No. 20-532

United States Court of Appeals for the Second Circuit

SCOTT POWELL,

Plaintiff – Appellee,

v.

JILL JONES-SODERMAN,

Defendant – Appellant,

FOUNDATION FOR THE CHILD VICTIMS OF THE FAMILY COURTS,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (NEW HAVEN)

REPLY BRIEF FOR APPELLANT JILL JONES-SODERMAN

David K. Ludwig
Thomas K. Hedemann
Nicholas E. Gaglio
AXINN, VELTROP & HARKRIDER LLP
90 State House Square
Hartford, Connecticut 06103
(860) 275-8100
dludwig@axinn.com
thedemann@axinn.com
ngaglio@axinn.com
Attorneys for Defendant-Appellant

November 13, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

This Court should reverse the judgement below for two independent reasons: First, the district court failed to make any finding that Jones-Soderman's statements were false, and the relevant trial evidence does not support any such finding. Second, the district court's determination that Jones-Soderman subjectively believed in the truth of her statements precludes, as a matter of law, a finding that she acted with "actual malice."

In his opposition brief, Powell does not dispute that Jones-Soderman's published statements relate to a matter of public concern and that he accordingly bore the burden of proving that Jones-Soderman's statements were false. Powell also does not dispute that the district court failed to render any explicit finding as to the truth or falsity of Jones-Soderman's statements. Rather, he incorrectly contends that the district court *implicitly* found that Jones-Soderman's statements were false. But the portions of the district court opinion that Powell references are largely concerned with Jones-Soderman's state of mind, and do not support his claim of an implicit factual finding.

Powell's argument that the record supports a finding of falsity is also fundamentally flawed because it relies overwhelmingly on hearsay – much of it from years before the relevant time period – that as a matter of law is not probative of truth or falsity. For example, the district court explicitly declined to admit

Powell's central alleged evidence of falsity, a 2011 expert report by Dr. Frazer, as probative for the truth of the matter. That report and the subsequent court decisions that it influenced thus cannot prove that Jones-Soderman's statements were false. Jones-Soderman's evidence that her statements were true, by contrast, are highly credible. They are based on the words and actions of the child victims themselves. The children's non-hearsay statements, as well as their conduct (e.g., fleeing their father's home to report the alleged abuse to the police), suggest that Powell was in fact abusing them. Powell's argument that the girls must have been lying because certain fact-finders in the past had not believed them does not satisfy his burden of proving that Jones-Soderman's statements were false.

Powell also fails to rebut the district court's finding that Jones-Soderman whole-heartedly believed, and still believes, that her statements were true. Powell argues that Jones-Soderman was aware of prior investigations that might have caused someone else to distrust the children's allegations, but that was explicitly considered by the district court. As the district court stated, Jones-Soderman simply believed the children over the conclusions of those prior investigations. Indeed, there is no explanation for Jones-Soderman's conduct other than her full conviction in the truth of her statements. Because Jones-Soderman subjectively believed her statements, they are entitled to the strong protections of First Amendment speech afforded to matters of public concern.

Finally, Powell fails to address any of the deficiencies in the district court's damages award. Because there was no evidence that Jones-Soderman's statements caused Powell not to be rehired as a summer camp director, and because Powell had suitable alternative employment available to him, the district court erred by awarding Powell lost income damages.

ARGUMENT

I. THE DISTRICT COURT DID NOT FIND, AND THE TRIAL EVIDENCE DOES NOT DEMONSTRATE, THAT JONES-SODERMAN'S STATEMENTS WERE FALSE.

Powell does not dispute the district court's finding that Jones-Soderman's statements were a matter of public concern. (*See* Appellee's Brief at p. 19-21.) Jones-Soderman's statements were thus entitled to the special protections of the First Amendment, which, among other things, required Powell to prove falsity of the statements. *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000) (In a suit involving speech on a matter of public concern where defamation, false light invasion of privacy or similar torts are asserted, the allegedly offending statements "must be provably false, and the plaintiff must bear the burden of proving falsity."); *Gleason v. Smolinski*, 319 Conn. 394, 444 (2015) (same). Contrary to Powell's assertions, the district court declined to find that the statements were false, and the record does not demonstrate falsity.

A. The District Court Did Not Implicitly Find that Jones-Soderman's Statements Were False.

Powell cannot identify a single sentence in the district court's opinion in which the district court found that Jones-Soderman's statements were actually false. Rather, Powell can only argue that the district court "implicit[ly]" found falsity. (Appellee's Brief at p. 20.) The court made no such finding. If the district court had made such a falsity finding, it would have explicitly included it in the opinion's 12-page section titled "Factual Findings." (Appx014-025.)

Powell can point to nothing in the district court's opinion from which one can deduce that the court necessarily made a finding of falsity. Indeed, the district court did not even acknowledge the case law requiring Powell to prove falsity, despite that case law having been the centerpiece of Jones-Soderman's defense. (*See, e.g.*, Appx010 (D.I. 91: "Defendant's MOTION for Judgment on Partial Findings for All Counts by Jill Jones-Soderman," based on Powell's failure to present evidence of falsity).) Powell cannot credibly claim that the district court implicitly made a finding that it did not even indicate was relevant to its decision.

B. The Trial Evidence Does Not Demonstrate that Jones-Soderman's Statements Were False.

Powell's argument that the record nevertheless shows that Jones-Soderman's statements were false fails for multiple reasons.

First, Powell relies almost entirely on hearsay, which is not evidence of truth or falsity. Jones-Soderman's Opening Brief sets forth all of the exhibits the district court admitted for the truth of the matter. (Opening Brief at 10.) Of these exhibits, the only exhibits Powell relies on to prove falsity is the transcript excerpt of proceedings before Judge Erika Tindill (Appx501-523), which Jones-Soderman already explained is of limited relevance (Opening Brief at 20-21). Although Judge Tindill released the children to Powell in that proceeding, she did not hear testimony from the children, read their letters/diary, or watch their video. (*Id.*) Judge Tindill also did not find that Powell did not abuse the children, but rather merely could not conclude based on the limited evidence before her that the children were in immediate danger. (*Id.*) Her instruction for Powell to install cameras inside his house in fact shows she contemplated that the abuse allegations might be true. (*Id.*)

Moreover, essentially all of Powell's supposed evidence of falsity stems back to a single 2011 evaluator report by Dr. Frazer, which the district court explicitly declined to consider for the truth of the matters asserted. (Appx432-433 (49:12-50:9) ("I will admit the exhibit for the limited purpose of showing the impact on the defendant . . . .").) Years before the children contacted Jones-Soderman, when the children were much younger, Frazer evaluated the Powell family and prepared a report concluding that the children's mother was mentally ill

and a danger to the children, and that she had made untrue allegations that Powell abused her and the children. (Appx524-567.) The Clarification of Judge Sommer referenced by Powell relied heavily on the Frazer report. (Appx569, Appx571.)[1] Judge Tindill also based her decision largely on the Frazer report as well as a second 2013 report by Frazer that was not introduced as evidence in this case. (Appx504 (4:3-6).) This Frazer report is also the only exhibit in the record that references the investigations by the Department of Children and Families and New Canaan Police discussed by Powell. Thus, while Powell attempts to give the impression that there was overwhelming evidence that the girls were lying about being abused, the reality is that all of this evidence is tied to the hearsay opinions of a single man from long before Jones-Soderman was even involved. Jones-Soderman also contended at trial that Frazer's report was "flawed" and even "malpractice," which Jones-Soderman could not develop through cross examination because Frazer did not appear as a witness. (Appx278 (97:9-11).)

Jones-Soderman's evidence that her published statements were true – which is *not* hearsay – is dramatically more compelling than those presented by Powell. As set forth in Jones-Soderman's Opening Brief, Jones-Soderman had extensive

[1] Although the district court admitted the Clarification of Judge Sommer (Appx567-574) as a "full exhibit" (Appx313 (19:11-12)), it explicitly stated that "to the extent that there's hearsay within the document, I'm not relying on those statements for the truth of those matters asserted" (Appx312 (18:20-24)).

communications with the children in which they detailed their father's recent abuse. The children were terrified of their father. They escaped to the police department to seek refuge. When Judge Tindill ordered that the children be returned to their father's custody, they were so distraught that they had to be hospitalized. (Appx349-350 (55:10-56:3).) In view of these compelling facts supporting Jones-Soderman's published statements, Powell's paltry evidence to the contrary fails to satisfy his undisputed burden to prove that Jones-Soderman's statements were false. Jones-Soderman's speech is thus protected by the First Amendment for at least this reason.

II. JONES-SODERMAN BELIEVED HER STATEMENTS WERE TRUE AND THEREFORE DID NOT ACT WITH "ACTUAL MALICE."

A. Powell Cites the Wrong Standard of Review.

Contrary to Powell's assertion, this Court reviews findings of actual malice *de novo*. *See Celle v. Filipino Reporter Enter. Inc.*, 209 F.3d 163, 184 (2d Cir. 2000) ("In reviewing a finding of actual malice, judges are constitutionally obligated to conduct an independent examination of the whole record."); *DiBella v. Hopkins*, 403 F.3d 102, 116 (2d. Cir. 2005) ("Appellate judges 'must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."). In fact, this Court applies the strict clear and convincing evidence standard when determining whether an appellant acted with

actual malice. *Celle*, 209 F.3d at 183-84 ("Whatever evidence is relied upon, actual malice must be supported by clear and convincing proof.").

Powell's suggestion that this Court must defer to the district court's finding of actual malice is facially inapposite, as it relates to review of "a jury's verdict" as opposed to trial court opinion. (Appellee's Brief at 19.)

B. The Record Fails to Show Actual Malice.

As Jones-Soderman explained in her Opening Brief, the actual malice "standard is a ***subjective*** one. . . ." (*See* Opening Brief at 21-22 (quoting *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (emphasis added).) "The reckless conduct needed to show actual malice 'is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing,' . . . but by whether there is sufficient evidence 'to permit the conclusion that the defendant in fact entertained ***serious doubts*** as to the truth of his publication.'" *Church of Scientology Intern. v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001) (emphasis added); *see also Harte-Hanks*, 491 U.S. at 667 (Actual malice requires the defendant to have made a publication with a "high degree of awareness of . . . probable falsity" or must have "entertained serious doubts as to the truth of h[er] publication."). The district court's finding, which is supported by the record, that Jones-Soderman subjectively believed in the truth of

her statements forecloses a conclusion that she acted with actual malice. (*See* Opening Brief at 22-27.)

Powell does not dispute that the relevant legal standard is subjective, or that the district court found that Jones-Soderman subjectively believed in the truth of her statements, but merely summarizes the district court's erroneous analysis.[2] Furthermore, all of the evidence of "recklessness" that Powell recites were considered by the district court, who nevertheless concluded that Jones-Soderman believed the children. (*See* Opening Brief at 22-25.) Appellate courts "defer to the trier's findings with respect to . . . a party's actual knowledge of a statement's falsity . . . ." *Gleason*, 319 Conn. at 439.

The trial record also amply supports Jones-Soderman's subjective belief in the truth of her statements. There is no dispute that the children repeatedly described their abuse to Jones-Soderman orally, in writing, and by recorded video. Nor is there any dispute that the children attempted to escape Powell's custody and

[2] Powell's discussion of an incident in which CP was cutting herself (Appellee's Brief at 12, 15) is irrelevant to whether Jones-Soderman subjectively believed her published statements to be true. It also mischaracterizes the events that transpired. Contrary to Powell's assertion, CP was not suicidal at that time and her cutting was only superficial. (Appx282 (101:1-8).) Jones-Soderman explained that her decision not to report the incident was justified because CP was safely in the custody of her grandparents and reporting the incident could have compromised CP's efforts to free herself from her father. (Appx282-283 (101:9-102:7).) Thus, Jones-Soderman's decision not to report the incident was based purely on her concern for the children's well-being.

expressed their genuine fear of Powell to Jones-Soderman, or that the children's maternal grandparents also believed their recounting of abuse. Furthermore, Jones-Soderman explained why Powell's asserted "evidence of the defendant's recklessness" (Appellee's Brief at 21-22) was insufficient to cause her to doubt the truth of her statements. For example, Judge Tindill's order relied on the opinions of Frazer, which Jones-Soderman considered to be gravely defective (Appx400 (17:15-25)) and was not based on testimony from the girls themselves (Appx503-504 (3:27-4:26)). Accordingly, there is no basis for this Court to overturn the district court's determination that Jones-Soderman subjectively believed in the truth of her statements, and her statements are protected by the First Amendment for this reason as well.

III. THE DISTRICT COURT ERRED IN AWARDING DAMAGES FOR LOST ACTUAL INCOME.

As explained in the Opening Brief, the district court's award of $60,000 in lost income was erroneous because (1) Powell presented no evidence that Jones-Soderman's statements caused his loss of employment at the summer camp and (2) Powell failed to take account of the fact that he had other employment readily available. (Opening Brief at 27-29.) Powell presents no argument to the contrary, instead merely stating that the lost income damages had "explicit support in the evidence." (Appellee's Brief at 22.) While there is evidence in the record that that Powell was not rehired at the summer camp and that he had previously been paid

$15,000 per year at the summer camp, these facts in themselves do not support the district court's damages award.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below in favor of Powell and enter judgment in favor of Jones-Soderman.

Dated: November 13, 2020

Respectfully submitted,

/s/ David K. Ludwig
David K. Ludwig
Thomas K. Hedemann
Nicholas E. Gaglio
AXINN, VELTROP & HARKRIDER LLP
90 State House Square
Hartford, Connecticut 06103
(860) 275-8100
dludwig@axinn.com
thedemann@axinn.com
ngaglio@axinn.com

Attorneys for Defendant-Appellant

CERTIFICATION OF SERVICE

I hereby certify that on November 13, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Appellate CM/ECF System. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System. Paper copies will also be mailed to opposing counsel at the time paper copies are sent to the Court.

Paper copies will be filed with the Court according to the Court's rules.

/s/ David K. Ludwig
David K. Ludwig