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SECOND CIRCUIT REVIEW

FIRST AMMENDMENT LAW: LIBEL OF A PUBLIC ENTITY

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This month, we discuss a significant decision issued recently by the United States Court of Appeals for the Second Circuit, which examines the showing of "actual malice" required in a libel suit brought by an allegedly defamed public entity.

In *Church of Scientology International* v. *Behar*,[1] in an opinion written by Chief Judge John M. Walker and joined by Judges Jose A. Cabranes and Fred I. Parker, the Second Circuit affirmed District Court Judge Peter K. Leisure's dismissal of plaintiff-appellant Church of Scientology International's (CSI) complaint asserting claims for libel against *Time* magazine, its parent company Time Warner Inc. and journalist Richard Behar.

In its complaint, CSI alleged that an article published by Behar in *Time* magazine contained a number of false and defamatory statements regarding CSI, its practices, and actions taken by its members. The court ruled that the statements at issue were either not "of and concerning" CSI, or else were written and published without actual malice.

'Scientology: Cult of Greed'

On May 6, 1991, *Time* magazine published a 10-page, 7,500-word cover article entitled "Scientology: The Cult of Greed." The article, written by defendant-appellee Richard Behar, was both highly critical of Scientology[2] as a belief system generally and of specific actions allegedly taken by its members. The article described Scientology as "posing as a religion," but being "really a ruthless global scam"; it then narrated various instances of wrongdoing by a number of individual Scientologists. CSI's complaint named as defendants Behar, *Time* magazine, and Time Warner Inc. and alleged as false and defamatory the following 12 statements from the article:

1. "The church survives by intimidating members and critics in a Mafia-like manner."

2. "Scientology is quite likely the most ruthless, the most classically terroristic cult the country has ever seen."

3. "Those who criticize the church — journalists, doctors, lawyers and even judges — often find themselves framed for fictional crimes, beaten up or threatened with death."

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4. Occasionally a Scientologist's business antics land him in jail. Last August, a former devotee named Steven Fishman began serving a five-year prison term in Florida. His crime: stealing blank stock confirmation slips from his employer, a major brokerage house, to use as proof that he owned stock entitling him to join dozens of successful class-action lawsuits. Mr. Fishman made roughly $1 million this way from 1983 to 1988 and spent as much as 30 percent of the loot on Scientology books and tapes. Scientology denies any tie to the Fishman scam, a claim strongly disputed by both Mr. Fishman and his longtime psychiatrist, Uwe Geertz, a prominent Florida hypnotist. Both men claim that when arrested, Mr. Fishman was ordered by the church to kill Mr. Geertz and then do an 'EOC,' or end of cycle, which is church jargon for suicide.

5. "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

6. "Baybak, 49, who runs a public relations company staffed with Scientologists, apparently has no ethics problem with engineering a hostile takeover of a firm he is hired to promote."

7. "What these guys do is take over companies, hype the stock, sell their shares, and then there's nothing left. They stole this man's property."

8. "The Lotticks lost their son, Noah, who jumped from a Manhattan hotel clutching $171, virtually the only money he had not yet turned over to Scientology. His parents blame the church and would like to sue but are frightened by the organization's reputation for ruthlessness."

9. "His death inspired his father, Edward, a physician, to start his own investigation of the church. 'We thought Scientology was something like Dale Carnegie,' Lottick says. 'I now believe it's a school for psychopaths. Their so-called therapies are manipulations. They take the best and brightest people and destroy them.' "

10. "It was too late. 'From Noah's friends at Dianetics' read the card that accompanied a bouquet of flowers at Lottick's funeral. Yet no Scientology staff members bothered to show up."

11. "The next month the Rowes flew to Glendale, Calif., where they shuttled daily from a local hotel to a Dianetics center. 'We thought they were brilliant people because they seemed to know so much about us,' recalls Dee. 'Then we realized our hotel room must have been bugged.' After bolting from the center, $23,000 poorer, the Rowes say, they were chased repeatedly by Scientologists on foot and in cars."

12. "In a court filing, one of the cult's many entities — the Church of Spiritual Technology — listed $503 million in income just for 1987."

Procedural History

In June 1992, defendants moved to dismiss the complaint on the grounds that the statements, none of which mentioned CSI by name, were not "of and concerning" CSI. On Nov. 23, 1992, the district court granted defendants' motion to dismiss in part, finding that certain of the statements complained of could not be read as referring to CSI.[3] Specifically, the court found that parts of statement 4 and all of statements 6, 7, 11 and 12 could not reasonably be considered to be of and concerning CSI.[4] Defendants then answered the complaint, and Mr. Behar asserted counterclaims against CSI for harassment and violation of the Fair Credit Reporting Act, 15 U.S.C. § 1681. The parties agreed to focus discovery on the issue of "actual malice" and to defer discovery on the issue of truth and falsity.

After two-and-a-half years of discovery, the district court granted summary judgment to defendants as to all of the remaining statements, except for statement 5, on the grounds of lack of actual malice.[5] On reconsideration, the district court granted summary judgment to defendants on statement 5 — i.e., that the Vancouver Stock Exchange (VSE) was one source of funds for the church (the VSE statement) — based on the "subsidiary meaning" doctrine,[6] and dismissed the complaint.[7]

On Sept. 9, 1997, CSI moved for leave to amend the complaint to assert a claim for nominal damages premised on a finding that the disputed statements were demonstrably false. The district court denied the motion, holding that allowing CSI to amend its complaint five years after it brought the action, and after summary judgment had been granted against it, would be unduly prejudicial to defendants.[8] The district court also held that amendment of the complaint would be futile, since a public figure claiming even nominal damages is still required to demonstrate actual malice under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[9] Although Mr. Behar's counterclaims were still pending, the parties agreed that these claims would be dismissed without prejudice, on the understanding that they could be refiled should the complaint be reinstated.

CSI moved for the district court to enter a final judgment dismissing its complaint, which the court granted,[10] whereupon CSI immediately filed the instant appeal. CSI challenged the district court's rulings on the grounds that the district court: (1) improperly ruled that portions of the article's allegedly defamatory statements were not of and concerning CSI; (2) improperly disregarded CSI's evidence that the statements were made with purposeful avoidance of the truth; (3) committed plain error in dismissing the VSE statement under the subsidiary meaning doctrine; and (4) erred in refusing to permit CSI to pursue a claim for nominal damages premised on a finding of falsity.[11]

Libel and Public Figures

Libel is defamation expressed in writing or print; it is a common law cause of action and applies separate standards to plaintiffs who are private individuals and those who are public figures. *Celle* v. *Filipino Reporter Enters., Inc.*, 209 F.3d 163, 176 (2d Cir. 2000). Throughout the litigation, CSI conceded that it was in fact a public figure, thus subjecting it to the strictures imposed by *New York Times Co.* v. *Sullivan*, 376 U.S. 254

(1964), in which the Supreme Court held that a "public figure" plaintiff must prove that an allegedly libelous statement was made with actual malice — that is, made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 280. This showing must be made by clear and convincing evidence. See *Celle*, 209 F.3d at 183.

'Actual Malice' Standard

Despite its name, the "actual malice" standard does not measure malice in the sense of ill will or animosity, but instead looks to the speaker's subjective doubts about the truth of the publication. See *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) ("Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will."). If it cannot be shown that the defendant knew that the statements were false, a plaintiff must demonstrate that the defendant made the statements with "reckless disregard" of whether they were true or false. The reckless conduct needed to show actual malice "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing," but by whether there is sufficient evidence "to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[12]

Thus, to prevail, CSI was required to show, first, that the statements complained of were defamatory — that is, they were (1) of and concerning CSI, and (2) likely to be understood as defamatory by the ordinary person. See *Celle*, 209 F.3d at 176. Then, because CSI was admittedly a public figure, the *New York Times* standard required a showing that the statements were (3) false, and (4) published with actual malice — that is, either knowledge of falsity or reckless disregard of the truth. See id. In contrast, a private plaintiff need only prove that false and defamatory statements of and concerning the plaintiff were made with gross negligence. See *Karaduman* v. *Newsday, Inc.*, 51 N.Y.2d 531, 539 (1980).

Because resolution of the falsity and actual malice inquiries required factual discovery, the district court conducted two and a half years of discovery on the issue; on this record, the Second Circuit held that CSI had failed to establish actual malice as to statements numbered 1-4 and 8-10, and as a result, CSI's claims based on statements 5-7 were held to be barred by the subsidiary meaning doctrine. Accordingly, the court did not reach the question whether any of these statements were "of and concerning" CSI.[13]

In *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the Supreme Court found the following factors relevant to a showing that the defendant harbored actual malice: (1) whether a story is fabricated or is based wholly on an unverified, anonymous source, (2) whether the defendant's allegations are so inherently improbable that only a reckless person would have put them in circulation, or (3) whether there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. Id. at 732.

CSI had argued that Mr. Behar held a negative view of Scientology and that his bias pervaded his investigation and caused him to publish false and defamatory statements

about CSI. The district court found that the evidence could not support such a claim: that while Mr. Behar's alleged bias would be relevant to show a purposeful avoidance of the truth if it were coupled with evidence of an extreme departure from standard investigative techniques, "plaintiff has failed to demonstrate the correlative circumstance of inadequate investigation to make its evidence of bias probative of actual malice, rather than probative of lack thereof [the] speaker's belief in his statements, even his exaggerations, enhances, rather than diminishes, the likelihood that they are protected."[14] Stating its belief that the district court had thus properly applied the actual malice standard, the Court proceeded to examine the individual statements for evidence of such actual malice.

Intimidation Statements

The district court found that Mr. Behar had relied on (1) "affidavits from former high-ranking Scientologists, newspaper and periodical articles, interviews and personal experience, and published court opinions" to support statement 1 (Mafia-like intimidation), (2) the judgment of Cynthia Kisser, an executive director of an organization dedicated to the study of cults, which was likely to be given credence by Behar in view of her knowledge and experience, for statement 2 ("classically terroristic"), and (3) Behar's personal experience and research to support statement 3 (retaliation against journalists, lawyers, doctors and judges)."[15] Citing evidence in the record of Behar's extensive research, the Court concurred with the district court's conclusion that no reasonable jury could find that defendants either knew or entertained serious doubts that these statements were false.

Similarly, the Court held the part of the statement 4 that pertained to Mr. Fishman's stock scam was not published with actual malice. The Court pointed out that Mr. Behar had interviewed Steven Fishman, Robert Dondero, the Assistant United States Attorney that prosecuted Mr. Fishman for stock fraud, and Marc Nurik, the attorney that represented Mr. Fishman. As the district court observed, Mr. Behar relied on these interviews.[16] He had no reason to have serious doubts about the truth of the information given him by the prosecuting attorney, the defense attorney and the defendant in the case.

The Court made the same point regarding the murder-suicide allegations in statement 4: Mr. Behar had interviewed Mr. Fishman's psychiatrist, Uwe Geertz and Vicid Aznaran, a former high-ranking Scientologist, and thus had evidence before him that served as a foundation for his allegations and protected him from a charge of actual malice.

CSI argued in response that Mr. Behar possessed evidence that Mr. Fishman's claims — that the church had ordered him to kill Dr. Geertz and commit suicide — were false; Mr. Fishman, CSI noted, had previously tried to frame the church with similar charges by staging a phony death threat 18 months earlier. If true, this allegation would provide "obvious reasons to doubt the veracity of the informant," and thus might expose Mr. Behar to liability, if he had known of a serious lack of credibility in a primary source.

While the Court acknowledged that CSI had raised questions about whether Mr. Fishman's account was reliable, the Court noted that the evidence in the record

showed that Mr. Behar had considerable corroboration of Mr. Fishman's account, including the testimony of Dr. Geertz that he had reported the death threat referred to in the article to the FBI, and Dr. Geertz's testimony in Mr. Fishman's criminal trial.

The Second Circuit observed that, even if there were credibility problems in Mr. Fishman's account, the article does not present Mr. Fishman's claim as undisputed fact, but rather makes clear that Scientology denies the truth of Mr. Fishman's and Dr. Geertz's charges. Because Mr. Behar had conducted extensive research, and because the death threat had been accurately reported as an allegation rather than as undisputed fact, the Court agreed with the district court that no reasonable jury could find that Mr. Behar had published the statements about the stock scam or the murder-suicide allegation with "purposeful avoidance of the truth."

The Lottick Statements

The district court found that statements 8, 9, and 10 (concerning the Lotticks and the loss of their son Noah) could not be found to have been published with actual malice because the Lotticks were not obviously lacking in credibility, their statements were not inherently improbable and Mr. Behar had investigated the case thoroughly.[17]

CSI alleged that Mr. Behar included some pieces of information and not others, for example, by not interviewing Noah Lottick's roommate. These allegations, the district court held and the Second Circuit affirmed, amounted to no more than "minor omissions in investigation, from which no inference of purposeful avoidance of the truth could reasonably be drawn."[18] Any such omissions are insignificant, the Court held, when viewed against the backdrop of Mr. Behar's investigation "as a whole": he interviewed Noah Lottick's parents, his friends and teachers, reviewed the police report of his death and was twice refused an interview by the director of the Dianetics Center in Hackensack, N.J., which Noah was attending.

Once again, the Second Circuit found that the research and investigation had been complete enough to shield Mr. Behar from any allegation of actual malice, not because the article did not contain hints of antagonism towards his subject, but because he had established solid factual grounds to support his allegations.

Subsidiary Meaning

The district court ultimately dismissed the "VSE Statement" (statement 5) based on the "subsidiary meaning" doctrine established by the Second Circuit in *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir. 1986).[19]

In *Herbert*, the court held that where a "published view" of a plaintiff is not actionable as libel, other statements made in the same publication are not "actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held that there can be no recovery." Id. at 312. Relying on the Supreme Court's holding, in *Masson* v. *New Yorker Magazine, Inc.*, that the related "incremental harm" doctrine is not a creature of federal constitutional law,[20] CS1 argued

that (1) the subsidiary meaning doctrine can be applied here only if it is part of the relevant body of state law, and (2) neither California nor New York law, one of which presumably applied to this case, recognizes this doctrine.

The Court rejected CSI's argument, asserting that the subsidiary meaning doctrine is more than "merely a gloss on constitutional actual malice." The "incremental harm" doctrine at issue in *Masson* reasons that where unchallenged or nonactionable parts of a publication are damaging, an additional statement, even if maliciously false, might be nonactionable because it causes no appreciable additional harm.[21] In *Masson*, the Supreme Court rejected any suggestion that the incremental harm doctrine is synonymous with first amendment libel protections:

> "[T]he question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not." *Masson*, 501 U.S. at 523.

Subsidiary Meaning

In contrast to the incremental harm doctrine, the subsidiary meaning doctrine does "bear upon" whether a defendant has acted with actual malice.

In *Herbert*, for example, the Second Circuit held that nine of 11 allegedly libelous statements were not actionable because they were not maliciously published; the published statements were backed by evidence that was not known to be false and as to the reliability of which the defendants had not shown reckless disregard. See *Herbert*, 781 F.2d at 305-07. Because defendants' overall "view" of the plaintiff rested on such evidence, the Second Circuit in *Herbert* held that they "could not be said to have had actual malice in publishing [it]." Id. at 311.

In light of this conclusion, the court held it would have been illogical to hold, based on other statements, that the plaintiffs in fact had such actual malice;[22] to avoid that contradiction, the court enunciated the subsidiary meaning doctrine. In the instant appeal, the court held that this doctrine, as articulated in *Herbert*, must be employed when determining whether a "view" was published with actual malice. Thus, the court held that the subsidiary meaning doctrine of *Herbert* poses a question of federal constitutional law, not state law, and remains good law after *Masson*.[23]

Under *Herbert*, therefore, the Second Circuit concluded that the district court properly held that the VSE Statement to be subsidiary in meaning to the larger thrust of the article, which asserted that "Scientology, rather than being a bona fide religion, is in fact organized for the purpose of making money by means legitimate and illegitimate."[24] The court likewise held that the assertions made in statements 6 and 7, which were included in the article's VSE sidebar, were also subsidiary to the general message of the article, and therefore CSI's claims with respect to those statements were properly dismissed. Lastly, the court rejected CSI's remaining claims, including CSI's claim for nominal damages.

The court pointed out that CSI's status as a public figure meant that it was required to demonstrate actual malice, no matter what remedy it sought.

In determining that the challenged statements in the article were not published with actual malice, or were subsidiary in meaning to statements made without actual malice, the Second Circuit did not make new constitutional ground; the opinion, by and large, is a careful application of the "public figure" standards first enunciated in *New York Times* v. *Sullivan* and later discussed by the Supreme Court in *St. Amant* v. *Thompson* and by the Second Circuit in *Celle* v. *Filipino Reporter Enters., Inc.*

More important is the court's clarification of the subsidiary meaning doctrine of *Herbert* v. *Lando* in the wake of the Supreme Court's holding in *Masson*; the court's distinction between the "incremental harm" and "subsidiary meaning" doctrines should be of great help to practitioners in the circuit. Lastly, the case illustrates, once again, the high degree of protection accorded journalists by *New York Times*: once CSI conceded its status as a public figure, the focus of the case turned entirely to an examination of Mr. Behar's research methods and documentation. Under such a standard, the primary requirement for a successful defense of an allegedly libelous article becomes, not the fairness, the clarity, or even the accuracy of a reporter's words, but rather the quality and scope of his research.

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ENDNOTES

[1] 2001 U.S. App. LEXIS 488 (2d Cir. Jan 12, 2001)

[2] Founded 40 years ago by writer L. Ron Hubbard, Scientology remains one of America's most controversial faith-based organizations. The official Scientologist Web site, www.scientology.org, contains substantial background material for those unfamiliar with the faith and its tenets. The Web site claims that Scientology currently maintains 2,318 churches, missions and related organizations in 107 countries and in 31 languages and that approximately 500,000 people participate in Scientology services for the first time each year.

[3] See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 806 F. Supp. 1157 (S.D.N.Y 1992).

[4] See id. at 1162-64.

[5] See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F. Supp. 637, 642-44 (S.D.N.Y. 1995).

[6] See *Herbert* v. *Lando*, 781 F.2d 298 (2d Cir. 1986) (holding that where a "published view" of a plaintiff is not actionable as libel, other statements in the same publication are not actionable if they "merely imply the same view" and are an "outgrowth of and subsidiary to those claims" which have been held not to justify recovery).

[7] See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 932 F. Supp. 589, 595 (S.D.N.Y. 1996).

[8] See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 1998 WL 575194, at *3 (S.D.N.Y. Sept. 9, 1999).

[9] See id. at *4-5.

[10] See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 1999 WL 126450, at *2 (S.D.N.Y. Mar. 9, 1999).

[11] CSI did not appeal the district court's decisions with respect to statements 11 and 12.

[12] *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968).

[13] In footnote 1 of the opinion, the Court makes the following distinction between statements made about a religion itself as opposed to its members, a distinction which might have proved critical had the Court not found an absence of actual malice on the part of the defendants: To the extent that the Behar article uses the

term "Scientology," Chief Judge Walker is of the view that the term as used denotes a belief system, or, as the article puts it, a "cult," and that therefore references to "Scientology" are not "of and concerning" the plaintiff Church of Scientology International of Los Angeles, Calif. This is true as surely as invective directed generally at Catholicism cannot be considered defamatory of an individual Catholic or a particular parish church; such "group libels" are not actionable by discrete members of the group. See *National Nutritional Foods Ass'n* v. *Whelan*, 492 F. Supp. 374, 380 (S.D.N.Y. 1990); *Brady* v. *Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786, 788-92 (App. Div. 1981). Chief Judge Walker also believes that the district court correctly concluded that the article's references to individual Scientologists could not be "of and concerning" CSI. See *AIDS Counseling & Testing Ctrs.* v. *Group W. Television, Inc.*, 903 F.2d 1000, 1005 (4th Cir. 1990) (holding that "allegations of defamation by an organization and its members are not interchangeable" (internal quotation marks omitted)).

14 See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 903 F Supp. at 641.

15 See id. at 642-43.

16 See id. at 644.

17 See id. at 643.

18 Id.

19 See *Church of Scientology Int'l* v. *Time Warner, Inc.*, 932 F. Supp. at 595.

20 See *Masson*, 501 U.S. at 523.

21 See *Herbert*, 781 F.2d at 310; *Simmons Ford, Inc.* v. *Consumers Union*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981) (holding that, in the context of an article evaluating plaintiffs' new electrical car and rating it "Not Acceptable" for a range of unchallenged reasons, a portion of the article wrongly implying that the car did not meet federal safety standards "could not harm [plaintiffs'] reputations in any way beyond the harm already caused by the remainder of the article.").

22 See id. (holding that recovery was barred as to an "incorrect" statement in part because "given the amount of other evidence supporting this view, the [defendants] did not publish this view with actual malice"); id. at 312 (holding that recovery was barred as to another statement because "we have already held that the [defendants] did not have actual malice in publishing their view").

23 The court notes, in passing, that both the "incremental harm" and "subsidiary meaning" doctrines are distinct from the "libel-proof-plaintiff" doctrine. See, e.g., *Cardillo* v. *Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975) (dismissing action by convicted figure in organized crime who sued publisher for book that mentioned

his involvement in criminal enterprises; holding that plaintiff was "libel-proof," that is, "so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages."). Because that doctrine was not before the court, "we take no position on its continued vitality after *Masson;"* whether this should be taken as an invitation to litigation will be left to our readers from the First Amendment bar.