SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, Ph.D.,	*	
Plaintiff,	*	
	*	**2012 *CA 008263 B***
v.	*	**Judge Jennifer M. Anderson**
	*	**Civil I, Calendar 3**
NATIONAL REVIEW, INC., *et al*.,	*	
Defendants.	*	

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AGAINST MARK STEYN

This matter is before the Court upon Plaintiff's Motion to Compel Discovery Against Defendant Mark Steyn, filed through counsel, on August 21, 2019, and Defendant Mark Steyn's Opposition to Plaintiff's Motion, filed through counsel, on September 4, 2019.

I. Background

Plaintiff filed a defamation lawsuit against Defendant for Defendant's article, *Football and Hockey*, published on the *National Review Online* on July 15, 2012. The alleged defamatory statements Plaintiff cited in the Complaints are: (1) Defendant's verbatim quote from Rand Simberg's article in which Simberg called Plaintiff "the Jerry Sandusky of climate change and molested and tortured data in the service publicized science"; (2) Defendant's original statements that, "not sure I'd have extended that metaphor all the way to the locker room showers with quite the zeal Mr. Simberg does, but he has a point"; and (3) "Michael Mann was behind the fraudulent climate-change 'hockey stick' graph, the very ringmaster of the tree-ring circus." (Pl.'s Compl. ¶ 28.)

The main idea of Defendant's article is the inadequate and ineffective investigations conducted by Pennsylvania State University into their employees, including Jerry Sandusky and

Plaintiff, and Defendant used the investigations to support his viewpoint that the institution is corrupt and is prepared to cover up the alleged wrongdoing of its "stars". (Pl.'s Compl. Ex. B.) Defendant's article is prompted by and based on Rand Simberg's (another defendant) article that was published on July 13, 2012. Defendant's entire 270-word four-paragraph article is closely connected to Simberg's July 13th article. For example, the first paragraph makes it clear that the article is a development from Rand Simberg's article; the second paragraph is a full-paragraph quote from Simberg's article and indicates the following paragraphs are built upon that quote; the third paragraph states "not sure I have extended the metaphor … with quite the zeal Mr. Simberg does, but he has a point"; and then the last paragraph, Defendant again quoted Simberg's analogy between Jerry Sandusky and Plaintiff. See id.

In this motion, Plaintiff seeks documents from Defendant to prove actual malice. Plaintiff sent 33 discovery requests to Defendant in total, and the parties have agreed on 25 of them, and eight requests are disputed in the current motion. The documents Plaintiff requested are from 1998 to the present, while the allegedly defamatory statement was published on July 15, 2012. In response, Defendant is willing to produce non-privileged documents in his possession, custody, or control relating to his writings and criticisms concerning Plaintiff from the day before Simberg's article was published (October 12, 2012) to the day after the lawsuit was filed (October 23, 2012). The Court will address the discovery requests in dispute one by one.

II. Analysis

Actual malice is the defendant's subjective knowledge of the statement's falsity or a reckless disregard for whether the statement is false. Doe No. 1 v. Burke, 91 A.3d 1031, 1044 (D.C. 2014). The reckless disregard requires the plaintiff to prove the defendant, in fact, entertained serious doubts as to the truth of the publication, which could be shown by the

defendant's high degree of awareness of the statement's probable falsity. Competitive Enter. Inst. v. Mann, 150 A.3d 1213, 1252 (D.C. December 22, 2016) (citing St. Amant v. Thompson, 390 U.S. 727, 731 (1968)). The actual malice in the defamation context is a shorthand expression of Defendant's knowledge or reckless disregard of the statement's falsity, and it is not the same as the malice used in daily life that means an individual's ill-will, spite, or animosity towards another. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510-11 (1991).

After reading Plaintiff's memorandum supporting the eight discovery requests, the Court finds Plaintiff confuses the definition of actual malice in the libel context with the malice commonly used, mistakenly equates himself and his research to the entirety of global warming, and misunderstands the District of Columbia Court of Appeals' *dicta*.

A. Request 1 and Request 5

Plaintiff requested the production of all documents relating to Plaintiff (Request 1) and all documents relating to Plaintiff's reputation (Request 5) from 1998 to the present. In response, Defendant agreed to produce non-privileged documents in his possession, custody, or control relating to his writings and criticisms concerning Plaintiff from July 12, 2012 to October 23, 2012.

Plaintiff confuses the actual malice in the libel context with the malice commonly used in everyday life. "Actual malice," as a term of art, has a different meaning from how the term is commonly understood., Cantrell v. Forest City Publishing Co., 419 U.S. 245, 251-52 (1974), and it is not synonymous with the malice that connotes ill-will, spite, or animosity, Masson, 501 U.S. at 510-11 (1991). Actual malice is simply a shorthand expression of the "knowledge of the statement's falsity or reckless disregard of its truth" standard, whereas everyday malice may include ill will, personal spite, a bad motive towards the plaintiff, or desire to injury the plaintiff,

etc., but the everyday malice is not the standard for actual malice in a libel case, nor can be used as the basis to find for the plaintiff. See Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 281 (1974); see also Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967).

Plaintiff's Requests 1 and 5 seeking documents about Plaintiff himself and his reputation is precisely the attempt to elicit evidence of Defendant's personal spite and animosity towards Plaintiff, the everyday malice that is inapplicable in the libel context. Plaintiff cites District of Columbia Court of Appeal's *dicta* that Defendant's zeal, bias, and animus towards Plaintiff may provide a motive to defame, Mann, 150 A.3d at 1259, to support his quest for the evidence of everyday malice. The Court of Appeals' *dicta* does not change the scope of the actual malice in a libel context. Instead, it merely states a common-sense fact, and in no way serves as a "mandate for discovery" as Plaintiff mischaracterized in his motion. To the extent that any possible motives may be behind the alleged defamation, Defendant's production of three-month documents is reasonably sufficient because the motives cannot be used as basis to find actual malice, and the article mainly concerns the inadequate investigation conducted by Penn State, not Plaintiff himself. Defendant's request for 21 years worth of documents e when he is not the main target of the alleged defamatory article is overly broad and grossly disproportionate, and thus cannot be permitted.

B. Request 2 and Request 3

Plaintiff requested the production of all documents relating to Dr. Mann's research (Request 2) and the production of all documents relating to the Hockey Stick Graph, MBH 98, and MBH 99 (Request 3). In response, Defendant agreed to produce non-privileged documents in his possession, custody, or control relating to his writings and criticisms concerning Plaintiff from July 2012 to October 2013.

The Hockey Stick Graph, MBH 98, and MBH 99 are collaborative work among Plaintiff and two other scientists who are not parties to this lawsuit. Complying with Plaintiff's request will inevitably include irrelevant information and documents that are immaterial and unnecessary in the prosecution of this action. The issue that Plaintiff seeks to prove here is that Defendant knew the alleged defamatory statements *concerning Plaintiff* were false, and/or Defendant actually entertained serious doubt as to the truth of the statements *concerning Plaintiff*. The Court finds that Defendant's production of all writings and criticisms relating to Plaintiff properly encompasses Defendant's writings about Plaintiff's research (Request 1) and Hockey Stick Graph, MBH 98, and MBH 99 (Request 5) to the extent it involves Plaintiff.

As to the time period, the Court finds Defendant's proposal from July 12, 2012, to October 23, 2012, is warranted by the facts and circumstances in this case. The case law instructs us that actual malice in a defamation claim focuses primarily on what a defendant knew or believed *at the time* the purportedly false statement was made, Hughes v. Twenty-First Century Fox, Inc., 304 F. Supp. 3d 429, 453 (S.D.N.Y. 2018), and the plaintiff may probe the editorial process to the extent it *is limited to the allegedly libelous article*, Tavoulareas v. Piro, 93 F.R.D. 35, 42 (D.D.C. 1981). Because this article is developed from and closely connected to Simberg's July 13th article throughout all four paragraphs, as discussed in detail before, see supra at 2, the proposed time range from the day before Simberg published the July 13th article to the day Plaintiff filed suit is appropriate.

C. Request 17

Plaintiff requested the production of all documents Defendant relied upon in making, adopting, and/or referencing the cited statements from the defamatory publications. Plaintiff and Defendant agree that "Defendant has agreed to produce documents that he relied upon in making

the defamatory statements." (Pl.'s Mot. to Compel, at 6; Def.'s Opp'n at 3.) Therefore, Request 17 is moot.

D. Request 19

Plaintiff requested the production of all documents relating to Defendant' policies and positions regarding global warming. Defendant rejected this request on the ground of irrelevance. The Court agrees with Defendant. This case is about defamation, not about Defendant's policy position on global warming. The Court is particularly careful and mindful not to step into the substance or merit of the policy debate on global warming. Whatever policy position Defendant holds, however wrong or meritless it might be, is Defendant's freedom of belief. The only thing that is relevant here is Defendant's knowledge and/or serious doubts about the truth of the statements. The broader question of global warming is never before the Court. Defendant's policy position on global warming has nothing to do with, and will not lead to relevant evidence concerning his knowledge or awareness of the probable falsity of these particular statements.

E. Request 21

Plaintiff requested the production of all documents relating to Defendant's effort to investigate the science behind global warming. Defendant rejects this request on the ground of overly broad and unnecessary in the prosecution of the case. The Court agrees with the Defendant.

Plaintiff confuses Defendant's effort to investigate the truth or falsity of the alleged defamatory statements with the effort to investigate the science behind global warming. This case is about the allegedly defamatory statements involving Plaintiff and Plaintiff claimed being

injured by those statements. The science behind global warming is not the plaintiff here and certainly cannot be defamed. Plaintiff cannot equate himself to the science of global warming. Defendant has no obligation to investigate the science behind global warming, and the failure to investigate the science does not result in any liability to Defendant. Defendant could have done matriculate research into global warming by studying every scientific report on that topic and maybe still liable for defamation if he published these particular statements with the knowledge of their falsity or serious doubts about their truth. Defendant could be found liable for failing to *investigate the truth of the statements concerning Plaintiff* when he had actually entertained serious doubt about the probable falsity because it meets the reckless disregard standard, but Defendant could not be found liable for anything if he failed to *investigate the science* behind global warming. Defendant is a writer, not a scientist. Likewise, Plaintiff is *a* scientist with his research focus on global warming, not *the* scientist representing the entirety of the science behind global warming. Defendant's investigation into the science behind global warming is completely irrelevant when it is not tied to Plaintiff specifically.

F. Request 26

Plaintiff requested the production of all documents relating to the advertisement regarding Plaintiff taken out by the *National Review* in the *Collegian*, Pennsylvania State University's student newspaper, on October 31, 2012. Defendant is a writer/contributor to the *National Review*, so absent some explanation from Plaintiff, it is unclear how much participation Defendant - as a writer - has in the *National Review*'s advertising planning process. Plaintiff should obtain such documents from the *National Review*, another party in this lawsuit because the *National Review* is in a better position to supply information about advertisement as the publisher of the advertisement. Defendant represents that he has agreed to produce documents

for the entire month of October 2012, which the Court deems as sufficient to show Plaintiff's state of mind regarding the October 31, 2012 advertisement.

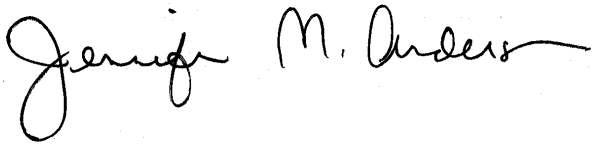
G. Publicly available documents

In addition to the specific discovery requests discussed above, the parties also disagree on whether Defendant should produce publicly available documents. Rule 26 provides that "the court must limit the frequency or extent of discovery ... if … the discovery can be obtained from some other source that is more convenient, less burdensome, or less expensive." Super Ct. Civ. R. 26(b)(2)(C)(i). If the documents requested are available in the public domain, Plaintiff and Defendant have equal access to the documents, which falls under "the discovery can be obtained from other more convenient and less burdensome source." In fact, Plaintiff admits in his motion that "normally it is acceptable to require a party only to produce those documents that are not publicly available." (Pl.'s Mot. to Compel at 11.)

The Court has difficulty to understand why Plaintiff requested only the CEI, another defendant in this case, to produce the documents that are not publicly available, (Pl.'s Mot. to Compel, at 27, July 23, 2019), and Plaintiff himself refused to produce publicly available documents to Defendant (Kornstein Decl. Ex. A, September 3, 2019), but requested Defendant to produce the publicly available documents to which Plaintiff. While Plaintiff voices his concern that he does not know the full extent of Defendant's public activities, this issue should be resolved by parties' communication. If Plaintiff is unable to find the information that Defendant claims to be publicly available, Plaintiff could ask Defendant for direction or request Defendant to produce.

Accordingly, it is hereby this 22nd day of October 2019,

ORDERED that Plaintiff's Motion to Compel Discovery Against Mark Steyn is **DENIED**.



Judge Jennifer M. Anderson
Signed in Chambers

Copies to:

John B. Williams, Esq.
Ty Cobb, Esq.
Peter J. Fontaine, Esq.
Counsel for Plaintiff
Via CaseFileXpress

Andrew Grossman, Esq.
Mark I. Bailen, Esq.
David B. Rivkin, Jr., Esq.
William O'Reilly, Esq.
Counsel for Defendants Competitive Enterprise Institute ("CEI") and Rand Simberg
Via CaseFileXpress

Anthony J. Dick, Esq.
Michael A. Carvin, Esq.
Thomas M. Contois, Esq.
James B. Moorhead, Esq.
Molly Bruder-Fox, Esq.
Christopher Moeser, Esq.
Shannen W. Coffin, Esq.
Counsel for Defendant National Review, Inc. ("NRI")
Via CaseFileXpress

Clifton S. Elgarten, Esq.
Mark Thomson, Esq.
Daniel J. Kornstein, Esq.
Mark Platt, Esq.
Michael J. Songer, Esq.
Counsel for Defendant Mark Steyn
Via CaseFileXpress