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 RECONSIDER
THE COURT'S MARCH 19, 2021 ORDER

The matter before the Court is Plaintiff Michael Mann's Motion to Reconsider the Court's March 19, 2021 Order, filed on April 9, 2021; Defendant National Review Inc.'s Opposition to Plaintiff's Motion for Reconsideration, filed on April 23, 2021; and Defendant Competitive Enterprise Institute's Response to Plaintiff's Motion to Reconsider the Court's March 19, 2021 Order, filed on April 23, 2021.

I. Legal Standards

A motion for reconsideration is discretionary and may be granted when the trial court finds there is an intervening change of controlling law, the availability of new evidence, the need to correct a clear error of law or fact, or the need to prevent manifest injustice. *In re Estate of Derricotte*, 885 A.2d 320, 325 (D.C. 2005); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). The clear error here means the original judgment is dead wrong, and manifest injustice requires clear and certain prejudice to the moving party and means the original judgment is fundamentally unfair to the moving party in light of governing law. *McNeil v. Brown*, No. 17-cv-2602 (RC), 2019 U.S. Dist. LEXIS 31928, at *5 (D.D.C. Feb. 28, 2019).

Reconsideration of a court's order is not intended to permit a party to continue presenting its case after the court has already ruled against it. *Dist. No. 1 — Pac. Coast Dist. v. Travelers Cas. & Sur. Co.*, 782 A.2d 269, 278 (D.C. 2001). A motion for reconsideration therefore affords no opportunity for the parties to relitigate the facts or theories already considered in the original judgment or to raise arguments or present evidence that could have been raised before the entry of the original judgment. *McNeil*, 2019 U.S. Dist. LEXIS 31928, at *5-6. In the motion for reconsideration, the trial judge is not required to give the matter full *de novo* review as if the original motion itself was before the judge. *Perry v. Sera*, 623 A.2d 1210, 1218 (D.C. 1993).

II. Analysis

Plaintiff argues that "[a] court may always revise its decisions prior to entry of final judgment," Pl. Mot. to Reconsider at 6 n.3, but a motion to reconsider is an extraordinary remedy and should be granted sparingly in the interests of finality and conservation of scare judicial resources. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); *In re Health Mgmt. Sys., Inc. Sec. Litig.*, 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) *Wendy's Int'l, Inc. v. Nu-Cape Construction, Inc.*, 169 F.R.D. 680, 685 (M.D. Fla. 1996); *Pennsylvania Ins. Guar. Ass'n v. Trabosh*, 812 F. Supp. 522, 524 (E.D. Pa. 1992).[1] "The purpose of a motion for reconsideration is not to allow a litigant a do-over on an issue that party has already raised." *Focht v. Mortgage*, No. 3:18-cv-151, 2020 U.S. Dist. LEXIS 221784, at *3 (W.D. Pa. Nov. 16, 2020). Reconsideration is not designed to enable a party "to present a better and more compelling argument that the party could have presented in the original briefs," *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 402 F.

[1] Superior Court Civil Rules 59(e) and 60(b) are identical to Federal Civil Procedure Rules 59(e) and 60(b) so the Court looks to federal court decisions for guidance in interpreting those respective rules. *See* Neuman v. Neuman, 377 A.2d 393, 398 (D.C. 1977) ("[T]trial court rules which have similar or identical counterparts in federal rules will be construed consistent with the latter.").

Supp. 2d 617, 619 (M.D.N.C. 2005), nor is it an opportunity for a party to offer new or improved legal arguments or put a finer point on older arguments. *Wootten v. Virginia*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016). *See also Gathagan v. Rag Shop / Hollywood, Inc.*, No. 04-805200-CIV, 2005 U.S. Dist. LEXIS 47237, at *8 (S.D. Fla. May 9, 2005) (noting that uncited, though pre-existing, authority, is not a proper basis for a motion for reconsideration). In short, reconsideration is not intended to provide a party a "second bite at the apple." *Oceana, Inc. v. Evans*, 389 F. Supp. 2d 4, 8 (D.D.C. 2005).

However, that is precisely the situation here. Plaintiff cites several cases, which could have been cited in the original motion, without any explanation for his failure to do so. None of these cases constitute an intervening change in the law. Rather Plaintiff is merely attempting to belatedly refurbish and bolster his arguments with previously uncited but extant authorities.

Plaintiff avoids acknowledging this by claiming the Court made a clear error of law. Plaintiff insists that not only did this Court err in its ruling, but so did other courts in the numerous cases this Court cited in its March 19, 2021 Order, including *AdvanFort Co. v. The Mar. Exec., LLC*, No. 1:15-cv-220, 2015 U.S. Dist. LEXIS 99208 (E.D. Va. July 28, 2015); *Stern v. Cosby*, 645 F. Supp. 2d 258 (S.D.N.Y. 2009); *Masson v. New Yorker Magazine*, 832 F. Supp. 1350 (N.D. Cal. 1993); *Secord v. Cockburn*, 747 F.Supp. 779 (D.D.C. 1990). *See* Pl. Mot. to Reconsider at 17 (alleging that *Price*, *Secord*, and *Masson* all incorrectly interpreted the Supreme Court's ruling in *Cantrell* [*v. Forest City Pub. Co.*, 419 U.S. 245 (1974)]); *id.* at 18 ("*AdvanFort*, *Masson*, and *Stern* simply followed the reasoning of the cases that had misread *Cantrell.*"). Petitioner's disparagement of *Secord* is particularly stunning considering he cited it favorably in his original Opposition. *Compare* Pl. Mot. to Reconsider at 3 ("*Secord* . . . incorrectly assumed that the actual malice element could not be imputed to a principal from a non-employee agent based on the

Supreme Court's decision in *Cantrell*") *with* Pl. Opp'n. at 11, Nov. 5, 2020 ("*Secord* court made clear that while actual malice could not be imputed in that case, it could be imputed in a relationship establishing respondeat superior.") (internal citation omitted).[2] Irrespective of Plaintiff's fluctuating view of the caselaw, the fact remains that this Court's ruling was in accord with many other decisions, thereby indicating its far from dead wrong or a manifest injustice.

Furthermore, the Court was correct in stating in its March 19, 2021 Order that Plaintiff in his initial Opposition had not cited any case where a court has imputed the liability of a non-employee agent to the principal based on actual or apparent authority in the context of the First Amendment's actual malice standard. The few cases he referenced, *Judah v. Reiner*, 744 A.2d 1037 (D.C. 2000) and *Makins v. District of Columbia*, 861 A.2d 590 (D.C. 2004), did not involve the First Amendment's actual malice standard or even defamation. Although Plaintiff now cites several defamation cases that allegedly have "imputed the actual malice element outside of an employer-employee relationship," Pl. Mot. to Reconsider at 1, some of these cases do not pertain to a public figure and the First Amendment's actual malice standard and others do not involve imputing the writer's state of mind to the publisher. The few First Amendment cases he references, involving the writer's state of mind being imputed to the publisher in an agency relationship, are fact specific and entail publishers who exerted significant control over the content of the writer's writing. *See Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1139-40 (7th Cir. 1985) (finding the agent was acting in his capacity as an employee); *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 539 n.19 (7th Cir. 1982) (publisher has significant control over the content and focus of the article); *see also Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1276 (3d Cir. 1979) (en banc).

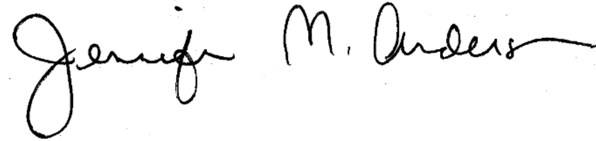
[2] *Secord* supported this Court's decision as it held that "[a]ctual malice must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*." *Secord*, 747 F. Supp. at 787 (citations omitted). Perhaps recognizing this now, Plaintiffs have decided to dismiss the decision as incorrect.

Other cases Plaintiff references too, such as *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983) and *McFarlane v. Esquire Mag.*, 74 F.3d 1296 (D.C. Cir. 1996), declined to impute the actual malice of the independent contractor to the publisher. These cases only suggest a narrow exception where vicarious liability may exist if there is extensive control over the independent contractor's writing. *See McFarlane*, 74 F.3d at 1303 (noting that *Hunt* seems to require an employment relationship, but may make an exception where "some kinds of intense editorial involvement by a publisher's employees might entangle them in the independent writer's thought process enough to serve as a basis for holding the publisher vicariously liable."). None of these cases endorse the broad proposition that actual malice may be imputed to the principal in just any agency relationship. They similarly do not serve as a basis for reconsidering the Court's decision to grant Defendant National Review summary judgment because Plaintiff did not argue Defendant National Review controlled Defendant Mark Steyn's writings. Indeed, none of these cases embraced Plaintiff's claim that the actual malice of the writer may be imputed to the publisher based on apparent authority. While Plaintiff cites the Supreme Court's decision in *Am. Soc'y of Mech. Eng'rs Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 566 (1982), that case did not deal with the First Amendment's actual malice standard.

Finally, to the extent there is any confusion about the language in the Court's March 19, 2021 Order, the Court clarifies that it held that the actual malice of Defendant Steyn may not be imputed to Defendant National Review based on the agency relationship here because Plaintiff failed to establish Defendant National Review controlled Defendant Steyn's writing.

Accordingly, it is hereby this 3rd day of August 2021,

ORDERED that Plaintiff Michael Mann's Motion for Reconsideration of the Court's March 19, 2021 Order is **DENIED.**



Judge Jennifer M. Anderson
Signed in Chambers

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