STATE OF MICHIGAN

COURT OF APPEALS

MARK L. GREBNER,

Plaintiff-Appellee,

v

INGHAM NEWSPAPER COMPANY d/b/a TOWNE COURIER and SCOTT T. SCHULTZ,

Defendants-Appellants,

and

RICHARD L. MILLIMAN a/k/a DIRK MILLIMAN and STEVEN P. RUHLING,

Defendants.

UNPUBLISHED
April 7, 1998

No. 196310
Ingham Circuit Court
LC No. 94-77693 CZ

Before: O'Connell, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

In this libel action, defendants appeal as of right a judgment entered in favor of plaintiff. Following a jury trial, defendant Schultz was ordered to pay plaintiff $17,259.79 in damages and defendant Ingham Newspaper Company was ordered to pay $40,270.04. We reverse.

The libel action was based on the following statement that appeared in a newspaper article written by Schultz and published in the February 26, 1994, edition of the Towne Courier: "For example, she alleges that an employee of Judge Jordan's conspired with a well-known Democratic political consultant to unseat incumbent District Court Judge Jules Hanslovsky by supplying purloined private documents from Hanslovsky's private files." The "she" referred to in the article was a former magistrate of the 54-B District Court, Joan Elizabeth Koblas. "Judge Jordan" is Judge David L. Jordon, then chief judge of the 54-B District Court, the "employee" is apparently Marc Thomas and the political consultant is apparently plaintiff. Judge Hanslovsky had been defeated in his bid for reelection to the 54-B District Court in 1992.

Defendants challenge the determinations below that the statement was "of and concerning" plaintiff, that the statement was false and that the statement was made with actual malice. Because these questions implicate protections afforded defendants under the United States Constitution, appellate review entails an "independent examination" of the record where we "examine for ourselves the statements in issue and the circumstances under which they were made." *New York Times Co v Sullivan*, 376 US 254, 285; 84 S Ct 710 (1964). We conduct such a review to determine whether there is clear and convincing evidence of actual malice. *Harte-Hanks Communications v Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989); see also *Rouch v Inquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 253-258; 487 NW2d 205 (1992); *Locricchio v Evening News Assn*, 438 Mich 84, 110-114; 476 NW2d 112 (1991). Essentially, whether the facts in a case meet the constitutional standard is a question of law. *Locricchio*, *supra* at 111. However, we afford considerable deference to credibility determinations by the trial court. *Harte-Hanks*, *supra* at 688.

Defendants argue that plaintiff failed to establish that the statement at issue was "of and concerning" plaintiff. *Rouch*, *supra* at 251. We disagree. "To render a statement defamatory, it must indicate the person intended by name, or connect that person with some fact or circumstance known to those to whom the publication is directed, by which they may understand who is meant . . . " Taylor et al., Michigan Torts Practice Guide, sec 1:648 at 1-82. "It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant." *Miller v Maxwell*, 16 Wend 9, (18 NY Sup Ct, 1836). Our independent review of the record shows that there is ample evidence to sustain the finding that the statement was "of and concerning" plaintiff. Given plaintiff's reputation in the community as a political commentator, a Democratic political consultant, and a seven-time elected public official in Ingham County, and given the frequency with which Schultz had previously attacked plaintiff in his newspaper column,[1] we conclude that readers of the statement would recognize plaintiff as the "well-known Democratic political consultant" referenced in the statement.[2]

Defendants also assert that plaintiff failed to prove that the statement was false. In order to prove that he has been libeled, a plaintiff must show that the defendant published a "false and defamatory" statement concerning the plaintiff. *Rouch*, *supra* at 251. The burden rests with the plaintiff to prove falsity. *Philadelphia Newspapers v Hepps*, 475 US 767, 776; 106 S Ct 1558; 89 L Ed 2d 783 (1986); *Rouch*, *supra* at 263. If, by "the statement," defendants are referring to the language quoted above, as opposed to the underlying allegation directed toward plaintiff, we agree.

At trial, plaintiff made a two-pronged attack on the falsity of this statement. First, he challenged Schultz's choice of language in the statement, focusing on the words "purloined" and "documents." With regard to this issue, plaintiff spent some time questioning Schultz and defendant Richard Milliman, the publisher of the Towne Courier, on their understanding of the meaning of the word "purloined" and both of them conceded that the word "steal" is a synonym for "purloin." Koblas then admitted that she had not told Schultz that Thomas had passed on "purloined" documents from Judge Hanslovsky's private files to plaintiff. When asked by plaintiff whether she would have used the word "steal" to characterize what Thomas had done, Koblas gave the following response: "I probably would not have

used that word because that word indicates to me that he, you know, took the document and took it out and permanently deprived the Court of a document as opposed to taking information." Plaintiff also focused on the semantic distinction between the words "document" and "information." Schultz indicated that he believed the two words were synonymous and that when another witness testified in her deposition in the whistleblower action that Thomas had supplied information to plaintiff, Schultz saw this as support for the assertion that Thomas had supplied plaintiff with documents from Judge Hanslovsky's private files.

In our judgment, plaintiff's focus on the precise definition of the words "purloin" and "document" is the kind of analysis that the Michigan Supreme Court discouraged in libel cases. *Rouch, supra* at 263-264. "To ensure the requisite 'breathing space' for free and robust debate on matters of public concern," the Court stated, "we think it is important to allow for imprecision and ambiguity in the choice of language." *Id.* at 264 n 25. Within the context of protected First Amendment expression, the question is not necessarily whether the meaning conveyed by the technical definition of the words is accurate, but rather whether the gist or essence of the statement is justified. Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." *Masson v New Yorker Magazine, Inc*, 501 US 496, 517; 111 S Ct 2419; 115 L Ed 2d 447 (1991), quoting *Heuer v Kee*, 15 Cal App 2d 710, 714; 59 P2d 1063 (1936).[3]

Here, Koblas specifically testified that, as written, the statement accurately reflected the "gist" of her allegation. She testified that the allegation she made was that Thomas "took the information" and passed it on to plaintiff. Substituting Koblas' language ("information [taken]") for Schultz's language ("documents purloined"), the statement at issue would read: "For example, she alleges that an employee of Judge Jordan's conspired with a well-known Democratic political consultant to unseat incumbent District Court Judge Jules Hanslovsky by supplying *information taken* from Hanslovsky's private files." In our judgement, the use of the words "taken" and "information" would not have created a markedly different effect in the mind of the reader. In either instance, the reader would have been left with the impression that Thomas had obtained information from a place he should not have been (i.e., Judge Hanslovsky's private files) and improperly passed it on to plaintiff. Whether that information was contained in an actual physical document that was delivered to plaintiff is unimportant in this context. Bearing in mind that plaintiff bears the burden of proof on the issue of falsity, we conclude that these variances in language do not evidence that the statement was false. Schultz's misconception of what Koblas had told him "is commonplace in the forum of robust debate," *Masson, supra*, at 519, and is not sufficient evidence of falsity to justify the forfeiture of defendants' First Amendment protections here.

Plaintiff's second argument is that, regardless of the technical accuracy or inaccuracy of Schultz's reporting about Koblas' testimony, Thomas, in fact, never provided him with information from Judge Hanslovsky's private files. Here, plaintiff challenges the accuracy of what Koblas said rather than the accuracy of what Schultz wrote. Essentially, plaintiff argues that because the substance of the allegation was false, had defendants properly investigated the matter they would have reached this conclusion. This argument appears to be premised on the assumption that defendants were required to follow some unnamed standard for proper investigation. *Cf*, however, *Beckly Newspapers Corp v*

Hanks, 389 US 81, 85; 88 S Ct 197; 19 L Ed 2d 248 (1967); see also *St. Amant v Thompson*, 390 US 727, 733; 88 S Ct 1323; 20 L Ed 2d 262 (1968). But the Supreme Court has concluded that even demonstrably false statements may deserve constitutional protection despite the fact that, presumably, a sufficiently thorough investigation would always root out false statements. *New York Times, supra* at 288. Rather, in *New York Times*, the Court opined that such false statements "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *Id*. at 271-72 (quoting *NAACP v Button*, 317 US 415, 433; 83 S Ct 328; 9 L Ed 2d 405 [1963]). In order to assure that such "breathing space" is maintained, the Court established the following test:

> The constitutional guarantees [of the First Amendment] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. [*Id*. at 279-80.]

In Michigan, this constitutional standard has been adopted by the Legislature in MCL 600.2911(6); MSA 27A.2911(6).[4]

It is unnecessary, therefore, that we address whether defendants here can insulate themselves from a libel action merely by attributing a false statement to another speaker. For, in the end, we are unable to conclude that defendants acted with "actual malice" in printing the statement in controversy. An independent review of the record does not sustain such a finding based on clear and convincing proof. Both Schultz and Milliman continue to profess a belief in the accuracy of the statement. Milliman testified that he did not print a retraction because he "believe[d] that the allegations contained in the paragraph are true." His professed belief in the accuracy of the statement does not evidence a knowing publication of a defamatory falsehood. See *New York Times*, *supra* at 286 (finding that a statement by a newspaper employee that, aside from one allegation, "he thought the [allegedly libelous statement] was 'substantially correct,'" did not evidence actual malice).

Additionally, the record shows that Milliman and Schultz did investigate Koblas' allegations before publishing. Accord *New York Times*, *supra* at 287. Schultz testified that he went through a substantial amount of information provided to him by Koblas before publishing. He specifically identified portions of a deposition from a whistleblower action, that had earlier been brought by Koblas against the 54-B District Court, that he said supported Koblas' allegations. In that deposition, Gwen Thompson-Simmons, a court clerk, testified that she had heard that Thomas had gone through Judge Hanslovsky's files, and that Thomas had passed on information regarding Judge Hanslovsky. Further, Koblas testified that she told Schultz that Judge Hanslovsky had testified at his deposition in the same case that he "believed that Mark Thomas had taken a letter . . . and also various other information that was obtained . . . through searching his computer files." Milliman testified that after reading Judge Hanslovsky's deposition post-publication, he was further convinced of the truthfulness of the statement in question.

Both Schultz and Milliman found Koblas to be credible. Schultz testified that he spoke with District Court Judge Frank Del Vero and East Lansing Councilman Bill Sharp prior to publication, and

that both persons had indicated that Koblas was a credible individual. In fact, the article from which the statement at issue was taken contained a quote from Judge Del Vero with regard to Koblas' credibility. Defendants were permitted to rely on Koblas' apparent credibility when publishing her allegations. See *New York Times*, *supra* at 287 (observing that the failure to reject an allegedly libelous advertisement was not unreasonable given that the Times had "relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement").

The determination of whether an individual published with malice or reckless disregard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. The record here, in our judgment, does not show that defendants either knew that the statement was false or that they acted with reckless disregard as to its truthfulness.[5]

In fairness to plaintiff, however, we emphasize again that the First Amendment protects even false statements when directed against public officials or public figures, at least in the absence of malice. At the end of the day, we do not know whether plaintiff received documents from Thomas, much less whether he received them knowing that they were obtained improperly. Therefore, we do not decide this case on the basis of whether the underlying allegation is true or false. While there may be some who decry that such an inquiry is not dispositive, or even necessarily at the heart of, the instant action, it is clear from both *New York Times* and MCL 600.2911(6); MSA 27A.2911(6), that other factors must be considered and ultimately predominate. What we can state, however, in an effort to clarify the significance of this decision is that defendants have not proved -- nor have they been called upon to prove -- the truthfulness of Koblas' assertion about plaintiff's conduct.

Finally, we conclude that the publication of the statement was not privileged under MCL 600.2911(3); MSA 27A.2911(3). This statute protects the publication of true reports of matters of public record.[6] Because we do not believe that the allegation was part of a public record, we reject defendants assertion that the statutory privilege applies here.

We reverse.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Plaintiff testified that Schultz published articles critical of plaintiff "roughly once a month," an assertion that was not challenged by either defendant. Both defendants acknowledged that the reference in controversy was intended to refer to plaintiff.

[2] Largely for these reasons, plaintiff is also properly characterized as a public official or public figure for purposes of constitutional libel analysis. *Curtis Publishing Co v Butts*, 388 US 130, 164; 87 S Ct 1975; 18 L Ed 2d 1094 (1967).

[3] The "gist" or "sting" of the statement here is in two parts. The first part is that "an employee of Judge Jordan "conspired with [plaintiff] to unseat incumbent District Judge Jules Hanslovsky." This part is per se not actionable. All elections against incumbents can be described by the press or especially by the incumbent as conspiracy to unseat the incumbent. If we were to consider this part of the statement libelous we would subject all challengers and the press to libel suits. Politics by definition can be classified as "a conspiracy to unseat the incumbent" without fear of a libel suit. While some judges might wish to prevent citizens from "conspiring," or agreeing, to unseat them, such agreements are commonly made and are an integral part of our political system.

The second part of the statement is more problematic. Here, it is alleged that "an employee of Judge Jordan" supplied "purloined private documents" to plaintiff. Plaintiff alleges that this statement accuses him of being a thief or at least conspiring to be a thief. First, we note that being supplied with purloined documents is not the same thing as stealing documents, particularly where there is no allegation that plaintiff was made aware that the documents were purloined. Second, plaintiff admits that he obtained sensitive information concerning Judge Hanslovsky and admits that he published this information in an attempt to unseat the incumbent. The only issue-- and we do not gainsay its significance-- is whether this particular information was "purloined," or, as plaintiff argues, derived from another source. The record below contains ample evidence that some sensitive information "was taken" from Hanslovsky's files.

While we find the choice of the word "purloined" to be ill-advised, this word alone does not transfer an otherwise newsworthy story into a libel or defamation lawsuit. The article does not accuse plaintiff of any criminal activity – it merely reports the allegations made in the Koblas lawsuit (i.e. that another person [Mark Thomas] supplied plaintiff with documents from Judge Hanslovsky's files). The gist or "sting" of the article is not actionable. *Masson, supra* at 517.

[4] This section provides:

> An action for libel or slander shall not be brought based upon a communication involving public officials or public figures unless the claim is sustained by clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether or not it was false.

[5] Plaintiffs argue that there was evidence showing that sources relied upon for the story did not have personal knowledge regarding the allegation made. However, this would not establish actual malice; lack of personal knowledge among sources does not indicate that the account they provide is false. Having said this, we emphasize that it is not our intent to give our imprimatur to the investigation conducted here. It is troubling, for example, that Schultz did not discuss the allegations in his statement with plaintiff prior to their publication. While there is indication that other individuals expressly chose not to speak with Schultz, there is no such indication in plaintiffs' case and Schultz at most attempted on only a single occasion to speak with plaintiff prior to publication.

[6] Section 2911(3) provides an exception for a true report of:

matters of public record, a public or official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report.