Nos. 14-cv-101, 14-cv-126 (consolidated)
IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Michael E. Mann, Ph.D.,

Plaintiff-Appellee,

v.

National Review, Inc.;
Competitive Enterprise Institute; and Rand Simberg,

Defendants-Appellants.

On Appeal from the Superior Court of the District of Columbia,
Civil Division, No. 2012 CA 008263 B

(The Honorable Natalia Combs Greene;
The Honorable Frederick H. Weisberg)

APPELLEE'S RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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The panel decision faithfully adhered to binding constitutional precedent. On the issue of protected opinion, the panel properly applied the mandate of the U. S. Supreme Court in *Milkovich v. Lorian Journal Co.*, 497 U.S. 1 (1990), that there is no "wholesale defamation exception" for any statement that might be claimed to be an opinion, and that statements which imply provably false facts do not qualify for protection under the opinion defense. Op. 55. The decision on the actual malice issue is similarly grounded in controlling precedent—most notably this Court's decision in *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), a case that is virtually indistinguishable from the facts involved here, and in which this Court squarely held that an unambiguous finding in a governmental report (and here we have at least four such reports) provided a sufficient evidentiary basis for a finding of actual malice. Op. 96.

This decision raises no issues of "exceptional importance." As the panel recognized, this is a "garden-variety" libel case "about the character of Dr. Mann." Op. 74 n.45. While the backdrop of this case may be a "no-holds-barred debate over global warming," Op. 58, the defamations here involve personal attacks on Dr. Mann's professional integrity. Nor does the decision open the litigation floodgates in Washington, D.C. This decision will do nothing to impair critical debate on political and scientific matters. As the panel repeatedly observed, the appellants' statements were not simple criticisms of Dr. Mann's

methods, his research, or his data techniques. To the sharp contrary, the appellants' "noxious" attacks were directed personally at Dr. Mann. Op. 60. They compared him to a sexual deviant and a convicted embezzler, Op. 60–61 n.36, and delivered "an indictment of reprehensible conduct." Op. 74. Fulsome debate and scientific criticisms are hardly the issues here.

I. BACKGROUND

The defamatory statements in this case, barely addressed in appellants' petitions, are set forth in the panel's decision, Op. 59–74, and the appendix. In July 2012, CEI, weighing in first, published a report titled "The Other Scandal in Unhappy Valley." The news peg for this report was the release of the investigation by Louis Freeh into Penn State's review of Jerry Sandusky's conduct. According to CEI, there had been an earlier "whitewash" at Penn State, dubbed "the Michael Mann affair." CEI led with the allegation that Dr. Mann was "the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in the service of politicized science." It accused him of "hockey stick deceptions," "data manipulation," "academic and scientific misconduct," and labeled him "the posterboy of the corrupt and disgraced climate science echo chamber."

Two days later, NRO ran its own article, "Football and Hockey." It quoted from the CEI report accusing Dr. Mann of "hockey-stick deceptions," comparing

him to Jerry Sandusky, and alleging that he had "molested and tortured data." NRO went on to describe the hockey stick graph as "fraudulent" and referred to the Penn State investigation as having been conducted by a "deeply corrupt administration" that had declined to find Mr. Mann "guilty of any wrongdoing." NRO concluded: "If an institution is prepared to cover up systemic statutory rape of minors, what won't it cover up?"

These allegations against Dr. Mann had been previously investigated by an array of "credentialed academics and professionals." Op. 85. While eight investigations had been conducted, four of them specifically considered and rejected the allegations of fraud and misconduct. The United Kingdom House of Commons, the University of East Anglia, the National Science Foundation, and Penn State all concluded that the accused scientists, including Dr. Mann, had not engaged in fabricating or deceptively manipulating data. They also found that there had been no scientific misconduct, fraud, or dishonesty. Op. 86.

It is not disputed that the appellants were aware of these studies and their conclusions before the statements were made. Op. 84, 96. In the court below, they did not contest the allegation that their statements were false. Nor did they attempt to introduce any evidence regarding the personal beliefs of the authors—or how they came to their beliefs in view of these investigations. Op. 89 n.56.

II. THE PANEL CORRECTLY HELD THAT NRO'S ACCUSATIONS ASSERTED "VERIFIABLE FACTS"

NRO argues that the panel's decision ignores controlling precedent that a statement is protected unless it asserts a concrete or specific event that can be proven false. NRO Br. 1. The decisions it cites, *Armstrong v. Thompson,* 80 A.3d 177 (D.C. 2013) ("gross misconduct")[1], *Rosen v. AIPAC, Inc.*, 41 A.3d 1250 (D.C. 2012) ("standards" had been violated), and *Myers v. Plan Takoma, Inc.*, 472 A.2d 44 (D.C. 1983) ("shady group of bar owners") held that the subjective characterizations in those cases could not be capable of being proved objectively false. NRO goes on to assert that its statements were mere "characterizations" of Dr. Mann's research, and, thus did not contain concrete or specific allegations.[2]

The subjective and ambiguous statements at issue in *Armstrong*, *Rosen*, and *Myers* stand in marked contrast to NRO's accusations against Dr. Mann. Here the allegations were specific and focused on Dr. Mann's professional conduct and character. NRO stated that he had engaged in fraudulent conduct, including "hockey stick deceptions" and "molest[ing] and tortur[ing] data." The comparison to Sandusky "implied that Dr. Mann's manipulation of data was seriously deviant

[1]NRO criticizes the panel for failing to discuss or distinguish *Armstrong,* NRO Br. 7, but fails to note that neither appellant cited this case in their briefs.

[2]CEI does not assert that its allegations were not capable of objective verification, nor could it, given that it called for another investigation.

for a scientist." Op. 60. These statements were, as the panel correctly found, "factual and specific" in their attack on Dr. Mann's scientific integrity.[3] Op. 73.

The panel clearly adhered to this Court's precedent in *Armstrong*, *Rosen*, and *Myers*, recognizing that ambiguous statements may not be presumed to necessarily convey a defamatory meaning. It stated that if NRO's only accusation was that the hockey stick was "fraudulent," that would not be enough to proceed. Op. 70. But the panel went on to observe that this statement could not be viewed in isolation, and that the entirety of the report must be considered, *citing Guilford Transportation Industries, Inc. v. Wilner*, 760 A.2d 580 (D.C. 2000). Op. 71. The panel held that, in context, NRO's factual and specific allegations about Dr. Mann's character and conduct were capable of being verified or discredited. Op. 74.[4]

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[3]NRO tries to suggest that the panel agreed with it that it had made no specific allegation against Dr. Mann: "[A]s the panel itself repeatedly recognized, the statements here also contain no specific allegations of deception or misconduct." NRO Br. 7. This is pure sophistry. What the panel said was that the article did not comment on the specifics of Dr. Mann's methodology—not that its allegations against him were not specific. Op. 61–62. Indeed, the panel held that NRO allegations were "factual and specific." Op. 73.

[4]NRO advances the curious argument that it should escape liability because it never accused Dr. Mann of falsifying data and just criticized the hockey stick graph. The fact that NRO did not expressly say "data falsification" is irrelevant, as it accused him of serious scientific misconduct. And as the panel observed in its discussion of the CEI report, the suggestion that it had only criticized the hockey stick graph "seems to be a forced interpretation." Op. 61.

Finally, NRO's argument that an actionable defamation must concern a "concrete event" finds no support in the law, and no case is cited for this proposition. It is not only concrete facts that can be proven false—personal attacks on a person's character are also subject to objective verification. The leading case on this, and one the appellants continue to ignore, is *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976). Op. 72–73. There, the founder of the National Review, William F. Buckley, based a defamation claim on an article that claimed he had lied "day after day." *Id*. at 895. The Second Circuit held that this statement was a factual assertion relating to Buckley's integrity, *id*. at 895–96, and the panel in this case correctly observed that NRO's statements were "similarly factual and specific in their attack on Dr. Mann's integrity." Op. 73. Personal attacks on one's character have long been held capable of containing allegations of fact. *See* Sack on Defamation, Section 4:3.6 (4th ed.); *see also Weyrich v. The New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2000) (allegation that the plaintiff had "snapped" and "froth[ed] at the mouth"); *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249 (D.D.C. 2013) (allegation that the plaintiff was a "warlord").

III. CEI'S ACCUSATIONS WERE NOT "SUPPORTABLE INTERPRETATIONS"

CEI asserts that its statements are protected as "pure opinion" because they advanced a "supportable interpretation" of the underlying facts. CEI Br. 1, relying upon *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994). This

exception is limited, and applies only if the author expressly sets forth the underlying facts in the article and further that those facts actually support the interpretation. The "interpretation must be rationally supportable by reference to the actual text he or she is evaluating . . . . A critic's statement must be a rational assessment or account of something the reviewer can point to *in the text,* or *omitted from the text.*" *Id*. at 315 (emphasis in original).

Here, the facts disclosed in CEI's report do not support its allegations of misconduct. CEI's report criticizes the Penn State and National Science Foundation investigations, but fails to provide any textual material from which readers could draw their own conclusion. Further, the facts on which the purported opinion is based must be accurate and complete. Op. 66, *citing Milkovich*, 497 U.S. at 18–19. Yet in this case, CEI's discussion of the reports it cited were inaccurate. CEI claimed that the NSF report relied on the integrity of the Penn State report. But the NSF report relied upon far more extensive material than just the Penn State report. Moreover, the CEI article omitted reference to the other reports. The panel properly held that CEI's statements were not protected as opinion "because the article gave a skewed and incomplete picture of the facts a reader would need to come to his or her own conclusions on the matter." Op. 66–69.

Nor is CEI correct that the panel departed from *Guilford* on this issue. At

bottom, CEI forgets that the opinion defense has no application if the statements are capable of objective verification. *Milkovich* makes this clear, and *Moldea* specifically stated that the supportable interpretation exception does not immunize personal attacks of the type presented in *Milkovich*. *Moldea*, 22 F.3d at 315. Nor do this Court's decisions in *Armstrong* and *Rosen* apply any different standard. *Armstrong* held that the statements in that case were "not verifiable as true or false." 80 A.3d at 188. And *Rosen*, *citing Guilford*, similarly applied the "provably false" test. *Rosen*, 41 A.3d at 1256.

IV. THE PANEL DID NOT "CONFLATE" ISSUES

CEI also asserts that the panel confused the standard for defamatory meaning (a matter ultimately for the jury) with the standard for whether the opinion defense applies (a matter for the court). CEI Br. 8–9. CEI refers to a passage in the decision where it says the panel cited precedent on the defamatory meaning issue (from *Guilford*, 760 A.2d at 600, and *Tavoulareas v. Piro*, 817 F.2d 762, 780 (D.C. Cir. 1987) (en banc)) for the proposition that a jury could find that the article accused Dr. Mann of specific acts of misconduct. There is no "conflation" here. The cited passage, at Op. 60, was in the section on defamatory meaning, not opinion, and the fact that the panel wrote that a jury could find that the article accused Dr. Mann of specific acts of misconduct does not, in any way, suggest that the issue of verifiable facts was an issue for the jury. To the contrary,

the panel clearly held that the statements of both CEI and NRO were capable of objective verification—with no reference to this being a jury issue. Op. 69, 74.

V. THE PANEL'S ACTUAL MALICE RULING WAS CORRECT

The panel's actual malice determination was grounded in binding precedent. The panel began by setting forth the appropriate standard. The plaintiff must make one of two showings: either that the defendant had subjective knowledge of the statement's falsity; or that the defendant acted with reckless disregard. Op. 81. Moreover, the reckless disregard standard is not defeated simply by the defendant's assertions of good faith: these assertions must be considered by the jury in light of all of the circumstances. *Id*. The panel then assessed whether there was sufficient evidence in the record to permit a jury to find actual malice.

In so doing, the decision reviewed the investigative reports. In the court below, Dr. Mann had submitted eight separate inquiries conducted by academic institutions and governmental bodies. The panel "set aside" the reports which, in its view, dealt only with the validity of the hockey stick and focused on the four reports that more directly addressed the appellants' statements that Dr. Mann had engaged in scientific misconduct. The National Science Foundation, University of East Anglia, the United Kingdom House of Commons, and Penn State all considered and rejected allegations of research misconduct. The panel also noted that it was impressed with the number, extent, and specificity of the investigative

reports, as well as by the prestigious nature of the investigative bodies, and observed that these reports were known to the appellants before they wrote their articles. Op. 83–87.

In contrast to the proof submitted by Dr. Mann, the appellants chose not to offer any evidence on the actual malice issue. As the panel noted, they failed to provide evidence that they had conducted research to support their accusations against Dr. Mann. Op. 100. Nor had they undertaken, like many defamation defendants, to submit affidavits or declarations attesting to their subjective beliefs or to offer any explanation as to how they could have come to those beliefs in light of the reports they had reviewed.[5] Op. 89 n.56. While the appellants did offer some explanations for their behavior in their briefs, none of this was evidence, and, in any event, the weight of these arguments (if advanced at trial) are issues for the jury. Op. 95.

The panel then addressed the law, and in particular, *Nader v. de Toledano*, 408 A.2d 31 (D.C. Cir. 1979) and *Jankovic v. International Crisis Group*, 822 F.3d 576 (D.C. Cir. 2016). The facts in *Nader* are strikingly similar to those at issue here. There, a congressional report had concluded that Ralph Nader had made his charges against General Motors "in good faith." Yet the defendant in that case,

[5]*See, e.g.*, *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576 591–92 (D.C. Cir. 2016) (noting submission of declarations), *Wash. Post Co. v. Keogh*, 365 F.2d. 965, 969 (D.C. Cir. 1966) (same).

aware of the congressional report, nevertheless wrote that Nader had falsified and distorted evidence. *Id*. at 37–38. The court held that the report's "explicit, unambiguous finding" that Nader had acted in good faith provided a sufficient evidentiary basis upon which to find actual malice. *Id*. at 53. The panel in this case applied the *Nader* court's reasoning to find that, in view of the appellants' knowledge of the reports involving Dr. Mann, which "unanimously" concluded that there had been no misconduct, a jury could find that the statements were made with actual malice. Op. 96–97.

The panel also reviewed the *Jankovic* case, a decision with equal significance in view of the evidentiary posture of this case. In *Jankovic*, the defendant had submitted a declaration to the trial court, attesting to its subjective belief in the accuracy of the challenged article—including the fact that the author had conducted his own review of publicly available material and had interviewed a number of sources in government and business. *Id*. at 591–92. The D.C. Circuit held that in view of the evidence submitted by the defendant attesting to its good faith belief, coupled with the plaintiff's failure to point to any evidence that there were reasons to doubt the report, the plaintiff had failed to establish that the defendant possessed the requisite subjective doubt to proceed to trial. *Id*. at 597. The panel here noted the critical distinctions between *Jankovic* and this case. There, the defendant put in evidence of its good faith belief; here appellants

submitted no evidence. There, the plaintiff put in no evidence to support an actual malice finding; here, Dr. Mann presented the results from at least four separate investigations. Op. 100–01. The panel then concluded that, "on the current record" in which the allegations of misconduct had been "definitively discredited," a jury could find that the appellants acted with actual malice. *Id*. at 101.

In their petitions, the appellants do not address the evidentiary posture of this case. Instead they raise a variety of legal issues regarding the actual malice ruling, none valid.

1. Appellants argue that the "ambiguous" or "amorphous" nature of their statements defeat any ability to satisfy the actual malice standard. But as discussed above, the panel correctly held that their statements were specific and factual. Op. 60 (CEI); Op. 73 (NRO).

2. CEI argues that the *Nader* decision requires the panel to consider whether its statement was a possible interpretation of the climategate emails. CEI Br. 13. But again, supportable interpretation only applies if the interpretation was supported by information disclosed in the text of the article—and here CEI did not disclose the content of the emails in the text of its article or the accurate content of the investigative reports. Moreover, *Nader* makes clear that the significant departure from reliable governmental reports provides a sufficient evidentiary basis for a finding of actual malice. *Id*.

3. NRO argues that Dr. Mann had not presented evidence regarding the subjective belief of the authors. NRO Br. 14. But, of course, this is an interlocutory appeal, and discovery has not yet occurred—nor has NRO presented any evidence on its subjective belief. Moreover, while subjective belief is a factor in the actual malice determination, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 n.30 (1984), courts recognize that plaintiffs "will rarely be successful in proving awareness of falsehood from the mouth of the defendant." *Herbert v. Lando*, 441 U.S. 153, 170 (1979) (Stewart, J., dissenting). That is why courts "typically will infer actual malice from objective facts." Sack on Defamation, Section 5:5.2 (4th ed. 2016). *See, e.g.*, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) (failure to conduct a sufficient investigation suggestive of a deliberate effort to avoid the truth). Here, consistent with its obligation to conduct an independent review of "the evidence in the record" *Bose*, 466 U.S. at 511, the panel undertook a thorough review of the proof presented below. The panel found that the strength of the conclusions in the four investigative reports, coupled with appellants' failure to present any evidence as to how they could make their statements in light of those reports, was sufficient to permit a jury to find, by clear and convincing evidence, that the appellants acted with reckless disregard. Op. 101, *citing Nader*, 408 A.2d at 41, 50–53.

4. Finally, CEI argues that the panel's decision somehow forecloses it

from disagreeing with the governmental reports at issue, supposedly substituting the actual malice determination with "some official's say so." CEI Br. 15. The decision did no such thing. To the contrary, the panel recognized that appellants' objections to the reports could be made to the jury. The panel specifically stated that it was not judging whether these objections would persuade a jury. Its only task at this point was to determine if the evidence of record would permit a jury to find for Dr. Mann. Op. 95.

VI. THERE IS NO QUESTION OF EXCEPTIONAL IMPORTANCE

The panel's decision poses no threat to this nation's tradition of questioning the government and its conclusions as CEI asserts. CEI Br. 15. Critics remain free to exercise their First Amendment rights, subject of course to the limitation expressed in *Milkovich* that statements of opinion can be actionable if they imply a provably false fact. Op. 55. While there is "no such thing as a false idea," there also is "no wholesale defamation exemption for anything that might be labeled opinion." *Milkovich*, 497 U.S. at 18 (citation and internal quotation marks omitted).

The panel's decision will not open the floodgates to abusive or politically driven lawsuits. The appellants did not simply criticize a scientific report or a political platform. They delivered "an indictment of reprehensible conduct" against a distinguished scientist, injuring his "character and his conduct." Op. 74.

And they did so in the face of repeated findings to the contrary by independent and credentialed panels. This decision has no impact on scientific or political debate; as the panel observed, this is a "garden-variety" libel case. Op. 74 n.45.

Finally, any scintilla of concern that this decision might lead to more lawsuits in our nation's capital should be put to rest in view of the District of Columbia's Anti-SLAPP Act, which was designed to "protect targets of meritless lawsuits." Op. 19. The Act was specifically structured to deter and punish lawsuits which are unlikely to succeed. In view of the considerable "breathing space" the Constitution already provides defamation defendants, and now coupled with the Anti-SLAPP Act (which the appellants here have already put to their good use), appellants' concern about "more libel suits against political opponents," and "more legal intimidation," CEI Br. 15, is fatuous.

VII. CONCLUSION

The petitions for rehearing and rehearing en banc should be denied. In addition, it should be noted that due to the procedures already invoked under the Anti-SLAPP Act, and the interlocutory nature of this appeal, this case is already old. The defamations occurred in 2012, and discovery has not yet been taken—significantly to the prejudice of Dr. Mann, who has the burden to make the necessary evidentiary showings. This is an expedited appeal, and Dr. Mann respectfully requests a prompt decision on these petitions.

Dated: March 13, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2017, I caused the foregoing Appellee's Response to Petition for Rehearing and Rehearing En Banc to be served by first class mail, postage prepaid, on the following:

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