Dear Les, 1/10/95

If consistency is the hbogoblin of small minds, there is nothing small-minded about Judge Scalia, who wrote the decision in Carto's case against Jack. In it, about a month before he signed the decision in my case (11/2 vs 12/7) he wrote:

"It is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falisty with impunity." Quoted from Law Week 12/26/84, 2561.

But in my case, he permitted the DJ, "while/ know" their "falsity" to more than lie about me with impunity: he rewarded them for it!

You will remember the lie about th judge "closely observing" me for the five years of the litigation during which he never once observed me with Jim. If you have not read the petition I sent you, there is another major one, and I use these two because they are specific in Mark Lynch's brief for me. It is as big a lie as, I suppose, is possible in an FOIA case. The same DJ lawyer eliminated entirely the two paragraphs of one of my requests and told the ~~xxxxx~~ court, Scalia and the two others, that the request consisted exclusively of Jim's few introductory words. The request itself is the two paragraphs the lawyer told the court are not included.

If this does not provide Jack with a peg or amusement, it says much about Scalia as a "judge," And certainly validates my comment about political activism in the guise of judicial decision.

For that matter, the entire pabel in my case is not hobgoblined because the same three judges decided in Shaw v FBI, two days before my decision, that the FBI affi/ant, whose falsehoods they accepted, was not competent, yet they accepted him in my case where he had no other qualification than the one they rejected in Shaw (slip opinion, page 9: "Since the affiant/(Phillips) was only a supervisor of the Records Management Division of the Bureau's Freedom of Information/Privacy Acts Section, and did not claim any personal ~~knowledge~~ participation in the investigation, his assertions cannot be assume to have been made upon personal knowledge." The "investigation" is the same in both cases, JFK assassination investigation.

I'm not familiar with Wald's ~~Wald's~~ background, rather I've forgotten it. Wilkey was appointed during a GOP administrationnfrom DJ, whence Reagan appointed Scalia. The DJ is so often sitting in judgement upon itself! (Bork and Starr in another of my recent cases, Bork of the Saturday Night Massacre scandal, Reagan appointees.)

When I was young the papers would be screaming about such judicial misconduct. Now corruption is commonplace and accepted.

Best wishes,

Volume 112 - Number 249 - Page 2557 Wednesday, December 26, 1984

THE DAILY WASHINGTON

Law Reporter

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U.S. Court of Appeals for the D.C. Circuit

DEFAMATION

SUMMARY JUDGMENT

In order to deny motion for summary judgment in libel action, trial court need not find that actual malice is established with "convincing clarity."

LIBERTY LOBBY, INC., ET AL. v. ANDERSON, ET AL., U.S.App.D.C. No. 83-1471, November 2, 1984. *Affirmed in part, reversed in part and remanded* per Scalia, J. (Edwards, J. and Harris, J. concur). *Mark Lane* with *Fleming Lee* for appellants. *Michael D. Sullivan* with *David J. Branson* and *Leonard Appel* for appellees. Trial Court—Parker, J.

SCALIA, J.: Liberty Lobby, a not-for-profit corporation incorporated under the laws of the District of Columbia, and Willis Carto, its founder and treasurer, a citizen of California, brought this suit in the District Court for the District of Columbia against Bill E. Adkins, a Texas citizen, Jack Anderson, a Maryland citizen, and the Investigator Publishing Company, a corporation formed under the laws of the State of Texas. Their suit, founded on diversity of citizenship, 28 U.S.C. §1332 (1982), charged that the defendants had libeled them in two articles printed in the October 1981 issue of *The Investigator* magazine, which was published by Jack Anderson. The District Court granted summary judgment for the defendants, *Liberty Lobby, Inc. v. Anderson*, 562 F.Supp. 201 (D.D.C. 1983), and the plaintiffs now appeal. The appeal presents issues regarding the asserted doctrine of a "libel-proof" plaintiff, *i.e.*, one whose reputation has already been so damaged that further defamation can do no harm; the assertion that a pre-publication warning of falsity given by the plaintiff establishes the malice necessary to sustain judgment on behalf of a public-figure plaintiff; applicaton of the "clear and convincing evidence" standard and the requirement of independent judicial determination of actual malice to a motion for summary judgment; and, of course, the merits consideration (under summary judgment standards) of whether the allegations were factual (as opposed to opinion), were defamatory, were false, and were made in good-faith reliance upon reputable sources.

I

Three stories published in the October 1981 issue of *The Investigator* are relevant to this lawsuit. The shortest of them, "American's Neo-Nazi Underground: Did *Mein Kampf* Spawn Yockey's *Imperium*, a Book Revived by Carto's Liberty Lobby?," was written by Jack Anderson and contained four of the thirty statements identified in the complaint as defamatory. That piece was an introduction to the two other articles: "Yockey: Profile of an American Hitler," telling the story of Francis Parker Yockey, a lawyer and author who took his own life in 1960, and "The Private World of Willis Carto," the source of the remainder of the statements identified as defamatory.

The "Yockey" and "Private World" articles were written by Charles Bermant, although the former appeared under the by-line of the magazine's staff writer Jon Obert, because Anderson did not like more than one piece attributed to a single author in any issue. Bermant joined Anderson's staff in March 1981, having previously worked in Anderson's office as an intern, but the story, according to the appellants, began much earlier. In November 1969, Joseph Trento and Joseph Spear published an article in *True* magazine entitled "How Nazi Nut Power Has Invaded Capitol Hill." Carto and Liberty Lobby sued *True*, claiming that the article defamed them. The lawsuit ended with a settlement under which *True* paid Carto a sum of money and published a favorable article about Liberty Lobby. In May 1981, Spear was working for Anderson, now as the Managing Editor of *The Investigator*. He assigned Bermant to investigate the Yockey and Carto stories and, plaintiffs claim, gave him drafts containing the statements made in the *True* article from which to work. Appellants' Brief at 29-30. Although the affidavit that Bermant filed with the district court does not list the Trento and Spear article as a source, *see* Bermant Affidavit at ¶¶8-17, the detailed appendix to the affidavit does identify it as a source, occasionally as the sole source, for some of Bermant's claims. *See, e.g.*, Bermant Affidavit Appendix at 16-17.

Bermant conducted other research, which the district court characterized as "exhaustive" and "thorough[]." 562 F.Supp. at 206, 209. He reviewed the products of a Freedom of Information Act request, sought information about Carto and Yockey in libraries, and interviewed a number of people. One of his major sources was Robert Eringer, a freelance journalist; several of the allegedly defamatory statements were based solely on Eringer's claims. Bermant never met Eringer and his deposition recounts only one telephone conversation with him. Eringer sent Berman a draft of an article containing some information about Liberty Lobby. That draft has since been lost, probably "thrown away." Bermant Deposition at 71-72. Eringer never identified any of his sources to Bermant, nor did Bermant inquire. Anderson testified that it did not matter to him whether Eringer was reliable, for "[w]e did not intend to use his material." Anderson Deposition at 51. Eringer, believed at the time of the proceedings below to live in London, was not deposed for this lawsuit. Another of Bermant's major sources was William Cox, an attorney representing a plaintiff who had sued an organization related to the appellants in the California courts. Bermant interviewed Cox and also relied on the "Declaration of William Cox Regarding the Urgency of the Proceedings," a document apparently produced for the California lawsuit.

Bermant "spent . . . several days" writing first drafts of the articles, which were then edited by Obert. Bermant Affidavit at ¶17. There is evidence that several of the allegedly defamatory statements were added to the "Private World" article during the editing process. Bermant Deposition at 119. *The In-*

(Cont'd. on p. 2560 - Judgment)

D.C. Court of Appeals

JUVENILES

DISPOSITION

Family Division has jurisdiction to order second disposition of juvenile where first disposition order was never executed.

IN THE MATTER OF A.A.I., D.C.App. No. 83-921, November 14, 1984. *Affirmed* per Yeagley, J. (Mack, J. concurs; Terry, J. concurs separately). *Richard B. Nettler* with *Inez Smith Reid* and *Charles L. Reischel* for appellant. *Joseph B. Tulman*, appointed by this court, for appellee A.A.I. *Randy Hertz* with *James Klein* for *amicus curiae*. Trial Court—Bacon, J.

YEAGLEY, J.: The issue presented by this appeal is whether the Family Division of the Superior Court (the Division) had jurisdiction to order a particular placement for a delinquent juvenile after the conditions of its original commitment order were not executed by the Department of Human Services (DHS). Appellant, the District of Columbia, challenges the authority of the Division to order an alternate placement. Since the original placement order was never executed, we uphold the action of the Division and accordingly affirm the second placement order.

* * *

The District now complains that the Division was without authority to issue the second disposition of August 17, 1983, placing respondent in the Martin Pollack Project. It is undisputed that the Family Division of the Superior Court is empowered to designate a particular placement for juveniles as part of its disposition order. D.C. Code §16-2320(c)(1) (1981); *id.* §16-2320(a)(5) (1981); *In re J.A.G.*, 443 A.2d 13, 15 (D.C. 1982); *In re J.J.*, 431 A.2d 587, 591 (D.C. 1981). The District argues that by virtue of issuing the initial disposition order of June 10, the Division surrendered jurisdiction over respondent and exclusive supervisory responsibility vested in DHS. We disagree. Only when the disposition order is issued *and* is implemented by DHS does the Division relinquish its authority to make a new disposition, and DHS can assume exclusive supervisory responsibility over the juvenile. *See In re J.M.W.*, 411 A.2d 345, 349 (D.C. 1980). By issuing the order, only interim custody of respondent transfers to DHS. Exclusive custody will vest in DHS only upon the execution of the conditions of the order.

If DHS were to prevail here, the Family Division's statutory authority to designate particular placements, D.C. Code §16-2320(c)(1) (1981); *id.* §16-2320(a)(5), would be rendered meaningless since the Division's disposition scheme could be

(Cont'd. on p. 2560 - Disposition)

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● TAXATION

The Application of Collateral Estoppel in the Tax Fraud Context: Does It Meet the Requirement of Fairness and Equity? 33 American University Law Review 643-666 (Spring 1984).

Herzog, Lester B. **Tax Shelter Opinions After TEFRA, Circular 230 and ABA Formal Opinion 346: Who Will Want to Sign Them?** 14 Cumberland Law Review 493-515 (1983-1984).

Houck, Oliver A. With Charity for All. 93 Yale Law Journal 1415-1563 (July 1984).

Littlejohn, Karin B. **Tax Ramifications of the Ownership of Natural Resources by Farmers.** 29 South Dakota Law Review 258-274 (Spring 1984).

DISPOSITION

(Cont'd. from p. 2557)

thwarted by the mere inaction of the agency. Thus, unless the court possesses some concomitant follow-up authority to assure the execution of its order, DHS could ignore the terms of the Division's order and implement its own rehabilitative program.

In the instant case, the initial disposition order was issued by the Division on June 10, 1983, but the conditions of that order were never executed by DHS. The order specifically provided that "Cedar Knoll was not an appropriate placement for him [respondent]," and yet for almost thirty days after the order was issued, DHS failed to remove respondent from that facility. Apparently, A.A.I. would have remained at Cedar Knoll indefinitely had he not absconded on July 5, 1983.

Furthermore, DHS was also ordered to consider the Youth Advocate Program as an alternative placement facility. Evidently DHS also disregarded this directive. When CAY Foster Homes rejected respondent, DHS sought placement only at Cedar Knoll. DHS never even attempted to place respondent with the Youth Advocates Program. Moreover, our review of the record indicates that almost three months had elapsed between the issuance of the original commitment order (June 10, 1983) and respondent's final placement in a suitable rehabilitative facility (September 2, 1983). In the interim, DHS ignored the detailed directives of the Division's order and detained respondent at Cedar Knoll in complete disregard of what the Division found were his best interests. In light of the agency's utter failure to implement the conditions of the June 10 disposition order, we hold that exclusive custody had not yet vested with DHS and the Division retained authority to issue the second commitment order placing respondent at the Martin Pollack Project.

This appeal also challenges that part of the June 10 commitment order in which the Division directed that "respondent shall be placed only by order of the Division." The District argues that the issuance of a commitment order automatically transfers custody to DHS, and that the Division's attempt to retain continuing authority to order subsequent placement for A.A.I. is contrary to a recent line of decisions of this court. *See In re J.A.G., supra,* 443 A.2d at 13; *In re J.J., supra,* 431 A.2d at 587; *In re J.M.W., supra,* 441 A.2d at 345. A careful reading of those decisions, however, reveals that appellant's reliance upon them is misplaced. These decisions all involved situations where only after placement was effected in accordance with the division's order did the court attempt to intervene to reassert its authority. *See In re J.A.G., supra,* (where subsequent to a period of aftercare treatment, the court ordered respondent placed in a new residential program as the third phase of respondent's treatment); *In re J.M.W., supra,* (where the court attempted to revoke the aftercare status of a juvenile who had been committed to the custody of DHS without any court-ordered conditions or other restrictions upon the discretion of DHS). Those situations differ significantly from the case at bar where DHS did not even begin to execute the placement scheme formulated by the Division.

We share, to some extent, the concerns expressed by the District that it is generally undesirable for the judiciary to intervene in matters relegated to the expertise of the various parts of the executive branch. Indeed, in some juvenile cases the degree of judicial involvement could be minimal. However, this deference is not warranted, or practical, where DHS has simply failed to carry out the order of the Division.

In light of the overriding goal of the District's Juvenile Act to promote the care and rehabilitation of the juvenile, *In re C.W.M.,* 407 A.2d 617, 620 (D.C. 1979), the court must be empowered to act and/or issue an alternative commitment order when DHS fails to comply with the original order of the Division. *See* D.C. Code §16-2324(a)(3) (1981).

Accordingly, the August 17, 1983, commitment order of the Family Division is

Affirmed.

TERRY, J., concurring: I join in the opinion of the court. I write separately, however, to stress that our decision today is a very narrow one, confined to the facts of this case. In particular, the validity of the trial court's direction in its June 10 order that "respondent shall be placed only by order of the [court]" depends on the fact that DHS did not even attempt to execute the other provisions of that order. Whether any trial court has the power, as a general proposition, to include such a provision in a commitment order is—to me, at least—still an open question.

JUDGMENT

(Cont'd. from p. 2557)

vestigator's art department produced several illustrations for the issue—two of which are also subjects of defamation claims.

Before the issue was published, William McGaw, editor of *The Investigator,* told the magazine's president that the articles were "terrible" and "ridiculous." He also viewed the illustrations and informed the art director that they "could be libelous." McGaw Affidavit at ¶¶13, 17. Also before the issue was published, the appellants delivered written notification to the appellees of those statements they thought were defamatory, without apparent effect.

The articles, analyzed in detail in Parts IV and V of this opinion, convey the message that Carto is racist, fascist, anti-Semitic, and a neo-Nazi, and that Liberty Lobby was established to pursue his goals. The introductory article, written by Anderson over the by-line "The Editors," stated that upon Yockey's death Carto was able "to pick up the torch and fan it into a prairie fire." His strategy "[t]o capture political power" was "to put a benign face on his operation . . . . Thus Carto called his base organization Liberty Lobby." The "Private World" article was to the same effect. It asked, for example, such rhetorical questions as whether "Carto's opinions march goosesteps beyond the pale of responsible American conservatism?;" repeated such claims of others as the assertion that Carto was "the leading anti-Semite in the country;" and, in words and illustrations, noted that Carto physically resembled and emulated the mannerisms of Hitler.

Carto and Liberty Lobby filed suit on September 15, 1981, challenging two of the illustrations and twenty-eight statements contained in the articles, including some of the statements repeated above.

II.

We turn first to arguments which both parties bring forward as a means of avoiding the difficult inquiry into the issues of falsity and malice. Appellees ask us to affirm the grant of summary judgment without further ado because the appellants are, on two theories, "libel-proof." First, they claim that the reputations of Liberty Lobby and Willis Carto have been irreparably strained by prior publications. Whether these prior publications are truthful is not relevant, they assert, because the tort of libel, which redresses injury to reputation, has no application when the plaintiff, for whatever reason, has a reputation that cannot be damaged.

We are not yet ready to adopt for the law of libel the principle that 10,000 repetitions are as good as the truth. We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth. To begin with, we cannot envision how a court would go about determining that someone's reputation had already been "irreparably" damaged—*i.e.,* that *no* new reader could be reached by the freshest libel. More important, however, no significant First Amendment values would be furthered by the rule appellees suggest, since, where a person has been widely libeled by reputable sources, the defendant's *good faith* reliance upon those sources provides, as we shall later discuss, a complete defense. Proving such good faith reliance (or actually, even less than that, merely preventing the plaintiff from proving the opposite by "clear and convincing evidence") is not such a burden that a prophylac-

tic rule need be adopted sanctioning willful character-assassination so long as it is conducted on a massive scale.

The appellees' second libel-proof theory is somewhat different. They claim that the unchallenged portions of these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage. This apparently equitable theory loses most of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential. ("He was a liar and a thief, but for all that he was a good family man.")

* * *

Appellants, for their part, argue that we can dispense with inquiry into the existence of actual malice, because that element of liability is automatically established (to a degree sufficient to go to the jury) by the fact that appellees proceeded with these publications despite a warning from appellants that the articles were defamatory and a demand that they not be printed. These were allegedly contained in a letter to Jack Anderson which was "as explicit and detailed as the complaint filed in this matter." It may be enough to note that the letter was not mentioned in the plaintiffs' papers in opposition to summary judgment, and is not part of the record on this appeal. Even if it were before us, however, the letter as described could not conceivably constitute, in and of itself, sufficient evidence of malice to overcome a summary judgment motion. That effect might be achieved by a prior notice citing specific, verifiable facts contradicting the allegations so directly as to cause any reasonable person to conduct further inquiry; but mere general allegations of falsity similar to those contained in the complaint do not suffice. If the case reaches the jury, of course, such a notice can be considered as evidence of malice along with other factors—but standing alone it cannot take the case there.

III

We must address, then, whether the District Court properly granted the defendants' motion for summary judgment on the ground that all the elements of libel had not been adequately established. The nature of those elements is not in dispute, but the degree of certitude with which one of them had to be established, and the nature of the judgment that the District Court was to bring to bear upon it (*i.e.*, independent or deferential) will require some discussion.

Appellants do not question the District Court's ruling that they were so-called limited purpose public figures, and that the alleged libels pertained to the area in which they held this status. This means that, as a constitutional matter, in order to recover damages from these media defendants, the plaintiffs had to prove that they acted with actual malice. * * *

To prevail in a libel trial, not only must the public-figure plaintiff prove the existence of actual malice; he must prove it with "convincing clarity," *New York Times v. Sullivan, supra,* 376 U.S. at 285-86, or to use the Court's more recent language, with "clear and convincing proof," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Moreover, judges are not merely to determine whether the finder of fact could reasonably find such "convincing clarity" to exist, but are "independently [to] decide" that point, "as expositors of the Constitution." *Bose Corp. v. Consumers Union*, 104 S.Ct. 1949, 1965 (1984). The issue we address in this portion of our opinion is whether these requirements of "convincing clarity" and "independent judicial determination" apply at the summary judgment stage. Even though this is a diversity case, that issue is governed by federal law—either because the Constitution imposes the more demanding requirements at the summary judgment stage, or because, if it does not, the matter is determined by the rules of the forum court under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360 (D.C. Cir. 1983) (applying *Erie* to the District of Columbia); *see Schultz v. Newsweek, Inc.*, 668 F.2d 911, 917 (6th Cir. 1982).

With regard to the "clear and convincing evidence" requirement, the issue can be framed as follows: whether, in order to deny the defendant's motion for summary judgment, the court must conclude that a reasonable jury not only could (on the basis of the facts taken in the light most favorable to the plaintiff) find the existence of actual malice, but could find that it had been established with "convincing clarity." We conclude that the answer is no. Imposing the increased proof requirement at this stage would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the plaintiff's case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the defendant's uncontroverted facts as well. It would effectively force the plaintiff to try his entire case in pretrial affidavits and depositions—marshalling for the court *all* the facts supporting his case, and seeking to contest as many of the defendant's facts as possible. Moreover, a "clear and convincing evidence" rule at the summary judgment stage would compel the court to be more liberal in its application of that provision of FED.R.CIV.P. 56(e) which states that the court "may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." In other words, disposing of a summary judgment motion would rarely be the relatively quick process it is supposed to be. Finally, if summary judgment were supposed to be based on a "clear and convincing" standard, it is hard to explain the Supreme Court's statement questioning the asserted principle that in public figure libel cases "summary judgment might well be the rule rather than the exception," and affirming to the contrary that "[t]he proof of 'actual malice' . . . does not readily lend itself to summary disposition." *Hutchinson v. Proxmire*, 443 U.S. 111, 120 & n.9 (1979). There is slim basis for such a statement if, in order to survive a motion for summary judgment, the plaintiff must establish an arguably "clear and convincing" case.

We believe, in short, that application of the "clear and convincing evidence" constitutional standard in public figure libel cases is similar to application of the "beyond a reasonable doubt" constitutional standard in criminal cases. There, "probable cause" is sufficient to take the case to trial, *see Brown v. Department of Justice*, 715 F.2d 662, 667 (D.C. Cir. 1983), and the heightened standard applies only after the government has had an opportunity to present its full case, *United States v. Davis*, 562 F.2d 681, 683-84 (D.C. Cir. 1977) (on motions for acquittal, court must determine whether there is any evidence "upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt").

* * *

For the foregoing reasons, we believe that the constitutional requirements of "clear and convincing" proof and independent judicial determination of the ultimate issue of actual malice are to be applied only after the plaintiff has had an opportunity to present his evidence. We thus agree with the two-stage approach set forth by Judge Wright, joined by Judge Robinson, in his concurrence in *Wasserman v. Time, Inc.*, 424 F.2d 920, 922 (D.C. Cir.), *cert. denied*, 398 U.S. 940 (1970):

> Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant . . . .
>
> If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."

One further clarification is needed: In reviewing the district court's application of the foregoing principle, we do not defer to its conclusions and reverse only if they are clearly erroneous. Since in granting or denying summary judgment a district court by definition makes a determination of law rather than fact, we review the matter anew. *Western Casualty & Surety Co. v. National Union Fire Insurance Co.*, 677 F.2d 789, 791 n.1 (10th Cir. 1982).

IV

A. *Nondefamatory Allegations*

We proceed, then, to a discussion of the merits. Preliminarily, we can eliminate from our inquiry those statements asserted to be false in the Complaint which cannot, as a matter of law, be libelous since they do not "tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," RESTATEMENT (SECOND) OF TORTS §559 (1977). * * *

We can also eliminate from our consideration three other allegations, which are constitutionally protected opinion, and therefore not actionable. * * * Since opinions cannot be false, they cannot be the basis of a defamation action. * * *

* * *

As to those challenged statements that could be defamatory, and were factual, appellees' defense was based not upon truth of the assertions but upon good-faith reliance on reputable sources. If established, that unquestionably eliminates the necessary element of actual malice. Inquiry into the question, however, cannot be conducted in gross. It is the individual allegedly libelous statement (taken in its proper

context) rather than the accuracy of the publication as a whole, which is on trial. A falsehood published with actual malice is no less actionable for being surrounded by an array of well documented and carefully researched allegations. The accompanying truth cannot eliminate the libel, and is indeed the most effective means of increasing its harm by increasing its credibility. The district court appears to have acknowledged this principle, since it found that "the information contained within [Bermant's] sources substantiates each allegation contained in the articles." 562 F.Supp. at 209.

* * *

The district court was correct in entering summary judgment in favor of the appellees on the foregoing twenty-one allegations, and we affirm its findings. As to each of them, one element of the cause of action—either defamatory content, factual nature or malice—is absent. Our examination of the record, however, reveals that a jury could reasonably conclude that the nine remaining allegations were defamatory, false, and made with actual malice. As to these claims, then, we must reverse and remand to the district court. *See* J. MOORE & J. WICKER, 6 Pt. 2 MOORE'S FEDERAL PRACTICE ¶56.27[1] at p. 56-1560 (2d ed. 1982) (remand for limited issues in dispute proper). *See, e.g., McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 717 F.2d 1460 (D.C. Cir. 1983).

Allegation 11 asserts that Liberty Lobby occupies a building in Washington, D.C., owned by the Government Educational Foundation, "[t]he chairman and owner of [which] is Willis Carto, who bought the building with money contributed by many of Liberty Lobby's members in response to an urgent appeal;" and that Liberty Lobby pays the Government Educational Foundation $6,000 per month rent. The implication is that Carto is deriving personal profit from an excessive rental to Liberty Lobby. The plaintiffs deny all elements of the allegation, asserting that the building is not owned by the Government Educational Foundation, that Carto is neither chairman nor owner of that organization, and that Liberty Lobby pays no rent for the building. The sources allegedly relied upon by Bermant (other than Eringer, whose reliability for purposes of the good-faith defense is inadequate, as we shall discuss below) do not assert ownership of the Foundation by Carto or the payment of any rent, much less a specific figure of $6,000. It is for a jury to determine the truth or falsity of these matters and whether, if false, they are defamatory. On the basis of evidence adduced at this stage, it is impossible to say that no actual malice could be found.

Allegation 15, in addition to once more characterizing Carto's movement among various right-wing groups as "drifting" (a statement we have disposed of in the context of another allegation earlier), asserted that Carto "organized and promoted the Joint Council for Repatriation. What he meant by 'repatriation' was the forced deportation of all blacks to Africa." The published sources relied upon by defendants support the assertion that Carto created this organization, and that its purpose was to "send[] American blacks back to Africa." They do not establish, however, that the proposal envisioned "forced deportation"—in fact, to the contrary, one of them asserted that Carto (overtly at least) only sought "voluntary" repatriation. While the latter detail reduces not at all the repugnant racism of the scheme, it is possible to be a racist without being guilty of the quite separate fault of advocating the forced deportation of United States citizens. It is the distinction between the actions of White Citizen Councils, during the worst days of the civil rights struggle, in subsidizing bus fares for blacks willing to emigrate from the South, and the action of groups such as the Ku Klux Klan in driving blacks out by physical force.

As far as racism is concerned, there is no distinction between the two, but the latter contains an additional and quite distinct repugnancy. Since the published sources referred to by the defendants not only do not establish this point but to the contrary assert that Carto's scheme was formally for "voluntary" repatriation, we think it is a jury question whether this allegation, if false, was made with actual malice.

We find that a jury could reasonably conclude that defamatory statements based wholly on the *True* article were made with actual malice. That article was the subject of a prior defamation action which was settled to Carto's satisfaction, a fact likely known to Bermant's editors, if not Bermant. Whether the particular statements relied on were false and whether the appellees were actually aware of that falsity are matters for a jury to determine. Allegation 19, the illustration suggesting that Carto emulated Hitler, and allegation 29, that Carrto joined the singing of "Hitler's 'Horst Wessel Lied' " and delivered a speech in an attempt to emulate Hitler's style and charisma, were based solely on the *True* article. There is no other evidence that Carto emulates Hitler in appearance or in action, allegations the jury could find to be defamatory.

We turn next to the five allegations based solely upon the conversation with Robert Eringer:

13. Statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;
14. Claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later convicted of felony in connection with political activities, the allegation could be considered defamatory);
17. Illustration showing Carto secretly observing prospective employees through a one-way mirror;
23. One-way mirror allegation, in text;
27. Claim that a lead story in an issue of *The Spotlight* was a total hoax.

We find that a jury could reasonably conclude that Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice. For one thing, there is only Bermant's word for the fact that Eringer ever said anything that supports the statements. The same was true for the statements, discussed earlier, attributed to Bartell and Suall—but as we noted, *supra*, those individuals were present at known locations in this country and could have been deposed by the plaintiffs, whereas the mysterious Mr. Eringer was thought to be somewhere in England. Moreover, Bermant's dealings with Eringer display a much lesser degree of care, despite the scurrilous allegations for which he is the sole source. Bermant not only did not inquire how Eringer came to know these details of Carto's operations; he never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone. Anderson admits that he did not care whether Eringer was reliable. These actions came close to the hypothetical case of actual malice the Supreme Court described in *St. Amant:* a story "based wholly on an unverified anonymous telephone call." 390 U.S. at 732. Eringer was identified by name, but he was in all other respects unknown to the appellees. These allegations, which defendants claim were based solely on Eringer's assertions, should have gone to the jury.

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We affirm the District Court's grant of summary judgment as to all claims of defamation except those addressed in Part V of this opinion. As to the latter, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

LEGAL NOTICES

PUBLIC AUCTION

Garagekeeper's lien on a '75 Lincoln 2-dr. hdtp., ser. no. 5Y89A867121. Sale to be held on December 31, 1984 at 9:30 a.m., 1940 Montana Avenue, N.E. Seller reserves the right to bid. Dec. 12, 19, 26.

GOVERNMENT

The District of Columbia: Whereas on the 4th day of January, 1984, the District of Columbia filed a Libel in the Superior Court of the City of Washington, District of Columbia In Superior Court Case No. CA59-84 against: $138.00 IN UNITED STATES CURRENCY (Alvin Butler) $91.00 IN UNITED STATES CURRENCY (Jerome Francis Blakeney) $24.00 IN UNITED STATES CURRENCY (Matthew Crokett) $275.00 IN UNITED STATES CURRENCY (Reginald Crowder) $20.00 IN UNITED STATES CURRENCY (Freddie Bailey) $4.00 IN UNITED STATES CURRENCY (Debbie Dawson) $293.35 IN UNITED STATES CURRENCY (Temba Ekoukow) $237.52 IN UNITED STATES CURRENCY (Eddie D. Fowler) $35.00 IN UNITED STATES CURRENCY (Stewart Allen Freeman) $30.00 IN UNITED STATES CURRENCY (Frank Goodwine, Jr.) $107.00 IN UNITED STATES CURRENCY (Michael Dwayne Gordon) $28.00 IN UNITED STATES CURRENCY (Carl Victor Green) $28.00 IN UNITED STATES CURRENCY (Michael Anthony Davis a/k/a Michael Anthony Ivery) $250.00 IN UNITED STATES CURRENCY (Oliver Martin) $41.00 IN UNITED STATES CURRENCY (Donald Sneed) $180.00 IN UNITED STATES CURRENCY (James Compton Tolbert) $143.00 IN UNITED STATES CURRENCY (Ralph Void) $134.00 IN UNITED STATES CURRENCY (Edward Otis Williams) $176.00 IN UNITED STATES CURRENCY (Emma Young), And whereas by virtue of process in due form of law, to me directed, I have seized and taken into my possession, to wit: $138.00 IN UNITED STATES CURRENCY (Alvin Butler) $91.00 IN UNITED STATES CURRENCY (Jerome Francis Blakeney) $24.00 IN UNITED STATES CURRENCY (Matthew Crokett) $275.00 IN UNITED STATES CURRENCY (Reginald Crowder) $20.00 IN UNITED STATES CURRENCY (Freddie Bailey) $4.00 IN UNITED STATES CURRENCY (Debbie Dawson) $293.35 IN UNITED STATES CURRENCY (Temba Ekoukow) $237.52 IN UNITED STATES CURRENCY (Eddie D. Fowler) $35.00 IN UNITED STATES CUR-