IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL E. MANN, PH.D., Plaintiff, v. NATIONAL REVIEW, INC., *et al.*, Defendants.	2012 CA 008263 B Judge Alfred S. Irving, Jr.

ORDER

Before the Court is Defendant Mark Steyn's *Rule 56 Motion for Summary Judgment*, filed on January 22, 2021. On March 3, 2021, Plaintiff Michael E. Mann, Ph.D., filed an opposition and, on March 22, 2021, Mr. Steyn filed a reply. In addition, before the Court is Dr. Mann's *Motion for Partial Summary Judgment*, filed on January 22, 2021. On March 3, 2021, Mr. Steyn filed an opposition and, on March 22, 2021, Dr. Mann filed a reply.

Mr. Steyn has moved for summary judgment on the issues of protected speech concerning public opinions, actual malice, truth, and certain damages. Dr. Mann has moved for partial summary judgment on the issue of falsity.

I. Brief Procedural Background

On July 13, 2012, Defendant Rand Simberg submitted to Defendant Competitive Enterprise Institute's ("CEI") Open Market weblog an article titled "The Other Scandal in Unhappy Valley" (the "Simberg Article"). The Simberg Article criticized the work of Plaintiff Michael E. Mann, Ph.D. On the same day of the submission, CEI published the Simberg Article. On July 15, 2012, Defendant Mark Steyn posted on National Review, Inc.'s ("NRI") website's blog section, The Corner, an article titled "Football and Hockey." On July 23, 2012, Dr. Mann's

counsel sent a letter to NRI threatening to sue over Mr. Steyn's post. On August 22, 2012, Rich Lowry, editor of NRI, wrote an article addressing Dr. Mann's threatened lawsuit.

On October 22, 2012, Dr. Mann filed the subject complaint alleging that Mr. Simberg and Mr. Steyn's articles contained defamatory statements. On December 14, 2012, NRI and Mr. Steyn filed special motions to dismiss the complaint pursuant to the District of Columbia's Anti-SLAPP Act. On June 28, 2013, Dr. Mann moved to amend the complaint. On July 10, 2013, the Hon. Natalia M. Combs-Greene granted the request.

On July 19, 2013, Judge Combs-Greene denied the special motions to dismiss. On July 24, 2013, NRI and Mr. Steyn moved to dismiss Dr. Mann's amended complaint, again pursuant to the Anti-SLAPP Act. On August 20, 2013, the case was transferred to then-Associate Judge Frederick H. Weisberg, who presided over the Civil I Calendar. On September 17, 2013, NRI and Mr. Steyn appealed the denial of their special motions to dismiss. On December 19, 2013, the District of Columbia Court of Appeals dismissed, as moot, Defendants' interlocutory appeal of the orders dismissing Dr. Mann's original Complaint. On January 22, 2014, Judge Weisberg denied NRI and Mr. Steyn's renewed special motions to dismiss. On January 24, 2014, NRI filed another notice of appeal. Mr. Steyn did not join in the appeal.

The District of Columbia Court of Appeals affirmed the trial court's denials of the special motions to dismiss in part and reversed in part. *See Competitive Enter. Inst. v. Mann*, 150 A.3d 1213 (D.C. 2016). The Court of Appeals denied a petition for rehearing, but amended its opinion slightly in 2018. *See Competitive Enter. Int. v. Mann*, 150 A.3d 1213 (D.C. 2016), *as amended* (Dec. 13, 2018) [hereinafter "*CEI*"]. The United States Supreme Court denied petitions for writs

of certiorari, with Justice Samuel Alito writing a dissenting opinion. *See Nat'l Review, Inc. v. Mann*, 140 S. Ct. 344 (2019) (Alito, J., dissenting).

The Court of Appeals' Opinion answered questions of first impression related to the Anti-SLAPP Act, and extensively analyzed the facts of the case. On May 31, 2019, the Hon. Jennifer M. Anderson dismissed Count IV (libel per se against NRI concerning publication of Mr. Lowry's editorial), Count V (libel per se against CEI concerning republication of Mr. Lowry's editorial), and Count VI (intentional infliction of emotional distress claims against all Defendants).

By his January 22, 2021 pleading, Mr. Steyn now seeks judgment on all remaining claims against him. The same day, Dr. Mann filed his motion for partial summary judgment.

II. Standard of Review

To prevail on summary judgment, the moving party "must demonstrate that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001) (citing Super. Ct. Civ. R. 56(a)). If the moving party is successful in making this initial showing, the burden shifts to the non-moving party, who must raise a genuine issue of material fact to survive summary judgment. *See Bradshaw v. District of Columbia*, 43 A.3d 318, 323 (D.C. 2012); *Musa v. Continental Ins. Co.*, 644 A.2d 999, 1002 (D.C. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). A party may move for summary judgment on "part of each claim or defense[.]" Super. Ct. Civ. R. 56(a); *United States ex rel. Landis v. Tailwind Sports Corp.*, 234 F.Supp.3d 180, 191 (D.D.C. 2017).

In reviewing a motion for summary judgment, a court must construe all evidence in the light most favorable to, and make all inferences in favor of, the non-moving party. *See Linen v.*

Lanford, 975 A.2d 1173, 1178 (D.C. 2008); *O'Donnell v. Associated Gen. Contractors of Am.*, 645 A.2d 1084, 1086 (D.C. 1994). "Summary judgment is an extreme remedy that is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law." *Maddox v. Bano*, 422 A.2d 763, 764 (D.C. 1980) (citing *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944)). "[M]ere conclusory allegations are insufficient to avoid entry of summary judgment." *Jones v. Thompson*, 953 A.2d 1121, 1124 (D.C. 2008) (internal quotations omitted). The "mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for the non-moving party." *Id.* at 1124 (internal quotations and alterations omitted).

Relevant to the instant inquiry is the additional consideration that summary judgment must be denied where "the offered evidence and its inferences would *permit* the factfinder to hold for the nonmoving party under the appropriate burden of proof," and that "the burden of proof varies with the nature of the civil action being litigated." *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979) (emphasis in original). In other words, "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "[I]f the claim must be demonstrated by heightened proof to succeed, the nonmovant claimant must produce more substantial evidence to successfully oppose summary judgment." *Sibley v. St. Albans Sch.*, 134 A.3d 789, 809 (D.C. 2016) (quotations omitted) (citing *Anderson*, 477 U.S. at 252).

III. Discussion

The elements of a claim for defamation are, as follows:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff;

> (2) that the defendant published the statement without privilege to a third party;
> (3) that the defendant's fault in publishing the statement [met the requisite standard]; and
> (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

CEI, 150 A.3d at 1240 (D.C. 2016) (alterations in original) (citing *Oparaugo v. Watts*, 884 A.2d 63, 76 (D.C. 2005)).

In 2016, the Court of Appeals considered the evidence comprising the record at the time. *See CEI*, 150 A.3d at 1232-60. The Anti-SLAPP Act requires that, after a defendant moves to dismiss and successfully demonstrates that the claim "arises from an act in furtherance of the right of advocacy on issues of public interest," the plaintiff must demonstrate that his claim is likely to succeed on the merits. *Id.* at 1232 (quoting D.C. Code § 16-5502(b)-(d)). The Court of Appeals applied the following standard:

> [T]he court evaluates the likely success of the claim by asking whether a jury properly instructed on the applicable legal and constitutional standards could reasonably find that the claim is supported in light of the evidence that has been produced or proffered in connection with the motion.

Id. at 1233. The Court of Appeals further elaborated that any consideration under the Anti-SLAPP Act must honor the right to a jury trial, and explained:

> [T]he standard to be employed by the court in evaluating whether a claim is likely to succeed may result in dismissal only if the court can conclude that the claimant could not prevail as a matter of law, that is, after allowing for the weighing of evidence and permissible inferences by the jury.

Id. at 1236. When compared to the standard applied in the summary judgment context, the Court of Appeals concluded that "the question is substantively the same: Whether the evidence suffices to permit a jury to find for the plaintiff." *Id.* at 1238 n.32.

Although Mr. Steyn did not join NRI in its January 24, 2014 Appeal, the Court of Appeals, nonetheless, considered extensively Mr. Steyn's July 15, 2012 article titled "Football and Hockey," which appeared on NRI's online blog, "The Corner." Mr. Steyn began the article with: "In the wake of Louis Freeh's report on Penn State's complicity in serial rape, Rand Simberg writes of Unhappy Valley's other scandal." *CEI*, 150 A.3d at 1224. Mr. Steyn then quoted the following selection from the Simberg Article:

> I'm referring to another cover up and whitewash that occurred there two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it's time that we revisit the Michael Mann affair, particularly given how much we've also learned about his and others' hockey-stick deceptions since. Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science that could have dire economic consequences for the nation and planet.

Mr. Steyn added his own commentary, as follows:

> Not sure I'd have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point. Michael Mann was the man behind the fraudulent climate-change "hockey-stick" graph, the very ringmaster of the tree-ring circus. And, when the East Anglia emails came out, Penn State felt obliged to "investigate" Professor Mann. Graham Spanier, the Penn State president forced to resign over Sandusky, was the same [one] who investigated Mann. And, as with Sandusky and Paterno, the college declined to find one of its star names guilty of any wrongdoing.
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> If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up? Whether or not he's "the Jerry Sandusky of climate change", [sic] he remains the Michael Mann of climate change, in part because his "investigation" by a deeply corrupt administration was a joke.

Id. at 1224-25.

In defining the contours of the Anti-SLAPP Act, the Court of Appeals noted that, while the Anti-SLAPP Act allows a defendant "the option to up the ante early in the litigation," the defendant "preserves the ability to move for summary judgment under Rule 56 later in the litigation, after discovery has been completed." *Id.* at 1239. The Court of Appeals was mindful to caution that its "legal conclusion is based on the evidence that has been presented at this juncture, in connection with the special motion to dismiss. Once discovery is completed, the legal conclusion that the evidence is sufficient to go to trial could change." *Id.* at 1258 n.60. By way of explanation, the Court of Appeals noted that it lacked the necessary and helpful "affidavits or depositions attesting to the personal beliefs of Mr. Simberg, Mr. Steyn, or the responsible personnel at CEI and National Review[,]" for a conclusive ruling on the issues before it. *Id.* at 1255 n.56. It therefore stands to reason that this Court would not necessarily be bound by the Court of Appeals' more preliminary conclusions now that this Court has the benefit of results from more extensive discovery, to include deposition testimony of certain actors in this litigation, as well as certain declarations or affidavits.

The Court of Appeals' 2016 Opinion nevertheless provides a useful legal roadmap for how this Court should consider and analyze the facts as now developed from discovery and presented to the Court. In his motion for summary judgment, Mr. Steyn argues that his article was "true, lacked actual malice, was part of a public debate, and caused Mann no harm." Def. Mem. of P. & A. at 17. Mr. Steyn also seeks summary judgment on whether Dr. Mann should be awarded damages. For his part, Dr. Mann moves for partial summary judgment on the issue of falsity.

A. Public Opinion

Appreciating that the Court of Appeals found that the statements in his article were not "protected opinion," Mr. Steyn contends that the Court of Appeals improperly failed to consider

the broader social context of the post. Def.'s Mem. of P. & A. at 28. Mr. Steyn argues that the analysis of whether a given statement is protected or not requires consideration of the "totality of the circumstances." *See Id.* (citing *Ollman v. Evans*, 750 F.2d 970, 997 (D.C. Cir. 1984)); *see also Milkovich v. Lorain Journal*, 497 U.S. 1 (1990). Mr. Steyn asserts that: 1) his language evidences an expression of an opinion ("he has a point"); 2) Mr. Steyn was not suggesting verifiable facts (the "tree-ring circus"); and 3) the alleged statements were subordinate to the main idea of the article, which was an opinionated critique of the ineffective investigations that Penn State conducted. *Id.* at 29. Further, Mr. Steyn asserts that the Court of Appeals failed to consider the article within the broader social context of both the "polemic surrounding the Hockey Stick and the public questioning of Penn State, in the wake of the Freeh Report." *Id.*

Mr. Steyn argues that his article concerns a matter of public importance and appeared in the online blog of an opinion magazine. As such, he contends the context of his statements matter and, when it is considered, the finding must be that his article is protected opinion. *Id.* at 30; *see also Guilford Transp. Indus., Inc.*, *v. Wilner*, 760 A.2d 580, 596 (D.C. 2000). Mr. Steyn further contends that internet communications are distinct from print media, such as newspapers. As such, courts have considered statements made in online fora as statements of opinion rather than fact, meriting even greater latitude. *Id.* (citing *Bellavia Blatt & Crosset P.C. v. Kel & Partners*, 151 F. Supp. 3d 287, 295 (E.D.N.Y. 2015).

A defamatory statement is one that "tends to injure [the] plaintiff in his trade, profession or community standing, or lowers him in the estimation of the community." *Guilford Transp. Indus., Inc.*, 760 A.2d at 594. The statement "must be more than unpleasant or offensive; the language must make the plaintiff appear 'odious, infamous, or ridiculous.'" *Rosen v. Am. Isr. Pub. Affairs Comm., Inc.*, 41 A.3d 1250, 1256 (D.C. 2012) (quoting *Howard Univ. v. Best*, 484

A.2d 958, 989 (D.C. 1984)). "The important societal interest in vigorous debate over matters of public concern protected by the First Amendment has led to the development of constitutional standards for evaluating statements before liability may be imposed under state defamation laws." *CEI*, 150 A.3d at 1241. "Under the First Amendment, a statement is not actionable 'if it is plain that a speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.'" *Id.* (quoting *Guilford Transp. Indus.*, 760 A.2d at 597).

"Although ideas and opinions are constitutionally protected, the First Amendment does not, however, 'create a wholesale defamation exemption for anything that might be labeled opinion.'" *Id.* (quoting *Milkovich*, 497 US. at 18). "[S]tatements of opinion can be actionable if they imply a proven false fact, or rely upon stated facts that are provably false." *Guilford Transp. Indus.*, 760 A.2d at 597. "Whether a defamatory statement of opinion is actionable often depends on the context of the statement in question." *Id.* "'If, for example, an average reader would likely understand that particular words, in the context of an entire article, were not meant to imply factual data but, rather, were intended merely to disagree strongly with the views of the [plaintiff], those words would be protected despite their factual content.'" *CEI*, 150 A.3d at 1241. "Statements that constitute 'imaginative expression' and 'rhetorical hyperbole' are not actionable because they 'cannot reasonably be interpreted as stating actual facts about an individual.'" *Id.* (quoting *Guilford Transp. Indus.*, 760 A.2d at 596-97). Such statements are used in a "loose, figurative sense" to show strong disagreement with another's ideas. *Id.* (quoting *Sigal Constr. Corp. v. Stanbury*, 586 A.2d 1204, 1210 (D.C. 1991)). However, "a statement is actionable if viewed in context it 'was capable of bearing a defamatory meaning and

. . . contained or implied provably false statements of fact.'" *Id.* at 1242 (quoting *Gilford Transp. Indus.*, 760 A.2d at 597).

Dr. Mann argues that the Court of Appeals was aware that the article was published in an opinion blog and was aware of the broader social context of Mr. Steyn's post. Pl.'s Mem. of P. & A. in Opp'n at 23-24. Indeed, the Court of Appeals noted:

> There is no dispute that the statements that Dr. Mann claims defamed him were made in the context of a broad disagreement between the parties about the existence and cause of global warming, a disagreement that reached a high level of intensity and rhetoric. Public discussion about whether there is a warming climate and, if so, its cause, involves scientific questions and policy prescriptions of general public interest. The First Amendment protects those engaged in a debate of such public concern in the expression of their ideas on the subject, even with pointed language, free of the chilling effect of potential civil liability. As a matter of constitutional principle, when the issue is whether liability may be imposed for speech expressing scientific or policy views, the question is not who is right; the First Amendment protects the expression of all ideas, good and bad.
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> But not all the statements cited in the complaint are necessarily cloaked by the First Amendment simply because the articles in which they appeared related to a matter of public concern. As we have discussed, the law distinguishes between statements expressing ideas and false statements of fact. To the extent statements in appellants' articles take issue with the soundness of Dr. Mann's methodology and conclusions—i.e., with ideas in a scientific or political debate—they are protected by the First Amendment. But defamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply as fact that Dr. Mann engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable.

CEI, 150 A.3d at 1242. This Court, as well, appreciated the broader social context of the time when the article was published. *See Guliford Transp. Indus.*, 760 A.2d at 597. Although Mr. Steyn's article was published on NRI's online blog, an editorial magazine found online, the First Amendment does not "'create a wholesale defamation exemption for anything that might be

labeled opinion,'" notwithstanding the medium of publication. *CEI*, 150 A.3d at 1241 (quoting *Milkovich*, 497 US. at 18).

A jury, therefore, could find that Mr. Steyn's statements accused Dr. Mann of engaging in specific acts of scientific and academic misconduct in the manipulation of data, and are thus supportive of a claim of defamation. *Id.* at 1247-48. The Court of Appeals provided: "We conclude that the statements in Mr. Simberg's article that Dr. Mann acted dishonestly, engaged in misconduct, and compared him to notorious persons, are capable of conveying a defamatory meaning with the requisite constitutional certainty and included statements of fact that can be proven to be true or false." *Id.* At 1247. Further, Mr. Steyn's repetition of Mr. Simberg's alleged defamatory statement is a publication in itself, and "[t]he law affords no protection to those who couch their libel in the form of reports or repetition." *See Olinger v. American Sav. & Loan Assoc.*, 409 F.2d 142, 144 (D.C. Cir. 1969); *see also CEI*, 150 A.3d at 1248.

Mr. Steyn, himself, characterizes Dr. Mann's conclusions as "deceptions" and wrongdoing" and accuses Dr. Mann of "molesting" and "torturing" data, thereby suggesting that Dr. Mann's character and morals are equivalent to that of Jerry Sandusky. Notably, he wrote: "Whether or not he's 'the Jerry Sandusky of climate change,' [sic] he remains the Michael Mann of climate change[.]" *CEI*, 150 A.3d at 1225, 1248. In addition, Mr. Steyn asserts that, "Michael Mann was the man behind the fraudulent climate-change 'hockey-stick' graph, the very ringmaster of the tree-ring circus." *Id.* Mr. Steyn asserts that Penn State "declined to find one of its star names guilty of any wrongdoing." *Id.* at 1225, 1248. Further, as the Court of Appeals notes, "[t]he clincher in Mr. Steyn's article: 'If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?' The implication that serious misconduct has been covered up is inescapable." *Id.* at 1248.

As the Court of Appeals observed, Mr. Steyn's statements "deliver an indictment of reprehensible conduct against Dr. Mann that a reader could take to be an assertion of a true fact." *Id.* at 1249. The allegations about Dr. Mann's character and his work as a scientist are capable of being verified or discredited. "If they are proven to be false, the statements breach the zone of protected speech." *Id.*; *see also Buckley v. Littell*, 539 F.2d 882, 895-96 (2d Cir. 1976). Having reviewed the facts as further developed through discovery, the Court agrees that the statements are capable of a defamatory meaning. It is within the jury's sole purview, however, to determine whether the statements are, in fact, defamatory. *See Tavoulareas v. Piro*, 817 F.2d 762, 780 (D.C. Cir. 1987).

B. Actual Malice

If the plaintiff in a defamation suit is a public figure, the First Amendment raises the required showing of fault to "actual malice." *CEI*, 150 A.3d at 1251-52 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)). A public figure-plaintiff "must persuade the fact-finder that the defendant acted with actual malice in publishing the defamatory statements by clear and convincing evidence." *Id.* "A plaintiff may prove actual malice by showing that the defendant either[:] 1) had 'subjective knowledge of the statement's falsity;' or 2) acted with 'reckless disregard for whether or not the statement was false.'" *Id.* (quoting *Doe v. Burke*, 91 A.3d 1031, 1044 (D.C. 2014)).

In defining the types of evidence that may be conclusive in a finding of actual malice, case law is expansive, but often unspecific. "The 'subjective' measure of the actual malice test requires the plaintiff to prove that the defendant actually knew that the statement was false." *Id.* at 1252 (citing *New York Times Co.*, 376 U.S. at 280). Circumstantial evidence may be used to show a defendant's state of mind, including evidence of motive, although the Supreme Court has

instructed that "courts must be careful not to place too much reliance on such factors." *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 668 (1989).

"Actual malice by way of 'reckless disregard' is not well-defined and cannot be fully encompassed in one infallible definition[.]" *Id.* (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)). "The 'reckless disregard' measure requires a showing higher than mere negligence; the plaintiff must prove that 'the defendant in fact entertained serious doubts as to the truth of [the] publication.'" *CEI*, 150 A.3d at 1252 (quoting *St. Amant*, 390 U.S. at 731). "The plaintiff may show that the defendant had such serious doubts about the truth of the statement inferentially, by proof that the defendant had a 'high degree of awareness of [the statement's] probable falsity.'" *Id.* (quoting *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 668). Evidence that a statement was fabricated, inherently improbable, or based wholly on an unverified anonymous source that the defendant had reason to doubt, will likely support a finding of actual malice. *See Tavoulareas*, 817 F.2d at 790 (citing *St. Amant*, 390 U.S. at 732). Reckless disregard "is not automatically defeated by the defendant's testimony that he believed the statements were true when published; the fact-finder must consider assertions of good faith in view of all the circumstances." *Id.*; *see also St. Amant*, 390 U.S. at 732.

Actual malice must be shown by clear and convincing evidence. *See CEI*, 150 A.3d at 1251-52 (citing *New York Times*, 376 U.S. at 287); *Thompson v. Armstrong*, 134 A.3d 305, 311 (D.C. 2016). The heightened evidentiary standard for a public figure's defamation claim imposes a heavier burden at summary judgment than that demanded of most other civil plaintiffs. *Nader*, 408 A.2d at 49-50. To survive summary judgment, "the plaintiff need only present evidence which shows a genuine issue of material fact from which a reasonable jury *could find* actual malice with convincing clarity." *Nader*, 408 A.2d at 49 (emphasis in original); *see also*

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 ("a court ruling on a motion for summary judgment must be guided by the *New York Times* 'clear and convincing' evidentiary standard in determining whether a genuine issue of actual malice exists[.]"). The District of Columbia Court of Appeals has described this standard as a "daunting one which very few public figures can meet." *Fridman v. Orbis Bus. Intelligence Ltd.*, 229 A.3d 494, 509 (D.C. 2020) (quoting *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1515 (D.C. Cir. 1996)).

Courts have found that certain types of commonly presented evidence, if offered as the sole basis for actual malice, are flatly deficient. This includes evidence of "personal spite, ill will or intention to injure on the part of the writer[.]" *Harte-Hanks Communications*, 491 U.S. at 666 n.7 (quotations omitted) (finding that jury instructions explaining as much, and in this language, were appropriate); *see also Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987). "To recover, plaintiffs cannot ground their claim 'on a showing of intent to inflict harm,' but must, instead, show an 'intent to inflict harm through falsehood.'" *Tavoulareas v. Piro*, 817 F.2d 762, 795 (D.C. Cir. 1987) (quoting *Henry v. Collins*, 380 U.S. 356, 357 (1965)). Some circumstances may justify reliance on such evidence, but only where the probative value of that evidence will outweigh the risk that "such evidence will chill honestly believed speech." *Tavoulareas*, 817 F.2d at 795.

The failure to investigate, even if a reasonably prudent person would have done so under the circumstances, or even where such failure constitutes a departure from professional standards of conduct, will, too, not alone give rise to actual malice. *Harte-Hanks Communications*, 491 U.S. at 688; *St. Amant v. Thompson*, 390 U.S. 727, 730-32 (1968); *Tavoulareas v. Piro*, 817 F.2d 762, 797 (D.C. Cir. 1987). But, the "purposeful avoidance of truth is in a different category." *Harte-Hanks Communications*¸ 491 U.S. at 692.

A combination of these factors, however, may properly support a finding of actual malice, particularly in the absence of evidence to the contrary. *See Tavoulareas*, 817 F.2d at 789 (instructing that "a plaintiff may prove the defendant's subjective state of mind through the cumulation of circumstantial evidence, as well as through direct evidence"). A court must "consider assertions of good faith in view of all the circumstances." *CEI*, 150 A.3d at 1213 (citing *St. Amant*, 380 U.S. at 732). And, as is standard in all civil cases, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]" *Anderson*, 477 U.S. at 255.

i. The Article's "Main Target"

Mr. Steyn argues that Penn State, not Dr. Mann, was the "main target" of the article. As such, this Court should grant his motion for judgment. Def.'s Mem. of P. & A. at 26 (citing *Renwick v. News & Observer Pub. Co.*, 310 N.C. 312, 319 (1984)). Dr. Mann asserts that, even if Mr. Steyn's primary focus was Penn State, this does not excuse the accusations he made against Dr. Mann. Pl.'s Mem. of P. & A. at 26.

In *Renwick*, the Supreme Court of North Carolina was tasked with determining whether a published piece was so susceptible to a defamatory meaning, to be libelous per se. *Renwick*, 310 N.C. at 318. The plaintiff, Hayden B. Renwick, was an Associate Dean of the College of Arts and Sciences at the University of North Carolina at Chapel Hill. *Id.* at 314. *The Raleigh Times* published an editorial, which quoted a former statement by Mr. Renwick regarding minority admissions. *Id.* The court found that, within the four corners of the editorial, ordinary people would understand that the statements were not directed at the plaintiff because the editorial mentioned him once in the second paragraph and the thrust of the editorial was that the

University had put in place special admission concessions for minority students, thereby contradicting charges of unfair discrimination practices against minorities. *Id.* at 319.

Here, unlike in *Renwick*, a jury could find that "the statements in Mr. Steyn's article are similarly factual [to that of the Simberg Article] and specific in their attack on Dr. Mann's scientific integrity." *CEI*, 150 A.3d at 1248; *see also* supra Part III.A. at 11-12. As the Court of Appeals explained further, Mr. Steyn's statements "deliver an indictment of reprehensible conduct against Dr. Mann that a reader could take to be an assertion of a true fact." *Id.* at 1249. Now that the record is much more developed since the Court of Appeals' ruling, this Court must conclude that the Court of Appeals ruling remains apt. A jury could find by clear and convincing evidence that Dr. Mann was the intended subject of Mr. Steyn's defamatory statements.

ii. Subjective Knowledge and Reckless Disregard

Plaintiff must offer sufficient evidence of Mr. Steyn's purported actual malice to survive summary judgment. *See CEI*, 150 A.3d at 1251-52 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964)).

Mr. Steyn asserts that, even if the article can be construed as a critique of Dr. Mann, such criticisms cannot be found to be fraudulent because several climate scientists have criticized the hockey stick graph. Mr. Steyn read published academic critiques regarding the graph, and he read other criticisms of the graph covered in popular media. Def.'s Mem. of P. & A. at 26-27; *See* Def.'s Reply at 3-4; *see also* Def.'s Statement of Undisputed Facts ("DSF") ¶¶ 66-82, 219-223, 227-229. Mr. Steyn reasons that taking one side of a debate cannot, alone rise to the level of actual malice and that Dr. Mann must demonstrate that Mr. Steyn engaged in purposeful avoidance of the truth. *Id.* at 27. In addition, Mr. Steyn argues that his criticisms of Penn State are justified in that they are gleaned from and informed by credible sources, such as popular

media coverage, the review of Sandusky's indictment, and the Freeh report. *Id.* at 24-25; *see also* DSF ¶¶ 209, 213-14.

More relevant to this Court's assessment, Mr. Steyn holds the view that investigations into Climategate do not exonerate Dr. Mann. He contends that the investigative reports instead address matters unrelated to Dr. Mann or punt the issue by concluding that Dr. Mann's methods were best left for scientific debate. From his evaluation, he concluded that the investigations failed to consider the details of the hockey stick studies. *Id.* at 27-28; *see also* DSF ¶¶ 84-101, 208.

Further, Mr. Steyn asserts that he never mentioned that Dr. Mann's distortion of the data amounts to academic or scientific misconduct, rather that the graph is fraudulent because it oversimplifies the climate record. *Id.* at 5. Mr. Steyn asserts that what is determinative is whether he had reason to doubt the facts on which his article is based. *Id.*

In reaction, Dr. Mann proffers that Mr. Steyn had obvious reasons to doubt the truth of his statements because Mr. Steyn was very much aware of the Muir Russell Report, the House of Commons Report, the Penn State Report, and the NSF Report, all of which had examined Dr. Mann's emails and conduct and found no academic or scientific misconduct. Pl.'s Mem. of P. & A. in Opp'n at 27. Further, Dr. Mann contends that Mr. Steyn need not have actually read the reports, but that his mere awareness or knowledge of them is sufficient for a jury to conclude that Mr. Steyn acted with reckless disregard. *Id.* at 28.

Dr. Mann offers that Mr. Steyn's "'deep investment' in one side of the global warming debate, and his 'zeal' in advancing his cause against the hockey stick, are factors that can be considered by the jury," as Mr. Steyn's motive to defame. *Id.* at 27-29; *see also* Counter Statements of Material Facts ("CS") ¶¶ 141-145; Williams Decl. ¶ 7. In addition, Dr. Mann

asserts that Mr. Steyn's failure to retract the article and Mr. Steyn's credibility are factors that a jury can consider when assessing actual malice. *Id.* at 31-33; *see also* CS ¶ 172, 181; William Decl. ¶¶ 19, 25.

In his Reply, Mr. Steyn asserts that his position on the global warming debate and his opposition to the hockey stick graph do not establish actual malice. Def.'s Reply at 10. In addition, his refusal to retract his statements and his alleged hostility toward Dr. Mann have no bearing on whether he wrote with actual malice. *Id.*

The Court of Appeals, in considering the evidence before it in 2016, concluded that the existence of the various investigatory reports was enough to give rise to an inference of actual malice. *CEI,* 150 A.3d at 1238 n.33, 1253. This Court is impressed that Defendants argued to the Court of Appeals that the nature of the reports did not give them cause to doubt the veracity of the statements at issue. The Court of Appeals disagreed. *Id.* at 1255-60. The Court of Appeals considered at length the "unreliability" and "subjectivity" of the reports and concluded that they were not so unreliable or inherently subjective as to preclude a jury from finding that Mr. Steyn acted with actual malice. *Id.* at 1255-58.

Mr. Steyn asserts that consideration of his deposition testimony is essential to understanding the reasonable basis for believing the truth of his statements at the time of publication. Def.'s Mem. of P. & A. at 23-24; see also DSF ¶¶ 217-29. The Court agrees that Mr. Steyn's deposition provides insight into his subjective knowledge of the statement's falsity at the time of publication. Whether his statements evidenced a reckless disregard for the truth of his statements "is not automatically defeated by the defendant's testimony that he believed the statements were true when published. The fact-finder must consider assertions of good faith in

view of all the circumstances." *Tavoulareas*, 817 F.2d at 790; *see also St. Amant*, 390 U.S. at 732.

Dr. Mann maintains that a jury could find, by clear and convincing evidence, that Mr. Steyn entertained serious doubts or that he possessed a high degree of awareness that his statements were false. In his deposition, Mr. Steyn admits that the sources he relied upon before writing his article do not express that the hockey stick was fraudulent or deceptive but that reading through the sources, it was hard not to infer that the authors were suggesting some type of widespread deception. Steyn Dep. 82:9-84:16. In addition, Mr. Steyn admits he did not contact any scientists upon whom he relied to discuss their views and to better understand the bases for their views. Steyn Dep. 33:17-34:15, 88:5-10. While Mr. Steyn admitted that he did not read the "American" investigation reports except for the Penn State investigation prior to drafting his statement, he explains that he had an "acquaintanceship" with the American reports, and that he read the United Kingdom reports, which included the Muir Russell Report and the U.K. House of Commons Report. Steyn Dep. 25:9-26:16, 29:1-30:11. The Court notes that the attorney for Dr. Mann mentions the Summer Russell Report in the deposition but likely was referring to the Muir Russell Report, as it appears no such report exists by that name. Steyn Dep. 25:13-15. While the Court takes no position on appropriate due diligence that Mr. Steyn should have exercised, a jury, however, may be impressed by Mr. Steyn's limited investigation.

The Court of Appeals noted that a jury may properly rely upon the Defendants' "zeal in advancing their cause against the hockey stick graph's depiction of a warming global climate[.]" *CEI*, 150 A.3d at 1259. What is apparent is that Mr. Steyn has since 2001 repeatedly inserted himself into the climate change debate, with harsh and public criticism of the hockey stick graph. Pl.'s Mem. of P. & A. in Opp'n at 28-29; *see also* CS ¶¶ 141-45.

Specifically, in a 2001 article titled "Where rising hot air hits cold hard facts," which was published in The Telegraph, Mr. Steyn criticized the hockey stick graph by opining that the graph "'looks like a long bungalow tacked on the side of the Empire State Building.'" *Id.* at 29 n.10; *see also* Ex. 7; William Decl. ¶ 8. In his deposition, Mr. Steyn asserts that he relied upon his own research and determination about the hockey stick graph and has maintained his position over the last twenty years that the hockey stick is fraudulent. Steyn Dep. 37:9-40:10.

Further, in a 2006 article titled "Climate Change Myth," which was published in The Australian, Mr. Steyn asserted that the hockey stick graph was "'a continuous, flat, millennium-long bungalow with a skyscraper tacked on for the 20th century. The graph was almost laughably fraudulent, not least because it used a formula that would generate a hockey stick shape no matter what data you input, even completely random, trendless, arbitrary computer-generated data.'" *Id.*; *See* Ex. 129; *see also* William Decl. ¶ 130.

Although animus itself is insufficient to support a finding of actual malice where First Amendment rights are implicated, "bias providing a motive to defame by making a false statement may be a relevant consideration in evaluating other evidence to determine whether a statement was made with reckless disregard for the truth." *CEI*, 150 A.3d at 1259 (citing to *Harte-Hanks Commc'ns, Inc.*, 491 US at 664-65, 667-68, 689 n.36). In evaluating the evidence of this case, a jury could consider that Mr. Steyn's zeal in advancing his cause against the hockey stick graph was the motivation for him to accuse Dr. Mann of fraud in producing the hockey stick graph with reckless disregard. *Id.* (citing to *Travoulareas*, 817 F.2d at 796).

The Court of Appeals rightly cautioned that the analysis of Mr. Steyn's actual malice must not be mistaken for an analysis of opinions that he expressed in participation in the global debate over global warming. *See CEI*, 150 A.3d at 1253 ("Much as Dr. Mann's pride in his work

may be wounded by criticisms of the hockey stick graph, [Defendants] are entitled to their opinions on the subject and to express them without risk of incurring liability for defamation."). Indeed, the First Amendment protects such participation. *Id.* "But defamatory statements that are personal attacks on an individual's honesty and integrity and assert or imply as fact that Dr. Mann engaged in professional misconduct and deceit to manufacture the results he desired, if false, do not enjoy constitutional protection and may be actionable." *Id*. at 1243. Dr. Mann offers significant evidence that Mr. Steyn held ill-will toward him, that Mr. Steyn was zealous in advancing his side of the climate change debate, and that Mr. Steyn did not investigate his claims. The combination of such evidence could reasonably support a jury finding that Mr. Steyn acted with actual malice.

C. Truth and Falsity

In a defamation case, the plaintiff bears the burden of proving that the defendant made a false and defamatory statement about the plaintiff. *See CEI*, 150 A.3d at 1240; *see also Phila. Newspapers v. Hepps*, 475 U.S. 767, 776-77 (1986) ("placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."). "There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence." *Harte-Hanks Communications*, 491 U.S. at 661 n.2; *see also Newton*, 930 F.2d at 669 n.7; *Tavoulareas*, 817 F.2d at 786 n.33. A "colorless denial" of a statement's substantial truth will not defeat a properly supported motion for summary judgment for a defendant. *Celle v. Filipino Reporter Enters.*, 209 F.3d 163, 188 (2nd Cir. 2000).

Considering that plaintiff bears the burden of proving defendant's statements were false, a defendant may defeat a defamation claim by showing a statement's "substantial truth." *Armstrong v. Thompson*, 80 A.3d 177, 183 (D.C. 2013); *see also Modela v. New York Times Co.*,

15 F.3d 1137, 1150 (D.C. Cir. 1994) ("When a trial court can find as a matter of law that a challenged publication is substantially true, then it may properly grant judgment for the defendant."). "In determining whether factual statements in an allegedly defamatory communication are substantially true, we discount minor inaccuracies 'so long as the substance, the gist, the sting, of the libelous charge be justified.'" *Armstrong*, 80 A.3d at 183 (quoting *Moldea v. New York Times Co.*, 22 F.3d 310, 318, 306 U.S. App. D.C. 1 (D.C. Cir. 1994)).

"Even if conveying only true facts, a communication can be defamatory by implication if, 'by the particular manner or language in which the true facts are conveyed, [the communication] supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference.'" *Armstrong*, 80 A.3d at 184 (quoting *White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. Cir. 1990)). "Substantial truth will succeed as a defense if 'a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn.'" *Id.* (quoting *White*, 909 F.2d at 520).

Both Dr. Mann and Mr. Steyn have moved for summary judgment on perhaps the most controversial question in this case: Whether Mr. Steyn's statements accusing Dr. Mann of fraud and misconduct are true or false.

i. Mr. Steyn's Motion for Summary Judgment for Truth as a Defense

Mr. Steyn argues that Dr. Mann has failed to meet his burden of proving that his statements were false, as evidence shows that Mr. Steyn's statements were true. First, Mr. Steyn asserts that it is true that Dr. Mann is "the Jerry Sandusky of climate change" in that, "like Sandusky, Mann was a beneficiary of the corrupt and unethical administration that ran Penn State and protected its stars." Def.'s Mem. of P. & A. at 17. Second, he argues that Mr. Simberg "had a point" when he argued that Dr. Mann had "molested and tortured data" to achieve the

"fraudulent" hockey stick graph. *Id.* Finally, Mr. Steyn asserts that it is true Dr. Mann was responsible for the "fraudulent climate-change 'hockey stick' graph." *Id.*

Mr. Steyn argues that the evidence on the record demonstrates that Penn State's investigation of Dr. Mann was inadequate. For support, Mr. Steyn notes that the Penn State investigation drew criticism from the National Science Foundation ("NSF") for not providing evidence necessary to concur with its conclusion, that Penn State did not adequately review the allegation of falsification, and that the University did not interview experts critical of Dr. Mann's research. *Id.* at 18-19; *see also* DSF ¶¶ 167-172; Ex. U at 1-2 (NSF Report).

Mr. Steyn argues that the hockey stick graph is misleading and his statements associated with the graph are true. *Id.* at 19. Mr. Steyn asserts that "[n]umerous respected academics, a congressional report, many books, and the popular press have explained the multiple ways the data behind the Hockey Stick fails to support its conclusions and criticized it as a fraud." *Id.* at 5-6, 19-22; *see also* DSF ¶¶ 19-83.

Dr. Mann argues that there are numerous peer reviewed studies that validate the hockey stick research, there are many academic and governmental investigations rejecting the fraud claim, and that the testimony of expert witnesses support his research. Pl.'s Mem. of P. & A. in Opp'n at 34. Dr. Mann notes that Mr. Steyn failed to designate one expert witness to offer an opinion of how the hockey stick is fraudulent and that his witnesses indicate that Dr. Mann published diligently. *Id.* at 34-38; *see also* CS ¶¶ 8, 81, 186-200.

Dr. Mann argues that Penn State's investigation was adequate. *Id.* at 10. Further, Dr. Mann argues that any allegation that the Penn State investigation was whitewashed was dispelled by the Inspector General of the NSF undertaking a review and reanalysis of Penn State's investigation, and concluding that there was no direct evidence of research misconduct.

Id. at 11, 22. By the way, as noted above, Mr. Steyn noted his acquaintanceship with the NSF report and cited to NSF as in essence sharing his conclusion about the legitimacy of the Penn State investigation.

"When a trial court can find as a matter of law that a challenged publication is substantially true, then it may properly grant judgment for the defendant . . . . [Where] the truth or falsity of multiple statements are presented as questions of fact for the jury, it is the jury's province to determine whether the publication was sufficiently false so as to have defamed the plaintiff." *See Modela*, 15 F.3d at 1150; *see also Trita Parsi v. Seid Hassan Daioleslam*, 595 F.Supp. 2d 99, 109 (D.C. Cir. 2009).

The extensive Statement of Disputed Material Facts plainly shows that there remain a great number of genuine disputes of material fact that speak to the methods that Dr. Mann used to develop his hockey stick graph, the conclusions to be drawn from the Climategate emails, and Dr. Mann's actions while under investigation. A reasonable jury could find, based on this evidence, in favor of either Dr. Mann or Mr. Steyn. Mr. Steyn has not "demonstrate[d] that there is no genuine dispute as to any material fact" and that he is "entitled to judgment as a matter of law." *Grant*, 786 A.2d at 580.

Having considered the exhibits to the pleadings and the record, this Court must conclude that reasonable jurors could differ in their conclusions about the truth of Mr. Steyn's statements. The falsity of the statements must be reserved for a jury.

ii. Dr. Mann's Motion for Partial Summary Judgment on Falsity

Dr. Mann requests that the Court grant partial summary judgment against Defendants NRI and Mr. Steyn because there is no genuine factual dispute that the defamatory statements were anything but false. Pl.'s Partial Mot. Summ. J. at 11. Dr. Mann argues that he has assembled overwhelming evidence that proves Defendants' statements were false. *Id.* at 15-16.

This evidence includes: 1) the report of the National Research Council, of the National Academy of Sciences, which conducted a review of Dr. Mann's research at the request of the U.S. House of Representatives; 2) "the body of extensive peer-reviewed, scientific studies reviewing, validating, and replicating the hockey stick;" 3) the reports issued in 2010 and 2011 by academic and governmental organizations which found that Defendants' allegations against Dr. Mann were false; and 4) the testimony of Dr. Mann's array of expert witnesses. *Id.* In addition, Dr. Mann requests that the Court strike the Defendants' affirmative defense of truth. Dr. Mann argues that Defendants have provided no support for their defense, as their statements were not minor, immaterial or true. *Id.* at 29.

In his opposition, Mr. Steyn argues that Dr. Mann is confusing and conflating what Mr. Steyn and Mr. Simberg wrote. Def.'s Mem. of P.& A. in Opp'n at 2. Mr. Steyn asserts that, procedurally, Dr. Mann's motion to strike truth as a defense is untimely under Rule 12(f) of the Superior Court Rules. Mr. Steyn notes that he served and filed his Amended Answer to Plaintiff's Amended Complaint on March 12, 2014, and that time has long passed for an affirmative defense. *Id.* at 8-9. As well, Mr. Steyn asserts that substantively the argument does not work because it is Dr. Mann's bears the burden to prove that the statements are false to survive summary judgment. *Id.* at 9. Furthermore, Mr. Steyn contends that his statements are indeed true. *Id.* at 10-22.

Mr. Steyn argues, too, that there should be no liability for republication of statements on an internet blog. *Id.* at 17. As support, he reasons that the U.S. Congress enacted Section 230 of the Communications Decency Act to shield an internet user from liability for sharing information provided by another content provider. *Id.* at 18. In his Reply, Dr. Mann argues that the Act does not provide immunity to authors who create the defamatory content. Pl.'s Reply at 19-20 (citing

Fair Hous. Council v. Roomates.com, LLC, 521 F.3d 1157 (9th Cir. 2008); *FTC v. Acusearch*, 570 F.3d 1187 (10th Cir. 2009)).

Finally, Mr. Steyn asserts that the Court should apply the neutral reporting privilege, which would protect his republication of Mr. Simberg's article because the privilege applies to "the accurate republication of any statement by or about a public figure as long as attribution to and identification of the source are made." Def.'s Mem. of P.& A. in Opp'n at 19 (citing to James E. Boasberg, *With Malice Toward None: A New Look at Defamatory Republication and Neutral Reportage*, 13 Hastings Comm. & Ent. L.J. 455, 488 (1991)). In his Reply, Dr. Mann argues that the neutral reporting privilege is highly criticized and has not been adopted in the District of Columbia. Pl.'s Reply at 17 (citing to *In Re United Press Intern*., 106 B.R. 323, 329 (D.D.C. 1989)). Further, Dr. Mann argues that this privilege is an affirmative defense that Mr. Steyn failed to plead in his answer and that the privilege does not apply if the republisher himself "espouses or concurs in the charges" or "launches his own personal attack[.]" *Id.* at 17-18.

The Court first notes, here, that, on February 5, 2021, NRI filed a consent motion requesting that the Court stay its deadlines for opposing Dr. Mann's motion for partial summary judgment until it received a ruling on its motion for summary judgment. On February 11, 2021, the Court granted NRI's motion to stay deadlines, and on March 19, 2021, the Hon. Jennifer M. Anderson granted NRI's motion for summary judgment. On April 9, 2021, Dr. Mann filed a motion for reconsideration, which is pending before Judge Anderson. The Court, therefore, will rule upon the issue of falsity as it applies to Mr. Steyn. *See also* Pl.'s Reply at 1.

As explained herein, there are myriad disputed material facts as to the methods that Dr. Mann employed in developing the hockey stick graph. A reasonable jury could find, from

the evidence, in favor of either Dr. Mann or Mr. Steyn. *See Grant*, 786 A.2d at 580; *see also* supra Part III.C.i. at 24. Further, the Court will not strike Mr. Steyn's truth as a defense argument. "[A] motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits." *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 166-67 (D.C. 2007).

Finally, the Court is not persuaded by Mr. Steyn's argument that Dr. Mann's motion should be denied because of the neutral reporting privilege or Section 230 of the Communications Decency Act. The Court has considered the evidence within the context in which Mr. Steyn made his online statements. Further, "[t]he law affords no protection to those who couch their libel in the form of reports or repetition. In the first-place, it has already been determined that repetition of a defamatory statement is a publication in itself, regardless whether the repeater names the source." *See also Olinger v. American Sav. & Loan Assoc.*, 409 F.2d 142 (D.C. Cir. 1969); *CEI*, 150 A.3d at 1248. In addition to republishing parts of Mr. Simberg's article, Mr. Steyn made his own statements about Mr. Mann which a jury could find to be defamatory. *See* supra Part III.A. at 11-12.

The Court, therefore, must deny Dr. Mann's motion for partial summary judgment, as there are genuine disputes of material fact about the falsity of Mr. Steyn's statements.

D. Damages

Dr. Mann, in seeking compensatory damages, is "require[d] . . . to prove the (1) existence of an actual injury, (2) causation traced back to the defendant's wrongdoing, and (3) the amount that is precisely commensurate with the injury suffered." *See* Order Granting, in Part, Def's. CEI and Simberg's Mot. Compel, May 5, 2020, at 2 (citing *Amiri v. Government of the Dist. of Columbia*, Case No. 97-0881, 2000 U.S. Dist. LEXIS 7263, at *3 (D.D.C. May 17, 2000)).

Plaintiff also seeks punitive damages, which requires him to establish that "he has suffered compensable harm as a prerequisite to the recovery of additional punitive damages." *Id.* at 4 (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 66 (1966)).

Mr. Steyn argues that Dr. Mann cannot show harm. Def.'s Mem. of P. & A. at 32. Mr. Steyn asserts that Dr. Mann's "economic and professional position have improved[,]" as Dr. Mann was promoted in 2013 to a Distinguished Professor and he has received numerous accolades after the publication of the purportedly defamatory article. *Id.*; DSF ¶¶ 23-31. Mr. Steyn asserts that Dr. Mann cannot show that his alleged economic harm was a proximate consequence of his article because Dr. Mann cannot prove who read Mr. Steyn's post and Dr. Mann cannot prove his grant funding was impacted by the article. *Id.* at 33.

Mr. Steyn argues that Dr. Mann lacks clear and convincing proof of actual malice; therefore, no presumed damages should be awarded. *Id.* Further, Mr. Steyn argues that even if a jury were to find actual malice, there is overwhelming weight of authority from many jurisdictions that bars presumed damages in all defamation cases. *Id.* Finally, Mr. Steyn asserts that, "[a]bsent any actual harm, nominal damages do not justify allowing [Dr.] Mann's case to proceed to trial[,]" as Mr. Steyn makes no allegations against Dr. Mann that have not been made against him countless times in a variety of publications. *Id.* at 34.

Dr. Mann asserts that, in a defamation case, plaintiffs are entitled to: 1) nominal damages; 2) actual or compensatory damages; 3) presumed damages; and 4) punitive damages. Pl.'s Mem. of P. & A. in Opp'n at 39 (citing to Sack on Defamation: Libel, Slander, and Related Problems Sect. 10:3). Dr. Mann argues that presumed damages may be recovered for "harm to reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* Dr. Mann posits that he has offered proof of injury and causation. *Id.* at 40

(citing Defamation: A Lawyer's Guide § 9:1). Dr. Mann agrees that punitive damages require a showing of actual malice. *Id.* (citing *Pearce v. E.F. Hutton Grp., Inc.*, 664 F. Supp. 1490, 1510 (D.D.C. 1987); *Connors, Fiscina, Swartz & Zimmerly v. Rees*, 599 A.2d 47, 49 n.2 (D.C. 1991)).

Dr. Mann asserts that his reputation was harmed in the community and that he began to receive disapproving glances around town after the articles were published. *Id.* at 42; *see also* CS ¶ 109. Dr. Mann offers the deposition testimony of John Abraham, Ph.D., who testified that he decided against including Dr. Mann on an academic paper for fear of injury to the reputation of other authors also on the project. *Id.* at 43; *see also* CS ¶ 201. In his Reply, Mr. Steyn argues that Dr. Abraham did not make any claim about the specific effects of Mr. Steyn's article on Dr. Mann, but to the effect of all the articles collectively; therefore, it is unclear that Mr. Steyn's article caused Dr. Mann any harm. Def.'s Reply at 13.

Dr. Mann argues that, in the four years before the defamatory posts, he received grants totaling over $3 million on proposals for which he was the principal or co-principal investigator. Over the four years since publication of the defamatory articles, Dr. Mann claims he received grants of just under $1 million. Pl.'s Mem. of P. & A. in Opp'n at 41; *see also* CS ¶ 108. In reaction, Mr. Steyn contends the facts do not begin to explain all of the possible bases for the change. Def.'s Reply at 13-14.

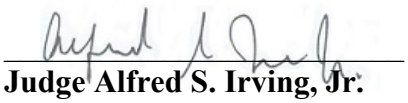
The Court finds that there is conflicting evidence as to the effect of Mr. Steyn's article on Dr. Mann's reputation and income. Indeed, there was much talk about the Climategate emails and subsequent investigations into Dr. Mann's conduct at the time. These other occurrences may have had an alleged negative effect upon Dr. Mann's reputation and income, thus obfuscating any discernable damage attributable to Mr. Steyn's article. No matter, Dr. Mann has raised evidence sufficient to survive summary judgment on this question, and the Court may not weigh

the evidence at this stage. *Anderson*, 477 U.S. at 249. A reasonable jury could find that Mr. Steyn's article caused injury to Dr. Mann sufficient to support compensatory damages. Further, Mr. Steyn has failed to provide binding authority that presumptive damages should not be awarded in defamation cases if actual malice is shown. *See Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 86 (D.C. 1980) (finding that presumed damages can be recovered "only if reckless or knowing falsehood is proved"); *see also Gertz v. Robert Welch*, 418 U.S. 323, 349-350 (1974); *Vereen v. Clayborne*, 623 A.2d 1190, 1195 n.5 (D.C. 1993); *Ingber v. Ross*, 479 A.2d 1256, 1264-65 (D.C. 1984).

ACCORDINGLY, it is by the Court this 22nd day of July 2021, hereby

ORDERED that Defendant Mark Steyn's *Rule 56 Motion for Summary Judgment* is **DENIED**; and it is further

ORDERED that Plaintiff's *Motion for Partial Summary Judgment* is **DENIED,** in part, as to the issue of falsity as it applies to Mr. Steyn.



Judge Alfred S. Irving, Jr.

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