No. 23-1303

In The
Supreme Court of the United States

CRAIG MALIN,

Petitioner,

v.

LEE ENTERPRISES, INCORPORATED, LEE PUBLICATIONS, INC. d/b/a WATERLOO CEDAR FALLS COURIER, ST. LOUIS POST-DISPATCH, LLC d/b/a ST. LOUIS POST DISPATCH, ROY BIONDI, RAY FARRIS, TOD ROBBERSON and KEVIN MOWBRAY,

Respondents.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

REPLY BRIEF

Craig Malin
240 W. Mill Street
Poynette, WI. 53995
(563) 529-1542
craigthomasmalin@gmail.com
Pro Se

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Reasons For Granting The Petition

Accustomed to having their way across their national newspaper empire, Respondent Lee Enterprises curiously attempts to bully this Court into a procedural corner; to not allow the Court which decided *Anderson v. Liberty Lobby*, *Milkovich v. Lorrain Journal* and *New York Times v. Sullivan* to even consider Petitioner's two questions.

Next, Respondents not so curiously restate Petitioner's two questions and misstate the record. Respondents do so as they have no facts to convince any jury how a casino which "alone" funded its "entire" move to land (App. at 65, 68) and has since paid over $150 million in taxes could possibly be "taxpayer-funded", as the 2019 publication at issue (App. at 58) falsely states as baseline fact. The casino "alone" funding its "entire" project and then paying $150 million in taxes is the *opposite* of the Davenport casino relocation being "taxpayer-funded".

As it is easier to note substantive parts of Respondents' opposition brief Petitioner agrees with than argue all the parts Petitioner substantively disagrees with, Petitioner agrees as follows:

1) Petitioner argued *Sullivan* was *"distinguishable from the facts of his case"* in a motion to the District Court to amend and enlarge the District Court's summary judgment ruling (Respondent brief, pg. 2).

2) Respondents' 2019 publication is the publication at issue (Respondent brief, pg.4).

3) *Anderson* stands for the proposition that *Sullivan's* clear and convincing standard applies to any actual malice element of a public figure defamation claim (Respondent brief, pgs. 15, 16).

4) *Sullivan* intentionally held open the possibility that a failure to retract may rise to the level of evidence of actual malice under different circumstances than the ones present in *Sullivan* (Respondent brief, pg. 19).

5) Petitioner requests this Court expand *Sullivan* to explicitly hold that failure to retract may be sufficient to establish actual malice (Respondent brief, pg. 21).

Petitioner agrees with all (1-5) of the foregoing. Petitioner disagrees, however, with Respondents' arguments for denying the writ of certiorari, for four principal reasons:

1. This Court is Not Barred From Granting the Writ

Respondent's arguments regarding error preservation are unavailing.

Firstly, Respondent admits Petitioner raised the matter of distinguishable facts between *Sullivan* and the instant case to the District Court when seeking to amend and enlarge the District Court's ruling (Respondent's brief, pg. 2). *Meier v. Senecaut* is not controlling, given different facts and the

Court's finding, *"There is no procedural rule solely dedicated to the preservation of error doctrine, and a party may use any means to request the court to make a ruling on an issue." Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002)

Secondly, Petitioner consistently presented contextual and factual differences between *Sullivan* and the instant case to the District Court. Petitioner presented contextual and factual differences to *Sullivan* on pages 26 and 27 of his Partial Summary Judgment Brief, and pages 10, 11 and 30 of his Reply Brief. In Petitioner's Rule 1.904(2) motion to the District Court, Petitioner referenced contextual and factual distinctions to *Sullivan* and its progeny on pages 29, 31 and 32 of his Brief, and pages 16, 17, 18, 19 and 20 of his Reply Brief. Petitioner also cited the requirement in *Anderson v. Liberty Lobby* for juries rather than judges to weigh evidence during his Rule 1.904(2) motion, on page 16 of his Reply Brief.

Petitioner did not fail to preserve error on *Anderson* and *Sullivan*; Iowa courts refused to address the distinctions Petitioner presented on *Anderson* and *Sullivan*.

Thirdly and most importantly, Article III of the U.S. Constitution vests supreme judicial power in this Court. The idea that this Court cannot update or rule on lower Courts misapplying *Anderson v. Liberty Lobby*, *Milkovich v. Lorrain Journal* or *New York Times v. Sullivan* -- all decided by this Court -- is preposterous.

2. Respondents' Opposition Brief Misstates the Record

If a national newspaper corporation got away with a false statement about material evidence and time itself at a state Court of Appeals (Petition, bottom of pg. 12, top of pg. 13), one would think that corporation would be particularly cautious about accurately stating the record before this Court. Unfortunately, that is not the case.

Respondents repeatedly claim they were "vindicated" or "exonerated" through the 2017 litigation and 2019 trial regarding Lee's 2015 publications (Respondent brief, pgs. i, 4, 6, 10, 17, 18, 19, 20). It is true Petitioner lost his 2017 defamation case at summary judgment (solely for lack of reputational damage evidence) and it is also true Petitioner lost his remaining tortious interference claim at trial in 2019, but that jury verdict in no way exonerated or vindicated the accuracy of Lee Enterprises' taxpayer burden claims regarding the Davenport casino. The 2019 jury verdict was a general verdict, with no recorded decision regarding the truth of the 2015 publications. The tortious interference jury instructions allowed a verdict for defendants even if jurors found the 2015 publications were false, but Petitioner did not prove those publications caused his separation from Davenport.

Respondents know the accuracy of the 2015 publications concerning any taxpayer burden related to the Davenport casino project was not "vindicated" through the 2017 litigation because:

1) the District Court's summary judgment ruling in 2018 (in the prior case) explicitly stated Defendants' insistence that "*public-money*" was used on the casino project demonstrated, "*... at the least, a genuine issue of material fact on whether the statements were published with actual malice ...*" (Petition, pg. 15), and

2) because Respondents' counsel made the exact argument about Petitioner not proving the 2015 publications caused his separation during closing arguments at the 2019 trial, and

3) because one of the issues the District Court got right in the instant case is finding the 2019 jury verdict did not establish the truth or falsity of the 2015 "taxpayer burden" claims in Petitioner's 2017 litigation, stating (App. at 28) "the whole subject matter" remains "at large".

Astoundingly, on page 20 of Lee's opposition brief they claim, "*... the 2019 editorial was an opinion piece protected by the First Amendment which merely summarized reporting that had already been vindicated ...*". To state the obvious, if Lee's 2015 reporting had "*already been vindicated*" prior to September of 2019, there would not have been a September 2019 trial, nor the September 2019 publication at issue which preceded that trial.

Such is the brazen arrogance *Sullivan* provides unethical media. Lee Enterprises publishes and refuses to retract wildly false statements about Petitioner for years -- leading to the 2019 publication at issue -- and then claims a "vindication" which did

not (nor could) exist *prior* to the publication. There are ample reasons to grant Petitioner's writ, but one *new* reason from Respondent's opposition brief is to reinforce consequences for making deceptive misstatements of the record to this Court.

3. Respondents Fail to Provide Evidence Necessary to Sustain Grant of Summary Judgement and Fail to Refute Petitioner's Documentary Facts in Their Opposition Brief

Respondents admit the 2019 publication was premised on the 2015 publications (then and now on a Lee Enterprises website). They cannot argue otherwise. On page 4 of their opposition brief they state the 2019 publication at issue referenced the trial concerning the 2015 publications. There is no dispute the 2019 Lee Enterprises publications at issue could have been published without the "*damning*" (App. at 58), uncorrected and objectively false 2015 Lee Enterprises publications which preceded it, on a Lee website to this day.

The dispute is Lee Enterprises knew from 2015 onward that the 2015 publications were false, but they corporately refused to correct the publications. That corporate refusal to correct, over the span of four years leading to the 2019 publication, has no parallel or protection in *Sullivan*.

Supreme Court Rule 15 is clear Respondents have an "*obligation to the Court to point out ... any misstatement made in the petition*". In addition to

Respondents' faulty and Constitution-ignoring argument regarding this Court's powers and their astoundingly poor judgment in making false statements about how they were "vindicated" in advance of the 2019 publication, Respondents' opposition brief offers no argument or contrary evidence to any of the following facts in the Petition:

A. Lee Enterprises is the controlling Respondent (Petition, pgs. 6, 18).

B. In 2015, a Lee Enterprises reporter possessed City of Davenport reports (App. at 65, 68) establishing the "entire" casino project was funded by the casino "alone" (Petition, pgs. 7, 8, 16, 23).

C. On October 7 and 8, and December 9 and 10 of 2015, Lee Enterprises' corporate hometown newspaper specifically did not publish the words "entire" and "alone" from the (uncited) October and December City reports in four news articles which otherwise included verbatim word sequences from the City reports (Petition, pg. 8).

D. On December 10 of 2015, Petitioner first requested corrections to the June 2015 Quad City Times publications. The Times' publisher forwarded the request fourteen minutes after receiving it to a Lee Enterprises Vice President. That Lee Vice President issued the corporate directive, "*attorneys are handling it from here*", according to a Lee Enterprises email dated December 15, 2015 (Petition, pg. 8).

E. While corporately refusing to correct objectively false statements about "taxpayers" paying "millions" for the casino project, Lee Enterprises' corporate hometown newspaper published a "Big Story" on June 4, 2017 about how the casino moving to Interstate 80 was a "Taxpayers Win" (App. at 61) ... while never correcting their 2015 publications or referencing Petitioner's work to secure that "win" (Petition, pgs. 2, 3, 11, 14, 18, 28, 32, 37, 38).

F. The Davenport casino has paid more than $150 million in taxes since moving to Interstate 80 (Petition, pgs. 2, 9, 19, 26).

G. The (then former) 2015 Lee Enterprises reporter was asked to provide background information which he used for his 2015 articles concerning Petitioner in discovery in the 2017 litigation. The two 2015 City reports he possessed in 2015 which established the "entire" project was funded by the casino "alone" were never provided (Petition, pg. 9).

H. Almost a year prior to the false 2019 publication about the casino being "taxpayer-funded", the District Court ruled in Petitioner's first case, *"Without explaining to readers the way public-private partnerships and public financing commonly worked on municipal projects such as ... the Rhythm City Casino development, Defendants' insistence that "public money" was being used on these projects despite Malin's protestations or explanations otherwise*

demonstrates, at the least, a genuine issue of material fact on whether the statements were published with actual malice; at most, this shows actual malice ..." (Petition, pg. 15).

I. *Milkovich v. Lorrain Journal* held that a separate constitutional privilege for opinion publications (such as the 2019 editorial at issue) was not required to ensure freedom of expression guaranteed by the First Amendment. Whether Petitioner engaged in "*backroom wheeling and dealing*" or whether the casino was or was not "*taxpayer-funded*" are both "*sufficiently factual to be susceptible of being proved true or false.*" *Milkovich v. Lorain Journal*, 497 U.S. 1, 21 (1990). Both are objectively and provably false (Petition, pg. 14).

Respondents offer no argument or contrary evidence to any (A - I) of the preceding in their opposition brief.

To be clear, none of the preceding is offered to *"overturn the adverse jury verdict following trial on Petitioner's first lawsuit against Lee Enterprises"* (Respondent brief, pg. 11). That trial is history. The 2019 jury determined the 2015 Lee publications did not tortiously interfere with Petitioner's employment agreement with the City of Davenport. Petitioner accepts that. What Respondents do not accept (and, indeed make repeated false statements about) is the 2019 jury verdict in their favor did not "vindicate" or "exonerate" the accuracy of the 2015 reporting

concerning any taxpayer burden related to the casino relocation project (App. at 27, 28).

To be further clear, the fighting issues in this case are whether Lee Enterprises knew the Davenport casino project was not "taxpayer-funded" prior to the 2019 publications, and did Petitioner supply clear and convincing evidence in accordance with *Anderson* about that prior knowledge to the Iowa courts (regarding *Anderson*, while Respondents repeatedly claim Petitioner argues for some "absolute" right to trial, Petitioner never once uses that word).

Petitioner supplied Iowa courts with clear, convincing, documentary evidence of Lee Enterprises' years-prior knowledge the Davenport casino project was the *opposite* of "taxpayer-funded".

Petitioner did what *Anderson* and *Sullivan* requires. Petitioner supplied the District Court with two 2015 City of Davenport reports possessed in real time in 2015 by a Lee Enterprises reporter stating the "entire" casino project was funded by the casino "alone" (App. at 65, 68). The project resulted in tens of millions of dollars of new tax revenue annually, with Lee's corporate hometown newspaper *publicly* heralding the project a "win" for "Taxpayers" (App. at 61) while at the same time Lee was *privately* and *corporately* refusing Petitioner's retraction demands.

Sullivan had nothing like that set of facts.

No reasonable juror, presented with independent documentary evidence of the casino *alone* funding its *entire* project and paying over $150 million in taxes since moving to Interstate 80 could possibly arrive at the opposite conclusion that the casino was "taxpayer-funded". That the Iowa Court of Appeals invented a "gist" of the 2019 publication conflicting with the only documentary evidence in the record of the entire casino project being funded by the casino alone and five independent individuals reading the 2019 publication with universally defamatory results (App. at 70, 71) is precisely contrary to this Court's ruling in *Anderson*:

> *"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)

Lee Enterprises, meanwhile, has still not placed a single piece of independent evidence in the record that any entity *other* than the casino funded a single dollar of the casino's relocation to Interstate 80. There is no such evidence in their opposition brief.

This is the rarest of public figure defamation cases; with documentary evidence of years of prior corporate knowledge of the falsity of publications, a

Lee Enterprises' *"attorneys are handling it from here"* email in evidence presaging their corporate cover-up, and numerous material factual and contextual differences to *Sullivan*.

The Iowa courts simply ignored Petitioner's evidence and granted summary judgement to Lee Enterprises, by rote.

4. Petitioner's Case is an Excellent Vehicle For the Court to Update *Sullivan*

This is a simple and timely case, perfectly suited to update *Sullivan* for the internet age and steer America toward journalism which, at a minimum, either corrects opposite of the truth publications or explains to a jury why they refuse to.

The case involves a faithful public employee and community volunteer who delivered a $150+ million "win" for the city and taxpayers he served, only to be falsely attacked by a national news corporation more interested in profit than truth.

The case presents uncontroverted documentary evidence of provable corporate knowledge of falsity years prior to publication, with lower courts either unwilling or unable to follow *Anderson* or question differences to *Sullivan* without guidance from this Court.

Should the Court grant the writ and decide in Petitioner's favor, lower Courts and media across the nation will heed this Courts' wisdom. While the

merits are (as always at this stage) yet to be determined by this Court, the mere granting of Petitioner's petition will send the message that at least one corporate purveyor of salacious and false journalism has some explaining to do.

That can only have a positive outcome, nationally.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,
Craig Malin
240 W. Mill Street
Poynette, WI. 53995
(563) 529-1542
craigthomasmalin@gmail.com