

In The  
Supreme Court of the United States

---

RICHELLE D. WALLACE,

*Petitioner,*

v.

CITY OF HAMPTON, ET AL.,

*Respondents.*

---

On Petition for Writ of Certiorari  
to the Supreme Court of Virginia

---

**JOINT BRIEF IN OPPOSITION**

---

James A. Cales III, Esq.  
*Counsel of Record*  
Furniss, Davis, Rashkind  
and Saunders, P.C.  
6160 Kempsville Circle  
Suite 341B  
Norfolk, Virginia 23502  
(757) 461-7100  
(757) 461-0083 (FAX)  
jcales@furnissdavis.com  
*Counsel for Jamie Rastatter*

Lola Rodriguez Perkins, Esq.  
Hampton City Attorney's Office  
22 Lincoln Street, 8th Floor  
Hampton, Virginia 23669  
(757) 727-6127  
(757)-727-6788 (FAX)  
lrperkins@hampton.gov  
*Counsel for City of Hampton,  
Mary Bunting, Nicole Clark,  
Jason Monk, Maurice Wilson*

## **QUESTIONS PRESENTED**

1. Is the petitioner entitled to plain and structural error relief for the court's violation of implementing the Constitution successfully under the First, Fifth, Seventh, and Fourteenth Amendments?
2. Does the Petitioner meet the three threshold requirements to be eligible for plain-error relief?
3. Should the Court reconsider the argument of Freedom of Press in cases not involving reporters, journalists, photographers, but rather citizens who distribute malicious, egregious statements on the internet, social media?
4. In his dissent, Justice Neil Gorsuch raised the question, "In the case of *New York Times v. Sullivan*, if ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that encourage falsehoods in quantities no one could have envisioned almost 60 years ago?"
5. Should his case be the Court's return of its attention to the "safe deposit" of our liberties. Justice Gorsuch, dissenting from the denial of certiorari in *Shekelzen Berisha v. Guy Lawson, et al.*, statement concerning *New [sic] Sullivan*, "But given the momentous changes in the Nation's media [sic] *York Times v. [sic]* landscape since 1964, I cannot help but think the Court would profit from returning its attention, whether in this case or another, to a field so vital to the safe deposit" [sic] of our liberties.
6. Whether it is an abuse of discretion under the Federal Rules of Civil Procedures [sic] when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise

defend, and that failure is shown by affidavit or otherwise, the clerk and/or court has failed to enter the party's default?

7. Whether it is an abuse of discretion under Federal Rule of Civil Procedures [sic] when the district judge – or a magistrate judge when authorized by local rule – fails to issue a *iv* Questions Presented-Continued mandated scheduling order as stated in the Federal Rules of Civil Procedures [sic] Rule 16?
8. Whether the Petition for a Writ of Certiorari should be fully granted when the petitioner was given the opportunity to add respondents after the judge's order to file an amended complaint?
9. Should the petitioner be allowed damages when the court denied a mandated scheduling order and discovery process for the petitioner to prove calculated damages in the case?

**PARTIES TO THE PROCEEDING**

Petitioner Richelle D. Wallace is a *pro se* party.

Respondents to the instant action include: The City of Hampton, Virginia; Mary Bunting, City Manager for the City of Hampton, Virginia; Nicole Clark, Human Resources Director for the City of Hampton, Virginia; Jason Monk, Fire Chief for the City of Hampton, Virginia; Maurice Wilson, Assistant Fire Chief for the City of Hampton, Virginia; and Jamie Rastatter, a firefighter for the City of Hampton, Virginia.

## **TABLE OF CONTENTS**

QUESTIONS PRESENTED .....	i
PARTIES TO THE PROCEEDING .....	iii
TABLE OF AUTHORITIES .....	v
COUNTERSTATEMENT OF THE CASE .....	1
A. Relevant Factual Background .....	1
B. Relevant Procedural History .....	2
REASONS FOR DENYING THE PETITION.....	4
I. Petitioner did not raise any federal claims in the trial court or the Virginia Supreme Court .....	4
II. There are no considerations governing the instant Petition for Writ of Certiorari that mitigate in favor of granting the relief requested .....	5
III. The Virginia Courts did not err in ruling on <i>New York Times v. Sullivan</i> issues in this action and it is the only substantive issue in the instant Petition for Writ of Certiorari .....	7
IV. Petitioner incorrectly conflates the Federal Rules of Civil Procedure and Virginia Civil Procedure.....	9
CONCLUSION.....	11

## **TABLE OF AUTHORITIES**

### **Case Law**

<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986) .....	8
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974) .....	8
<u>Herb v. Pitcairn</u> , 324 U.S. 117 (1945) .....	6
<u>Katz v. Oden, Feldman &amp; Pittleman</u> , 332 F. Supp.2d 909 (E.D.Va. 2004).....	9
<u>New York ex rel. Bryant v. Zimmerman</u> , 278 U.S. 63 (1928) .....	4
<u>New York Times v. Sullivan</u> , 376 U.S. 254 (1964) .....	8
<u>Webb v. Webb</u> , 451 U.S. 439 (1981) .....	5

### **Statutes**

U.S. Const. amend. I .....	7
----------------------------	---

### **Rules of Court**

Sup. Ct. R. 10 .....	5, 6
Fed. R. Civ. P. 1.....	10

Fed. R. Civ. P. 81.....	10
Va. R. Sup. Ct. 3:1.....	10
Va. R. Sup. Ct. 5:17.....	4

## **COUNTERSTATEMENT OF THE CASE**

### **A. Relevant Factual Background<sup>1</sup>**

Richelle D. Wallace, a former employee of the City of Hampton, Virginia, filed her original action in the Circuit Court for the City of Hampton, a state court of the Commonwealth of Virginia. Compl. at 4. This action arises from comments allegedly made by Jamie Rastatter, a City of Hampton employee, on social media on January 31, 2018 and May 1, 2018. Compl. at 6, 7. The comments were made surrounding Wallace's unsuccessful candidacy for election to the Hampton City Council and there is no meaningful dispute that Wallace is a public figure within the context of the First Amendment and defamation law.

Wallace, a former captain in the Hampton Fire & Rescue Division (HFRD), and Rastatter, a Medic and Firefighter for HFRD, were former co-workers. Comp. at 7, 8. Wallace and Rastatter exchanged comments back and forth relating to Wallace's campaign for office and her employment history with the City of Hampton. Compl. at 7-10. Wallace contacted Hampton City Manager Mary Bunting on January 31, 2018, to discuss the social media exchange. Compl at 12. Wallace claimed violation of a settlement agreement from a prior lawsuit. Comp. at 12. On February 1, 2018, Bunting responded that no violation of the settlement agreement had taken place as the comments made by Rastatter were in a personal capacity and do not involve the City of

---

<sup>1</sup> The relevant factual background has been compiled from the last operative Complaint submitted in the Hampton Circuit Court of the Commonwealth of Virginia.



Hampton. Compl. at 12. Bunting agreed to have Human Resources Director Nicole Clark and Interim Fire Chief Jason Monk investigate the comments further to determine if there was any violation of City policy. Compl. at 12, 20. Despite notifications that an internal investigation was being conducted, Wallace filed the instant action. Compl. at 23.

### B. Relevant Procedural History

Wallace submitted a Complaint filed in Hampton Circuit Court, suing Rastatter, Mary Bunting (the City Manager), and the City of Hampton. In response, respondents filed demurrers and special pleas. Following recusal by the judges of the Hampton Circuit Court, Judge William Savage, retired, was appointed to preside over the case. Judge Savage sustained the respondents' demurrers and pleas at a hearing on December 18, 2019, and Order dated March 4, 2020. Wallace was afforded leave to amend.

Wallace filed an Amended Complaint on January 27, 2020, recrafting her allegations and adding defendants Nicole Clark, Jason Monk, and Maurice Wilson<sup>2</sup>. The respondents again filed demurrers and pleas that were heard by the trial court on December 29, 2020. The trial court sustained the demurrers and pleas in Orders dated March 19, 2021, at a hearing properly noticed but not attended by Wallace. The Order states, "that plaintiff was a public figure in the context of this case and in order to prevail she would be required to prove malice in accordance with the holding of *New York Times v.*

---

<sup>2</sup> Respondent Wilson has no specific factual allegations presented against him by petitioner.

*Sullivan*.” Throughout these proceedings, Wallace filed numerous motions for reconsideration and recusal.

Wallace filed a notice of appeal to the Supreme Court of Virginia on April 19, 2021, followed by the petition for appeal on April 26, 2021. Wallace did not file any assignments of error relating to federal law and *New York Times v. Sullivan* in the appeal to the Supreme Court of Virginia. Wallace then presented oral argument in support of the petition for appeal to the Supreme Court of Virginia panel on December 7, 2021. On December 22, 2021, the Supreme Court of Virginia entered an Order finding no reversible error in the judgment complained of and, accordingly, the court refused the petition for appeal. Wallace filed a petition for rehearing on January 5, 2022, but the petition was denied on March 25, 2022.

On May 3, 2022, Wallace submitted a Petition for Writ of Certiorari, but it was subsequently denied for failure to follow submission requirements and she was given leave to refile. On July 11, 2022, Wallace submitted the instant petition to the Court.

## **REASONS FOR DENYING THE PETITION**

- I. Petitioner did not raise any federal claims in the trial court or the Virginia Supreme Court

Wallace never raised an issue of federal law in the Virginia state courts. As a result, this Court is unable to consider any federal question raised for the first time here. The Court requires that a party seeking to litigate a federal constitutional issue on appeal of a state court judgment must have raised that issue with sufficient precision to have enabled the state court to have considered it and she must have raised the issue at the appropriate time below. *See generally New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

Pursuant to Rule 5:17(c)(1)(i) of the Supreme Court of Virginia, “[o]nly assignments of error assigned in the petition for appeal will be noticed by this Court. If the petition for appeal does not contain assignments of error, the petition will be dismissed.” Wallace failed to submit assignments of error related to any federal questions for which she sought review and, as such, the Supreme Court of Virginia never had an opportunity to consider them.

“At the minimum, however, there should be no doubt from the record that a claim under federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law. Otherwise, we cannot be sufficiently sure, when the state court

whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.” Webb v. Webb, 451 U.S. 493, 501 (1981).

Here, Wallace has not adequately presented the federal issues to the state appellate court for consideration. Wallace crafted her arguments throughout the litigation in state court as a defamation claim by way of Virginia tort law. Wallace’s decision to assert violation of state tort law disregarded the possibility of federal claims. Wallace simply does not raise any issue of federal law in prior appellate proceedings. The questions presented in the instant submission are first raised with the Petition for Writ of Certiorari. In the absence of having allowed the Virginia Supreme Court an opportunity to address these alleged errors, they simply cannot be raised for the first time before this Court.

- II. There are no considerations governing the instant Petition for Writ of Certiorari that mitigate in favor of granting the relief requested

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States, consideration of a Petition for Certiorari by the Court is guided by a circumstance where a state court of last resort has decided an important federal issue in a manner that conflicts with other state courts of last resort of the federal courts of appeals or has resolved an

important issue of federal law that should be resolved by the Supreme Court or has decided an important issue of federal law in conflict with a decision of the Supreme Court. Sup. Ct. R. 10 (b) and (c). In the case at bar, Wallace requests that this Court resolve that the Virginia Supreme Court erred in affirming the trial court's ruling that Wallace was in fact a public figure and is therefore required to prove malice in accordance with the holding of *New York Times v. Sullivan*. Wallace has attempted to frame the instant petition as requiring a review of federal questions decided by the Supreme Court of Virginia, this assertion is mistaken. A detailed examination of the record in this action belies such an assertion and demonstrates that the Virginia Supreme Court considered only issues of state law.

As a threshold matter, there is only one issue raised at the trial court which could be loosely construed as a determination of an issue under federal law and the First Amendment as applied by *New York Times v. Sullivan*, and that is the requirement of actual malice due to Wallace's status as a public figure running for political office. On motion of the defendants, the trial court applied *New York Times v. Sullivan* as raised by respondents early in litigation; however, Wallace never exercised her right to preserve an alleged error in regard to the court's ruling on the *New York Times v. Sullivan* issue. The Virginia Supreme Court's decision on matters of state law is final. See *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights"). The claim of defamation is an issue of state tort law, and the determination of whether the respondents' conduct

based upon the evidence presented by Wallace amounted to defamation was based on Wallace's status as a public figure. While arguments were raised touching on the implications of the First Amendment, the issues before the state courts did not involve the resolution of questions of federal law. Rather, the matters of law addressed dealt exclusively with whether the conduct supported by the evidence in this case amounted to tortious activity for which the respondents should be held liable. The state trial court, applying state tort law and correctly applying *New York Times v. Sullivan*, answered no.

III. The Virginia Courts did not err in ruling on the applicability of *New York Times v. Sullivan* to this action and it is the only substantive issue in the instant Petition for Writ of Certiorari

While Wallace failed adequately to plead any facts that would invoke federal questions of the First Amendment and subsequent *New York Times v. Sullivan* issues, Virginia courts addressed the significance of *New York Times v. Sullivan* as it relates to the overarching themes presented in this action. As the Virginia trial court stated in its Order, "that plaintiff was a public figure in the context of this case and in order to prevail she would be required to prove malice in accordance with the holding of *New York Times v. Sullivan*." See Order entered March 4, 2020.

The First Amendment imposes federal requirements on what a plaintiff must prove to prevail on their defamation claim. Plaintiff must show (1) falsehood; (2) actual malice; (3) that the

claim was “of and concerning” the defendant; and (4) all of this must be shown by clear and convincing evidence. *See New York Times v. Sullivan*, 376 U.S. 254, 283-91 (1964)

In the instant action, Wallace contends that she was not a public figure, but nevertheless, did meet the actual malice standard. Both contentions are incorrect. Wallace squarely falls into the public figure category and she has failed to allege any facts that would meet the threshold requirements of the actual malice standard.

As a candidate for City Council, Wallace was undoubtedly a public figure and her campaign was a matter of public concern. In matters involving public concern, the First Amendment prohibits an award of presumed damages unless the plaintiff shows that the defendant knew the publication to be false or evidenced reckless disregard for the truth, thereby showing the actual malice as required by *New York Times v. Sullivan*. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). This case involved matters of municipal government and public concern, thereby requiring Wallace to show proof of actual malice. Instead, Wallace only refers to the statements as “false and defamatory” repeatedly. Procedural requirements of the actual malice standard must be established by clear and convincing evidence for the claim to even survive summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). These conclusory allegations are woefully insufficient to overcome the protections of the federal constitution.

Wallace contends that the state courts erred in failing to agree that she met the actual malice

standard required for a public figure in a defamation case. It is critical to understand that Wallace is improperly conflating state tort law with federal constitutional rights. To recover under the law of the case as pleaded, the only claim addressed in the brief is the state law tort of defamation. Under Virginia law, a claim for defamation must show the elements are clear and beyond meaningful dispute. To state a claim upon which relief can be granted, the petition was required to show: (1) publication; (2) of an actionable statement; and (3) that it was made with the requisite intent. Katz v. Oden, Feldman & Pittleman, 332 F. Supp.2d 909, 922 (E.D.Va. 2004). Defamatory statements are not merely unpleasant or offensive statements, but are statements that are such to make the allegedly aggrieved party appear “odious, infamous, or ridiculous.” Katz, 332 F.Supp.2d at 922. The statement must also contain an objectively provable false element in order to state a claim upon which relief can be granted. Id. In the instant action, Wallace failed to reveal any meaningful basis for a viable defamation claim. This is the reason that Wallace’s claims did not survive in state court. Essentially, Wallace pleads opinions of Rastatter, which cannot support any claim of defamation. The elements of *New York Times v. Sullivan* clearly apply, and there is no interest of justice that can be served by disturbing that decision.

#### IV. Petitioner incorrectly conflates the Federal Rules of Civil Procedure and Virginia Civil Procedure

Wallace devotes a section of her Petition for Writ of Certiorari to discussing allegations of repeated



violations of the Federal Rules of Civil Procedure while in the litigation stages of the Virginia state courts. Wallace incorrectly conflates these two separate bodies of civil procedure. While they may overlap in some areas, they are distinctly different. In Virginia state courts, Virginia Civil Procedure is to be applied unless otherwise provided by law.<sup>3</sup> Due to the fact that Wallace failed to assert any federal claims in her actions in state court, there would be no reason for the Federal Rules of Civil Procedure to be applicable to procedure in Virginia state courts. The Federal Rules of Civil Procedure are utilized in civil actions and proceedings in the United States district courts, and in specific instances provided for in FRCP 81, none of which apply. See Fed. R. Civ. P. 1, 81. These arguments advanced by Wallace must be ignored.

---

<sup>3</sup> “These Rules apply to all civil actions, in the circuit courts, whether the claims involved arise under legal or equitable causes of action, unless otherwise provided by law. These rules apply in cases appealed or removed to such courts from inferior courts whenever applicable to such cases.” Va. R. Sup. Ct. 3:1

**CONCLUSION**

For the reasons discussed above, the Petition should be denied.

Respectfully submitted,

James A. Cales III, Esq.

*Counsel of Record*

Furniss, Davis, Rashkind and Saunders, P.C.

6160 Kempsville Circle, Suite 341B

Norfolk, Virginia 23502

(757) 461-7100

(757) 461-0083 (FAX)

jcales@furnissdavis.com

*Counsel for Jamie Rastatter*

Lola Rodriguez Perkins, Esq

Hampton City Attorney's Office

22 Lincoln Street, 8<sup>th</sup> Floor

Hampton, Virginia 23669

(757) 727-6127

(757)-727-6788 (FAX)

lrperkins@hampton.gov

*Counsel for City of Hampton, Mary Bunting,*

*Nicole Clark, Jason Monk, Maurice Wilson*