCL 600.2911(3) (the “fair reporting” privilege). “Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record * * *, or for a heading of the report which is a fair and true headnote of the report.” Although the Court of Appeals had no need to reach this issue, it does provide an independent basis which supports its ruling.

The requirement of independent appellate review reiterated in *New York Times v Sullivan* is a rule of federal constitutional law. It emerged from the exigency of deciding concrete cases; it is law in its purest form under our common-law heritage. It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of “actual malice.”

As a preliminary matter however, defendant Barrows wishes to place this issue in proper factual context. Although the (faulty) premise of the plaintiff’s argument to this Court is that she was libeled by an assertion that she had engaged in “illegal” conduct while working for Suttons Bay, in fact the basis of the plaintiff’s claim is that these defendants published a staff report authored by the village manager of Suttons Bay that addressed plaintiff’s job performance and posed some questions concerning her actions. Although plaintiff virtually ignores the substance of that staff report (found at Appellant’s Apx, p 29a), a consideration of the actual memorandum does provide the starting point for answering the question of whether the plaintiff had provided clear and convincing evidence that defendants acted with actual malice when they published that document. A review of that document will demonstrate that whether plaintiff had engaged in what might have been considered illegal conduct while working at Suttons Bay was hardly the only source of concern expressed therein that would have been relevant to a consideration of plaintiff’s qualifications and suitability for office in Elmwood Township, and it is a potentially confusing oversimplification to simply refer to the alleged defamation as an assertion of “illegal” conduct.¹⁴

¹⁴ The statements set forth in the Stewart memorandum are discussed *supra*, in Donald Barrows’ Counter Statement of Material Facts and Proceedings, §B, pp 7-8 and are also

Plaintiff's logic also fails when relying on various conversations to support her position that there was clear and convincing evidence of actual malice on the record of this case because, *inter alia*, she has confused and/or mis-stated the timing of some of those conversations. There is, for example, no dispute that Charles Stewart investigated what he perceived to be irregularities in plaintiff's job performance at Suttons Bay, that he presented his findings to the Suttons Bay personnel committee in his staff report, and that plaintiff's employment was, shortly thereafter, terminated. There is no dispute that any doubts that Stewart may subsequently have entertained as to any of the facts set forth in his report were never communicated by him to Donald Barrows. And there is no dispute that any concerns that may have been expressed by Stewart to either George Preston or Jerry VanHuystee were not communicated by either of these individuals to Donald Barrows prior to the mailing of the staff report. There is no evidence that VanHuystee was even aware of the existence of the staff report when he last communicated with Barrows. Nor can the evidence support a finding that any defendant knew that Stewart believed that some of the facts set forth within his report may have been false, because the only person he spoke to, George Preston, did not understand Stewart to have said that anything was false, so Preston did not report that concern to anyone. Moreover, as the trial court granted a directed verdict to the defendants on plaintiff's concert of action/joint enterprise allegations, her attempts to support her allegations concerning the knowledge of one defendant by reference to the alleged knowledge of another must also fail. Any attempt to impute the knowledge or concerns of any of these individuals to Donald Barrows necessarily fails as a matter of logic, as a matter of fact, and as a matter of law.

discussed *infra*, §II.

I. DONALD BARROWS' MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT SHOULD HAVE BEEN GRANTED WHERE PLAINTIFF, A PUBLIC FIGURE, FAILED TO SUSTAIN HER BURDEN OF ESTABLISHING FACTS FROM WHICH A JURY COULD CONCLUDE, BY CLEAR AND CONVINCING PROOF, THAT BARROWS HAD PUBLISHED ALLEGEDLY FALSE AND DEFAMATORY STATEMENTS WITH ACTUAL MALICE.

The parties to this litigation are each politically involved citizens: They have run for political office and have participated in political campaigns, including recall campaigns. They have attended formal meetings of their local government, and have participated in those meetings. They have attended informal meetings of groups of citizens where issues of import to those attending can be discussed, including the performance of their public officials. Such political involvement is also evident in the May 16, 2005 dissemination of a publically available staff report which raised questions concerning plaintiff's performance while working for the Village of Suttons Bay, and it is this conduct which has given rise to this litigation. Yet, this country, and this state, have a tradition of protecting such political activity, including both the right to associate and the right to speak. Accordingly, the right to seek damages in a civil suit as a result of political speech is significantly circumscribed, and the law imposes a heavy burden on those who seek to do so. As noted by the Michigan Supreme Court in *In re Chmura*, 464 Mich 58, 65 (2001),

[p]olitical speech is at the core of our electoral process and of the First Amendment freedoms . . . an area of public policy where protection of robust discussion is at its zenith. * * * Because the central purpose of the First Amendment speech clause is to protect core political speech, we determined that political speech may not be regulated in the same manner that commercial speech is regulated. [Citation and internal quotations omitted]

Similarly, and as a matter of federal constitutional law, in *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 686; 109 S Ct 2678; 105 L Ed 2d 562 (1989), the United States Supreme Court noted that "[t]here is little doubt that 'public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.'" This is such a case.

All parties agree that the constitutional principles enunciated in *New York Times v Sullivan*, *supra*, *St Amant v Thompson*, 390 US 727; 88 S Ct 1323; 20 L Ed 2d 262 (1968), *Bose Corporation v Consumers Union of United States, Inc*, *supra*,, and *Harte-Hanks Communications, Inc v Connaughton*, *supra*, apply to this case.¹⁵ Pursuant to these principles, which defeat plaintiff's claim, she may not prevail against any individual defendant in this litigation unless she proved, by clear and convincing evidence, that allegedly false and defamatory statements were published by that defendant with "actual malice." As defined by the United States Supreme Court in *New York Times*, *supra*, 376 US, 280, a statement is made with "actual malice" when it is made "with knowledge that it is false or with reckless disregard of whether it was false or not." See also, *Ireland v Edwards*, *supra*, 230 Mich App, 614; *Kefgen v Davidson*, *supra*, 241 Mich App, 625; and *Faxon v Michigan Republican*, *supra*, 244 Mich App, 474-475. Significantly, case law is clear that, just as actual knowledge looks to the subjective understanding of the defendant, so too is the "reckless disregard" standard a subjective one. As the United States Supreme Court explained in *St Amant*, *supra*, 390 US, at 731, the reckless disregard standard requires clear and convincing proof that "a false publication was made with a 'high degree of awareness of * * * probable falsity'" or evidence of publication "despite the publisher's awareness of probable falsity". The Court stated that its prior opinions had made clear

that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained

¹⁵ Notwithstanding plaintiff's suggestion to the contrary, the standards set forth in these cases apply equally to a consideration of the denial of defendant's motion for summary disposition. *Anderson v Liberty Lobby, Inc*, 477 US 242, 252 *et seq*; 106 S Ct 2505; 91 L Ed 2d 202 (1986), where, *inter alia*, the court held that, in order to defeat a motion for summary judgment or directed verdict, a plaintiff must produce clear and convincing proof of actual malice. "Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Id.*, at 254.

serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice. *Id.*

Moreover, in order to sustain a finding of actual malice, proof of such must have been “clear and convincing,” and whether or not evidence is sufficient to support a finding of actual malice by clear and convincing proof is a question of law. *Bose, supra*, 466 US, at 490, 510-511; *Harte-Hanks, supra*, 491 US, 685-686; *In re Chmura*, 464 Mich 58, 72 (2001); *Faxon, supra*, 244 Mich App, 474. Although actual malice can be proven with the use of circumstantial evidence, the United States Supreme Court has cautioned that the courts must not place too much reliance on such evidence. *Harte-Hanks, supra*, 491 US, at 668. Nor will a mere failure to investigate suffice to establish actual malice. *New York Times, supra*, 376 US, at 287-288 [The failure of the defendant newspaper to check the accuracy of the advertisement against its own files would, “at most support a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.”]; *St Amant, supra*, 390 US, 732-733 [“Nothing referred to by the Louisiana courts indicates an awareness by St. Amant of the probable falsity of Albin’s statement about Thompson. Failure to investigate does not in itself establish bad faith.”]; *Harte-Hanks, supra*, 491 US, at 688 [“[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. * * * In a case such as this involving the reporting of a third party’s allegations, ‘recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.’”] Likewise, evidence of “ill will” will not suffice, and the relevance of such evidence is, at best, suspect. *Harte-Hanks, supra*, 491 US, at 666-667.

Moreover, any finding of liability is subject to independent appellate review. “In cases where that line [between speech unconditionally guaranteed and speech which may legitimately be

regulated] must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect. * * * We must make an independent examination of the whole record, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.” *New York Times, supra*, 376 US, 285 [citations and internal quotations omitted]. *Bose, supra*, 466 US, 500-501, 503 [“When the standard governing the decision of a particular case is provided by the Constitution, this Court’s role in marking out the limits of the standard through the process of case-by-case adjudication is of special importance.”]¹⁶

Application of these standards to the record of this case mandates an affirmance of the Court of Appeals.

A. The record contains no evidence that Donald Barrows had actual knowledge that any defamatory statements within the Stewart staff report were false.

Notwithstanding the plaintiff’s arguments to the contrary, there is absolutely no evidence in the record of this case, either on defendant’s motion for summary disposition or at trial, that Donald Barrows had actual knowledge that any information contained within the Stewart staff report was false, and the trial court agreed. On Barrows’ motion for directed verdict, the trial

¹⁶ Contrary to plaintiff’s suggestion that more deference should be given to the jury where the issue is “reckless disregard”, both the *St Amant* and *Bose* opinions reflect that the need for independent review is especially important in such cases. In *Bose, supra*, 466 US, 505, the Court spoke to its independent review in cases involving alleged libelous speech, noting: “In such cases, the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited. Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas.”

court held that there was no evidence that he had actual knowledge that the published statements were false, but that it was possible to infer the existence of reckless disregard: “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.” [TR 10/31/06, p 972; Appellant’s Apx, p 423a] As no appeal was taken by plaintiff from this ruling, plaintiff has not preserved the argument made to this Court that her burden of proving actual malice was satisfied by evidence that Barrows had actual knowledge that the Stewart report contained false assertions.

In any event, the trial court properly held that a jury submissible question was *not* presented because the record contains absolutely nothing to support plaintiff’s assertion that Donald Barrows knew that the statements within the report were false.¹⁷ Although plaintiff relies on the testimony of George Preston with regard to his discussions with Charles Stewart and John Stanek, Mr. Preston testified that he had never told either Stanek or anyone else that the report was false, and simply told Stanek that there had been no criminal investigation into the questions raised by Stewart in his report and that, in Preston’s opinion, the report should not be sent out. [TR 10/25/06 (Preston), pp 407, 417, 428; Appellant’s Apx, pp 145a, 155a, 166a] There was no evidence that Stanek repeated even this information to Barrows. Indeed, Preston told no one that information contained within the memorandum was false because it was not Preston’s understanding that anything was false. (TR 10/25/06 [Preston], p 417; Appellant’s Apx, p 155a)

¹⁷ As discussed *infra*, to the extent that the plaintiff relies on the same evidence to support her argument that Barrows had acted in reckless disregard of the statements’ truth or falsity, the argument is equally fallacious.

Indeed, there is no dispute that Preston never spoke to Barrows at all. Nor was there any other evidence in this record that Barrows was told, or otherwise discerned, that the report contained statements that were not true. As Barrows testified, he knew the reliability of the person who prepared the report and that of the person who had provided it to him. [TR 10/25/06 (Barrows), pp 490-493, 496; Appellant's Apx, pp 226a-229a, 232a] Thus, he did no independent investigation into the veracity of the contents of the staff report that had been prepared by Charles Stewart, and he had no reason to do so. The only evidence cited by plaintiff which even arguably relates to the alleged actual malice of Barrows was (1) VanHuystee's testimony concerning his interaction with Barrows, and (2) testimony that, when asked by Preston if he had had anything to do with the publication of the Stewart memo, Barrows denied involvement. This evidence did not suffice to establish actual malice.

Firstly, plaintiff has mischaracterized the substance and import of the VanHuystee testimony. The record is clear that VanHuystee was not involved in the oversight or supervision of the plaintiff (TR 10/25/06 [VanHuystee], p 380; Barrows Apx, p 109b), had had absolutely no role in the investigation or discipline of the plaintiff (TR 10/25/06 [VanHuystee], p 367; Appellant's Apx, p 124a), had not been in contact with Mr. Stewart or the village council about the supervision of plaintiff (TR 10/25/06 [VanHuystee], p 380; Barrows Apx, p 109b), and did not know "one way or another" whether plaintiff had done anything illegal. (TR 10/25/06 [VanHuystee], p 380; Barrows Apx, p 109b) Although VanHuystee testified that he was asked about any illegality by Barrows on five occasions, on five occasions he answered that "[a]s far as I know there was no illegality done." (TR 10/25/06 [VanHuystee], p 371; Appellant's Apx, p 128a) Of course, he was not in a position to know. In fact, there is no evidence that he even knew about the Stewart report when he asked Stewart if he could see plaintiff's personnel file. Rather, it was

in an effort to put an end to Barrows' questions that he contacted Stewart who directed him to the memorandum. (TR 10/25/06 [VanHuystee], p 371; Appellant's Apx, p 128a)

Plaintiff's reliance on Barrows' alleged denial of involvement with the publication in order to prove actual malice is equally unavailing. She argues that this alleged denial supported a conclusion that, at the time of publication, Barrows was conscious of a mistake made in publishing the Stewart memo. This assertion simply lacks any logical merit. Moreover, any relevance such an argument might have had if the inquiry by Preston had occurred shortly after the publication, as implied by plaintiff's argument, is nullified by the omitted fact that, according to Preston himself, the inquiry was made, and the denial asserted, only after this litigation had been commenced against Preston and Barrows (TR 4/25/06 [Preston], p 410; Appellant's Apx, p 148a) – a totally different context within which to view the interchange. As the United States Supreme Court held in *Bose, supra*, 466 US, 512, regarding evidence of the defendant's attempts to avoid responsibility for his publication: "He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made – that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication."

In no event was there clear and convincing proof of actual knowledge. In *Kefgen v Davidson*, 241 Mich App 611, 625 (2000), the Michigan Court of Appeals explained the necessity and meaning of "clear and convincing" proof:

* * * Because a jury verdict in a defamation case involving a public figure may rest only on clear and convincing evidence of actual malice, to survive a motion for summary disposition in such a case, the nonmovant must show actual malice by clear and convincing evidence rather than by a mere preponderance. See *Anderson [v Liberty Lobby, Inc]*, 477 US 242 (1986); see also *New York Times Co [v Sullivan]*, 376 US 254 (1964) *supra* at 279-280. [footnote omitted] Clear and convincing evidence is defined as evidence that

“produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.’ . . . Evidence may be uncontroverted, and yet not be ‘clear and convincing.’ . . . Conversely, evidence may be ‘clear and convincing’ despite the fact that it has been contradicted.” [Citations omitted]

As in both *Kefgen v Davidson, supra*, and *Faxon v Michigan Republican State Central Committee*, 244 Mich App 468 (2001), plaintiff herein did not sustain her burden of demonstrating actual malice either at the summary disposition stage, or at trial. As the Court of Appeals held, a judgment in favor of defendant Barrows was mandated. Assuming that the Stewart report did contain false and defamatory statements, there is no evidence that Barrows had knowledge of their falsity; nor, as discussed below, is a reckless disregard for the truth apparent on this record.

B. The record does not contain clear and convincing proof that Donald Barrows acted with a reckless disregard for the truth when he published the Stewart staff report.

Not only was there *no* evidence of actual knowledge of false and defamatory statements within the Stewart staff report, but there is scant evidence of reckless disregard. Certainly there was no clear and convincing proof of same. As the Michigan Supreme Court noted in *In re Chmura, supra*, 464 Mich, 72 (2001), this standard requires evidence that is “so clear, direct, and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.” [Citation and internal quotations omitted] As further explained in *Kefgen, supra*, at 244 Mich App, 627:

* * * Reckless disregard for the truth necessary to prove actual malice is not established by showing merely that a defendant acted with preconceived objectives or acted upon insufficient investigation. *Ireland, supra* at 622. In determining whether a defendant acted with actual malice, the question is not whether a prudent person would have published or would have investigated before publishing, but

instead is whether the publisher entertained serious doubts regarding the truth of the statements published. *Id.* * * *

There is nothing in the record of this case that would support a finding, by clear and convincing evidence, that Barrows entertained serious doubts regarding the truth of the statements set forth in the Stewart report. Yet, when the trial court denied the defendants' motions for directed verdict, it failed to apply this standard and, instead, denied the motions on the erroneous finding that the record contained some evidence: "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." [TR 10/31/06, p 972; Appellant's Apx, p 423a] In so ruling, the trial court erred, and the Court of Appeals correctly held that this case should not have been submitted to the jury.

Similarly, the trial court erred when it had earlier denied Barrows' motion for summary disposition. While acknowledging that it was the plaintiff's burden to demonstrate the existence of actual malice by the presentation of clear and convincing evidence, the trial court erroneously concluded that the record had been sufficient. In its opinion denying this motion, the court referenced the history between plaintiff and defendants Stanek and Flohe, during which plaintiff had been involved in a campaign to recall them as Elmwood Township officials, as well as the fact that plaintiff had been elected to replace Flohe as Elmwood Township Supervisor. It characterized Stanek and Barrows as supporters of Flohe. The court also referenced plaintiff's reliance on other material in the record:

The Plaintiff also relies upon Defendant Barrows' deposition in which he testified that it was his idea to mail the Stewart report to the masses and that he acted with Defendants Stanek and Flohe; a letter that Defendant Stewart wrote but did not send to Defendant Barrows in which he recounts that he told George Preston in advance of the mailing that the Plaintiff did not engage in any criminal wrongdoing; an e-mail, dated May 19, 2005, that Defendant Stewart sent to the Plaintiff acknowledging that the allegations in the report were false; the deposition

of Defendant Stewart in which he testified that he told George Preston before the mailing that Smith did not engage in any wrongdoing; the deposition and affidavit of George Preston in which he testified that he told the Defendants not to send the mass mailing until he could investigate the truthfulness of the allegations contained therein and that he told Defendant Stanek, among others, that the allegations of wrongdoing were false.

This evidence, if believed by the jury, is sufficient to support Plaintiff's claims against the individual Defendants that each knowingly participated in mailing the Stewart report and that they did so either with actual knowledge that it was false or with reckless disrespect of its truth.

(June 21, 2006 Decision and Order, pp 10-11; Appellant's Apx, pp 45a-46a)

In her Appellant's Brief to this Court, plaintiff continues to rely on such evidence. It does not, however, suffice to support a finding of actual malice. As reflected in the above-quotation, the trial court cited, and plaintiff relies on, the following evidence: (a) a letter that Charles Stewart wrote, but did not send to Barrows; (b) an e-mail dated May 19, 2005, that Charles Stewart sent to plaintiff, acknowledging that allegations in the report were false; (c) the deposition testimony of Charles Stewart that he told witness George Preston before the mailing occurred that plaintiff had not engaged in any wrongdoing; (d) the affidavit of Preston that he had told the defendants not to mail the Stewart report until he could investigate its truthfulness; and (e) that Preston had told "Defendant Stanek, among others, that the allegations of wrongdoing were false." However, the first two points could not have placed Barrows on notice of any inaccuracies because both the letter and the e-mail were written *after* the mailing had occurred and the letter to Barrows was never even sent to him. Likewise Stewart's statement to Preston was not a statement to Barrows, so it could have provided no pertinent information to Barrows. Nor could Preston's pre-mailing advice to wait before mailing the Stewart report help establish either that Barrows knew the report contained false statements, or that he acted in reckless disregard of whether they were false. As noted by the Court of Appeals in *Faxon v Michigan Republican State Central*

Committee, 244 Mich App 468, 474 (2001), reckless disregard is not a negligence standard, and is “not measured by whether a reasonably prudent man would have published or would have investigated before publishing, but by whether *the publisher* entertained serious doubts concerning the truth of the statements published.” (emphasis added)

Finally, that Preston allegedly told “Defendant Stanek, among others” that the allegations of wrongdoing were false does not establish that defendant Barrows was so told. Indeed plaintiff presented no evidence that Preston ever talked to Barrows, or that Barrows was ever told about Preston’s conversation with Stanek before the mailing occurred. Most importantly, there was no evidence that Preston in fact told anyone that anything in the Stewart report was false because, according to Preston himself, Stewart never told him that anything in the memo was false. As Preston testified that Stewart never told him that anything in the Stewart report was false, and testified that he did not recall telling Stanek or anyone else that anything in the report was false, there was no evidence at either the summary disposition stage or at trial that Barrows knew or acted in reckless disregard that anything in the report was false. Thus, the record has never contained evidence from which a jury could reasonably have concluded that there was clear and convincing proof that Barrows acted with “actual malice.”

To the extent that plaintiff has relied, and continues to rely, on Stewart’s statements concerning his own beliefs regarding the veracity of his report, plaintiff’s reliance is misplaced since Stewart’s beliefs were not communicated to Barrows at any relevant point, and because Stewart’s beliefs were not the critical question. There is no evidence that *Barrows* “entertained serious doubts regarding the truth of the statements published,” and certainly no clear and convincing evidence. His motion for summary disposition, as well as his motion for directed verdict at trial, should have been granted on this basis alone.

In support of her argument that this evidence would support a finding of “reckless disregard”, plaintiff relies on *Harte-Hanks Communications, Inc v Connaughton, supra*, while essentially ignoring *St Amant v Thompson, supra*. However, a review of these cases demonstrates that it is *St Amant* that is controlling, while *Harte-Hanks* is materially distinguishable. In *St Amant*, as in the case at bar, the Court was confronted with a defamation action involving political opponents where one (Thompson) complained that statements by the other (St. Amant) falsely imputed to him gross misconduct of a nefarious nature. The case was tried to the court which returned a verdict in favor of Thompson. The evidence demonstrated that St. Amant had no personal knowledge of the activities he reported, that he had relied solely on the affidavit of a third party as to whose reputation for veracity the record was silent, that he had failed to verify the information he was given, and gave no consideration as to whether the statements defamed Thompson. The United States Supreme Court held that this evidence *fell short* of proving reckless disregard. While recognizing that “[r]eckless disregard,’ it is true, cannot be fully encompassed in one infallible definition” and that “its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards” (390 US, 730), the Court found that its cases provided meaningful guidance, emphasizing the subjective nature of the inquiry:

* * * These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. * * * (390 US, 731)

It is submitted that the circumstances presented by the case at bar are analogous to *St Amant*. Barrows relied on the public report prepared by the village manager, with no suspicion that any facts contained therein were not true. On the other hand, the circumstances presented in *Harte-Hanks*, on which plaintiff relies, are distinguishable. In that case, the defendant had, itself,

actually instituted an extensive investigation but, *inter alia*, failed to interview the critical witness known to it, or to listen to tapes provided to it by the plaintiff, either of which actions would have demonstrated what was true and what was false. Rather, the case at bar is properly governed by the more general discussion of defamation cases brought by public officials, or those who seek public office, found throughout the *Harte-Hanks* opinion. Consider, for example, the following passage:

There is little doubt that “public discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule,” * * * and the strongest possible case for judicial review. * * *

* * *

This value must be protected with special vigilance. When a candidate enters the political arena, he or she “must expect that the debate will sometimes be rough and personal,” * * * and cannot “cry Foul!” when an opponent or an industrious reporter attempts to demonstrate” that he or she lacks the “sterling integrity” trumpeted in campaign literature and speeches, * * *

(491 US, 686-687)

In her reliance on *Harte-Hanks*, plaintiff seeks to impose liability on Barrows because he did not investigate the facts contained within the Stewart staff report, suggesting that this was a purposeful avoidance of the truth which may, in some cases, support a finding of reckless disregard. However, case law demonstrates that recklessness of this nature may be found only “where there are obvious reasons to doubt the veracity of the informant or the accuracy of the reports.” *Harte-Hanks, supra*, 491 US, 668. No such obvious reasons existed in this case, nor was there reason to suspect the “probable falsity” of the report. In the absence of such factors, there can be no duty to investigate, or a finding of reckless disregard because of a failure to do so. Plaintiff is essentially urging the adoption of a standard that would require one to obtain personal knowledge of the facts before publishing any potentially damaging information. This is a

standard which would significantly chill First Amendment rights, and is a standard that has been rejected by the United States Supreme Court.

Moreover, to the extent that plaintiff seeks to support the imposition of liability on Barrows by asserting the existence of “ill will,” plaintiff’s efforts must also be rejected. Not only has the United States Supreme Court held that the existence of ill will does not suffice to support a finding of actual malice (*Harte-Hanks, supra*, 491 US, at 666-667), but acceptance of the plaintiff’s argument in this case would, itself, serve to chill the First Amendment rights that the “actual malice” standard is designed to protect. Plaintiff contends that the existence of ill will can be inferred from the fact that defendants are political opponents of the plaintiff. If, however, political opposition can give rise to an inference of ill will, and if ill will may be considered evidence of actual malice, then political opposition will be considered evidence of actual malice. Obviously, as a matter of constitutional law, plaintiff’s premise must be rejected.

Finally, plaintiff argues that the jury’s verdict should be affirmed because it was the jury’s responsibility to assess the credibility of the witnesses and that its verdict necessarily evidences its disbelief of the defendants’ assertions concerning their knowledge of the facts set forth in the Stewart staff report. Were it proper to so interpret the jury’s verdict, such a rejection does not provide the clear and convincing proof that was required in this case. Even if the jury disbelieved every historical fact stated by the defendants, plaintiff put forth no contrary facts which would fill the void and sustain her constitutional burden of establishing actual malice by clear and convincing proof. This issue of credibility and the jury’s appropriate role in cases involving claims of defamation brought by public officials was discussed by the United States Supreme Court in both *Bose, supra* and *Anderson v Liberty Lobby, supra*. As explained in *Bose, supra*, 466 US, at 512, 513:

When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion. [citation omitted] In this case, the trial judge found it impossible to believe that Seligson continued to maintain that the word “about” meant “across.” Seligson’s testimony does not rebut any inference of actual malice that the record otherwise supports, but it is equally clear that it does not constitute clear and convincing evidence of actual malice. Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made – that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

* * *

“* * * We may accept all of the purely factual findings of the District Court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that Seligson or his employer prepared the loud-speaker article with knowledge that it contained a false statement, or with reckless disregard of the truth.

And as the Court explained in *Anderson, supra*, regarding the granting of summary judgment involving issues of actual malice, a plaintiff may not defeat such a motion “without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant’s denial of a conspiracy or of legal malice.” (477 US, 256) Quoting from *Bose, supra*, 466 US, 512, the *Anderson* Court noted that “discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion.” (477 US, 256-257) In the case at bar, plaintiff failed to sustain her burden at either the summary disposition or trial stage of the proceedings, judgment should have been entered in favor of the defendants, and the Court of Appeals properly so held.

II. DONALD BARROWS’ MOTIONS FOR SUMMARY DISPOSITION AND DIRECTED VERDICT SHOULD HAVE BEEN GRANTED WHERE THE STATEMENTS PUBLISHED BY HIM WERE NOT “FALSE AND DEFAMATORY”.

It was the position of Donald Barrows, as discussed above, that the record did not support a finding of actual malice and this argument independently supports the reversal of the Judgment

entered against Mr. Barrows in this case. However, contrary to plaintiff's argument, it was also Barrows' position on appeal to the Michigan Court of Appeals that reversal was mandated when the substance of the statements set forth in the Stewart memo were considered because, under prevailing precedent, these statements are not "false and defamatory".¹⁸ Those statements which were set forth in the memo which might, upon further investigation, have been found to have been "false", such as plaintiff's status as an employee of Suttons Bay rather than an independent contractor, were not "defamatory". Thus, even if Barrows could otherwise have been subjected to liability for defamation due to his publication of the Stewart report, that liability could not be premised on statements that plaintiff had been hired as an independent contractor in 2001, or that she had been hired for a specific purpose, or for a specific period of time. Likewise, Mr. Stewart's statement that plaintiff had never received a W-2 form is not defamatory.

Nor could liability be premised on the Stewart statements that the position offered to plaintiff after she failed to be reappointed as village clerk was offered to her at a lower rate of pay than she had been making. This was factually true, and not defamatory. Likewise, the statement that plaintiff had never formally accepted the position offered was both factually true and not defamatory.

It was also factually true that plaintiff had raised her hourly rate from the \$17.00 per hour offered to her to the \$21.74 she had previously been paid. The question was whether she was properly authorized to do so. At the time he wrote his memo, it was Stewart's belief that plaintiff had done so without his knowledge and without proper authorization. Accordingly, Stewart recommended that plaintiff's hourly rate be reduced as an employee, or that she return to (what he

¹⁸ In order to prevail in *any* defamation action, a plaintiff must establish the existence of a false and defamatory statement concerning the plaintiff. *Ireland v Edwards, supra*, 230 Mich App, 614.

believed to have been her previous) independent contractor status. It was plaintiff's position that she had secured proper authorization for the hourly rate change. Whether or not plaintiff had secured proper authorization was not followed up, or ever determined. (Stewart dep, pp 146, 147, 149-150; Barrows Apx, pp 22b-23b) Pursuant to the authority of *Ireland v Edwards*, 230 Mich App 607, 617-619 (1998), this statement, contained within this public report, could not support a claim of defamation. Whether or not plaintiff secured proper authorization to change a job offered at \$17 per hour to a job paying \$21.74 is not provable as false, relating as it does to the village procedures and the lines of authority. Moreover, in context, this statement was not capable of defamatory interpretation, as it is contained in a public report which pertained, after all, to an ongoing investigation. The report raised the question of proper authorization and, in context, anyone reading the report would understand that this is what it was, and nothing more. Moreover, the report was substantially true.

Given that the statements contained in the Stewart memorandum were unlikely to result in a finding that they were both false and defamatory, as well as the additional defense proffered by the defendants that publication of the memorandum was protected by the statutory fair reporting privilege, MCL 600.2911(3), the plaintiff's focus began to shift to the caption that had been added to the top of the memorandum before it was disseminated by defendants.¹⁹ Plaintiff argued that this caption did not fall within the privilege and that it was, itself, false and defamatory. The Court of Appeals held otherwise, stating that "irrespective of authorship, as a matter of law, the statement alone is incapable of defamatory meaning." (Slip Opinion, p 5; Appellant's Apx, p

¹⁹ Plaintiff's response to defendant's motion for summary disposition focused primarily on the publication of the Stewart document itself. However, in response to Barrows' motion for reconsideration, and at the trial of this matter, plaintiff shifted her focus to the handwritten heading.

446a) Contrary to plaintiff's argument, not only is this holding correct, but it was raised by Barrows as a defense to the liability asserted which was premised on the caption.²⁰

As noted by the Court of Appeals, the following heading to the Stewart report could not support the Judgment in this case:

Attention: Suttons Bay Villagers
Alledged [sic] Misuse of Village Taxpayer Funds?

As consistently argued below, and contrary to the trial court's ruling that one could find that this was a declaratory statement that there had been a misuse of taxpayer funds, it could not be reasonably construed as an assertion of fact, but only as identification of the query posed by the Stewart document itself. As a question, and given the inclusion of the word "alleged" and the use of a question mark, it asks whether there has been a misuse of taxpayer funds. As a statement, it could reasonably be read to indicate no more than that there had been an allegation of a misuse of taxpayer funds, an issue that even Mr. Stewart admitted had been raised by his report.

Mr. Stewart testified that it was his belief when he wrote the report, as well as when he testified, that plaintiff had been trying to circumvent the reduction of her pay rate when she was not reappointed clerk. [TR 10/25/06 (Stewart), pp 299-300; Barrows Apx, pp 99b-100b] He further testified that in the course of his investigation leading to his August 10, 2004 report, he had come to doubt plaintiff's honesty, and that while nothing criminal may have occurred, he believed that there had been an ethical violation. [TR 10/25/06 (Stewart), pp 316-317; Barrows Apx, pp 103b-104b] With regard to his report's relevance to the question of taxpayer funds, the following colloquies are informative:

²⁰ Because of the caption's prominence in the "fair reporting privilege" issue, the argument concerning the defamatory meaning (or not) of the caption was placed in that section of Barrows' Appellant's Brief, pp 42-44.

Q. * * * In the course of your investigation, or as the result of your investigation, you began to doubt Ms. Smith's honesty, isn't that true?

A. Yes.

Q. And, was one of those issues the paycheck issue?

A. Yes.

Q. Were there others?

A. As I recall the paycheck issue was the biggest alarm to me.

Q. And, your own reading of your own memo to the personnel committee raised the question of whether there could be a misappropriation or whether there was a misappropriation of funds even, isn't that true whether it was intentional or unintentional?

A. The August 10th memo?

Q. Yes.

A. Yes.

[TR 10/25/06 (Stewart), p 317; Barrows Apx, p 104b]

Q. When I took your deposition, as you testified here today, you said one of the concerns is if she – one of the concerns as to whether or not there had been a misappropriation of taxpayer funds was that if she had accepted the bookkeeper position the bookkeeper's position was at \$17 an hour where she was continuing to pay herself at a rate of \$21.74 an hour and that was your concern, correct?

A. Correct.

Q. And, then, I asked you, and I'll ask you again, how is that – at that time when you wrote that report, how did you consider that to be misappropriation of taxpayer funds?

A. If she accepted the bookkeeper's position, the bookkeeper's position salary was set at \$17 an hour and the records were reflecting that she was paying herself \$21.74 an hour.

Q. All right, thank you. And, that situation, sir, was part of your call of what you believed to be possible misappropriation of funds?

A. That was a concern, yes.

[TR 10/25/06 (Stewart), pp 337-338; Barrows Apx, pp 106b-107b]

Indeed, in his May 17, 2005 memorandum to the Suttons Bay Village Council, in which he discussed the dissemination of his August 10, 2004 staff report, admitted into evidence as Defendants' Exhibit 1, Mr. Stewart had, himself, described his report as having "called alarm to what I believed to be misuse of funds as applied to Deri's monetary reimbursement for services she provided to the Village." Thus, the caption itself is not provable as being false and, accordingly, could not support a defamation claim. See, *Ireland v Edwards*, 230 Mich App 607, 616-620 (1998).

CONCLUSION

When it granted leave to appeal, this Court expressly directed the parties to address the record evidence that could have supported a finding of actual malice on the part of citizens who published a public report that was critical of the plaintiff public official. In the preceding pages, defendant-appellee, Donald Barrows, has attempted to do so by setting forth the record facts (on both his motion for summary disposition and as introduced at trial), and by discussing why those facts could not support a finding that he either had knowledge of any false and defamatory facts within the Stewart staff report when he published that report, or that he published the report with reckless disregard of whether it was false or not. Although a plaintiff may attempt to sustain her burden of providing clear and convincing proof of actual malice by reference to some circumstantial evidence, there was insufficient evidence in the record of this case to support such a finding. Moreover, although purposeful avoidance of the truth may provide evidence of reckless disregard, the existence of actual malice remains a subjective inquiry and, in the case at bar, there was insufficient evidence to support a finding that Barrows in fact possessed obvious reasons to doubt the veracity of the facts set forth in the staff report. Indeed, the evidence is directly to the contrary.

Moreover, plaintiff responded to this Court's direction by ignoring the trial court's rulings on defendants' motions for directed verdict, by attacking the quality of the opinion released by the Court of Appeals, by ignoring the actual content of the publication that gave rise to this litigation, and by confusing the record of who said what to who, and when. Indeed, an acceptance of plaintiff's legal arguments would necessarily chill the First Amendment rights that the actual malice standard, and the requirement of independent review, were designed to protect. It would require citizens such as the defendants herein to obtain personal knowledge of any information

published about their public officials, particularly where they were politically opposed to that public official. The cases cited throughout this brief mandate a rejection of such arguments.

RELIEF REQUESTED

Defendant-Appellee, Donald Barrows, respectfully requests that this Court affirm the judgment of the Michigan Court of Appeals.

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