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)

BRIEF AND SPECIAL APPENDIX FOR APPELLANT JILL JONES-SODERMAN

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July 30, 2020

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JURISDICTIONAL STATEMENT

Defendant-Appellant Jill Jones-Soderman appeals from a final order and judgment entered by the United States District Court for the District of Connecticut on January 14, 2020 in favor of Plaintiff-Appellee Scott Powell. The District Court had jurisdiction under 28 U.S.C. § 1332. Jones-Soderman timely appealed on February 11, 2020. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court legally erred in entering judgment for Powell without finding that Powell proved that the statements published by Jones-Soderman are false.

2. Whether the District Court legally erred in finding that Jones-Soderman published the statements with actual malice despite finding that she subjectively believed that her statements were true.

3. Whether the District Court erred in awarding damages for lost income when Powell failed to offer any evidence that the statements published by Jones-Soderman were the cause of his alleged loss of employment.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Jones-Soderman is a psychoanalyst by training and has extensive experience dealing with "high-conflict" types of cases. (Appx133-134 (85:3-86:25).) She has

worked with victims of child abuse since 2002. (Appx135 (87:1-6).) She is the founder and executive director of the nonprofit organization Foundation for Child Victims of the Family Courts ("FCVFC"). (Appx135-136 (87:7-90:7).)

In July 2015, Jane Powell called Jones-Soderman to evaluate options for potentially regaining custody of her daughters CP and EP who were in the sole custody of their father Scott Powell. (Appx138 (90:16-11).) Jane Powell told Jones-Soderman that she was divorced from Scott Powell in 2008 and that "the context of that [divorce] involved serious domestic violence allegations and serious allegations of sexual abuse of the children." (Appx141 (93:6-12).) In 2011, the Department of Social Services granted sole custody to Scott Powell. (Appx141-142 (93:20-94:12).) Jones-Soderman agreed to assist Ms. Powell in her attempt to regain at least partial custody of the children. (Appx149 (101:8-12).)

On March 16, 2016, Jones-Soderman received letters from each of CP and EP. (Appx157-159 (109:24-111:6); Appx439-442.) The letter written by EP stated that "[Powell] has touched parts of our bodies that make us feel uncomfortable, physically hurt and threatened us, and really frightened me. . . . It's really scary for me to tell people about the abuse because I'm scared that my dad might kill me." (Appx439-441.) The letter written by CP similarly stated that the children were making plans for someone to "rescue [them] from the abuse of [their] father" and that they "cannot take it anymore." (Appx442.) The children

also sent Jones-Soderman a video, in which the girls stated that "[f]or the last five years, [they had] been abused by [their] father," that "[t]hings ha[d] been getting worse," and that they were "really scared." (Appx174-175 (126:23-127:2); Appx438.) Based on her extensive prior experience with abused children, Jones-Soderman was convinced that the children were telling the truth in these letters and video. (Appx175-176 (127:15-128:5).)

On March 17, 2016, the children jointly called Jones-Soderman. (Appx176 (128:6-13).) The call lasted approximately three hours. (Appx194-195 (13:21-14:1).) The children told Jones-Soderman that "if [Jones-Soderman] didn't help them get out of the circumstances that they were living in by [the coming] weekend that they ha[d] a plan to kill themselves together." (Appx176 (128:14-17).) The girls provided a "very explicit[]" account of Powell's abusive actions over the previous two days, which the girls also stated was representative of the abuse they had endured for years. (Appx176-177 (128:18-129:9).) In one example, the children stated that over the previous two days, Powell had forced his way into the bathroom while EP was taking a bath, and then stared at the nude EP for minutes, "smiling, laughing, [and] sneering." (Appx195-196 (14:3-15:7).) Also within the previous two days, Powell "walk[ed] around in his . . . boxer shorts with an erection," and then "look[ed] to make contact with [EP] to go in his bedroom . . . ." (Appx194-195 (13:12-14:15).) The girls stated that they were both

still "very frightened and fearful" by these encounters while they were describing them on the phone. (Appx196 (15:8-24).)

The children also reported to Jones-Soderman more severe abuse that had occurred less recently. CP stated that Powell had raped her when she was six years old and again when she was twelve years old. (Appx190-191 (9:14-10:22).) CP also described Powell as committing other "aggressive, hostile" acts of physical and sexual abuse, such as "touch[ing] her breasts in a sexual and aggressive way [and] grab[bing] her vagina." (Appx191-192 (10:23-11:7).) EP said that Powell "lick[ed] her vagina" when she was "very, very young," and that Powell had engaged in "frottage" with her, "which is where a man puts his penis between the child's legs and essentially masturbates, not engaging in penetration." (Appx192-193 (11:8-12:18).)

Before the call ended, Jones-Soderman and the children made plans for the girls to escape and go to the police. (Appx198 (17:2-25).) The children went to a friend's house for an overnight visit on the following Saturday (March 19, 2016), and then were picked up on Sunday morning (March 20, 2016) by their maternal grandparents – Rick and Cynthia Diehl – and brought to the police station. (Appx199-202 (18:1-21:5).) At the friend's house and on the way to the police station, the girls recounted certain recent and habitual incidents of abuse to the grandparents, which Rick Diehl promptly recorded in an Application for

Emergency Ex Parte Order of Custody dated March 21, 2016 ("Protective Order") (Appx450-452), noting the most recent dates that the abuse occurred. (Appx338 (44:16-25).) The Protective Order states:

> [Powell] routinely walks around [the children's] home wearing either boxers or a towel. While doing so [he] has an erection. (Last incident 3/16/16). When he walks around with an erection, he has them sit near him and rub his shoulders and his feet. (same). He watches each of them shower (3/17/16). In front of [EP], he calls [CP] a "fucking Jewish cunt whore" (3/16/16)[.] He regularly pulls [CP's] hair and throws her about by her hair (same). He has kicked her in the stomach and asked her[,] "[W]hy aren't you dead? Why haven't you killed yourself[?] [W]hy don't you cut yourself[?] Why don't you take a bottle of pills[?]" He keeps a handgun in a fingerprint activated safe on his nightstand and has threatened to shoot [CP] (3/16/16). He has often pointed the gun at her head and laughed. Each child has reached puberty, and [Powell] refuses to provide them with necessary hygienic materials, and he laughs at them when they menstruate. [Powell] does not maintain an adequate amount of food in the home so that the girls have been forced to ask friends and their mother to sneak them food. On his computer at home, [Powell] has pornography which he has shown to the children and some of the pornography depicts girls whom the children do not believe are of age.

(Appx451.)

The children reported to Jones-Soderman that the police officers they met with at the station believed them when they recounted that Powell abused them. (Appx202-203 (21:6-22:4).) After the children left the police station, they stayed at a hotel with their grandparents. (Appx203-204 (22:5-23:15).) The next morning, the children and the grandparents went to court – the Judicial District of Stamford/Norwalk. (Appx205 (24:13-16).) The court entered the Protective Order

application and granted temporary custody to the grandparents. (Appx215 (34:1-13).)

Within one or two days following the Protective Order hearing, CP sent Jones-Soderman a diary excerpt in which CP provided further details of Powell's alleged abuse. (Appx204 (23:16-21).) The diary excerpt included the following allegations:

> "touches [me] wherever he wants (trips me, grabs chest, bottom, and between legs, pulls hair) – makes it a game"
>
> "hit[s], kick[s] (stomach, back, legs) . . . grabs arms & twists . . . hits/whips with objects (towels) kicking, throwing at us (plates, chairs, garbage) . . . punching/pushing in stomach"
>
> "threatens to shoot, kill, beat us[:] 'You won't see tomorrow,' 'I'll pop ya one,' 'You won't be able to walk' . . . 'Why don't you kill yourself finally?' 'Why aren't you dead yet?' 'Why don't you just go off yourself?' 'Why don't you just take a bottle of pills?'"
>
> "threatens to hospitalize me if I tell people what he does"
>
> "kicks me out of house in snow/rain/cold, sometimes overnight"
>
> "opens door when we're naked and laughs"
>
> "when having flashbacks, laughs and touches me"
>
> "humiliates/makes fun of me around his friends (grabs bottom, just a dirty Jew)"
>
> "also in public (loudly)[,] 'This kid cuts herself, that's why she needs these pills,' 'She's crazy. She even goes to a school for fucked up kids like her.'"

(Appx446-449.) These statements confirmed to Jones-Soderman that the children were being "held in a dangerous, controlling, threatening, intimidating atmosphere" while they were in Powell's custody. (Appx212 (31:13-20).)

Powell appealed the Protective Order. (Appx215 (34:19-24).) The children, their attorney (Alex Schwartz), and the grandparents kept Jones-Soderman informed of the appeal proceedings. (Appx216 (35:5-7).) Jones-Soderman was told that all evidence of the children's abuse (other than the allegations in the Protective Order itself, quoted above) was excluded or never introduced to the court, and that the girls were not permitted to testify. (Appx216 (35:17:21).)

Judge Erika Tindill overturned the Protective Order and returned the children to Powell's custody. The court explained that it "c[ould]not, on the evidence before the Court, find that" there was "an immediate and present risk of physical danger or psychological harm" to the children. (Appx504-505 (3:27-4:5).) The court listed the evidence it considered, identifying (1) email exchanges, (2) reports from Dr. Frasier, (3) testimony from police officers, and (4) the dissolution actions between Jane Powell and her first husband and between Jane Powell and Scott Powell. (Appx503-504 (2:26-3:26).) The court did not identify the children's testimony, nor the children's letters (Appx438-441) or video (Appx438) as considered evidence. (Appx503-504 (2:26-3:26).) The court also explicitly stated that it had been provided with CP's diary (Appx446-449), but did

not read it. (Appx503-504 (2:26-3:6) ("The Court has reviewed all but the book . . . written by the older child, [CP], something about Paris. I have seen it. I have not read that piece of evidence.").)

Despite finding insufficient evidence to conclude that the children were at immediate risk, the court nonetheless ordered Powell to install surveillance cameras in his house (excluding the bathroom and the children's bedrooms). (Appx519 (18:21-26).) The court explained that this measure was, among other things, "to protect the girls" and to "capture anything that's happening in the home." (*Id.*; Appx521 (20:22-26).)

Immediately following the court's ruling reversing the Protective Order, the children called Jones-Soderman in a state that was "beyond hysterical" and "acutely suicidal." (Appx223 (42:2-20).) The children's aunt took them to the hospital, where they were admitted. (Appx223 (42:12-22).) The children remained at the hospital for two days, after which Powell returned them to his home. (Appx223 (42:23-25), Appx224 (43:22-25).)

Left with no other avenue of protecting the children following the court's reversal of the Protective Order, Jones-Soderman published the articles on the website of the Foundation for Child Victims of the Family Courts that are the subject of this case. (Appx237-238 (56:20-57:14).) As Jones-Soderman explained,

> [O]ne of the things that I address[ed] . . . is a public health issue . . . [W]hen witnesses to . . . serious crimes, particularly against children, don't come forward, . . . it doesn't stop with an isolated incident . . . . [Rather,] those perpetrators are empowered and are able to commit other crimes and continue their bad behavior in various ways. And to my knowledge, as per my investigation, there was a history, and there were a number of people who knew that there was a problem and didn't address it in any kind of constructive way.

(Appx248 (67:8-24).)

Jones-Soderman thus published the articles at issue in order to put pressure on Powell to stop his allegedly abusive behavior. (Appx249 (68:5-8), Appx288-289 (107:12-108:2) ("[T]here needed to be some oversight of his behavior. He was unrestrained to that point. . . . [M]y immediate concern was the welfare and protection of those children at that time.").) Jones-Soderman also wanted to make sure, by creating "public awareness, [that] if anything happened to these girls, that was not going to be something that was swept under the carpet." (Appx289 (108:7-12).)

When CP turned 17 later that year, she emancipated herself. (Appx230-231 (49:24-50:10).) Shortly thereafter, EP attempted to escape again but was returned to Powell's custody by the police. (Appx234-235 (53:15-55:22).)

II. PROCEDURAL HISTORY

On October 3, 2016, the Powell filed this action against Jones-Soderman and the FCVFC asserting claims for defamation *per se*, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional

distress. On December 22, 2017, the District Court dismissed FCVFC from the case.

The case was tried before the District Court on October 21-23, 2019. Powell rested his case-in-chief on the first day and Jones-Soderman filed a Motion for Judgment on Partial Findings immediately thereafter.

The District Court admitted all exhibits marked at trial for the purpose of determining Jones-Soderman's state of mind. The District Court also admitted certain exhibits for the truth of the matter:

- Appx438 – Video of Powell children. Admitted "for the purpose of showing that [the children] were really scared, and that they reached out because they believed they were being abused." (Appx425 (42:6-10).)
- Appx439-441 – Letter from EP. Admitted "for the fact that [the children] were scared and frightened [of Powell], and that's why they reached out to [Jones-Soderman]." (Appx426 (43:10-13); *see also* Appx427 (44:8-9).)
- Appx442 – Letter from CP. Admitted for the purpose of showing that the children "reached out for help" and "felt at the time that they could not take it anymore." (Appx427-428 (44:12-45:1).)
- Appx443-445 – Letter from CP. Admitted "for a showing that [the children] were fearful of [Powell], fearful – extremely fearful of him." (Appx428 (45:2-19).)
- Appx450-452 – Protective Order. Admitted as a full exhibit. (Appx419-420 (36:20-37:2), Appx340 (46:14-22).
- Appx501-523 – Excerpt of transcript of proceedings before Judge Erika Tindill. Admitted as a full exhibit. (Appx414 (31:11-13).)

On January 14, 2020, the District Court issued a Memorandum of Decision ("Memorandum") and a Judgment. On the claims of intentional and negligent

infliction of emotional distress, the District Court found that Powell failed to prove the common element of severe emotional distress. (Appx042-043.) With respect to Powell's claims for defamation *per se* and false light invasion of privacy, the District Court rejected Jones-Soderman's First Amendment defense because it found that Powell proved actual malice by a preponderance of evidence. (Appx 028-042.)

As to damages, the District Court found that Powell proved "garden variety" emotional distress in the amount of $40,000 and compensatory damages in the amount of $60,000 for loss of a summer position as a camp director at a country club. (Appx043-046.) The District Court denied Powell's claim for punitive damages because Powell failed to prove actual malice by clear and convincing evidence. (Appx046-047.)

SUMMARY OF THE ARGUMENT

The District Court committed two legal errors, each of which require this Court to reverse the judgment below in favor of Powell on the allegations of defamation *per se* and false light invasion of privacy and enter judgment in favor of Jones-Soderman.

First, it is black letter law that, 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." *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000). Although correctly concluding that Jones-Soderman's statements were of public concern, the District Court failed to make *any* finding with respect to Powell's obligation to demonstrate their falsity, despite the fact that Jones-Soderman moved for judgment on partial findings on that ground at the close of Powell's case-in-chief. Furthermore, the trial evidence fell far short of demonstrating that Jones-Soderman's statements are false. This Court should therefore reverse the judgment below and enter judgment in favor of Jones-Soderman.

Second, the First Amended shields speech on matters of public concern from liability unless the plaintiff proves that the false statement was made with "actual malice," i.e., "with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 129 (2d Cir. 2013) (quoting *Hustler Magazine, Inc. v. Fal*well, 485 U.S. 46, 52 (1988)). The Supreme Court's standard for actual malice "is a ***subjective*** one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.'" *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (emphasis added). Here, the District Court correctly found that Jones-Soderman "believed the children's allegations [of abuse], in part, because of their demeanor during their many phone calls and in the

video they sent to Jones-Soderman, and because of the content of the letters and the detailed allegations in C.P.'s diary entries." (Appx047.) The District Court's finding that Jones-Soderman subjectively believed in the truth of her statements is irreconcilable with a finding of actual malice under the Supreme Court's test. For this reason as well, this Court should reverse the judgment below and enter judgment in favor of Jones-Soderman.

Finally, the District Court erred in awarding damages for lost income because Powell failed to offer evidence sufficient to prove that Jones-Soderman's statements caused the country club not to rehire Powell, or that Powell did not recoup any such loss through alternative employment.

ARGUMENT

I. STANDARD OF REVIEW

"In cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). Thus, "an appellate court's review of a trial court's finding of actual malice is not controlled by the 'clearly erroneous' standard of Federal Rule of Civil Procedure 52(a)." *Lundell Mfg. Co. v. Am. Broad. Companies, Inc.*, 98 F.3d 351,

356 (8th Cir. 1996). Rather, an appellate court "must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Bose*, 466 U.S. at 511.

"[W]hether a statement relates to a matter of public concern" is similarly a "question[] of law" in the context of defamation, which is reviewed *de novo*. *Gleason v. Smolinski*, 319 Conn. 394, 437 n.35 (2015). An appellate court must, however, "defer to the trier's findings with respect to . . . a party's actual knowledge of a statement's falsity . . . ." *Id.* at 439 (2015).

II. THE DISTRICT COURT LEGALLY ERRED BY NOT REQUIRING POWELL TO PROVE THAT THE ALLEGEDLY DEFAMATORY STATEMENTS ARE FALSE.

A. The First Amendment Protects Speech on Matters of Public Concern by Placing the Burden on Plaintiffs to Prove that Allegedly Tortious Statements Are False.

The Supreme Court has reiterated that "speech on 'matters of public concern' . . . is at the heart of the First Amendment's protection, and is entitled to special protection." *Synder v. Phelps*, 562 U.S. 443, 451-52 (2011) (internal citations quotations omitted). This Court has similarly explained that "heightened First Amendment protections apply to any tort alleging reputational harm as long as the underlying speech relates to a matter of public concern." *Dongguk Univ.*, 734 F.3d at 129.

It is axiomatic that only untrue statements can give rise to damages for torts alleging harm to reputation. *See, e.g., Gleason*, 319 Conn. at 431 (2015) ("[F]or a claim of defamation to be actionable, the statement must be false . . . ."); *Cweklinsky v. Mobil Chem. Co.*, 364 F.3d 68, 75 (2d Cir. 2004) ("Under Connecticut law, a defamatory statement is, by definition, untrue. As such, a true statement cannot be the basis of a claim for defamation.") (internal citations omitted); *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 131 (1982) ("The essence of a false light privacy claim is that the matter published concerning the plaintiff [] is not true . . . .").

Further, only the central message of an alleged libel is required to be true for a defendant to avoid liability. *Goodrich*, 188 Conn. at 112-13. "If [a defendant] succeeds in proving that the main charge, or gist, of the [alleged] libel is true, [s]he need not justify statements or comments which do not add to the sting of the charge or introduce any matter by itself actionable." *Id.* (internal quotations omitted). "The issue is whether the [alleged] libel, as published, would have a different effect on the reader than the pleaded truth would have produced." *Id.*

When the statements involve a matter of public concern, the special protections afforded to such speech by the First Amendment require that "the plaintiff must bear the burden of proving falsity, at least in cases where the statements were directed towards a public audience with an interest in that

concern." *Flamm*, 201 F.3d at 149; *see also Gleason*, 319 Conn. at 444 (same). As this Court has explained, this "balances . . . . the state interest in compensating private individuals for wrongful injury to reputation [with] . . . . the First Amendment interest in protecting free expression." *Flamm*, 201 F.3d at 149-50.

B. The District Court Correctly Concluded that Jones-Soderman's Statements Were of Public Concern.

Speech on matters of public concern is speech related to a "matter of political, social or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public[.]" *Synder*, 562 U.S. at 453 (citations & internal quotations omitted). It is well established that "[t]he commission of [a] crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, . . . are without question events of legitimate concern to the public[.]" *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). Furthermore, "[t]he issue of sexual child abuse is unquestionably a matter of public concern because it addresses the health and safety of society's most vulnerable members: children." *Day v. Dodge*, No. 186035362S, 2019 WL 994532, at *3 (Conn. Super. Ct. Jan. 25, 2019).

The District Court correctly determined that the allegedly defamatory statements in this case are of public concern:

> In this case, the speech at issue relates to alleged sexual and physical abuse by Scott Powell. It is well established that "[t]he commission of [a] crime, prosecutions resulting from it, and judicial proceedings

> arising from the prosecutions, . . . are without question events of legitimate concern to the public[.]"

(Appx029 (quoting *Cox Broadcasting Corp.*, 420 U.S. at 492); s*ee also* Appx031 (explaining that "allegations of abuse are matters of public concern . . . .").) Thus, Jones-Soderman's statements are entitled to the special protections of the First Amendment, which, among other things, require Powell to prove the falsity of the statements.

C. The District Court Failed to Require that Powell Prove Falsity.

Jones-Soderman consistently maintained the defense of truth to Powell's allegations. In fact, Jones-Soderman moved for judgment on partial findings at the close of Powell's case-in-chief precisely on the ground that Powell failed to carry the burden of proving falsity. (*See* Appx010 (D.I. 91: "Defendant's MOTION for Judgment on Partial Findings for All Counts by Jill Jones-Soderman").)

Despite Jones-Soderman's assertion of this defense, the District Court failed to make any factual findings with respect to the truth or falsity of Jones-Soderman's statements. (Appx015-028 (setting out "the Court's findings of fact pursuant to Fed. R. Civ. P. 52(a)(1)").) The District Court thus rendered judgment against Jones-Soderman without determining that Powell proved falsity. (*See, e.g.*, Appx034.) Indeed, the District Court failed to even acknowledge that Powell bears the burden of proving falsity. (Appx028-034.) This is legal error mandating reversal. *See Gleason*, 319 Conn. at 441, 452 (holding that "reversal is required"

in a defamation case involving statements relating to a matter of public concern due to "the trial court's failure to conduct the falsity analysis required by the first amendment. . . .").

D. The Trial Evidence Does Not Demonstrate Falsity.

The Connecticut Supreme Court has observed that "whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence . . . . remains an open question as a matter of federal law, including within the Second Circuit." *Gleason*, 319 Conn. at 447 n.44 (collecting case law).[1] Since *Gleason*, some courts have adopted the clear and convincing evidence standard. *See, e.g.*, *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1109 (10th Cir. 2017) ("For statements relating to matters of public concern, all plaintiffs, public or private, must prove actual malice, and they must prove the defamatory statement is materially false by clear and convincing evidence.") (internal citations and quotations omitted); *Anderson v. Colorado Mountain News Media Co.*, No. 18-02934, 2019 WL 3321843, at *4 (D. Colo. May 20, 2019), *report and recommendation adopted*, No. 18-02934, 2019 WL 6888275 (D. Colo. Dec. 18, 2019) ("When a matter is one of public concern, the First Amendment

[1] Clear and convincing evidence is "a more exacting standard" of proof than proof by a preponderance of evidence. *United States v. Thomas*, 274 F.3d 655, 672 (2d Cir. 2001). There must be "evidence indicating that the thing to be proved is highly probable or reasonably certain." *Ragbir v. Holder*, 389 F. App'x 80, 84-85 (2d Cir. 2010) (citation, internal quotations & alterations omitted).

affords special protections and a heightened burden applies: A plaintiff is required to prove the statement's falsity by clear and convincing evidence.") (internal quotation omitted). Also, by analogy, the United States Supreme Court in the "public figure" context has adopted the clear and convincing standard, explaining that "the First Amendment . . . precludes recovery . . . unless the petitioner proved by clear and convincing evidence that respondent made a false disparaging statement with 'actual malice.'" *Bose*, 466 U.S. at 489-90.

Irrespective of which standard applies, the evidence falls far short of showing that the "main charge, or gist" of Jones-Soderman's statements are false. On the contrary, the evidence is far more suggestive of truth than of falsity. For example, Defendant's Exhibit F – quoted *supra* p. 5 – which the District Court admitted as evidence of the truth of the statements, contains graphic descriptions of abuse. (Appx450-452.) This description of abuse is consistent with and corroborated by the video and letters the children sent to Jones-Soderman, which the District Court admitted into evidence as showing that the children were "extremely fearful" of Powell and "reached out [for help] because they believed they were being abused." (*Supra* at p. 10; Appx438-445.) And the children's report of abuse that occurred within 48 hours of their March 17, 2016 call with Jones-Soderman, which the District Court also found to be admissible for the truth of the matter (Appx209-210 (28:7-29:17); Appx426-427 (43:18-44:5)), is

consistent with the Protective Order account and is further evidence that Defendant's statements are true. (*Supra* at pp. 3-4.)

For his part, Powell offered only two pieces of evidence that could have any bearing on the truth or falsity of Jones-Soderman's statements. First is Powell's own testimony that he did not abuse the children. Powell did not call any witnesses to corroborate his testimony, or otherwise testify as to the state of affairs in his household at the relevant time. Powell's testimony is therefore entitled to only minimal weight considering the seriousness of the accusations against him. Indeed, the District Court did not make a finding that his testimony was credible.

Second is the transcript excerpts from the proceeding where Superior Court Judge Erika Tindill returned the children to Powell's custody. (Appx501-523.) In the transcript, the court explains that it returned the children to Powell's custody because it had insufficient evidence to conclude that there was "an immediate and present risk of physical danger or psychological harm" to the children. (Appx504-505 (3:27-4:5)). The court did not, however, hear testimony from the children themselves, nor see or consider the video (Appx438) and letters (Appx439-445) showing that the children were "extremely fearful" of Powell. (*Supra* at p. 10.) And no expert offered any opinions concerning the children's recent allegations of abuse. Furthermore, the court ordered Powell to install surveillance cameras in his house in part "to protect the girls." (Appx519 (18:21-26).) If Judge Tindall had

given no credence to the children's allegations in the Protective Order, she would have been unlikely to require as intrusive a measure as the installation of in-home surveillance cameras.

Considered as a whole, the evidence does not permit a finding that Jones-Soderman's statements are false. This Court should therefore reverse the District Court and enter judgment in favor of Jones-Soderman.

III. THE DISTRICT COURT LEGALLY ERRED BY FINDING THAT JONES-SODERMAN ACTED WITH ACTUAL MALICE.

A. The First Amendment Further Protects Speech on Matters of Public Concern by Requiring Plaintiffs to Prove Actual Malice.

Where, as the District Court found to be the case here, speech relates to a matter of public concern, a plaintiff seeking damages for alleged harm to reputation must prove that the speaker acted with "actual malice," i.e., "'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Dongguk Univ.*, 734 F.3d at 129 (quoting *Hustler*, 485 U.S. at 52 (quoting *New York Times*, 376 U.S. at 279-80)).

B. The Supreme Court Has Provided a Subjective Standard for Actual Malice.

The Supreme Court has made it clear that, to find "a reckless disregard for truth" in the context of an actual malice determination, "the defendant must have made the false publication with a "high degree of awareness of . . . probable falsity" or must have "entertained serious doubts as to the truth of h[er]

publication." *Harte-Hanks*, 491 U.S. at 667 (internal citations omitted). The actual malice standard thus measures "the speaker's subjective doubts about the truth of the publication." *Church of Scientology Int'l v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001). In other words, "[t]he standard is a ***subjective*** one. . . ." *Harte-Hanks Commc'ns*, 491 U.S. at 688 (emphasis added). *See also Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 183 (2d Cir. 2000) ("[R]eckless disregard of the truth (means) subjective awareness of probable falsity. . . .") (quoting *Hotchner v. Castillo–Puche*, 551 F.2d 910, 912 (2d Cir.1977)); *Yiamouyiannis v. Consumers Union of U. S., Inc.*, 619 F.2d 932, 940 (2d Cir. 1980) (actual malice requires showing "of defendant's actual state of mind either subjective awareness of probable falsity or actual intent to publish falsely"); *Karedes v. Ackerley Grp., Inc.*, 423 F.3d 107, 119 (2d Cir. 2005) (actual malice inquiry pertains to "the speaker's subjective doubts about the truth of the publication").

C. The District Court Legally Erred by Finding Actual Malice Because the Evidence Establishes, and the District Court Found, that Jones-Soderman Subjectively Believed in the Truth of Her Statements.

Based on the evidence at trial, the District Court correctly found that Jones-Soderman "believed the children's allegations [of abuse], in part, because of their demeanor during their many phone calls and in the video they sent to Jones-Soderman, and because of the content of the letters and the detailed allegations in C.P.'s diary entries." (Appx047; *see also* Appx040 (stating that Jones-Soderman

"may have believed the girls, and thus, believed, honestly and in good faith, in the truth of her statements. . . .") (internal quotation omitted).) The District Court further stated that, after the children recounted Powell's abuse to Jones-Soderman on March 16 and 17, 2016, "Jones-Soderman believed that if she did not get [the children] out of [Powell's] house that weekend, they would go through with their pact to kill themselves." (Appx017-018.)

Having found that Jones-Soderman believed in the truth of her statements, the District Court should have applied the Supreme Court's subjective standard and concluded that there was no actual malice. (*See supra* at pp. 21-22.) Instead, the District Court stated that Jones-Soderman's demonstrated "belief is not enough to overcome liability for defamation. . . . She must also have had 'grounds for such belief.'" (Appx040 (quoting *Gambardella v. Apple Health Care, Inc.*, 291 Conn. 620, 638 (2009)).) This was legal error.

The District Court erroneously derived its "belief-plus-grounds" standard from the Connecticut Supreme Court's statement in *Gambardella* that "[t]he proper inquiry is whether a defendant believes, honestly and in good faith, in the truth of his statements and whether he has grounds for such belief." *Gambardella*, 291 Conn. at 638. But *Gambardella* stands only for the unremarkable proposition that a court is not required to accept a defendant's testimony that she believed in

the truth of her statements, but should also consider objective circumstantial evidence bearing on the credibility of that testimony.

In *Gambardella*, the defendants argued that the trial court erred in finding actual malice merely because they testified that they believed their statements were true. *Id.* at 634-35. As the court put it, "the defendants appear to claim that the trial court should have accepted their representations that they believed the statements were true, ***despite overwhelming evidence to the contrary***." *Id.* at 642 n.9 (emphasis added). Rejecting that proposition, the court explained that it is appropriate to "consider whether a defendant, in professing a belief that h[er] statements were true, has grounds for h[er] belief." *Id.* Thus, the Connecticut Supreme Court did not hold that a defendant must demonstrate objective "grounds" for a professed belief, but rather held that a court may consider the existence of grounds for the belief as part of determining whether the defendant, in fact, subjectively held the professed belief.

Gambardella is thus consistent with this Court's statement that "whether [a defendant] in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts." *Celle*, 209 F.3d at 183. As such, "objective circumstantial evidence can . . . override defendants' protestations of good faith and honest belief that the report was true." *Id.* at 186. If, for example, a plaintiff demonstrates that the defendant

lacked any objective grounds for her professed belief in the truth of the statements at issue, that may support an inference that she did not, in fact, believe that her statements were true. But the fundamental standard remains the same, i.e., whether the defendant ***subjectively*** believed her statements to be true. *See, e.g.*, *Herbert v. Lando*, 441 U.S. 153, 160 (1979) (explaining that evidence as to the "state of mind of the defendant" is "essential" to an actual malice inquiry). And, as discussed above, the District Court here correctly found, and Powell did not dispute, that Jones-Soderman had a good-faith belief in the truth of her statements, grounded primarily on the children's communications to her.

D. This Court Should Enter Judgment for Jones-Soderman Because the Evidence Establishes the Absence of Actual Malice.

Although an appellate court independently reviews a finding of actual malice when the First Amendment is implicated, it "defer[s] to the trier's findings with respect to . . . a party's actual knowledge of a statement's falsity . . . ." *Gleason*, 319 Conn. at 439. This Court therefore reviews the District Court's finding that Jones-Soderman believed her statements to be true for clear error. Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.") "The burden of overcoming the district court's factual findings is, as it should be, a heavy one." *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556,

1559 (Fed. Cir. 1986). "Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) (citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949)).

The evidence here offers no indication that the District Court clearly erred in finding that Jones-Soderman believed the statements to be true. On the contrary, the evidence demonstrates that Jones-Soderman based her statements on the children's repeated representations – made to her in writing, on video, and orally – that Powell was sexually and physically abusing them. (*See supra* at 2-8.) The children's representations were consistent and often highly detailed, and were accompanied by displays of psychosocial trauma, further confirming their veracity. (*See id*.) Indeed, the children made the same representations to the their maternal grandparents, the Diehls, as well as to New Canaan police officers, all of whom believed the children. (Appx332-333 (38:21-9-23).)

Jones-Soderman also testified as to why Judge Tindall's April 22, 2016 order returning the children to Powell's custody did not alter her belief in the truthfulness of the children. First and foremost, Judge Tindall elected not to hear testimony from the children themselves. (Appx503-504 (2:26-3:26), Appx238 (57:4-14).) Furthermore, the only psychological evaluator giving testimony had not seen the children in more than five years. (Appx237-238 (56:22-57:3.)

Additionally, the attorney had Mr. Diehl rather than the children sign the statement in the Protective Order application detailing their allegations of abuse. (Appx238 (57:4-14).) Still further, immediately following Judge Tindall's ruling the children called Jones-Soderman in a state that was "beyond hysterical" and "acutely suicidal." (Appx223 (42:2-20).) The children's aunt took them to the hospital where they remained for two days. (Appx223 (42:23-24).) These facts support the District Court's finding that, even against the background of Judge Tindall's order, "[Jones-Soderman] believed the children's allegations . . . ." (Appx047.)

Finally, it bears noting that the District Court was incorrect in stating that "Jones-Soderman offered no testimony to support her statement that evidence of sexual assaults being committed by Powell upon his minor children 'are now on camera . . . .'" (Appx040.) In fact, Jones-Soderman submitted the video she received from the children where the children themselves state that they had been abused by Powell for the past five years. (*Supra* at 2-3; Appx438.)

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

The District Court erred in awarding Powell damages for loss of actual income. "It is axiomatic that the burden of proving damages is on the party claiming them. . . . When damages are claimed they are an essential element of the plaintiff's proof and must be proved with reasonable certainty. . . ." *Am. Diamond Exch., Inc. v. Alpert*, 302 Conn. 494, 510 (2011) (internal quotation omitted).

Here, Powell alleged that a country club did not rehire him as a summer camp director in the spring of 2016 as a result of Jones-Soderman's statements. But Powell failed to offer any evidence, let alone prove with reasonable certainty, that the statements caused the club's decision. Indeed, Powell offered no evidence that anyone at the country club even had any awareness of the statements. (Appx092-093 (44:8-45:16).) All Powell could offer was that he was "mysteriously" not rehired and that the club simply told him it "want[ed] to go in a different direction." (*Id.*) There was thus insufficient evidence for the District Court to find that Jones-Soderman's statements were the cause of the club's decision not to rehire him. And the District Court did not, in fact, make any such finding. (Appx045.)

Powell also failed to present sufficient evidence as to what his actual financial damages would have been had he proved that Jones-Soderman's statements were the cause of the club's decision not to rehire him. He testified that he was paid $15,000 per year as summer camp director, but he failed to testify as to what income he would have forgone during the camp season from his normal employment as a home improvement contractor. (Appx092 (44:8-14).) If, for example, he was able to earn $15,000 during the camp season as a contractor, his loss of employment at the country club caused no financial harm. Plaintiff's actual

financial injury – to the extent he was financially injured at all – is thus not calculable based on the record evidence.

Therefore, to the extent this Court finds that the District Court did not err in its liability finding, it should reduce the District Court's damages award by $60,000.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below in favor of Powell on the allegations of defamation *per se* and false light invasion of privacy and enter judgment in favor of Jones-Soderman.

Dated: July 30, 2020

Respectfully submitted,

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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)

SPECIAL APPENDIX

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July 30, 2020

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UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SCOTT POWELL

v. Civil No. 3:16-CV-1653(RMS)

JILL JONES-SODERMAN

JU D G M E N T

This matter came on for court trial before the Honorable Robert M. Spector, United States Magistrate Judge. On January 14, 2020 Judge Spector entered a Memorandum of Decision in favor of the plaintiff in the amount of $100,000.00.

It is therefore;

ORDERED, ADJUDGED and DECREED that the judgment is for the plaintiff, Scott Powell and the case is closed.

Dated at New Haven, Connecticut, this 16th day of January 2020.

Robin D. Tabora, Clerk

By: /s/
A. Campbell
Deputy Clerk

EOD: January 16, 2020

CERTIFICATION OF SERVICE

I hereby certify that on July 30, 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