**REL: 5/13/2011**



# ALABAMA COURT OF CIVIL APPEALS

**OCTOBER TERM, 2010-2011**

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**2090705**

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**Benjamin L. Little**

**v.**

**Consolidated Publishing Company and Megan Nichols**

**Appeal from Calhoun Circuit Court**
**(CV-09-900147)**

On Application for Rehearing

PER CURIAM.

This court's opinion of December 3, 2010, is withdrawn, and the following is substituted therefor.

Benjamin L. Little appeals from a summary judgment entered by the Calhoun Circuit Court ("the trial court") in favor of Consolidated Publishing Company ("CPC") and Megan Nichols.

The evidence the parties submitted in support of, and in opposition to, Nichols and CPC's motion for a summary judgment tended to show the following. Little, a Christian minister, has been an Anniston city councilman since his election in 2000. In early 2007, Little, acting on the recommendation of Phillip White, then mayor of Uniontown, contacted Yolanda Jackson, a human-resource-management consultant, about possibly addressing what Little considered to be the substandard human-resources practices of the City of Anniston ("the city"). On February 10, 2007, Little drove to Uniontown to pick up Jackson, and the two of them went to Demopolis for dinner, all at the expense of the city. Little and Jackson talked for between 90 minutes and 2 hours, and then Little drove Jackson back to Uniontown, dropped her at the city hall, and returned to Anniston. The next day, Jackson sent her résumé to Little, indicating her willingness to assist in developing new human-resources policies and procedures for the

city. Little recommended Jackson to the other city-council members, but, at that time, they apparently showed little interest in having Jackson perform an audit of the city's human-resources practices.

A year later, however, the city council renewed its interest in the matter and Little, after meeting again with Jackson in Uniontown, arranged for Mayor White and her to attend a city-council meeting in April 2008. At that meeting, Jackson informed the council of her qualifications and Mayor White related the success of Jackson's efforts in helping Uniontown with its human-resources problems. The city council voted 5-0 to pay Jackson $2,500 to perform an audit of the city's human-resources practices. Following the council meeting, Little took Jackson and Mayor White to dinner in Anniston.

Jackson performed the audit. During the auditing process, Jackson did not meet personally with Little, but she did talk with him on the telephone several times. After the audit was completed, Little drove to Uniontown and talked with Jackson about the audit for about 20 minutes. The record does not indicate any other interaction between Little and Jackson.

In November 2008, John Spain was elected to the Anniston city council. At a city-council meeting conducted at some point in February 2009, Spain questioned the usefulness of the audit conducted by Jackson and stated his intention to investigate the matter. Nichols, a reporter for The Anniston Star, a newspaper owned and published by CPC, interviewed Spain and Little after the meeting. Based on her notes from the meeting and her interviews, Nichols wrote an article that appeared on the front page of The Anniston Star on February 19, 2009, under the headline: "Spain wants investigation into HR audit ordered by Little." In that article, Nichols related some facts and the opinions of certain city officials, including Spain, that indicated that the audit had been conducted poorly and had yielded nothing productive. In addition, the article stated:

> "Spain also said there is a buzz in the city that Little had or has a personal relationship with Jackson and that's why he pushed for her hiring last year.
>
> "'If this is not the case, it's very unfair to Councilman Little,' Spain said. 'If there is substance to it, it needs to be disclosed.'
>
> "Little, who is not married, said he is not involved personally with Jackson.

> "'I know a lot of people,' he said. 'But I've never had a relationship with that girl. And if I did have a relationship with her, that wouldn't relate to the city anyway.'
>
> "Several attempts to reach Jackson this week failed."

Nichols submitted an affidavit in support of the motion for a summary judgment in which she stated that, in her interview with Spain, he made the statements that were attributed to him in the article. Nichols stated that it had been her understanding from statements made by Spain during that interview that "there were rumors in the community that Council member Little may have been dating a consultant hired by the City." In her deposition, Nichols clarified that Spain had also indicated to her that there was a "buzz" that Little had based his decision to "push" for Jackson's hiring because of their rumored personal relationship. In both her affidavit and her deposition testimony, Nichols attested that she had quoted Spain and Little accurately in the article. Bob Davis, the editor of The Anniston Star, testified in his deposition that he had contributed to the article by noting that Little was not a married man, in order to give the article "greater context."

Nichols stated in her affidavit that she did not write the article out of ill will, spite, or malice toward anyone. She stated that she was simply reporting the words of Spain as told to her as part of her job as a reporter, which included covering the meetings of the city council. Nichols further attested in her affidavit that she had no concerns or doubts about the accuracy of the information quoted in the story. She stated that she had not investigated whether, in fact, a rumor was circulating about Little and Jackson; she could verify only that Spain had asserted as much. As for checking the factual basis of the alleged rumor, Nichols testified that she had asked Little about the rumor and had attempted to contact Jackson. Nichols and Davis both testified that they had no reason to doubt the veracity of Little's denial. Although Nichols had not been able to reach Jackson, the article was published. Harry Brandt Ayers, the publisher of The Anniston Star, testified that he knew Spain did not like Little but that no editor or other person employed by the newspaper had attempted to ascertain the factual basis of Spain's statements.

On February 20, 2009, The Anniston Star published an editorial that Davis had written titled: "Ben's greatest hits: A litany of crumbling plans." In that editorial, Davis wrote:

> "Most recently we've learned more details about Councilman Ben Little's sweetheart HR audit deal. At Little's urging, Anniston paid Yolanda Jackson of Uniontown $2,500 to examine the city's human resources practices. Working for what city officials say is a few hours and she claims was several days, Jackson produced a report that is virtually useless. Not one recommendation has been implemented."

Davis then recounted several other endeavors Little had undertaken while he was a councilman that Davis considered to have been unsuccessful.

On February 24, 2009, counsel for Little wrote a letter to Ayers, requesting that the newspaper retract certain statements contained in the article and the entire editorial, both of which Little considered to be false and malicious. Specifically, Little's counsel maintained that Little had not ordered the audit or hired Jackson; rather, he said, the city council had voted 5-0 to hire Jackson to conduct the audit. The evidence, construed in a light most favorable to Little, shows that Nichols attended the meeting at which the city council voted to hire Jackson and that Nichols knew that

Little had not "ordered" the audit, as stated in the headline above the initial article reporting that Spain wished to investigate the circumstances surrounding the audit. Little's counsel also asserted that the article had repeated false gossip provided by Spain, who was described in the letter as "a well known opponent of Mr. Little on the city council," to the effect that Little had "pushed" for Jackson's hiring because Little had a personal relationship with Jackson. Little's counsel further objected to the characterization of the audit in the editorial as a "sweetheart" deal that Little had "urged" the council to make.

On February 26, 2009, Little's counsel sent a proposed retraction to counsel for CPC. On February 27, 2009, in an article titled "For the Records" that was printed on page two of that day's edition of The Anniston Star, the following appeared:

> "A headline for a Feb. 19 article in The Anniston Star mischaracterized Anniston City Councilman Ben Little's role in hiring a contractor to audit the city's human resources practices. In fact, the council as a whole ordered the audit. The Star apologizes to Councilman Little for this error.
>
> "Furthermore, the article quoted another city councilman concerning the existence of rumors circulating that Little had some type of personal

> relationship with the contractor hired by the entire council. In context, it was clear that the person quoted was not stating whether or not the rumors were true and the person was expressly quoted as saying that if the rumors were untrue, those spreading the rumors would be unfair to both Little and the contractor. The Anniston Star wishes to make absolutely clear that it has not and is not alleging that such a relationship exists or that such rumors have a factual basis. In fact, Little has vehemently denied such a relationship exists."

Later that day, Little's counsel wrote CPC's counsel, objecting because he had not reviewed or approved the foregoing article before it was published and demanding that different wording appear on the front page of the newspaper. No further correction appeared in the pages of The Anniston Star.

On March 24, 2009, another editorial appeared in The Anniston Star in which it was recounted that some individuals had taken copies of past editorials that were critical of Little and had "penned threats to Little's life in the margins." That editorial quoted Little as blaming the editorial board of The Anniston Star for provoking the death threats through its "vicious and incorrect" editorials. That editorial then stated:

> "Little has so far proven no major inaccuracies in the editorials. In fact, the paper did run a minor

> correction and an apology on a news story, after the mistake was brought to the paper's attention. But Little has presented no evidence of 'viciousness' or 'incorrectness' to the newspaper, even though he has been invited to."

That editorial ended with an invitation for Little to use space in the newspaper for any rebuttal. In a letter dated March 27, 2009, Little's counsel objected to the characterization of the earlier "For the Records" article as a "minor correction" and asked for another retraction. The request was not granted.

Little filed a complaint against CPC and Nichols, as well as several fictitiously named defendants, on May 18, 2009. In that complaint, Little alleged that CPC and Nichols had maliciously published false and defamatory statements about him in the February 19 article and in the February 20 editorial that, he claimed, had not been effectively retracted. Little further asserted:

> "[Little] avers that [CPC] has waged a long campaign to libel and vilify Little in the Anniston community calling him names such as 'a crank.' The object of the campaign was racial in nature and was intended to make [Little] an object of scorn and hatred in the Anniston, Alabama community because of [Little's] efforts to aid the African-American community to have a fair voice in Anniston community affairs, even if that voice is not pleasing to the Anniston white community. The effect of the campaign

> of [CPC] has been to create an atmosphere of hatred of Little in which [CPC's] views of the good of the community was believed to require the elimination of Little from the affairs of the City of Anniston."

Little averred that, as a direct result of the "campaign of vilification" committed by CPC, death threats written in the margin of The Anniston Star editorials had been placed in public places throughout Anniston. Little asserted claims of libel and the tort of outrage and sought compensatory and punitive damages.

CPC and Nichols filed an answer and a counterclaim pursuant to the Alabama Litigation Accountability Act. See § 12-19-270 et seq., Ala. Code 1975. After taking the deposition of Little, CPC and Nichols filed a motion for a summary judgment on September 4, 2009. See Rule 56, Ala. R. Civ. P. Little responded with a brief in opposition to the motion, but he also requested to postpone a hearing on the motion in order to complete discovery. See Rule 56(f), Ala. R. Civ. P. After completing much of that discovery, Little filed a second response to the summary-judgment motion. The trial court heard arguments on the motion on February 22, 2010. The trial court entered a summary judgment in favor of CPC and Nichols as to both claims set out in the complaint.

Little then timely appealed to the Supreme Court of Alabama; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.[1]

Little contends that the trial court erred in granting the summary-judgment motion on his claim of libel. Specifically, Little asserts that he presented substantial evidence creating a genuine issue of material fact as to whether Nichols and CPC had maliciously published a false and defamatory rumor about Little, i.e., that he had "pushed" for Jackson's hiring because he was in a personal relationship with her. Therefore, he contends, the trial court improperly entered a summary judgment in favor of Nichols and CPC as to his libel claim.

Among the grounds on which CPC and Nichols moved for a summary judgment was that the statements at issue were not

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[1]The trial court did not rule on the counterclaim filed by CPC and Nichols; however, "[o]ur caselaw has ... clarified that the failure of a trial court to specifically reserve jurisdiction over an [Alabama Litigation Accountability Act] claim in a summary-judgment order impliedly disposes of the claim and renders the summary judgment final. See Gonzalez, LLC v. DiVincenti, 844 So. 2d 1196, 1201 (Ala. 2002). Accordingly, we hold that the summary judgment is a final judgment that will support an appeal." McGough v. G & A, Inc., 999 So. 2d 898, 903 (Ala. Civ. App. 2007).

published with "constitutional malice" and that, therefore, they are protected from an action for damages by the First Amendment of the United States Constitution. See New York Times v. Sullivan, 376 U.S. 254 (1964).

When a plaintiff in a libel action is a public official and the alleged defamatory statement relates to his conduct as a public official, the plaintiff must establish "constitutional malice" by clear and convincing evidence. Gary v. Crouch, 923 So. 2d 1130, 1138 (Ala. Civ. App. 2005) (citing Wiggins v. Mallard, 905 So. 2d 776 (Ala. 2004); and Smith v. Huntsville Times Co., 888 So. 2d 492 (Ala. 2004)). "Constitutional malice" refers to the standard set forth in New York Times Co. v. Sullivan, supra. "This standard is satisfied by proof that a false statement was made '"with knowledge that it was false or with reckless disregard of whether it was false or not."'" Smith, 888 So. 2d at 499 (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989), quoting in turn New York Times v. Sullivan, 376 U.S. at 279-80).

In the context of a summary-judgment motion as to a claim of libel involving a public official, the United States Supreme Court has explained:

> "'[W]here the New York Times [Co. v. Sullivan] "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual [constitutional] malice, clearly a material issue in a New York Times [Co. v. Sullivan] case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual [constitutional] malice by clear and convincing evidence or that the plaintiff has not.'
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> "Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986) (footnote omitted). The Supreme Court of Alabama has reiterated that '[a] trial judge is not required "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."' Camp v. Yeager, 601 So. 2d [924,] 927 [(Ala. 1992)] (quoting Anderson, 477 U.S. at 249, 106 S. Ct. 2505)."

Gary v. Crouch, 923 So. 2d 1130, 1138-39 (Ala. Civ. App. 2005). On appeal from a summary judgment, this court reviews

the case de novo, applying the same standards as the trial court. See id.

> "When determining if a genuine factual issue as to actual [constitutional] malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times [Co. v. Sullivan, 376 U.S. 254 (1984)]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find [constitutional] malice by clear and convincing evidence."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). In making the determination whether the public figure has produced evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find [constitutional] malice by clear and convincing evidence," id., the court must believe the evidence submitted by the public figure and all justifiable inferences must be drawn in his or her favor. 477 U.S. at 255.

The United States Supreme Court has explained:

> "In [Sullivan], ... the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In Garrison v. State of Louisiana, 379 U.S. 64 (1964), ... the opinion emphasized the necessity for a showing that a false publication was made with a 'high degree of awareness of ... probable falsity.' 379 U.S., at 74.

> Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions. 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."

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

In this case, Nichols wrote an article reporting on a city-council meeting during which the usefulness of a human-resources audit was called into question. During the meeting, Spain discussed his intention to investigate that audit, which, Spain asserted, Little had "pushed" the city council to undertake. After the meeting, Nichols spoke to Spain further about his call for an investigation into the audit. The article stated that "Spain ... said there is a buzz in the city that Little had or has a personal relationship with [Yolanda] Jackson and that's why he pushed for her hiring last year [to conduct an audit for the city]." The article also quoted Spain as saying, "If this is not the case, it's very

unfair to Councilman Little," and "If there is substance to it, it needs to be disclosed." Nichols spoke to Little about Spain's assertions regarding the audit, and, in the article, she wrote that Little had denied the truth of the rumor. Nichols also testified that she had attempted to contact Jackson about Spain's assertion but that she had been unable to reach Jackson.

In reviewing the record, we found no evidence indicating that, at the time the article was published, Nichols or anyone else employed by CPC subjectively knew that Little did not have a personal relationship with Jackson and that Little had not recommended Jackson to perform the audit based on that personal relationship. Based on the evidence in the record on appeal, we conclude that Little did not present sufficiently clear and convincing evidence indicating that CPC and Nichols published the rumor with knowledge of its falsity.

Likewise, Nichols's and Davis's testimony indicating that they had no reason to doubt Little's denial cannot be construed as clear and convincing evidence indicating that they acted "with reckless disregard of whether [the allegedly defamatory statement] was false or not," Sullivan, 376 U.S. at

280, i.e., that they acted with a "high degree of awareness of ... probable falsity." Garrison v. Louisiana, 379 U.S. 64, 74 (1964). In discussing the clear-and-convincing quantum of proof needed to show constitutional malice, i.e., actual malice, the United States Court of Appeals for the Second Circuit wrote: "Surely liability under the 'clear and convincing proof' standard of Sullivan cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 121 (2d Cir. 1977). See also Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. at 660 n.1 (quoting Edwards with approval).

In claiming that Nichols and CPC acted with reckless disregard as to whether the allegedly defamatory statements were false, Little points to what he believes should have been done before the article containing the rumor was published. For example, Little seems to argue that Nichols should have investigated whether, in fact, a rumor was circulating about Little and Jackson. He also argues that Nichols and CPC

should have done more investigation into the factual basis of the alleged rumor. However, failing to investigate the truth behind Spain's assertions as to why he was requesting an investigation into the audit in the manner Little believed should have been done before the article was published is insufficient to demonstrate that Nichols or CPC acted with reckless disregard for the truth. See St. Amant v. Thompson, 390 U.S. at 731.

CPC acknowledged that the headline above the article in question inaccurately stated that Little "ordered" the audit performed by Jackson. Apparently, an unknown copy editor drafted that headline. Roughly a week after the article was published, The Anniston Star published an article correcting the mistake in the headline, noting that the entire city council, not Little acting by himself, had ordered the audit. The text of the original article itself stated that the city council had hired Jackson to conduct the audit and that Spain had asserted that Little had "pushed for her hiring." Whether Little ordered the audit or merely "pushed" for it is immaterial. The gist of the publication of Spain's comments, which is the heart of Little's libel claim, is that Little's

alleged personal relationship with Jackson allegedly led the city to pay for a supposedly worthless audit, i.e., that Little abused his public office. Whether Little ordered the audit or merely recommended it does not alter the nature of the alleged abuse of public office. Cf. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of [determining constitutional malice] unless the alteration results in a material change in the meaning conveyed by the statement.").

Based upon our review of the record, we conclude that a reasonable jury could not find by clear and convincing evidence that Nichols and CPC acted with constitutional malice in publishing the alleged defamatory statements. Therefore, Little cannot sustain his libel claim against Nichols and CPC. Accordingly, the trial court properly entered the summary judgment in favor of Nichols and CPC as to Little's libel claim.

Judge Moore, in his dissent, relies on WKRG-TV, Inc. v. Wiley, 495 So. 2d 617 (Ala. 1986), as well as other cases applying common-law principles that were decided before 1986,

for the proposition that, when reporting on an allegedly defamatory statement made by a third party in a public meeting, a news reporter's key inquiry must be whether the content of that statement is substantially true, not whether the statement itself is being accurately reported. ___ So. 3d at ___. In Wiley, our supreme court affirmed the denial of a motion for a summary judgment, appealed pursuant to Rule 5, Ala. R. App. P., and held that a television station did not have a constitutional right to repeat allegedly false statements about a public official "simply because they were made at a public meeting on a matter of public concern." Wiley, 495 So. 2d at 619. We note, however, that Wiley, which was decided in September 1986, does not mention the United States Supreme Court's holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986), decided in April 1986, regarding speech that is of public concern. In Hepps, the United States Supreme Court noted that, "[w]hen the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." 475

U.S. at 775. We cannot reconcile the United States Supreme Court's holding in Hepps with our supreme court's holding in Wiley.

> "The second paragraph of Article VI of the United States Constitution sets out what is known as the Supremacy Clause:
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> > "'This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.'
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> "The United States Supreme Court has repeatedly held that '[i]t is basic to this constitutional command that all conflicting state [laws] be without effect.' Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128-29, 68 L. Ed. 2d 576 (1981) (citing M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427, 4 L. Ed. 579 (1819)). Therefore, when federal and state laws conflict, the federal law triumphs and preempts the conflicting state law.
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> "Not only are conflicting state statutes and regulations preempted, but state common law rules are also preempted to the extent that they conflict with federal law."

Cantley v. Lorillard Tobacco Co., 681 So. 2d 1057, 1059 (Ala. 1996). Because our supreme court's holding in Wiley conflicts with the constitutional protections the First Amendment affords in circumstances such as those in the instant case, as those protections have been articulated by the United States

Supreme Court's holding in Hepps, this court is bound to follow the opinion of the United States Supreme Court.

Moreover, we note that, although no Alabama appellate court has followed Wiley for the proposition the dissenting opinion relies on in this case, both this court and our supreme court have followed Hepps subsequent to the release of Wiley. See Ex parte Rudder, 507 So. 2d 411, 416 (Ala. 1987) (citing Hepps for the proposition that, "where it is determined that a private individual is alleging defamation, there must be a determination of whether the defamatory speech involves a matter of public concern"); see also Forrester v. WVTM TV, Inc., 709 So. 2d 23 (Ala. Civ. App. 1997) (same).

Little also contends that the trial court erred in entering the summary-judgment on his tort-of-outrage claim. Specifically, he asserts that he produced substantial evidence creating a genuine issue of material fact as to whether CPC committed acts of outrageous conduct by publishing what Little said were racially motivated attacks on him and that those attacks caused him to be subjected to death threats. Little also asserts that the trial court erred in concluding that his tort-of-outrage claim was subsumed in his libel claim. Alabama

law recognized the tort of outrage or, as our caselaw also refers to it, intentional infliction of emotional distress, Stewart v. Matthews, 644 So. 2d 915, 918 (Ala. 1994), in American Road Service Co. v. Inmon, 394 So. 2d 361 (Ala. 1980), when the supreme court held:

> "[O]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress and for bodily harm resulting from the distress. The emotional distress thereunder must be so severe that no reasonable person could be expected to endure it. Any recovery must be reasonable and justified under the circumstances, liability ensuing only when the conduct is extreme. ... By extreme we refer to conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."

394 So. 2d at 365. That tort has since been limited by caselaw to only a few factual situations. See Michael L. Roberts & Gregory S. Cusimano, Alabama Tort Law 23.0 (2d ed. 1996). Little argues that this court should now expand the cause of action to encompass situations in which a newspaper publisher, motivated by racial bias, issues libelous denunciations of a public official that cause unknown third persons to issue death threats to that public official.

Little also argues that the claim should not be considered to be subsumed in the tort of libel.

Some caselaw cited by Little, who is African-American, indicates that courts of other jurisdictions have recognized that a defendant may be liable for outrageous conduct in allowing a hostile work environment in which a plaintiff is forced to endure racial taunts or slurs. See Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735, 736, 565 P.2d 1173, 1174 (1977); Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493, 496, 86 Cal. Rptr. 88, 89-90, 468 P.2d 216, 218 (1970); see also Gomez v. Hug, 7 Kan. App. 2d 603, 604, 645 P.2d 916, 918 (1982); and Jones v. Fluor Daniel Servs. Corp., 959 So. 2d 1044, 1045 (Miss. 2007). The holdings of those cases do not readily translate to the situation in this case because Little has not presented any evidence indicating that the editors of The Anniston Star used any racial epithets against Little while exercising a position of authority over him. Nevertheless, Little argues that, based on those cases, we should hold that a newspaper commits the tort of outrage when

it wrongfully or falsely criticizes a public official based on improper racial motivations.[2]

We need not decide that question, however, because Little has not presented substantial evidence to support his theory. When viewed in a light most favorable to Little, the evidence shows that, since he became a councilman, many editorials printed in The Anniston Star have criticized Little's leadership, policy choices, and effort. It appears that Little has taken positions on several subjects of political interest that conflict with the stance of the editorial board of the newspaper, particularly regarding a dispute as to the best and highest use of Fort McClellan, a topic of much public debate in Anniston. Little testified that he believed that those editorials stemmed not from legitimate public debate, but from the fact that he is an African-American and refuses to "kowtow" to the wishes of the ownership of The Anniston Star. To support his opinion, Little presented evidence indicating only that his name had appeared in the newspaper a disproportionate number of times when compared to his

[2]Little did not cite to the trial court or to this court any case directly on point.

Caucasian counterparts. CPC countered that it had printed more stories about Little solely because of his outspokenness on topics of public interest. The evidence submitted by Little hardly constitutes substantial evidence indicating that CPC has instituted a campaign against him based on improper racial motivations. See § 12-21-12(a), Ala. Code 1975 (requiring proof of "substantial evidence" in order "to submit an issue of fact to the trier of the facts"); and West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989) (defining "substantial evidence" as "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved").[3]

We also need not decide whether, absent an improper racial motivation, a newspaper can be held liable for

[3]In another context, the Alabama Court of Criminal Appeals has stated that "'statistics and opinion alone do not prove a prima facie case of [racial] discrimination.'" Banks v. State, 919 So. 2d 1223, 1230 (Ala. Crim. App. 2005) (quoting Woods v. State, 845 So. 2d 843, 845 (Ala. Crim. App. 2002)). We need not discuss at any length the type of evidence that would suffice to prove that a defendant acted with racial animus in an outrageous manner. We simply hold that the evidence presented in this case does not amount to substantial evidence of an improper racial motivation.

outrageous conduct when its readers instigate death threats against a public official based on false or misleading information contained in editorials. Little has couched his entire argument regarding his tort-of-outrage claim specifically to include the racial component. This court cannot make and address legal arguments for an appellant. See Dunlap v. Regions Fin. Corp., 983 So. 2d 374, 378 (Ala. 2007).

Because Little has not presented substantial evidence to support his tort-of-outrage claim, the trial court properly entered a summary judgment on that claim. Hence, we need not consider Little's argument that his claim was not subsumed in his libel claim.

For the foregoing reasons, the judgment of the trial court is affirmed.

APPLICATION GRANTED; OPINION OF DECEMBER 3, 2010, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Thomas, J., concurs.

Thompson, P.J., and Bryan, J., concur specially.

Moore, J., concurs in part and dissents in part, with writing, which Pittman, J., joins.

THOMPSON, Presiding Judge, concurring specially.

I agree that Benjamin L. Little failed to demonstrate that Consolidated Publishing Company and Megan Nichols (collectively "CPC") acted with "constitutional malice," also referred to as actual malice, in publishing the allegedly defamatory statements. I write specially to point out that the published statements also involved matters of public concern that are entitled to heightened scrutiny.

> "In actions for defamation, there must be an initial determination by the trial judge in regard to the status of the allegedly defamed person as a public official, a public figure, or a private individual. Fulton v. Advertiser Co., 388 So. 2d 533 (Ala. 1980), cert. denied, 449 U.S. 1131, 101 S. Ct. 954, 67 L. Ed. 2d 119 (1981). Furthermore, where it is determined that a private individual is alleging defamation, there must be a determination of whether the defamatory speech involves a matter of public concern. Philadelphia Newspapers, Inc. v. Hepps, [475 U.S. 767 (1986)]. These determinations are questions of law for the trial judge. Fulton. These issues must be resolved first, because the manner of their resolution determines what elements of proof are necessary for recovery. Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979), citing New York Times Co. v. Sullivan, [376 U.S. 254 (1964)]."

Ex parte Rudder, 507 So. 2d 411, 416 (Ala. 1987).

In cases involving First Amendment disputes, like the instant case, courts are often called upon to balance

competing important interests: allowing the continuance of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), "without unduly sacrificing the individual's right to be free of unjust damage to his reputation." Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113, 115 (2d Cir. 1977).

In this case, Little, an Anniston city councilman, asserted that CPC acted with constitutional malice in publishing a statement that another councilman, John Spain, made: that there was a "buzz in the city that Little had or has a personal relationship with [Yolanda] Jackson [the person who conducted the human resources audit at issue] and that's why he pushed for her hiring last year." Little asserted that the rumor was false and that, in publishing Spain's statement, CPC defamed him.[5] CPC defended publication of the statement on several grounds, including that it had accurately and

[5]I do not reach the issue of whether the statements at issue are, in fact, defamatory.

truthfully reported the events that occurred during and after the city-council meeting at which an investigation into the audit was discussed. The main opinion, relying on WKRG-TV v. Wiley, 495 So. 2d 617 (Ala. 1986), among others decided before 1986, rejects that reason as a valid defense in this case.

In Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986), the United States Supreme Court noted that, "[w]hen the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." The Hepps Court then wrote as follows:

> "To ensure that true speech on matters of public concern is not deterred, we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern.
>
> "In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. See Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 540 (1980) (content-based restriction); First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978) (speaker-based restriction); Renton v. Playtime Theaters, Inc., 475

U.S. 41, 47-54 (1986) (secondary-effects restriction). See also Speiser v. Randall, 357 U.S. 513 (1958) (striking down the precondition that a taxpayer sign a loyalty oath before receiving certain tax benefits). It is not immediately apparent from the text of the First Amendment, which by its terms applies only to governmental action, that a similar result should obtain here: a suit by a private party is obviously quite different from the government's direct enforcement of its own laws. Nonetheless, the need to encourage debate on public issues that concerned the Court in the governmental-restriction cases is of concern in a similar manner in this case involving a private suit for damages: placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result. See New York Times, 376 U.S., at 279; Garrison [v. Louisiana], 379 U.S. [64,] 74 [(1964)], ('Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned'). Because such a 'chilling' effect would be antithetical to the First Amendment's protection of true speech on matters of public concern, we believe that a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant. To do otherwise could 'only result in a deterrence of speech which the Constitution makes free.' Speiser, supra, 357 U.S., at 526.

"We recognize that requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so. Nonetheless, the Court's previous decisions on the restrictions that the First Amendment places upon the common law of defamation firmly support our conclusion here with respect to the allocation of the burden of proof. In attempting to resolve related issues in the defamation context, the Court

> has affirmed that '[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.' Gertz [v. Robert Welch, Inc.], 418 U.S. [323,] 341 [(1974)]. Here the speech concerns the legitimacy of the political process, and therefore clearly 'matters.' See Dun & Bradstreet[, Inc. v. Greenmoss Builders, Inc.], 472 U.S. [749,] 758-759 [(1985)] (speech of public concern is at the core of the First Amendment's protections). To provide '"breathing space,"' New York Times, supra, 376 U.S., at 272 (quoting NAACP v. Button, 371 U.S. [415,] 433 [(1963)], for true speech on matters of public concern, the Court has been willing to insulate even demonstrably false speech from liability, and has imposed additional requirements of fault upon the plaintiff in a suit for defamation. See, e.g., Garrison, 379 U.S., at 75; Gertz, supra, 418 U.S., at 347."

Hepps, 475 U.S. at 776-78 (first emphasis added).

Before Hepps was decided, the United States Supreme Court had written:

> "[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."

Garrison v. Louisiana, 379 U.S. 64, 73 (1964)

This is not a case of a so-called "chase after rumors." CPC did not merely publish an article that there were rumors

circulating throughout the area that a public official had allegedly been involved in indiscretions. Instead, the article at issue was about one city councilman seeking an investigation into a human-resources audit. The article related city officials' statements regarding the way the audit had been conducted, and Spain's questioning of the usefulness and validity of the audit. One of the questions raised by Spain was whether there was any truth to the "buzz" that Little had pushed for the audit because he had had a "personal relationship" with the woman who performed the audit. The article went on to quote Spain as saying, "If this is not the case, it's very unfair to Councilman Little," and "If there is substance to it, it needs to be disclosed." In other words, an article about the Anniston city council's discussion regarding an investigation of a human-resources audit included a statement from Spain that one of the reasons why he believed the investigation was necessary was because Little may have had a personal reason for hiring the auditor. The language at issue is about the legitimacy of the public process; that is, it is about a matter of public concern. Furthermore, unlike Hepps, this case involves a statement regarding a public

official. As such, the language at issue is "'speech that matters'" and, therefore, is deserving of the protections afforded by Hepps.

I believe, therefore, that, as a matter of law, under Hepps, Little failed to meet his burden of showing the falsity of the statements he claims were defamatory, in both the article and in the editorial at issue. Therefore, the summary judgment on his claim of libel against CPC was proper.

BRYAN, Judge, concurring specially.

I agree with the statement in Judge Moore's special writing that "[n]othing in [WKRG-TV, Inc. v.] Wiley[, 495 So. 2d 617 (Ala. 1986),] contradicts any statement of the law made in [Philadelphia Newspapers, Inc. v.] Hepps[, 475 U.S. 767 (1986)]." ___ So. 3d at ___ n.10. In all other respects, I concur in the main opinion.

MOORE, Judge, concurring in part and dissenting in part.

I concur in the decision to grant the application for rehearing as to the propriety of the summary judgment entered on the libel claim filed by Benjamin L. Little against Consolidated Publishing Company ("CPC") and Megan Nichols. I also concur to affirm the trial court's summary judgment as to Little's tort-of-outrage claim; however, I dissent from the decision to affirm the summary judgment on Little's libel claim.

In order for a public figure, like Little, see Mobile Press Register, Inc. v. Faulkner, 372 So. 2d 1282 (Ala. 1979), to recover compensatory or punitive damages for libel, that public figure must prove that the defendant, with "constitutional malice," published to another written or printed material containing a false and defamatory statement concerning the public figure, which is either actionable without having to prove special harm (per se) or actionable upon proof of special harm (per quod). See Ex parte Crawford Broad. Co., 904 So. 2d 221, 225 (Ala. 2004). In this case, CPC and Nichols moved for a summary judgment on the grounds that the statements upon which Little predicated his libel

claim were not false or defamatory, that they enjoy qualified immunity from liability for publishing those statements, and that the statements were not published with constitutional malice. On appeal, Little challenges each of those grounds as being insufficient, either factually or legally, to support the summary judgment entered by the trial court.

1. The "Truth" Argument

In his complaint, Little alleged that CPC and Nichols libeled him in the February 19, 2009, story in The Anniston Star by stating: "[John] Spain also said there is a buzz in the city that Little had or has a personal relationship with [Yolanda] Jackson[, the person hired by the Anniston city council to conduct an audit of the city's human-resources practices,] and that is why [Little] pushed her for hiring last year." Little further essentially alleged that CPC and Nichols reiterated those assertions in the editorial published on February 20, 2009, in which Bob Davis, after referring to "Little's sweetheart HR audit deal," wrote: "At Little's urging, Anniston paid Yolanda Jackson of Uniontown $2,500 to

examine the city's human resources practices."[6] CPC and Nichols asserted in their summary-judgment motion that all the allegedly offensive statements were "substantially true." See 1 Alabama Pattern Jury Instructions: Civil 23.04 (2d ed. Supp. 2009) ("In determining whether the statement was true or false, you must not consider whether the statement was absolutely and in all respects accurate, but rather whether the statement was substantially accurate and accurate in all material respects with regard to the plaintiff.").

Because the published statements involved a public figure and involved a matter of public concern, Little is not entitled to any presumption that the statements published by CPC and Nichols were false. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776-77 (1986). The freedom of speech guaranteed by the First Amendment of the United States Constitution places the burden of proving falsity at trial

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[6]Little arguably claimed in the trial court that he had also been defamed by other statements contained in editorials published in The Anniston Star; however, on appeal, Little does not argue that the trial court erred in entering a summary judgment as to any libel claim based on those other statements. Hence, I do not address those claims. See Rogers & Willard, Inc. v. Harwood, 999 So. 2d 912, 923 (Ala. Civ. App. 2007) ("This court will not consider on appeal issues that are not properly presented and argued in brief.").

squarely on a public- figure plaintiff claiming injury to his or her reputation as the result of statements that involved matters of public concern and were published by a media defendant. Id. at 775-76. Thus, in this case, Little would bear the burden at trial of proving that CPC and Nichols published false statements regarding his relationship with Jackson and the impact that relationship had on his decision to recommend her hiring to the Anniston city council. In the context of a summary-judgment motion,

> "'[i]f the burden of proof at trial is on the nonmovant, the movant may satisfy the Rule 56[, Ala. R. Civ. P.,] burden of production either by submitting affirmative evidence that negates an essential element in the nonmovant's claim or, assuming discovery has been completed, by demonstrating to the trial court that the nonmovant's evidence is insufficient to establish an essential element of the nonmovant's claim....'"

Ex parte General Motors Corp., 769 So. 2d 903, 909 (Ala. 1999) (quoting Berner v. Caldwell, 543 So. 2d 686, 691 (Ala. 1989) (Houston, J., concurring specially)). Hence, at this stage of the proceeding, CPC and Nichols bore the burden of proving either that the alleged defamatory statements were not false or that Little could not prove their falsity with substantial evidence. See Rule 56, Ala. R. Civ. P.

In their summary-judgment motion, CPC and Nichols initially argued that they had negated an essential element of Little's claim by proving that they accurately quoted Spain. Basically, CPC and Nichols maintain, as asserted in the February 26 "correction" printed in the "For the Records" article, that they did not publish a story stating that Little and Jackson actually had engaged in a personal relationship or that, based on that relationship, Little had, in fact, pushed for Jackson to be retained for the audit. They contend that they published a story that reported only that Spain had said that there was a rumor to that effect circulating around Anniston. They contend that, because they accurately quoted Spain, along with Little's denial of the rumor, they truthfully reported the events occurring during and after the February city-council meeting.[7] The trial court noted that,

[7]Little takes issue with that argument. Little contends that, in her affidavit, Nichols stated only that Spain had told her that he had heard a rumor that Little was or had been involved personally with Jackson but that, later, in her deposition, Nichols added that Spain had also stated that the rumor accused Little of pushing for the audit due to that personal relationship. I disagree. In her affidavit, Nichols stated generally that Spain had made all the statements that she had attributed to him in the story, which would include the statement that it was rumored that Little had pushed for the audit due to his alleged personal relationship with

regardless of the falsity of the rumor, Little had failed to prove that there was not a rumor floating around Anniston as described by Spain to Nichols. CPC and Nichols argue that, without such evidence, they cannot be liable for merely circulating Spain's statements.

In WKRG-TV, Inc. v. Wiley, 495 So. 2d 617 (Ala. 1986), a media defendant made the identical argument that CPC and Nichols make -- that "the publisher is making a 'true' statement of the events of the meeting, regardless of the truth or falsity of the statements made in the meeting." 495 So. 2d at 619. Our supreme court rejected that argument, holding that, under Alabama law, when the media reports a defamatory statement made by a third party, the repetition of that defamatory statement is considered a separate and actionable publication. 495 So. 2d at 619. Hence, when determining truthfulness, the key inquiry is not whether the reporter fairly and accurately quoted or summarized the

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Jackson. In her affidavit, Nichols did not further address that particular allegation made by Spain, but the fact that she did not further discuss the allegation does not render her later, more specific, deposition testimony inconsistent with her affidavit. Hence, I conclude that the record contains essentially undisputed evidence indicating that, in the story, Nichols simply reproduced the statements made by Spain.

statement of the third party, but whether that statement is substantially true.

I find the holding in Wiley to be consistent with the following statements of the common law of defamation.

> "The fact that the publication of the scandalous matter purports to be based on rumor is no defense. Publication of libelous matter, although purporting to be spoken by a third person, does not protect the publisher, who is liable for what he publishes. Stephens v. Commercial News Co., 164 Ill. App. 6 [(1911)]; Cooper v. Lawrence, 204 Ill. App. 261-270 [(1917)]; O'Malley v. Illinois Publishing & Printing Co., 194 Ill. App. 544 [(1915)]. Very pertinent to this point is the comment in Newell on Slander and Libel, 4th Ed., § 300. 'A man cannot say there is a story in circulation that A. poisoned his wife or B. picks C.'s pocket in the omnibus, or that D. has committed adultery, and relate the story, and when called upon to answer say: "There was such a story in circulation; I but repeated what I heard, and had no design to circulate it or confirm it"; and for two very plain reasons: (1) The repetition of the story must in the nature of things give it currency; and (2) the repetition without the expression of disbelief will confirm it. The danger--an obvious one--is that bad men may give currency to slanderous reports, and then find in that currency their own protection from the just consequences of a repetition.'"

Cobbs v. Chicago Defender, 308 Ill. App. 55, 31 N.E.2d 323, 325 (1941). See also Davis v. Macon Tel. Publ'g Co., 93 Ga. App. 633, 639-40, 92 S.E.2d 619, 625 (1956) ("The fact that the charges made were based upon hearsay in no manner relieves

the defendant of liability. Charges based upon hearsay are the equivalent in law to direct charges.").

In Martin v. Wilson Publishing Co., 497 A.2d 322 (R.I. 1985), a newspaper published an article about a local real-estate developer in which the newspaper scolded local residents for spreading a rumor that the developer had caused or profited from a rash of arsons in areas he was developing. The developer sued the newspaper publisher arguing that

> "the newspaper essentially reported the existence ... of false, defamatory rumors circulating about town connecting [the developer] with a rash of incendiary fires, despite the fact that the newspaper had no belief in the underlying truth of such rumors."

497 A.2d at 325. The lower court instructed the jury that the burden was on the developer to prove that no such rumors existed. "In essence, the trial justice ruled as a matter of law that if such rumors were current at or before the time of publication, the newspaper could republish such rumors with impunity." 497 A.2d at 327. The Supreme Court of Rhode Island disagreed with that proposition of law, stating:

> "It has long been recognized in respect to the law of defamation that one who republishes libelous or slanderous material is subject to liability just as if he had published it originally. Cianci v. New Times Publishing Co., 639 F.2d 54, 60-61 (2d Cir.

1980); Metcalf v. The Times Publishing Co., 20 R.I. 674, 678, 40 A. 864, 865 (1898); Folwell v. Providence Journal Co., 19 R.I. 551, 553-54, 37 A. 6, 6 (1896); Rice v. Cottrel, 5 R.I. 340, 342 (1858); 3 Restatement (Second) Torts § 578 (1977); Prosser and Keeton, Torts § 113 at 799 (5th ed. 1984).

"A good statement of this rule is set forth in Olinger v. American Savings and Loan Association, 409 F.2d 142, 144 (D.C. Cir. 1969):

> "'The law affords no protection to those who couch their libel in the form of reports or repetition. ... [T]he repeater cannot defend on the ground of truth simply by proving that the source named did, in fact, utter the statement.'

"The republication rule applies to the press as it does to others. Cianci, 639 F.2d at 61.

"....

"Consequently, the appropriate inquiry to be submitted to the triers of fact in the instant case was not whether such rumors existed but whether the rumors were based upon fact or whether they were false. ..."

497 A.2d at 327. Thus, even in a case in which the newspaper decried the rumor, it could not avoid liability on the basis that it was merely reporting its existence. See also Bishop v. Journal Newspaper Co., 168 Mass. 327, 332, 47 N.E. 119, 121 (1897) (imposing liability for libel on publisher even though

it included information contradicting rumor in story); accord Restatement (Second) of Torts § 548 comment e (1976).[8]

Based on the foregoing authorities, a newspaper reporter or publisher cannot avoid liability for publishing a false and defamatory statement on the ground that the newspaper reporter or publisher accurately quoted the rumormonger, even if the newspaper story clearly identified the statement as an unverified report and even if the newspaper story contains a denial of the rumor by its subject. See Connaughton v. Harte Hanks Commc'ns, Inc., 842 F.2d 825, 837 n.6 (6th Cir. 1988), aff'd, 491 U.S. 657 (1989) ("[I]t is clear that 'mere publication of a denial by the defamed subject does not absolve a defendant from liability for publishing knowing or reckless falsehoods.'" (quoting Tavoulareas v. Piro, 759 F.2d

[8]Several other authorities have reached the same or similar conclusions. See Dun & Bradstreet, Inc. v. Robinson, 233 Ark. 168, 172, 345 S.W.2d 34, 37 (1961) (defendant must prove truth of substance of rumor even though report included disclaimer "it is currently reported"); Hope v. Hearst Consol. Publ'ns, Inc., 294 F.2d 681, 682 (2d Cir. 1961) (upholding jury award in libel suit based on gossip-column item that began "Palm Beach is buzzing with the story ...."); and Thackrey v. Patterson, 157 F.2d 614, 614 n.1 (D.C. Cir. 1946) (reversing dismissal of complaint in libel suit based on article reporting "conjectures" and "saucy little rumors" about plaintiffs).

90, 133 (D.C. Cir. 1985))). Hence, by proving that they accurately reported Spain's statements, CPC and Nichols did not negate Little's claim that the rumors circulating about him and Jackson were false.

CPC and Nichols next argue that Little "admitted that he had some type of a 'relationship' as suggested in the subject publications." The evidence in the record is clear, however, that Little did not admit to any personal relationship with Jackson. Little actually denied the existence of such a relationship both in his interview with Nichols and in his deposition testimony. Little testified that he had never even heard of Jackson before Phillip White, then the mayor of Uniontown, recommended her as a human-resources consultant. Thereafter, Little met with Jackson several times, dined with Jackson on two occasions, once with Mayor White in attendance, and talked with her over the telephone on four or five occasions. CPC and Nichols did not present any evidence indicating that Little and Jackson discussed anything other than the official business for which Jackson was ultimately engaged. The record certainly does not indicate that Little engaged in a "personal relationship" as opposed to a business

relationship with Jackson. Hence, I reject the factual argument that Little admitted to a personal relationship, either expressly or impliedly, and I conclude that CPC and Nichols did not produce any evidence indicating that Little and Jackson did, in fact, engage in a personal relationship of any kind that would be sufficient to warrant the imposition of a summary judgment.

CPC and Nichols additionally argue that "[Little] cannot meet his burden of proof in this case, and his claims fail as a matter of law." Assuming that that language advances an argument that Little cannot produce substantial evidence indicating that the alleged defamatory statements were false, I reject that contention. Little presented uncontradicted evidence indicating that he did not have a personal relationship with Jackson. Little also presented evidence indicating that he did not recommend the hiring of Jackson on the basis of any such personal relationship. Little testified that he had recommended Jackson solely on the basis of his conversations with Mayor White and the perceived need for Jackson's consulting services. CPC and Nichols admitted that Little did not, as the headline to the February 19 story

alleged, order the human-resources audit. Thus, assuming that the burden of production had shifted to Little to present substantial evidence indicating that the alleged defamatory statements were false, Little carried that burden.

A summary judgment would be appropriate in this case if the evidence showed indisputably that the rumor about Little that was repeated in The Anniston Star was substantially true or if Little could not present substantial evidence of its falsity. However, the record shows, without dispute, that Little did not have a personal relationship with Jackson, that he did not order the audit, and that he did not recommend Jackson based on any alleged personal relationship. Hence, CPC and Nichols were not entitled to a summary judgment based on their "truth" argument.

2. The "Defamatory Meaning" Argument

CPC and Nichols next argue in support of the summary judgment that the statement that Little had a "personal relationship" with Jackson is not reasonably capable of defamatory meaning. "Generally, any false and malicious publication, when expressed in printing or writing, or by signs or pictures, is a libel [if it] charges an offense

punishable by indictment[] or ... tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society." McGraw v. Thomason, 265 Ala. 635, 639, 93 So. 2d 741, 744 (1957). "The test to be applied in determining whether a newspaper article makes a defamatory imputation is whether an ordinary reader or a reader of average intelligence, reading the article as a whole, would ascribe a defamatory meaning to the language." Drill Parts & Serv. Co. v. Joy Mfg. Co., 619 So. 2d 1280, 1289 (Ala. 1993) (citing Loveless v. Graddick, 295 Ala. 142, 148, 325 So. 2d 137, 142 (1975)). "The question of '[w]hether the communication is reasonably capable of a defamatory meaning is a question, in the first instance, for the court,' and 'if the communication is not reasonably capable of a defamatory meaning, there is no issue of fact, and summary judgment is proper.'" Drill Parts & Serv. Co., 619 So. 2d at 1289-90 (quoting Harris v. School Annual Publ'g Co., 466 So. 2d 963, 964-65 (Ala. 1985)).

Taken in isolation, the term "personal relationship" does not necessarily carry with it any pejorative connotation. However, Nichols stated that she used that term after

receiving information from Spain that led her to believe that Little and Jackson had a dating relationship. Davis placed that phrase "in greater context" in the February 19 story by referring to Little as being unmarried, thereby, at least arguably, implying the relationship was romantic in nature. The February 20 editorial furthered that notion by referring to the audit as "Little's sweetheart" deal, because that term had no other obvious meaning considering no one had alleged Little had gained any pecuniary advantage from the audit. See Hale v. Kroger Ltd. P'ship I, 28 So. 3d 772, 776 (Ala. Civ. App. 2009) (holding that, in ruling on a summary-judgment motion, record evidence must be viewed in a light most favorable to nonmovant). When coupled with the statements that Little had "ordered" the audit and that the audit had produced nothing of value for the $2,500 spent, the entirety of the statements implies that Little used his office to benefit his romantic interests at the expense of the City of Anniston.

In Wiley, supra, the supreme court held that false statements that implied that a public official was misusing his office for his own personal gain were defamatory. 495 So.

2d at 619. In Gray v. WALA-TV, 384 So. 2d 1062 (Ala. 1980), overruled on other grounds, Nelson v. Lapeyrouse Grain Corp., 534 So. 2d 1085 (Ala. 1988), the supreme court held that statements implying that a public contractor had "corruptly and illegally obtained, through political connections, a contract with the city and had not performed under the contract although having been paid to do so, and thereby dishonestly obtained public funds," were libelous per se. 384 So. 2d at 1065. See also Wofford v. Meeks, 129 Ala. 349, 357, 30 So. 625, 628 (1901) (holding that false statements impugning honesty of county commissioners in transacting public business were libelous per se); Advertiser Co. v. Jones, 169 Ala. 196, 204-05, 53 So. 759, 762 (1910) (newspaper article improperly asserting that city official had used city labor to advance his personal business interests held defamatory). Other jurisdictions likewise hold that statements accusing a public official of self-dealing or otherwise abusing the privileges of public office are defamatory in nature. See Annotation, Libel and Slander: Actionability of Statement Imputing Incapacity, Inefficiency, Misconduct, Fraud, Dishonesty, or the Like to Public Officer

or Employee, 53 A.L.R.2d 8 (1957). The caselaw from other jurisdictions suggests that the statements implying that Little had used his public office to advance his personal relationship with Jackson at the cost of the City of Anniston, and without the City of Anniston receiving anything of value in return, would be considered defamatory.

In moving for a summary judgment, CPC and Nichols argued solely that the term "personal relationship," when considered in isolation, did not carry an actionable defamatory meaning. CPC and Nichols did not argue that the term "personal relationship," when used in the context applicable here, could not be considered defamatory in nature. That argument, of course, would have been rejected. Given the context in which the term was used in this case, CPC and Nichols are not entitled to a summary judgment on the basis that the term "personal relationship" is incapable of a defamatory meaning.

### 3. "Qualified Privilege" and "Constitutional Malice" Arguments

In their motion for a summary judgment, CPC and Nichols asserted that they had a qualified privilege to publish the

rumor about Little, pursuant to Restatement (Second) of Torts § 611 (1977),[9] which provides, in pertinent part:

> "The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported."

In Wilson v. Birmingham Post Co., 482 So. 2d 1209 (Ala. 1986), the supreme court appeared to have adopted § 611 of the

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[9]After applying for rehearing, CPC and Nichols orally argued before this court that they also had a qualified privilege under Restatement (Second) of Torts § 602 and the "neutral-reporting privilege" espoused in Edwards v. National Audubon Society, Inc., 556 F.2d 113, 120 (2d Cir. 1977). I also note that the main opinion relies, in part, on Edwards. However, those privileges were not asserted before the trial court, and this court cannot affirm the summary judgment on the basis of those privileges without denying Little due process. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). Moreover, this court has not been directed to any binding precedent in which the appellate courts of this state have adopted either privilege. Compare Wilson v. Birmingham Post Co., 482 So. 2d 1209, 1212-13 (Ala. 1986) (relying on Edwards) with Wiley, 495 So. 2d at 619 (rejecting "newsworthiness" as basis for qualified privilege recognized in Edwards). Although CPC and Nichols urge this court to change Alabama law to include those privileges, in light of their failure to properly raise the applicability of those privileges before the trial court and to obtain a ruling on the matter, I find this to be an inappropriate case in which to consider taking that action.

Restatement (Second) of Torts in whole, but, in Wiley, supra, the court held that Alabama law had embraced only a limited form of § 611 that "would correspond at most to the 'official action or proceeding' portion of the rule." 495 So. 2d at 618. That portion of the rule to which Wiley refers is embodied in § 13A-11-161, Ala. Code 1975, which provides, in pertinent part:

> "The publication of a fair and impartial report ... of any investigation made by any ... public body or officer, shall be privileged, unless it be proved that the same was published with actual malice ...."

It appears from the supreme court's comments in Wiley that Alabama recognizes that a party has a qualified privilege to repeat defamatory statements uttered at a public investigatory meeting so long as the publication is fair, impartial, and repeated without "actual malice."

In their summary-judgment motion, CPC and Nichols argued that, because Spain made the statements at a public meeting about a matter of public concern and because they fairly reported those statements, the publication of those statements is qualifiedly privileged under § 611 of the Restatement (Second) of Torts. The evidence indicates that the statements attributed to Spain and of which Little complains were not

made in the course of a public meeting, but in an interview following the conclusion of a public meeting; however, Little does not argue that point as a basis for avoiding the summary judgment. Little also does not argue that CPC and Nichols failed to fairly report the substance of the statements made by Spain. Little argues solely that the motion for a summary judgment should not have been granted because, he says, he presented sufficient evidence that CPC and Nichols acted with the requisite malice when repeating the rumor.

In that regard, I note that § 13A-11-161 states that "actual malice" must be shown. However, that state law is preempted by federal law, which provides that, when a plaintiff in a libel action is a public official and the alleged defamatory statement relates to his or her conduct as a public official, the plaintiff must establish "constitutional malice" by clear and convincing evidence. Gary v. Crouch, 923 So. 2d 1130, 1138 (Ala. Civ. App. 2005) (citing Wiggins v. Mallard, 905 So. 2d 776 (Ala. 2004); and Smith v. Huntsville Times Co., 888 So. 2d 492 (Ala. 2004)). "Constitutional malice" refers to the standard set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1984). "This

standard is satisfied by proof that a false statement was made '"with knowledge that it was false or with reckless disregard of whether it was false or not."'" Smith v. Huntsville Times Co., 888 So. 2d 492, 499 (Ala. 2004) (quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989), quoting in turn New York Times v. Sullivan, 376 U.S. at 279-80).

> "When determining if a genuine factual issue as to [constitutional] malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times [Co. v. Sullivan, 376 U.S. 254 (1984)]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find [constitutional] malice by clear and convincing evidence."

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986). In making the determination whether the public figure has produced evidence of a sufficient "caliber or quantity to allow a rational finder of fact to find [constitutional] malice by clear and convincing evidence," id., the court must believe the evidence submitted by the public figure and all justifiable inferences must be drawn in his or her favor. 477 U.S. at 255.

Making all justifiable inferences in favor of Little, the evidence shows that Little never engaged in a personal relationship with Jackson. At some point, Little recommended to the city council that Jackson perform the human-resources audit. Little did not advocate for the hiring of Jackson in order to advance his nonexistent personal relationship with her. Little did not "order" the audit; rather, the city council, after hearing from Jackson and Mayor White at a public meeting, voted unanimously to retain Jackson to perform the audit. Nichols was aware of the manner of Jackson's hiring based on her attendance at that city-council meeting. In a February 2009 city-council meeting, Spain, a known political opponent of Little, indicated that the audit was worthless and that he intended to investigate the matter. Following that meeting, Spain, in an interview with Nichols, informed Nichols that there was a "buzz" around Anniston that Little had urged the city council to retain Jackson because of his personal relationship with Jackson.

At no time did Nichols or CPC know for a fact that the rumor was false. Nichols interviewed Little, who denied the truth of the rumor. Nichols and Davis both testified that

they had no reason to doubt that denial. Nichols attempted to contact Jackson for about a week following her interview with Spain, but to no avail. Neither Nichols nor any other CPC employee followed up with Spain or anyone else to identify the source of the rumor or to take any other steps to ascertain whether, in fact, the rumor existed or whether the rumor had any basis in fact. Nichols drafted the story, accurately quoting both Spain and Little. Davis added "context" to the story by noting that Little was unmarried. An unknown copy editor drafted the headline for the February 19 story that contained the false statement that Little had "ordered" the audit. CPC then published the story, with the inaccurate headline, on the front page of the February 19 edition of The Anniston Star. CPC later attempted to correct the erroneous headline and to clarify that it was not alleging that the rumor was accurate, but it did not place that "retraction" on the front page of the newspaper as Little's attorney had demanded.

Based on the foregoing evidence, I agree that Little did not present sufficiently clear and convincing evidence indicating that CPC and Nichols published the rumor with

knowledge of its falsity. The record contains no evidence indicating that, at the time the story was published, Nichols or anyone else employed by CPC subjectively knew that Little did not have a personal relationship with Jackson and that Little had not recommended Jackson to perform the audit based on that personal relationship. Nichols knew that Little had not "ordered" the audit, a fact that will be discussed in more detail later in this writing, but that knowledge does not equate to subjective knowledge of the falsity of the rumor.

I now turn to the question whether CPC and Nichols recklessly disregarded the truth of the rumor. "A defendant acts with 'reckless disregard' if, at the time of publication, the defendant '"entertained serious doubts as to the truth of [its] publication" or acted "with a high degree of awareness of ... [its] probable falsity."'" Smith v. Huntsville Times Co., 888 So. 2d at 499 (quoting McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996), quoting in turn St. Amant v. Thompson, 390 U.S. 727, 731 (1968)); see also Finebaum v. Coulter, 854 So. 2d 1120, 1124 (Ala. 2003) (citing St. Amant, 390 U.S. at 731). "'The [constitutional] malice standard is subjective; the plaintiff must prove that

the defendant actually entertained a serious doubt.'" Smith, 888 So. 2d at 499-500 (quoting McFarlane, 91 F.3d at 1508).

In her affidavit, Nichols attested that she had no serious doubts about the accuracy of her story. However, it is clear from her deposition testimony that Nichols was attesting only that she was accurately quoting Spain and Little. Nichols did not testify that she had no serious doubts about the validity of the rumor. To the contrary, Nichols and Davis, the CPC editor, both testified that they had no reason to doubt Little's denial. A jury could reasonably find that Nichols and CPC could not be both certain that Little's denial was true and also believe, without any serious doubts, that the rumor was true. Hence, a jury could be clearly convinced that Nichols and CPC subjectively entertained serious doubts about the veracity of the rumor before publishing it.

Moreover, the record contains some evidence indicating that CPC actively embellished the rumor. By their own admissions, both CPC and Nichols acknowledge that the headline stating that Little "ordered" the audit does not accurately portray the facts surrounding Jackson's hiring. The story

itself states that "the City" hired Jackson to perform the audit, not that Little "ordered" the audit. In quoting Spain, Nichols did not obtain any information indicating that Little had directed that the city council hire Jackson to conduct the audit. It appears that an unknown copy editor employed by CPC who drafted the headline fabricated that Little had "ordered" the audit. The evidence shows that CPC did not publish any story without editorial review, so a jury could infer that an editor employed by CPC approved the headline although it did not accurately summarize the story that followed.

The headline does not so much report the rumor as it does supplement it with additional false information conveying that Little had the authority to "order" the audit. When considered in conjunction with the claims that Little had a personal relationship with Jackson and that the audit was deemed worthless by several Anniston officials, the headline gave additional gravity to the implication that Little was abusing his position as a city councilman. A jury could at least infer that the headline, by overstating Little's role in Jackson's hiring, was intended to lend greater credence to a rumor that Little was misusing his authority as a city

councilman, which CPC and Nichols did not know to be true. Cf. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("[A] deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes of [determining constitutional malice] unless the alteration results in a material change in the meaning conveyed by the statement." (emphasis added)).

In Wiley, supra, the supreme court suggested that constitutional malice may be inferred if a reporter actively encourages the spreading of a defamatory statement. In that case, a reporter covering a neighborhood meeting regarding a proposed landfill asked a citizen to repeat a rumor on camera that two county commissioners had a personal financial stake in a corporation that would benefit from their approval of the landfill site. 495 So. 2d at 619-21. The supreme court noted that that evidence indicated that the reporter had acted with constitutional malice in reporting the rumor, although the court found "[e]ven more significant" other evidence that another reporter had determined the falsity of the rumor before the report was made. 495 So. 2d at 621. In this case, the headline did not merely repeat the rumor, it expanded on

it, actually contributing additional, inaccurate, facts to the rumor. Under Wiley, that contribution cannot be discounted.[10]

In holding that certain fact issues prevent this court from affirming the summary judgment entered by the trial court, I do not mean to be understood as stating that the mere publication of a rumor implies constitutional malice. See Howard v. Antilla, 294 F.3d 244, 252-53 (1st Cir. 2002) (publication of rumor that company chairman was a convicted felon using a false alias held insufficient to establish constitutional malice). I also do not mean to be understood as stating that the publication of a rumor despite a denial by its subject constitutes constitutional malice. See Smith 888 So. 2d at 501 (noting that "'"such denials are so commonplace in the world of polemical charge and countercharge that, in

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[10]The main opinion asserts that Wiley conflicts with the holding in Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). I disagree. As explained by our supreme court in Ex parte Rudder, 507 So. 2d 411, 415-16 (Ala. 1987), in Hepps the United States Supreme Court held only that the First Amendment requires a private-figure plaintiff to prove the falsity of the defamatory statement when the speech involves a matter of public concern, thereby preempting the common-law rule placing the burden of proving the truth of the statement on the defendant. Nothing in Wiley contradicts any statement of the law made in Hepps. Thus, Wiley has never been overruled and remains binding on this court. See Ala. Code 1975, § 12-3-16.

themselves, they hardly alert the conscientious reporter to the likelihood of error"'" (quoting Connaughton, 491 U.S. at 691 n.37, quoting in turn Edwards, 556 F.2d at 121)). Additionally, my writing should not be understood as stating that the failure of Nichols and CPC to more thoroughly investigate the veracity of the rumor indicates that they acted with constitutional malice. Smith, 888 So. 2d at 500 ("Indeed, the failure to investigate does not constitute malice, unless the failure evidences '"purposeful avoidance,"' that is, 'an intent to avoid the truth.'" (quoting Sweeney v. Prisoners' Legal Servs., 84 N.Y.2d 786, 793, 647 N.E.2d 101, 104, 622 N.Y.S.2d 896, 899 (1995), quoting in turn Connaughton, 491 U.S. at 693)); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974). I state only that, under the circumstances of this case, summary judgment is inappropriate because a jury could reasonably find constitutional malice by inferring that Nichols and CPC subjectively entertained serious doubts as to the veracity of the rumor and that, by publishing the headline, CPC purposefully or recklessly contributed inaccurate facts that improperly enhanced the rumor.

"The United States Supreme Court has explained:

> "'[W]here the New York Times [Co. v. Sullivan] "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns [constitutional] malice, clearly a material issue in a New York Times [Co. v. Sullivan] case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown [constitutional] malice by clear and convincing evidence or that the plaintiff has not.'
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> "Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (footnote omitted). The Supreme Court of Alabama has reiterated that '[a] trial judge is not required "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."' Camp v. Yeager, 601 So. 2d [924,] 927 [(Ala. 1992)] (quoting Anderson, 477 U.S. at 249, 106 S.Ct. 2505)."

Gary v. Crouch, 923 So. 2d at 1138-39. On appeal from a summary judgment, this court reviews the case de novo, applying the same standards as the trial court. See id. Based on my review of the evidence, I conclude that the trial court erred in entering a summary judgment in favor of CPC and

Nichols on Little's libel claim. From the evidence in the record, a jury could be clearly convinced that Nichols and CPC published a false and defamatory rumor about Little in reckless disregard of the truth or the falsity of that rumor.

Pittman, J., concurs.