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CIRCUIT COURT OF
MOBILE COUNTY, ALABAMA
SHARLA KNOX, CLERK

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

DR. CHARLES BROWN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.: 02-CV-2022-901998**
	)	
SINCLAIR MEDIA, INC.,	)	
SINCLAIR BROADCASTING,	)	
DEERFIELD MEDIA, INC.,	)	
d/b/a WPMI 15, et al.,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COME NOW, Defendants Deerfield Media, Sinclair Broadcast Group, Sinclair Media II and Bob Noonan (collectively the "Station")[1] and offer the following brief in support of their motion for summary judgment (the "Motion"):

I. Introduction

This defamation action stems from a case of unfortunate, but simple, human error. In early 2022, Plaintiff Charles Brown became pastor-emeritus at Government Street Baptist Church in Mobile after more than 40 years of service. In a May 27, 2022 broadcast, the Station displayed a photograph of the Plaintiff for approximately

[1] As noted in Argument Part D, *infra*, Sinclair Media, Inc., and Sinclair Broadcasting no longer appear to be viable parties and, in any event, are not entities that have existed. Sinclair Media II is a former entity that has since merged into Sinclair Communications, LLC. Sinclair Broadcast Group was incorporated when suit was filed, but is now an LLC. For ease of reference and reading, all Defendants will be referred to as the "Station" for the bulk of this brief.

eleven seconds while discussing an ongoing scandal in the Southern Baptist Convention and a different "Charles Brown" – a Baptist pastor who had been convicted of sexual misconduct in Alabama in the 1980s. Later that same day, Defendant Bob Noonan ("Noonan") met with the Plaintiff, apologized for the Station's mistake, and arranged for the Station to run multiple retractions acknowledging the mistake and stating clearly that the Plaintiff was not the Charles Brown who had been convicted of sexual misconduct. A few days later the Station aired a positive interview feature with Plaintiff highlighting his career and his efforts to combat sexual immorality.

Nevertheless, Plaintiff filed this lawsuit alleging defamation arising from the May 27 broadcast. As the below will demonstrate, Defendants are entitled to summary judgment on Plaintiff's claims and, at the very least, all of his claimed damages except actual damages.

II. Narrative Summary of Undisputed Facts

A. The Plaintiff's history within the Southern Baptist Convention ("SBC").

After graduating from seminary school in the 1960s, Plaintiff Charles Brown first began his work as a pastor at the Evergreen Baptist Church in Seminary, Mississippi. (Excerpts from the deposition of Charles Brown, attached to the Motion as **Exhibit A**, at p. 12: l. 12 to p. 16: l. 7.) After working at one or two other Baptist churches in Mississippi, he eventually moved back home to Mobile to pastor at West

End Baptist Church. (Id.) West End Baptist eventually merged with another church to form Government Street Baptist Church in the mid-1980s. (Id.) Plaintiff would serve as pastor at Government Street Baptist until his retirement nearly 40 years later. Six months after retirement he was back to pastoring on a part time basis at Smithtown Baptist Church in Citronelle. (Id. at 16: 18 to 17: 4.) All of the churches where Plaintiff has pastored are affiliated with the SBC.[2]

During his many years of service at Government Street Baptist, local media, including the Station, sought out the Plaintiff to comment or interview on public issues, "like national issues [that] would come up, war." (Id. at 22: 22 to 24: 8.) He would also preach sermons about sexual immorality. (Id. at 33: 4-15.) All his life he has "fought and spoken and demonstrated against" lifestyles "that [are] not biblical." (Id. at 146: 14 to 147: 13.) The night before the subject broadcast, on May 26, 2022, Plaintiff and other SBC pastors in the area met with Ed Litton, then president of the SBC, to "explain[] some of the stuff that was fixing to happen" regarding the release of a list of alleged and convicted sexual abusers affiliated with the SBC the next day. (Id. at 102: 3 to 103: 3.) Brown was "sitting there as a participant supporting him and supporting what the [SBC] was doing." (Id.)

[2] The SBC is the world's largest Baptist denomination and the largest Protestant denomination in the United States. (https://en.wikipedia.org/wiki/Southern_Baptist_Convention) (accessed 3/29/24).

Brown does not dispute that his photo and resume were posted on the Government Street Baptist Church website or Facebook page at the time of the subject broadcast, and his resume would have had something with the word "Evergreen" on it if it listed the churches he had pastored at. (Ex. A, Brown depo. at 47: 8 to 48: 16.)

B. Public concern over sexual misconduct within the SBC.[3]

In 2019, the *Houston Chronicle* published a series of articles entitled "Abuse of Faith" which found that hundreds of SBC church leaders and volunteers had been charged with sex crimes, and the SBC had mishandled or concealed warnings that these individuals were in the midst of the SBC.[4] At the 2021 annual convention of Southern Baptists in Nashville, where over 15,000 people attended from over 5,570 churches, the scandal within the SBC "came to a head" and the scope of an

[3] The Court must take judicial notice in this defamation action of the SBC sexual abuse scandal from national and local sources. *See* Ala. R. Civ. P. 201(b) (judicially noticed facts include facts (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned) and (d) (court "shall" take judicial notice of such facts if requested by the party and supplied with the necessary information); *Eliott v. Lions Gate Entm't Corp.*, 639 F. Supp. 3d 1012, 1022 (C.D. Cal. 2022) ("In defamation cases, courts commonly take judicial notice of relevant publications to illustrate what "was in the public realm at the time, [although] not whether the contents of those articles were in fact true.") (citing *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 259 (9th Cir. 2013)). *See e.g., Hadley v. Doe,* 34 N.E.3d 549, 558 (Ill. 2015) (following intermediate appellate court's decision to take judicial notice of the ongoing Penn State sexual abuse scandal in defamation case where defendant called plaintiff "a Sandusky.")

[4] https://www.houstonchronicle.com/news/investigations/abuse-of-faith/, accessed 1/17/2024, and https://www.npr.org/2022/06/02/1102621352/how-the-southern-baptist-convention-covered-up-its-widespread-sexual-abuse-scand, accessed 1/17/2024.

independent review by Guidepost Solutions was greatly expanded.[5] The resulting "Guidepost Report" and the release of the SBC's internal list of individuals convicted of or alleged to be involved in sexual misconduct was widely anticipated.

C. SBC releases its secret list of church-affiliated individuals convicted of or alleged to be involved in sexual misconduct.

In May 2022, after years of internal and external pressure, the SBC released a previously secret list of SBC-affiliated individuals convicted of or alleged to have been involved in sexual misconduct.[6]. The list, which remains publicly available online, named 33 individuals from Alabama – including a "Charles Brown" who worked at a church in Evergreen, Alabama:

> In 1987, Charles Brown, London Baptist Church, Evergreen, AL, convicted of abusing a teenage boy in 1986.
>
> Brown was convicted of a reduced misdemeanor charge and given a suspended sentence.
>
> Sex Offender Registry - Uncertain – Multiple Listings of Charles Brown
> Baptist Type – Uncertain
> SBC Workspace has a London Baptist Church in Castleberry, AL, that is next to Evergreen, AL
>
> Source: Evergreen Courant, 9/25/1986; 1987[7]

[5] Guidepost Report at 15-16, https://www.documentcloud.org/documents/22031737-final-guidepost-solutions-independent-investigation-report, accessed 4/2/24, and https://www.al.com/news/2021/06/southern-baptist-convention-meets-amidst-sex-abuse-controversy-racial-divide.html, accessed 1/17/2024.

[6] https://www.npr.org/2022/05/27/1101734793/southern-baptist-sexual-abuse-list-released, accessed 1/3/24.

[7] https://sbcec.s3.amazonaws.com/FINAL+-+List+of+Alleged+Abusers+-+SBC+REDACTED.pdf , pg. 26, accessed 1/3/24.

The release of the list was a "big national story." (Excerpts from the deposition of Bob Noonan, attached to the Motion as **Exhibit B,** at p. 150: 21 to 151: 23.) In addition, the fact the list included "local names" made it of interest to the Station's viewers in south Alabama. (Id.)

D. The May 27, 2022 Broadcast which mistakenly used Plaintiff's photo.

Cayla Coker ("Coker") was the executive news producer at the Station at the time the list of alleged abusers was released. In addition to determining which stories were newsworthy, she was responsible for videos, photos, and, sometimes, the written words accompanying a news broadcast. (Excerpts from the deposition of Cayla Coker, attached to the Motion as **Exhibit C**, at 12: 11-21 and 15: 22 to 16:16.)

The release of the SBC abusers list was newsworthy to Coker, meaning something that "impacts a lot of people...something people would generally care about." (Id. at 16: 23 to 17: 18.) Around 49 minutes before the Station's noon broadcast on May 27, 2022, she emailed another station employee, Keith Lane, ("Lane") about the newly-released list from the SBC. (Ex. C, Coker depo at 21: 21 to 26: 5; Brown deposition exhibits 18 and 19 (emails), attached to the Motion collectively as **Exhibit D**.) Coker's email to Lane specifically mentioned that a Charles Brown from Evergreen was on the SBC's list. (Id.) However, Coker's email did not give Lane any specific instructions or tasks. (Id.) Nevertheless, Lane emailed back about eight minutes later with a photograph of Plaintiff Charles Brown. (Id.)

Coker assumed this meant that Lane had vetted the photograph of Brown, and it was good to air along with another photograph that Lane found on the internet of another individual on the list and identified in Coker's email. (Id.)

At the time, Lane was working for the Station as its "digital lead." (Excerpts from the deposition of Lane, attached to the Motion as **Exhibit E**, at 41:21 to 42: 7.) His job entailed taking station broadcasts and making them available online and/or on social media. (Id.) When Lane received the 11:11 AM email from Coker on May 27, 2022 about the release of the SBC list, he was not sure what he was being asked to do, but he took it upon himself to help out and try to find mugshots of the people referenced. (Id. at 50: 10 to 55: 7 and 57: 11-20.)

Lane searched the internet for a mugshot of "Charles Brown" from Evergreen, Alabama but came up short. (Id. at 50: 10 to 55: 7) He then ran an "images"[8] search using the information contained in the email. (Id.) The picture of the Plaintiff that eventually ran with the broadcast, "appeared among the first handful of image search results." (Id.) Lane clicked on the photo to verify it was the correct person and was taken to a Mobile church website. (Id.) Lane looked through the information on the website and was convinced that the photo he chose was the correct "Charles Brown" on the SBC list, because there was some reference to an "Evergreen Baptist Church

[8] An image search on Google, for instance, returns images instead of web pages in response to user's keywords. (https://www.lifewire.com/what-is-google-images-4585165, accessed 3/23/24.)

on the website for the person in the photo." (Id.) He emailed the two photos of two names he was able to find back to Coker. (Id.) That was the last contact Lane had with story before the broadcast. (Id. at 65: 19-22.)

Coker then wrote the news story or script for the Station's noon broadcast. (Ex. C, Coker depo. at 34: 5-12.) A true and correct copy of the video broadcast is attached to the Motion as **Exhibit F**. A true and correct copy of the script for the broadcast is attached to the Motion as **Exhibit G**. The broadcast and script speak for themselves. As relevant, when discussing the "Charles Brown" of Evergreen who was convicted of sexual crimes in the 1980s, the Station aired the photograph of the Plaintiff for approximately eleven seconds. (Id.)

Plaintiff was not watching the Station's noon broadcast on May 27. (Ex. A, Brown depo. at 35: 19 and 36: 1 to 37: 7.) He learned the Station had used his photograph from a church member named Sally Knight, who called him after it had aired. (Id.) She expressed to Plaintiff that she knew he was not working in Evergreen in the 1980s because he had been at Government Street Baptist Church "all those years." (Id.) Plaintiff heard from other church members and family about the broadcast, but none of these individuals told them they believed he was involved "with anything involving sexual predation." (Id. at 60: 6-12.)

Plaintiff called the Station and talked to its news director, Defendant Bob Noonan ("Noonan") about the broadcast. (Id. at 61: 10 to 63: 16.) Noonan asked

Brown to wait and then spoke with Lane to advise him of Plaintiff's complaint regarding the photograph. (Id.) Lane went back through his browsing history and the church website where he retrieved the photo, and compared it to Coker's email. It was then that Lane realized he had made a mistake because the churches did not match. (Ex. E, Lane depo. at 69: 1 to 70:9.) He told Noonan, who then acknowledged the mistake to Brown and agreed to run a retraction. (Id.; Ex. A, Brown depo at 61: 10 to 63: 16.) Noonan would later personally apologize to Plaintiff. (Id.) Plaintiff came to the Station that afternoon where, among other things, he was interviewed by Noonan. (Ex. B, Noonan depo. at 18: 8 to 19: 9.)

E. Defendants run multiple same day retractions, further retractions, and a longer interview piece.

The Station ran multiple retractions, starting with the 5 PM broadcast on May 27, and including the 6 and 10 PM broadcasts later that day. (Ex. B, Noonan depo. at 125: 20 to 127: 1.) The 5 PM retraction segment's script from that date states in relevant part:

> We need to make a correction tonight about a story we reported on NBC 15 at Noon.
>
> The story was about the investigation into alleged sex abuse within the Southern Baptist Convention...
>
> The names identified and their church affiliations *were* correct.
>
> However, the picture we showed for one of the people on that list was *not*.
>
> We incorrectly showed a picture of Charles Brown who served as pastor at Government Street Baptist Church for 45 years.

> Reverend Brown is *not under investigation...
>
> We apologize to Dr. Brown, the Government Street Baptist Church and to our viewers.

(Exhibit 7 to Deposition of Bob Noonan, attached to the Motion as **Exhibit H**, at SBG 000040.) The retraction which ran the next day, May 28, included part of Noonan's interview with Plaintiff on May 27. (Id. at SBG 000041.) Then, on May 31, the Station aired a lengthier portion of Plaintiff's interview with Noonan during its 6 PM broadcast. (Id. at SBG 000044-45; Ex. B, Noonan depo. at 113: 18 to 115: 7 and 118: 18 to 120: 5.)

Approximately 3,000 viewers saw the noon broadcast with Plaintiff's photograph on May 27. (Id.) The 5 PM broadcasts later that day, with the retraction, garnered six times more viewers than the noon broadcast. (Supplemental Responses to Interrogatories #3 & #4, to be submitted under Seal as **Exhibit I**). Subsequent broadcasts with retractions or the longer interview with Plaintiff received more viewers than the subject broadcast or around the same number of viewers. (Id.) Brown responded affirmatively when asked at his deposition whether he "got the retractions [he] wanted" from the Station. (Ex. A, Brown depo. at 118: 7-9.) There is nothing more Plaintiff knows of he wants published about the incident or the use of his photograph. (Id. at 98: 16-22.)

In addition to his interview with the Station, Plaintiff cooperated with two additional media outlets associated with the SBC, including the *Alabama Baptist*, in order to make clear he was not the same Charles Brown included on the SBC list. (Ex. A, Brown depo. at 111: 10 to 116: 3; Articles, exhibits 7 and 8 to the Brown depo., attached collectively to the Motion as **Exhibit J**.) The resulting articles noted explicitly that Plaintiff was not the same Charles Brown on the SBC list and included favorable quotes from Plaintiff's colleagues attesting to his character. (Id.)

Plaintiff acknowledges that he does not know of anyone at the Station that harbors any ill will towards him or would want to hurt him. (Ex. A, Brown depo. at 24:20 to 25: 3.) For their part, Lane and Coker were reprimanded for their roles in the subject broadcast. (Ex. E, Lane depo. at 82: 9-10.) Lane "mistakenly satisfied what he thought was his responsibility" and should have communicated more clearly in locating the photograph of the Plaintiff and sending it to Coker. (Ex. E, Lane depo. at 88: 9 to 89: 3.) Coker's assessment is more blunt – airing Plaintiff's photograph was a "big mistake." (Ex. C, Coker depo. at 26: 13-18.) Plaintiff, for his part, "knew a mistake had been made." (Ex. A, Brown depo. at 64: 23 to 65: 4.)

III. Standard of Review

The standard of review on summary judgment is well-settled. The movant is entitled to a summary judgment if there are no genuine issues as to any material fact and the movant is entitled to judgment as a matter of law. Ala. R. Civ. P. 56(c)(3).

IV. Argument

A. Plaintiff's claims are barred because there is no clear and convincing evidence the Station acted with actual malice.

1. Public figures, public concerns, and actual malice.

The Plaintiff's status as either a public official, public figure, or a private figure determines their burden of proof for defamation actions. *Mead Corp. v. Hicks*, 448 So. 2d 308, 310 (Ala. 1983) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)). Public figures cannot recover for defamation unless they prove with clear and convincing evidence that the defendant published the defamatory statement with actual malice *i.e.,* with knowledge that it was false or with reckless disregard for whether it was false or not. *Finebaum v. Coulter*, 854 So. 2d 1120, 1124 (Ala. 2003) (quoting *Sullivan*). Usually, a private figure has the burden of establishing by a preponderance of the evidence that the defendant negligently published the defamatory statement *i.e.,* the publication created an unreasonable risk of harm to the Plaintiff. *Cottrell v. NCAA*, 975 So. 2d 306, 333 (Ala. 2007) (citing *Mead*, 448 So. 2d at 312). But, if the defamatory speech involves a matter of public concern, a private figure must instead prove by clear and convincing evidence that the statement was made with *Sullivan* actual malice. *Cotrell*, 975 So. 2d at 344 (citing *Ex parte Rudder*, 507 So. 2d 411, 416 (Ala. 1987) and *Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1095 (Ala. 1988) ("A "defamed" plaintiff who is a public official or a public figure or whose case involves

matters of public concern must prove, by clear and convincing evidence, that the defamatory communication was made with *Sullivan* actual malice") (underline added)). The Plaintiff's status is a question of law for the Court. *Cottrell*, 975 So. 2d at 333.

2. The SBC sexual abuse scandal was a matter of public concern.

There can be no dispute that the subject broadcast involved a matter of public concern. "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216 (2011) (internal citations and quotation marks omitted). As the articles cited in Facts Parts B & C, *supra*, make clear, the sexual abuse scandal within the SBC had been widely reported on for years before the release of the SBC's list containing the names of those accused or convicted of sexual misconduct. It is not surprising then that both Coker and Noonan saw the release of the list as newsworthy, and the inclusion of individuals who had worked in Alabama on the list as particularly newsworthy for a station based in Alabama. *See, e.g., Forrester v. WVTM TV*, 709 So. 2d 23, 26 (Ala. Civ. App. 1997) (finding news broadcast concerning adults putting pressure on children in sports to be a matter of public concern: "the community has an interest in the welfare of its

children") (Ex. C, Coker depo at 16: 23 to 17: 18; Ex. B, Noonan depo. at 150: 21 to 151: 23.) Accordingly, the Court should conclude that the broadcast involved a matter of public concern.

3. Plaintiff was a public figure.

The Court should also find that Plaintiff was a public figure. Public figures, as opposed to private figures, "usually have greater access to the media which gives them a more realistic opportunity to counteract false statements than private individuals normally enjoy." *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (internal quotation marks omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)). Public figures, unlike private figures, also "invite attention and comment." *Silvester*, 839 F. 2d at 1494 (quoting *Gertz*, 418 U.S. at 345).

There are two types of public figures – all-purpose and limited. An all-purpose, public figure ""occup[ies] positions of such persuasive power and influence that they are deemed public figures for all purposes." *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (quoting *Gertz*, *supra*). To determine whether a plaintiff is a limited purpose public figure for a particular controversy a court must "(1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation [was] germane to the

plaintiff's participation in the controversy." *Little v. Breland*, 93 F.3d 755, 757 (11th Cir. 1996). The Court should find Plaintiff is both.

Plaintiff served as pastor at a large local SBC church for many years. His prominent position gave him access to the media, including the Station, where he was interviewed many times on issues of national and local importance. (Ex. A, Brown depo. at 22: 22 to 24: 8. He preached on issues of sexual morality and "fought and spoken and demonstrated against" sexual activity that was "not biblical." (Id. at 33: 4-15 and 146: 14 to 147: 13.) He also participated in a discussion with the president of the SBC regarding the ongoing sexual abuse controversy the day before the release of the list. (Id. at 102: 3 to 103: 3.) Admittedly, the subject broadcast was not germane to Plaintiff's participation in the controversy, but the evidence shows that he was certainly more than a private figure and had some involvement, through the Church, in responding to the controversy.

Indeed, Plaintiff was able to avail himself to the multiple media outlets, including the Station, after the subject broadcast to correct its fallacies – something *Gertz* specifically contemplates that public figures usually can do, and private figures cannot. *Gertz*, 418 U.S. at 345. (Id. at 61: 10 to 63: 16 and 111: 10 to 116: 3; Ex. J to the Motion.) Accordingly, this Court should conclude that Plaintiff was either an all-purpose public figure or a limited purpose public figure and require that he prove his claims at this stage with clear and convincing evidence of actual malice.

4. There is no clear and convincing evidence of actual malice.

Since the subject broadcast was on a matter of public concern and Plaintiff was a public figure, Plaintiff must produce clear and convincing evidence at the summary judgment stage the broadcast was made with "actual malice." *Smith v. Huntsville Times Co.*, 888 So. 2d 492, 499 (Ala. 2004). The Plaintiff's evidence on this front is sorely lacking.

The Alabama Supreme Court has described actual malice as follows:

> 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.'" *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) (quoting *New York Times v. Sullivan*, 376 U.S. at 279-80). 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.'" *McFarlane*, 91 F.3d at 1508 (quoting *St. Amant*, 390 U.S. at 731)(emphasis added). "The actual malice standard is *subjective*; the plaintiff must prove that the defendant *actually* entertained a serious doubt." *Id.* (emphasis added).
>
> Malice can be shown by circumstantial evidence showing, for example, "that the story was (1) 'fabricated,' (2) 'so inherently improbable that only a reckless man would have put [it] in circulation,' or (3) 'based wholly on' a source that the defendant had 'obvious reasons to doubt,' such as 'an unverified anonymous telephone call.'" *McFarlane*, 91 F.3d at 1512-13 (quoting *St. Amant*, 390 U.S. at 732). However, malice cannot be "measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731 (emphasis added). Indeed, the failure to investigate does not constitute malice, unless the failure evidences "'purposeful avoidance,'" that is, "an intent to avoid the truth." *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 *Connaughton*, 491 U.S. at 693); see *Gertz v.*

> *Robert Welch, Inc.*, 418 U.S. 323, 332, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

Smith v. Huntsville Times Co., 888 So. 2d 492, 499-500 (Ala. 2004) (some internal citations omitted). As should be no surprise based on the above, "[a] mistake is clearly insufficient to support a finding of actual malice." *Cottrell v. NCAA*, 975 So. 2d 306, 349 (Ala. 2007).

There is no evidence that the Station broadcast Plaintiff's picture with knowledge that he was not the same Charles Brown listed in the SBC report, nor is there evidence it was published with reckless disregard of whether it was false. The undisputed testimony of Coker and Lane shows that Coker sent Lane an email with the SBC list that highlighted names from Alabama. (Ex. C, Coker depo at 21: 21 to 26: 5; Ex. D.) The email did not provide Lane with any specific instructions, nor did it inform Lane that Coker was intending to air the photographs at the noon broadcast. (Id.). Lane searched the internet based on the information contained in the list for a Charles Brown who was associated with the SBC in Alabama, and he found an image of a Charles Brown who was a SBC pastor in Alabama from the website of an SBC Church. (Ex. E, Lane depo. at 50: 10 to 55: 7 and 57: 11-20.) According to Lane, both the list and the church website mentioned "Evergreen" in relation to where "Charles Brown" had pastored – which indicated to Lane he had found the right "Charles Brown." (Id.) Indeed, Plaintiff acknowledges that his resume was on his church's Facebook or web page and would have included a reference to "Evergreen"

if it listed all the churches where he had pastored. (Ex. A, Brown depo. at 47: 8 to 48: 16.) Lane was convinced, based on this information, he had found the right person. (Ex. E, Lane depo. at 50: 10 to 55: 7 and 57: 11-20.)

Plaintiff will argue that additional investigation would have revealed that the Charles Brown on the list and Plaintiff were not one in the same – as Lane discovered after being confronted by Noonan following Plaintiff's call to the Station. But, the case law is clear "the failure to investigate does not constitute malice," and there is no evidence Lane did not investigate further before the broadcast because he was purposefully avoiding the truth. Lane was convinced after his original investigation that had found a picture of the correct Charles Brown. *Smith*, 888 So. 2d at 499-500 (Ala. 2004). (Ex. E, Lane depo. at 50: 10 to 55: 7 and 57: 11-20.)

At bottom, the use of the Plaintiff's photograph in the broadcast can be chalked up to a mistake. (Ex. A, Brown depo. at 64: 23 to 65: 4; Ex. C, Coker depo. at 26: 13-18; Ex. E, Lane depo. at 69: 1 to 70: 9 and 88: 9 to 89: 3.) Plaintiff shared a common name and an association with an "Evergreen" Baptist Church with someone who was on the SBC's list. Lane was mistaken, but he had understandable reasons to believe he had found a photograph of the right Charles Brown. He passed it along to Coker who relied on her co-worker. Even though the associated allegations were quite serious, that does not deter from the fact Plaintiff's photograph was shown because, at the time, the Station believed it was showing a photo of the

same Charles Brown mentioned on the SBC list. Evidence of actual malice, much less the clear and convincing evidence required at this stage, is completely lacking. Accordingly, since this was a matter of public concern and[9] Plaintiff was a public figure, his claims fail as a matter of law, and the Court should grant summary judgment in the Station's favor.

B. Plaintiff cannot recover presumed and punitive damages because the SBC sexual abuse scandal was a matter of public concern.

If Plaintiff's claims are viable, which they are not, Plaintiff will no doubt claim that he is entitled to "presumed damages" in this case because the broadcast constituted defamation *per se*. *See Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1092 (Ala. 1988). Assuming the broadcast was defamation *per se* for purposes of the Motion, presumed and punitive damages are also barred in this case because the broadcast involved a matter of public concern -- the SBC sexual abuse scandal – and there is no clear and convincing evidence of actual malice. *Nelson*, 534 So. 2d at 1095-96. *See also Gertz*, 418 U.S. at 345; Marsh, *Alabama Law of Damages* § 36:26 (6th ed.) ("If the plaintiff is a private individual and the alleged defamatory statement is a matter of public concern, the plaintiff must demonstrate clear and convincing evidence of actual malice to recover presumed and punitive damages.").

[9] Again, the language from *Cottrell* and *Lapreyhouse* cited above makes clear that since this was a matter of public concern, Plaintiff must have clear and convincing evidence of actual malice regardless of his public or private status. Since the Court should also find he is a public figure, the actual malice standard applies to his claims either way.

(*See* Argument Part A.2.) Again, as noted above, there is no clear and convincing evidence of actual malice in this case. Accordingly, the Court should find Plaintiff is not entitled to presumed and punitive damages.

C. If his claims are viable, Plaintiff can only recover "actual" damages and not punitive damages because the Stations published a retraction in accordance with Ala. Code § 6-5-184 thru § 186.

If Plaintiff's claims in this case are viable, which they are not, his claimed damages should be limited to "actual damages" because the Station published multiple retractions in accordance with Ala. Code §§ 6-5-184 thru § 186.

Punitive damages are not recoverable in defamation actions in Alabama unless it is proved (1) "the publication was made by the defendant with knowledge that the matter published was false, or with reckless disregard of whether it was false or not" (*i.e.,* actual malice) and (2) "five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter." Ala. Code § 6-5-186. Similarly, if the defendant proves the publication was made "made in good faith by mistake or through inadvertence or misapprehension" and that he has issued a retraction in the same medium as the original publication within

10 days of the date of the publication, the Plaintiff "shall recover only actual damages." Ala. Code §§ 6-5-184 & -185 (underlined added to quotation from -185).

Both circumstances are met here. The above clearly establishes that showing Plaintiff's photo during the subject broadcast was done without actual malice and was the result of a mistake. It is also clear that the Station published multiple retractions – starting on the same day the broadcast aired. (Facts Part E, *supra*.) These retractions were aired on the same station in time slots that received either substantially more or close to as many viewers as the original broadcast. Plaintiff's lawyers may quibble with the fullness or fairness of the retractions, but Plaintiff agrees that he "got the retractions [he] wanted," and there is nothing more Plaintiff knows of he wants published about the incident or the use of his photograph. (Ex. A, Brown depo. at 98: 16-22 and 118: 7-9.)

The retractions also identified the prior broadcast, identified the specific error in the prior broadcast, confirmed the error once again, and apologized to the Plaintiff. (*See, e.g.,* Ex. H). As such, the circumstances under Ala. Code § 6-5-184 thru § 186 are clearly met, and the Court should enter summary judgment on all of Plaintiff's claimed damages except "actual damages."

D. Sinclair Media, Inc., and Sinclair Broadcasting should be dismissed and the style of the case revised to reflect the true identity of the Sinclair parties.

As relevant, the original Complaint in this case named two "Sinclair" defendants -- "Sinclair Media, Inc." ("SMI") and "Sinclair Broadcasting" ("SB"). (Doc. 2.) The operative First Amended Complaint named two different "Sinclair" Defendants -- Sinclair Media, II ("SM2") and "Sinclair Broadcast Group" ("SBG") – it did not name SMI or SB as Defendants. (Doc. 12.)

Since there are no claims stated against SMI and SB in the operative First Amended Complaint, these two Defendants should be dismissed. Even if there were claims stated against these supposed defendants in the operative complaint, neither entity exists. (Sinclair Affidavit, attached to the motion as **Exhibit K**.)

In addition, the style of the case should be amended or revised to reflect that SM2 no longer exists and SBG was incorporated when suit was filed, but is now a limited liability company. (Id.) SM2 has merged into Sinclair Communications, LLC. (Id.) Plaintiff's operative complaint states claims against fictitious defendants and the remaining Defendants in this case have no objection to substituting Sinclair Communications, LLC, for SM2 or dismissing SM2 and adding Sinclair Communication as a Defendant – whichever the Court prefers.

V. Conclusion

The Station made a mistake when it published the Plaintiff's photograph while reporting on another Charles Brown on the SBC sexual misconduct list. Plaintiff, who was a prominent local pastor for many years and who enjoyed regular access to the media, turned to the media to address the mistake in the broadcast. The Station aired multiple retractions identifying the error and apologizing to Plaintiff less than a week after it aired. Under these circumstances, the Court should find that Plaintiff was a public figure, the broadcast was on a matter of public concern, his photograph was published without clear and convincing evidence of actual malice, and enter summary judgment in favor of the Station. In the alternative, the Court should find for multiple reasons that Plaintiff is only entitled to his actual damages in this case – not presumed damages and certainly not punitive damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2024, a copy of the foregoing was served upon the following by filing the same with AlaFile, which will send a copy to the following individuals:

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