



United States District Court,
District of Columbia.

Mark LANE, Plaintiff,
v.
RANDOM HOUSE, INC., Defendant.

No. Civ.A. 93-2564 RCL.

Jan. 26, 1995.

II. FACTUAL BACKGROUND

This is a libel case concerning an advertisement that appeared in *The New York Times* on two occasions in late August, 1993. The advertisement announced publication by Random House of Gerald Posner's *Case Closed*, a book supporting the Warren Commission's conclusion that Lee Harvey Oswald, acting alone, assassinated President John F. Kennedy. The theme of the book is captured near the bottom of the advertisement--"ONE MAN. ONE GUN. ONE INESCAPABLE CONCLUSION."--followed by the promotional exhortation to "READ: CASE CLOSED BY GERALD POSNER."

Lane's objection is to the body of the advertisement where his photograph appears along with five other literati whose theories about the Kennedy assassination are well-known to American readers and filmgoers. *145 Each photograph is accompanied by a direct quote; and each quote is contrary to the views espoused by Posner in his new book. Above the six photographs is the caption: "GUILTY OF MISLEADING THE AMERICAN PUBLIC."

Immediately after the advertisement appeared, Lane protested to both *The New York Times* and Random House. His demand for a retraction was rejected. Random House indicated that it would not re-run the advertisement-- but only because the pre-publication promotional campaign for Posner's book was finished.

Lane does not deny the quote attributed to him in the advertisement: "There is no convincing evidence that Oswald fired a gun from the sixth-floor window of the Book Depository or anywhere else on the day of the assassination." Still, Lane argues that he was injured in two respects. First, he objects to the unauthorized use of his photograph, name and notoriety in promoting the sale of *Case Closed*.

Second, he seeks damages for the disparagement of his integrity and candor arising from the perceived suggestion in the advertisement that he has been intellectually dishonest with the American people.

V. FALSE LIGHT

[10][11] Lane claims that Random House sullied his reputation and disparaged his credibility by knowingly depicting him in a false light and thereby intentionally causing him mental anguish and emotional distress. False light invasion of privacy is defined as follows:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977).

[12][13][14] The second prong for false light--knowledge or reckless disregard of the falsity of the underlying statement--is the same "actual malice" requirement for a defamation action set forth in Sullivan, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Whereas an action for defamation redresses damage to one's reputation, the tort of false light is intended to remedy mental distress from having been exposed to public view. "Yet, truth or assertion of opinion are defenses in both causes of action." White v. Fraternal Order of Police, 909 F.2d 512, 518 (D.C.Cir.1990) (citing Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir.1983)). Moreover, the same absolute and conditional privileges available to libel defendants may be invoked in defense of false light claims. See Restatement (Second) of Torts § § 652F, 652G (1977). As we shall see below, Random House has colorable defenses against defamation. By law, these defenses are valid against false light as well.

With respect to the "highly offensive" prong of the standard, Random House correctly observes that challenging Lane's views by calling them "misleading" is hardly the repugnant conduct necessary to sustain a false light claim. Indeed, it lies comfortably within the boundaries of rough and

tumble debate which should have been anticipated by Lane upon publication of his own contentious bestseller. "Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments." [Ollman v. Evans, 750 F.2d 970, 993 \(D.C.Cir.1984\)](#) (Bork, J., concurring), *cert. denied*, [471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 \(1985\)](#).

[15] Of course, at this stage of the proceedings, the question the court must resolve is whether a fact-finder could rationally conclude that the aspersion to Lane is highly offensive. [Moldea v. New York Times, 15 F.3d 1137, 1140 \(D.C.Cir.\) \(Moldea I\)](#) (rehearing *149 granted, reversed on other grounds, [22 F.3d 310 \(D.C.Cir.\) \(Moldea II\)](#)), *cert. denied*, [513 U.S. 875, 115 S.Ct. 202, 130 L.Ed.2d 133 \(1994\)](#). The standard is an objective one, based upon the reaction that a reasonable person would have if he or she were the subject of the Random House advertisement. *Id.*

[16] Lane entered the public forum by embroiling himself in one of the most factious debates of our time. It is quite simply untenable that someone espousing Lane's views would take umbrage at the rather reserved assessment that he misled the American public. "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in [Lane's] position..." Restatement of Torts (Second) [§ 652E](#), cmt. c. Under Lane's lopsided rules of engagement, he gets his choice of weaponry and tactics; Random House must do battle unarmed and march openly in a straight line. A conspiracy theory warrior outfitted with Lane's acerbic tongue and pen should not expect immunity from an occasional, constrained chastisement.

Random House, in publicizing its own book has publicized Lane's as well. In the process, Random House furnished a bibliography from which varying insights on the Kennedy assassination can be extracted and scrutinized, then accepted or rejected. The court is unwilling to substitute its perspective for that of an informed readership. If Lane is aggrieved as he claims, he should know that an already burdened judicial system cannot accommodate protestations of this sort.

Lane's false light allegations are dismissed--both because the statement in the Random House advertisement does not objectively cross the "highly offensive" threshold, and for the reasons discussed

below in connection with Lane's defamation claim.

VI. DEFAMATION

In his fifth and last count, Lane claims defamation. According to Lane, Random House knew or could easily have determined that Lane had not been charged with nor convicted of misleading the American public. Nevertheless, with actual malice or extreme recklessness, Random House twice published the offending advertisement. Because the falsity of the charge was objectively determinable and likely to be believed as factual, Lane contends he was defamed.

There is, however, a very real risk in sanctioning recovery for libel under these circumstances. Debate about one of our important historical events could be stifled by threats of costly litigation. As Random House remarked in their motion for summary judgment, "To allow conspiracy theorists to haul book authors into court in an effort to punish written criticism is contrary to our tradition of arriving at truth through a robust exchange of views in the marketplace of ideas." Lane is certainly entitled to his beliefs; but it is not defamatory to criticize him. Books, editorials and talk shows are more appropriate forums than courts for this type of polemic.

A. Fair Comment Privilege

[19][20][21] The common law privilege of fair comment applies where the reader is aware of the factual foundation for a comment and can therefore judge independently whether the comment is reasonable. [Milkovich, 497 U.S. at 30 n. 7, 110 S.Ct. at 2712 n. 7](#), (Brennan, J., dissenting). Fair comments are not actionable in defamation "[b]ecause the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts..." [Moldea I, 15 F.3d at 1144](#). In the District of Columbia, the fair comment privilege can be invoked even if the underlying facts are not included with the comment. [Fisher v. Washington Post Co., 212 A.2d 335, 338 \(D.C.1965\)](#) (relying on [Sullivan v. Meyer, 141 F.2d 21 \(D.C.Cir.\)](#), *cert. denied*, [322 U.S. 743, 64 S.Ct. 1145, 88 L.Ed. 1575 \(1944\)](#)).

[22] Here, application of the privilege is straightforward. Lane's direct quote is included in the Random House advertisement and the reader is urged to read *Case Closed* (or the works of any or all

of the six conspiracists) for a fuller explication of the competing viewpoints. The inclusion of the underlying facts, directly in the form of a quotation and indirectly in the form of a booklist, more than complies with this circuit's criteria for applying the fair comment privilege. See also, [Potomac Valve and Fitting, Inc. v. Crawford Fitting Co.](#), 829 F.2d 1280, 1290 (4th Cir.1987) (challenged statement not actionable because "premises are explicit, and the reader is by no means required to share [defendant's] conclusion").

B. First Amendment Protection

[23][24][25] The precepts governing the interrelationship between defamation and First Amendment jurisprudence were recently set forth in [Milkovich](#), 497 U.S. at 18-21, 110 S.Ct. at 2705-07. To be defamatory, a statement must be "objectively verifiable" as true or false. [Id.](#) at 21, 110 S.Ct. at 2707. To insure room for "imaginative expression" and "rhetorical hyperbole," statements are only actionable if they have an explicit or implicit factual foundation. [Id.](#) at 20, 110 S.Ct. at 2706. Full constitutional protection exists for rhetoric that, due to its loose, figurative tone cannot reasonably be interpreted as stating actual facts about an individual, and for imprecise statements that are not susceptible of being proved true or false. [Id.](#) at 20-21, 110 S.Ct. at 2706-07.

The Seventh Circuit expanded upon the [Milkovich](#) formulation. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." [Haynes v. Alfred A. Knopf, Inc.](#), 8 F.3d 1222, 1227 (7th Cir.1993) (citations omitted).

[26] "GUILTY OF MISLEADING THE AMERICAN PUBLIC," would seem the ideal prototype of a statement that conforms to the [Milkovich-Haynes](#) model. It is rhetorical hyperbole; it does not state actual facts about an individual; it cannot be proven true or false. The statement in the Random House advertisement "could not reasonably be interpreted as stating anything other than a subjective belief." [Grodan](#) at 14. Gerald Posner's evaluation in *Case Closed* is that Lane misled the public. That evaluation cannot be objectively verified without resolving *151 thirty years of controversy surrounding the Kennedy assassination. To the extent that Posner's opinion rests on underlying facts, those facts are lodged in his and

Lane's books. Events discussed in the two books have resisted objective verification for more than three decades. Readers may believe one book, the other, or neither; but there is no indication that Lane's theories have acquired the imprimatur of received wisdom.

[27][28] Prior to [Milkovich](#), this circuit recognized a strict dichotomy in defamation actions between assertions of opinion and assertions of fact. See, e.g., [Ollman](#), 750 F.2d at 971. [Milkovich](#) rejected this practice. Post-[Milkovich](#) cases held that opinions can be actionable if they imply a provably false fact. See, e.g., [White](#), 909 F.2d at 522. Thus, the task is to "determine as a threshold matter whether a challenged statement is capable of a defamatory meaning; and whether it is verifiable--that is, whether a plaintiff can prove that it is false." [Moldea II](#), 22 F.3d at 316-17 (citing [Moldea I](#), 15 F.3d at 1142-45). The burden of proving falsity rests squarely on the plaintiff. He or she must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue.

Applying these principles in a context not far removed from the dispute the court grapples with today, the D.C. Circuit concluded: "[W]hen a reviewer offers commentary that is tied to the work being reviewed, and that is a supportable interpretation of the author's work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation." [Moldea II](#), 22 F.3d at 313. The context in [Moldea II](#) was a book review "in which the allegedly libelous statements were evaluations quintessentially of a type readers expect to find in that genre." [Id.](#) at 315. It was [Moldea](#)'s book at issue, not his character, reputation or competence as a journalist. While a bad review inevitably injures an author's reputation to some extent, "criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional 'breathing space' appropriate to the genre." [Id.](#) (citing [Sullivan](#), 376 U.S. at 272, 84 S.Ct. at 721).

Lane insists that his case against Random House is not about who killed President Kennedy. Instead, Random House has accused Lane in no uncertain terms of being guilty of a public deceit, of duplicity and intellectual dishonesty. Random House implied that Lane has been exposed as a charlatan. Indeed, attests Lane, Random House's charges can be proven false; his veracity, integrity, intellectual honesty and candor can all be plumbed in a trial as a matter of

fact.

[29][30] If Random House had said what Lane said it said, perhaps we would have a more perplexing case. Even then, it is difficult to imagine how the court could assess Lane's deceitfulness, veracity, etc. without examining the assassination itself. Reckless disregard for the truth might qualify Lane for some of Random House's unstated pejoratives; but the "truth" has remained camouflaged since 1963, notwithstanding protracted analysis and debate. In *Milkovich* terms, if the underlying facts are not "objectively verifiable," the opinion based upon those facts is not actionable. [497 U.S. at 21, 110 S.Ct. at 2707](#). In *White* terms, "[a]ssertions of opinion on a matter of public concern ... receive full constitutional protection if they do not contain a provably false factual connotation." [909 F.2d at 522](#). The challenged Random House statement has no provably false connotation, nor does it imply provable facts.

Moreover, Random House simply did not mention candor, integrity, duplicity, charlatanism or the other colorful terminology conjured up by Lane. The advertisement expressly said: "guilty of misleading the American public." "Guilty" is defined as "justly chargeable with or responsible for a usually grave breach of conduct." *Webster's Ninth New Collegiate Dictionary* 542 (1990). In this instance, the breach of conduct is misleading the public. "Mislead" is not synonymous with "deceive." The latter implies "imposing a false idea or belief," while the former is merely "a leading astray that *may or may not be intentional*." *Id.* at 329 (emphasis added). Whether or not Lane has been exposed as a charlatan, one would be hard-pressed to pluck that insinuation from the comparatively bland charge in the Random House advertisement. "Even the ... *152 assertion that appellants are 'blatantly misleading the public' ... is subjective and imprecise, and therefore not capable of verification or refutation by means of objective proof." [Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724, 728 n. 7 \(1st Cir.\), cert. denied, 504 U.S. 974, 112 S.Ct. 2942, 119 L.Ed.2d 567 \(1992\)](#).

The contested statement in the Random House advertisement reflects differing interpretations of the murky facts surrounding the Kennedy assassination. By "expressing a point of view only ... the challenged language is immune from liability." [Phantom Touring, 953 F.2d at 729](#). *Groden* concurs: "[K]nown evidence concerning the Kennedy assassination and the extensive debate over the Warren Commission's findings demonstrate that the

actual facts will never be verifiable to everyone's satisfaction. Thus, the statements in the advertisement are merely statements of Posner's argument or opinion...." [Groden at 14-15](#).