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January 11, 1985

In the copy of my petition to the appeals court for an en banc rehearing that I sent you, there is an inadvertent omission. Also, at that time I was not aware of an earlier decision written by Judge Scalia that decided the exact opposite about "falsity." Attached are xeroxes of what I refer to.

"By the same panel" was omitted in line 8 of page 6 of the petition. The very same judges who decided my case decided the cited Shaw case, Wilkey, Wald and Scalia. The sentence should have read "In Shaw ... decided only two days earlier by the same panel, Phillips was held (on page 9) to be incompetent for precisely the same reason..." I have clipped the Shaw footnote from which this is quoted and copied it on the first page of the Shaw decision, which identifies the judges. The point, so you will not have to reread the petition, is that SA Phillips was held to be incompetent in the Shaw case because his attestations were not "made upon personal knowledge," a precise duplication of his role in my case. Both are FOIA lawsuits for JFK assassination information. In my case the identical panel credited Phillips' incompetent attestations that I alleged, under oath and without refutation, were falsely sworn.

Judge Scalia wrote the decision in No. 83-1471, decided about five weeks earlier, the Liberty Lobby's suit against Jack Anderson. He found that while it "is shameful that Benedict Arnold was a traitor" and was not a "shoplifter," under the law one cannot lie and call Arnold a shoplifter "knowing its falsity with impunity."

It appears, however, that Judge Scalia holds that a legally incompetent FBI agent and FBI counsel can utter "falsity" under oath "with impunity" because that is the thrust of the decision in my case. Also, according to the same law, as decided by the same judge, Jack Anderson cannot make a mistake in his writing but both FBI agents and counsel can lie and prevail before both the district and appeals courts based on those lies. (If, as I attested, Phillips's lies were "material," such lying is the felony of perjury.)

Harold Weisberg

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5084

J. GARY SHAW

v.

FEDERAL BUREAU OF INVESTIGATION, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-00756)

Argued October 31, 1984

Decided December 5, 1984

Miriam M. Nisbet, of the Bar of the Supreme Court of North Carolina, *pro hac vice* by special leave of the Court, with whom *Joseph E. diGenova*, United States Attorney, *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys were on the brief, for appellant.

James H. Lesar, for appellee.

Before: WILKEY, WALD and SCALIA, *Circuit Judges*.

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[2] In addition to citing the statutes, the Bureau produced an affidavit affirming that "[t]he investigations were conducted to determine if activities of the subject of the file were in violation of one or more of [those] statutes," Affidavit of John N. Phillips at 6; *see also* Declaration of John N. Phillips at 1. In addition to being superfluous—since as we have described, subjective intent need not initially be established—this affidavit was ineffective for the desired purpose. Since the affiant 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 participation in the investigation, his assertion cannot be assumed to have been made upon personal knowledge.

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