THE SUPREME COURT
STATE OF ARIZONA

Timothy Jeffries and Charles Loftus, Plaintiffs, vs. The Honorable Rosa Mroz, Judge of the Superior Court of State of Arizona, in and for Maricopa County, Defendant. State of Arizona, Real Party in Interest.	Supreme Court Case No: Court of Appeals Division One Case No.: SA-20-0056 MARICOPA COUNTY SUPERIOR COURT Case No.: CV2017-054912

PLAINTIFF JEFFRIES'S PETITION FOR REVIEW

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I. The Issues Decided By The Court Of Appeals That The Petitioners Presented For Supreme Court Review.

The Court of Appeals declined jurisdiction (Appendix 1), so there are no specific decisions by the Court of Appeals. We present here the issue that had been presented to the Court of Appeals.

This Petition presents a purely legal question of statewide importance, as follows: in a defamation action against state officials, those officials have limited immunity. Plaintiff is required to show malice. The issue is whether plaintiff can show motive to lie as part of its case or whether motive to lie is irrelevant and excluded. This is a pure legal question of statewide importance.

This Court has jurisdiction pursuant to A.R.S. § 12-120.21(A)(4) and Arizona Rules of Procedure for Special Actions, Rule 1(a). "The exercise of special action jurisdiction is appropriate if a case raises issues of first impression or involves purely legal questions, questions of public importance, or issues that are likely to rise again." *Martin v. Reinstein*, 195 Ariz. 293, 300 (App. 1999) (citing *Andrade v. Superior Court*, 183 Ariz. 113, 115, 901 P.2d 461, 463 (App. 1995).

In *Chamberlain v. Mathis*, 151 Ariz. 551, 559, 729 P.2d 905, 9133 (1986), this Court had a passage indicating that an objective standard in proving malice (knowing

a statement is true or reckless disregard of the truth) was applicable. Under the objective standard, all that would count is what a reasonable person would have known when making a statement, rather than what the Defendants themselves actually knew, which would be a subjective standard. But then in footnote 6 of the same decision, the Court stated:

> Of course, this objective standard does not shield a public official who *knew* his statements were false, even though a reasonable person in the official's situation may have had reasonable grounds for believing the statements were true.

(151 Ariz. at 560.)

There is an apparent contradiction in this Court's decision in *Chamberlain*, although the two quotations can be reconciled if the footnote only applies where there is evidence that the Defendant knew he was lying. If there is evidence he was lying, and it is disputed by Defendant, then whether or not he had a motive to lie is relevant, because if he had a motive, it is more probable that he lied, than if he did not have a motive.

In this case, the trial court relied upon the first quotation in *Chamberlain*, and ruled that evidence of motive could not be a part of discovery, and could not be presented at trial. (The trial court orders are Appendices 2 and 3.) The trial court relied on the first quote from *Chamberlain*, ignored footnote 6, and ruled that evidence of motive could not be subject to discovery, and could not be submitted at trial.

The Court of Appeals, in *Western Technologies, Inc. v. Neal*, 159 Ariz. 433 (App. 1988), a case that this Court impliedly approved by dismissing review, took the opposite approach, quoting footnote 6, and held:

> As we noted above, the court's discussion of the "reasonable person-reasonable belief" test contained a footnote reference making it clear that **a public official who actually knew his statement was false would not be protected by qualified immunity even if a reasonable person in his situation would have had reasonable grounds for believing his statement was true**. 151 Ariz. at 559 n. 6, 729 P.2d at 913 n. 6.

(159 Ariz. at 443, review dismissed, emphasis added).

We can understand that the Court of Appeals, in the Special Action in this case, did not want to get into a possible contradiction of the first quotation in *Chamberlain*, not not withstanding footnote 6, as that was a case decided by this Court. Only this Court, not the Court of Appeals, can clarify the apparent contradictions, or reconcile them, on this important issue.

II. Facts.

In an amended complaint (Appendix 4), Petitioners have alleged that they discovered corruption on the part of certain government officials in the Governor's office, the facts of which are set forth in extreme detail. Amended Complaint, Appendix 4, pp. 4-15) Rather than correct the corruption, the decision was made by Defendants to engage in well-orchestrated defamation of Petitioners to destroy their credibility, so no one would

believe there was corruption. The Complaint sets forth specific lies that were told and how they were false. (*Id.*)

In the Issues section above, we suggested that the two possibly contradictory parts of the Chamberlain decision could be reconciled by applying footnote 6 only if there was actual evidence that a defendant deliberately lied.

The Motion, Response, and Reply, regarding refused discovery pertaining to corruption as a motive, are attached as Appendices 5, 6, and 7. In Defendant's Response, Appendix 6, Defendant made an important admission:

> And the State does not dispute that evidence regarding a speaker's actual knowledge of the falsity of his or her statement concerning firearms ammunition would be relevant **if any such evidence existed**.

(P. 7, emphasis added.)

"Any such evidence" does exist. Part of it is set forth in the Declaration of Charles Loftus, attached to Appendices 5 and 7, as follows:

> 1. I have personal knowledge that Mr. Chris Luebkin, who prepared the published report that defamed me and Timothy Jeffries, knew that he was lying, and that the Governor's office deliberately covered up exculpatory information regarding these lies. Here are four examples:
>
> 2.(1) Luebkin quoted Carlos Contreras as saying the following; "A/C Contreras stated he and Mr. Loftus convinced Jeffries that arming every DES employee was ill-advised and, after careful and gentle persuasion (fearing they would be fired if they argued to vehemently with him)" [not to arm everyone];
>
> 3. Shortly after the published report was released Carlos Contreras told me that he did not say this, and this statement by Luebkin is false.

Therefore, Luebkin must have known he was lying when he attributed quoted material from Carlos Contreras which Contreras never said to Luebkin. I confirmed this information with Carlos Contreras on Jan 7, 2020 at around 10:30 AM.

4.(2) Luebkin also says in the report: "A/C Contreras stated Jeffries and Loftus had different reasons for their desires to expand the amount of armed personnel assigned to DES/OIG security services. A/C Contreras stated Jeffries wanted to create his own police force that he would control."

5. Shortly after the published report was released Carlos Contreras told me that he did not say this, and this statement by Luebkin is false. Therefore, Luebkin must have known he was lying when he attributed quoted material from Carlos Contreras which Contreras never said to Luebkin. I confirmed this information with Carlos Contreras on Jan 7, 2020 at around 1030 AM.

6.(3) Craig Harris from the Arizona Republic submitted a public records request to the Department of Public Safety the week following our dismissal. He asked for DPS to provide an estimate of the appropriate level of ammunition for training DES officers. DPS completed an analysis and forwarded it to DPS General Counsel Annie Foster. Annie Foster emailed it to Daniel Scarpinato, PR Manager for the Governor. Annie Foster asked him how much of this information should be released to Craig Harris. This was in an email. However, when I presented this email to Craig Harris asking if he was aware of it, he indicated that he was not. The DPS report indicated the ammunition level that DES had was insufficient. The Luebkin report falsely stated that we had excess. This was exculpatory information which was covered up by the Governor's office. This shows that the Governor's office knew that the report contained false accusations against me and Timothy Jeffries.

7. (4) On December 12, 2016, I sent an email with my own needs assessment that we were short on ammunition to Luebkin. This is before I knew about the study referred to above. This is six months before Luebkin's report. Yet, Luebkin stated in his report that we had too much ammunition.

8. Therefore, Luebkin must have known he was lying because he had an analysis contradicting his lie 6 months before he published the lie.

Therefore, there was evidence in the record indicating actual knowledge of falsity. Defendant admits that this makes actual knowledge relevant. (Appendix 6, p. 7, quoted above.)

III. The Reasons The Petition Should Be Granted.

Plaintiff has presented significant evidence that Defendants lied and knew they were lying. Defendants obviously deny this. It should be for a jury to decide that question.

The State admitted in its Response to the Motion to Compel that "whether speakers knew they were lying" was relevant. (Appendix 6, p. 7.)

It follows that their motivations are also relevant. Plaintiffs argue they knew that they were lying. Defendant argues that they did not. If they were motivated to lie that increases the probability that plaintiff is correct. Arizona Rules of Evidence provides evidence is relevant if:

> "(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

(Rule 401) Rules of Evidence, emphasis added.)

If Defendants had a motive to lie, this would tend to make Petitioners' allegation that they did lie more probable to be correct, than if they did not have any motive to lie. Indeed, under rule 404 (B), evidence of other crimes, wrongs, or acts, is generally not admissible, but can be admissible if offered to show motive. Clearly, motives are an

indicator of key facts, such as, in our case, whether or not people who lied knew they were lying. If they had a motive to lie, then it is more likely that they lied, than if they had no motive to lie.

The following are a few examples of quotations from cases holding that motive is relevant to intent:

Payne v. Commonwealth, 233 Va. 460, 357 S.E.2d 500, 503 (1987):

> [E]vidence of motive is relevant to establish a defendant's intent. *Robinson v. Commonwealth,* 322 S.E.2d 841, 843 (Va. 1984)
>
> . . .
>
> Manifestly, this evidence was relevant and properly admitted. *State v. Tran,* 712 N.W.2d 540, 546 (Minn. 2006):

State v. Tran, 712 N.W. 2d 540, 546 (Minn. 1006):

> Evidence of motive is relevant to show premeditation or intent. *State v. Moua,* 678 N.W.2d 29, 40 (Minn.2004); *State v. Nunn,* 561 N.W.2d 902, 908 (Minn.1997).

(Emphasis added.)

United States v. Krug, 15-CR-157-A, 2017 WL 907817, at *1, p. 7, n.4 (W.D.N.Y. Mar. 8, 2017):

> To the extent that the Government intends to argue at trial that the Defendant's motive is relevant to his intent, motive would also be a proper basis for admitting other-acts evidence.

(Emphasis added.)

In *Thomas v. Bowman*, 24 Ariz. App. 322, 538 P.2d 409 (1975), this Court stated:

> It is always relevant to show any bias, interest, motive or special relationship relative to a witness or a party to an action.

(24 Ariz. App. at 324, emphasis added.)

As stated in section I, footnote 6 in *Chamberlain, supra* state that whether speakers knew they were lying is relevant.

This issue was resolved in detail by the United States Supreme Court in the analogous area of privilege to defame public persons, where the same requirement of malice is required. *Herbert v. Lando*, 441 U.S. 153 (1979).

A journalist resisted inquiry into his motives in a defamation case, citing the protections of the First Amendment. The District Court held that the inquiries were proper. The Second Circuit reversed. The US Supreme Court overruled the Second Circuit and held, as did the District Court, that the inquiries were allowable.

The United Supreme Court stated:

> It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error.

(441 US at 160, emphasis added.)

The Court stated further:

> Courts have traditionally admitted any direct or indirect evidence relevant to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages.

(441 US at 164, emphasis added.)

The Court stated further:

> As respondents would have it, the defendant's reckless disregard of the truth, a critical element, could not be shown by direct evidence through inquiry into the thoughts, opinions, and conclusions of the publisher, but could be proved only by objective evidence from which the ultimate fact could be inferred. It may be that plaintiffs will rarely be successful in proving awareness of falsehood from the mouth of the defendant himself, but the relevance of answers to such inquiries, which the District Court recognized and the Court of Appeals did not deny, can hardly be doubted. To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with "convincing clarity."

(441 US at 170, emphasis added.)

The Court stated further:

> Permitting plaintiffs such as Hebert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our

> cases contemplate and does not abridge either freedom of speech or of the press.

(441 US at 172, emphasis added.)

The Court stated further:

> Evidentiary privileges in litigation are not favored, and even those rooted in the Constitution must give way in proper circumstances.

(441 US at 175.)

The Court stated further:

> The Court has more than once declared that the deposition-discovery rules are to be accorded a broad and liberal treatment to effect their purpose of adequately informing the litigants in civil trials. *Schlagenhauf v. Holder*, 379 U.S. 104, 114–115, 85 S.Ct. 234, 241, 13 L.Ed.2d 152 (1964); *Hickman v. Taylor*, 329 U.S.. 495, 501, 507, 67 S.Ct. 385, 388, 391, 91 L.Ed. 451 (1947).

(441 US at 177.)

The evidence requested by Plaintiffs' Motion to Compel regarding corruption cover up as a motive to defame Plaintiffs is relevant and should be discoverable and admissible to prove motive to deliberately defame Plaintiffs.

Petitioners have shown facts on the record demonstrating Defendants had actual knowledge of the falsity of their statements. Defendants controvert those facts. Motive

to lie would make Plaintiffs position more probably true than otherwise. It follows that Plaintiffs and their witnesses should be permitted to testify at trial.

It is therefore respectfully requested that this Court reverse the trial court's denial of their Motion to Compel and remand with instructions to compel disclosure of evidence regarding motive to defame Plaintiffs, and permit evidence regarding corruption coverup as a motive for lying, at trial.

Respectfully Submitted April 8, 2020.

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