

December 26, 1984

decided 11/2/84, Scalia, Edwards & Harris CONCUR.

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 by 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 out-cast'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 defend-

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ants, 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-Hymning & 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 rely itself to summary disposition." Hutcheson v. Proxmire, 443 U.S. 111, 120 & n.9 (1979). There is slim basis for such a statement if order to survive a motion for summary judgment, the plaintiff must establish an argument "clear and convincing" case.

We believe, in short, that application of "clear and convincing evidence" constitutional standard in public figure libel cases is similar application of the "beyond a reasonable doubt" constitutional standard in criminal cases. The "probable cause" is sufficient to take the case to trial, see Broun v. Department of Justice, 523 F.2d 662, 667 (D.C. Cir. 1975), 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 (D.C. Cir. 1977) (on motions for acquittal, courts 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 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 therefore agree with the two-stage approach set forth in Judge Wright, joined by Judge Robinson, in concurrence in Wasserman v. Time, Inc., 498 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 conclusion 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 717, 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 §611 (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, appellee's defense was based not upon truth of the assertions but upon good-faith reliance on reputable sources. If established, that unquestionable 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 prop-