

No. 2001-65993

THE LOCAL CHURCH	'	IN THE DISTRICT COURT OF
An unincorporated association, et al.	'	
	'	
Plaintiffs	'	
	'	
VS.	'	HARRIS COUNTY, TEXAS
	'	
HARVEST HOUSE PUBLISHERS, an	'	
Entity incorporated in Oregon and California	'	
JOHN ANKERBERG, an individual; and	'	
JOHN WELDON, an individual,	'	
	'	
Defendants	'	80 TH JUDICIAL DISTRICT

**PLAINTIFF’S SUR-REPLY TO DEFENDANTS’ “SECOND” MOTION FOR
SUMMARY JUDGMENT**

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RESTATEMENT (SECOND) OF TORTS (1977), SECTION 577A 3, 4

I. PLAINTIFFS TIMELY FILED THEIR DEFAMATION CLAIM WITHIN ONE YEAR OF THE DEFENDANTS' MARCH 2001 REPRINTING OF THE ECNR.

Defendants' statute of limitation challenge fails because, under Texas law, **each new printing** of a defamatory work starts the limitations period running anew.

“The single publication rule is limited in its application, however. The rule does not apply to separate printings of the same publication or to situations in which the same information appears in different publications. Under those circumstances, it is apparent that the publisher intends to reach different audiences and this intention justifies a new cause of action. .”

Stephan v. Baylor Med. Ctr., 20 S.W. 3d 880, 889 (Tex. App. – Dallas 2000, no pet.)

Defendants ignore the foregoing clear cut rule, also announced in Hollway v. Butler, 662 S.W. 2d 688 (Tex. App. – Houston 1983, writ ref'd n.r.e.).

In asserting that Plaintiffs' libel claim is barred by the one-year statute of limitations provided in Texas Civil Practice and Remedies Code Section 16.002(a), Defendants both misconstrue the decision in Hollway v. Butler, supra, and disregard their reprinting of the ECNR for a third time in March 2001. Defendants concede, as they must, that they sent the ECNR to press for a third time in Winter 2001 and that Plaintiffs filed this action on December 31, 2001.¹ (PA1, Ex. C, Ex. 4 at 136:22-138:11; Defendants' Memo. Brief at 44.) Therefore, the undisputed evidence proves that Plaintiffs **timely filed** this action well within the one year of Defendants' defamatory conduct.

Defendants first imply that under the decision in Hollway, supra, each reprinting of the ECNR subsequent to December 1999 cannot begin a new limitations period because each reprinting had nothing more than “minor” changes from the original publication. (Defendants'

¹ Although Robert Hawkins, Jr. testified that the ECNR was reprinted for a third time in February 2001 (see PA1, Ex. C, Ex. 4 at 136:22-138:11), Plaintiffs believe that the third reprinting actually occurred in March 2001. Whether the ECNR was reprinted by Defendants in February or March 2001 is irrelevant to the statute of limitations issue since in either case the Plaintiffs' Original Petition was timely filed on December 31, 2001.

Memo. Brief at 44-45.) Although Defendants quote an irrelevant portion of Section 577A of the RESTATEMENT (SECOND) OF TORTS (1977), they inexplicably fail to refer the Court to the holding in Holloway. The court in Holloway expressly held that each *reprinting* of a defamatory book constitutes a new publication under the Single Publication Rule. Holloway, 662 S.W.2d at 692. The court stated “we are not limiting a plaintiff to a single cause of action in the event the *same information* appears in *separate printings* of the *same publication* . . . The single publication rule applies strictly to multiple copies of a libelous article published as part of a single printing.” Id. (emphasis added). Therefore, contrary to Defendants’ claim whether any substantive changes occurred in the March 2001 reprinting of the ECNR is of no moment. Id. Accordingly, with each new reprinting of the ECNR, Defendants issued a new “publication” and therefore provided Plaintiffs with a new limitations period for their libel claim. Plaintiffs timely filed this action on December 31, 2001, within one year of Defendants’ March 2001 reprinting of the ECNR.

Defendants’ further contend that Plaintiffs’ libel claim is barred by the one year statute of limitations because the fourth reprinting of the ECNR was purportedly in response to an order received, not an attempt by Defendants to create a new audience. (Defendants’ Memo. Brief at 45.) Defendants’ argument is without merit. First, it is not necessary for this Court to address this fourth reprinting in order to dispose of Defendants’ statute of limitations defense. As discussed above, under the rule as enunciated in Holloway Defendants exposed themselves to a new limitations period for defamation when they sent the ECNR to print for a third time in March 2001. Second, Defendants fail to cite a single source of relevant authority for their novel proposition that their pecuniary motive in printing the book for a fourth time negates the applicability of the Holloway rule.

Defendants concede that “alterations” and “minor changes” were made to the reprints of the ECNR published subsequent to December 1999. (See Defendants’ Motion, ¶¶ 71-72, Defendants’ Memo. Brief. at 44.) That admission alone is sufficient to take Defendants’ out of the realm of Section 577A, cmt. d of the RESTATEMENT since the reprintings were more than mere “extra copies of the first edition of the book.” Each reprint constituted new publication.

Holloway, 662 S.W.2d at 692. Similarly, the fact that the fourth reprinting occurred in February 2002, a full twenty-six (26) months after the initial publication of the ECNR in December 1999 negates any notion that the fourth reprinting occurred “not long after the original publication,” as required by Section 577A, cmt. d. of the RESTATEMENT.

Defendants’ argument concerning the fourth reprinting is simply a distraction from the undisputed fact that Defendants published the ECNR for a third time in March 2001. Because Plaintiffs filed their Original Petition in December 2001, their libel claim was timely filed within one year of when their cause of action accrued.

II. THERE IS A “TRAINLOAD” OF EVIDENCE ESTABLISHING CONSTITUTIONAL MALICE

Defendants’ constitutional malice argument contains zero citations to deposition testimony and zero references to documentary evidence. This is no accident since that material contains no evidence that suggests the absence of constitutional malice. Indeed, the documentary evidence and deposition testimony adduced in Plaintiffs’ opposition brief, combined with other evidence such as expert affidavits, not only raise a triable issue as to constitutional malice but are sufficient to support a finding of constitutional malice. That evidence is set forth in Plaintiff’s original response to Defendants’ “Second” Motion for Summary Judgment (the current motion). However, certain points merit re-emphasis here.

First, Defendants’ contention that they “never intended for the allegedly defamatory statements to be applied to the Plaintiff” is belied by the evidence. In their depositions, defendants **admitted** that the Introduction and Doctrinal Appendix were intended to apply to the Plaintiffs. The testimony of John Weldon is a prime example:

“Q: . . . There were nontheological evils that were listed in the introduction, weren’t there?”

A: You’re simply asking whether or not there were nontheological evils mentioned in the introduction.

Q: That’s the question.

A: Yes, sir.

Q: Yes, there were, correct?

A: Yes.

Q: And what the purpose of mentioning them in the introduction?

A: It was to illustrate that some religions or cults can get to an extreme point; that it's not just something that people should have no concern with.

* * *

(PA1, Ex. C, Ex. 2 at 142:4-14)

“Q: For someone who has a family member in one of these groups, by reading the introduction you wanted that person to know, that someone who has a family member, you wanted them to know that sometimes, in some of these groups, there can be evils beyond theological.

A: Yes, sir.”

(PA1, Ex. C, Ex. 2 at 143:5-10)

Coupled with defendants' repeated admissions that they had no basis in fact to believe that the challenged statements were true as to Plaintiffs, Weldon's effective admission that he intended those statements to be read as applicable to Plaintiffs is sufficient -- in itself -- to establish reckless disregard for the truth.

A second point must be made. It concerns the cumulative manner in which the Court must view the evidence when determining the constitutional malice issue. As the Court explained in Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982), aff'd 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed. 2d 502 (1984): “a court typically will infer actual malice from objective facts. These facts should provide evidence of negligence, motive, and intent such that

an accumulation of the evidence and appropriate inferences supports the existence of actual malice.” (emphasis added).

In the case at bar, the evidence supports a finding of constitutional malice and at the very least raises a triable issue of fact as to its existence.

III. DEFENDANTS’ DEFAMATORY MEANING ARGUMENT IS UNSOUND.

A. Defendants’ “Grammatical” Analysis Deliberately Excludes Considerations that are Critical to The Determination of Defamatory Meaning

Defendants cling to their defamatory meaning argument like a sailor clutching the rigging of a sinking ship. Although the argument has twice been rejected by this court, defendants continue to elaborate upon it, ever more ornately, in the hope that complexity will obscure its fundamental unsoundness. In their reply brief, defendants expand at ponderous length upon the “grammatical” analysis that appears in their moving papers. They parse each challenged phrase word by word, make conclusory statements about the “clear” and “logical” import of those words and then, with great assurance but *no legal authority*, assert that the words can be read no other way. No court has used such a narrow and quibbling approach to the defamatory meaning question.

Before addressing the most conspicuous weaknesses in defendants’ analysis, an important point must be made. It emanates from the well-settled rule that issues of defamatory meaning must be resolved by evaluating the challenged language *in the context of the work as a whole*. The court must consider the work’s tenor, tone, structure, format, and the circumstances surrounding its publication. Allied Marketing Group, Inc. v. Paramount Pictures Corp., 111 S.W. 3d 168, 175-176 (Tex. App - Eastland 2003, pet’n filed). Here, this court must examine not only the words at issue but also the *type of text* that contains them and the manner in which the words are presented. Those factors - - as much as the words themselves - - influence the way in which the text is understood.

From the many briefs and voluminous exhibits that have been filed on the defamatory meaning issue, one indisputable fact emerges: *The Encyclopedia of Cults and New Religions is a*

partisan text with a specific -- indeed stated -- agenda: It is designed to persuade its readers to be “intolerant” of the cults described in its pages. As its authors and publisher conceded, the book was conceived and published to “inform” readers that cults are Godless, immoral, dangerous.

To achieve that end without unduly enhancing the legal risks inherent in it², the defendants cannily bundled their most vilifying and shocking charges in the book’s Introduction and Appendix. Then, with carefully chosen phrases,³ they encouraged their readers to draw, not merely the most reasonable, but also the *intended* inference that each charge applies to at least some of the groups in the book. To ensure that no group would emerge unstained, defendants deliberately made it impossible for readers to determine whether any particular group is guilty or innocent of any particular charge. The fact that each organization appears in an “encyclopedia” about “cults” prompts readers to resolve that ambiguity against the organization(s) in question. View as a whole, the title, format and structure of the book all but shriek the authors’ intent to tar each organization with the string of calumnies – ostensibly directed at no one in particular – that spill onto the book’s opening and closing pages.

Simply stated, the book’s status as an anti-cult tract influences the manner in which a reasonable reader would understand it. Once the reader views the challenged statements in light of the book’s structure, format and stated purpose – salient factors that are deliberately omitted from the defamatory meaning analysis in the Reply brief – it becomes apparent that the charges in the introduction are intended to apply -- and can be understood to apply -- to the groups discussed in the book. Indeed, a reasonable reader would conclude that charges that had no application to at least some of the groups in the book would not have been included therein.

² It should be recalled that the book’s Introduction notes the authors’ concern about legal challenges. See Introduction at xxvi.

³ For example, by stating that “not all the groups have all the characteristics [of cults] and not all groups have every characteristic in equal measure,” the defendants invite readers to infer that some groups possess some of the characteristics of cults and some possess those characteristics to a higher degree than others.

B. Defendants’ “Grammatical” Analysis is Not the Legal Test for Determining the Issue of Defamatory Meaning

As repeatedly emphasized in past briefings, the courts of this state resolve questions of defamatory meaning by applying a “totality of the circumstances” test. As explained by the court in Allied Marketing Group, *supra*, when a trial court determines the issue in the first instance, it must “construe[] the allegedly defamatory publication as a whole in light of surrounding circumstances based on how a person of ordinary intelligence would perceive the publication.” *Id* at 15. (Numerous citations omitted) This test differs strikingly from the “grammatical” analysis set forth in defendants’ papers.

Undoubtedly mindful that the ordinary reader’s understanding of any given text is not governed solely by the “accepted rules of English grammar⁴,” the Allied Marketing Group court did not deem it appropriate to incorporate those rules into its analysis or to refer to them in any way. Instead, the court (and its predecessors in Musser v. Smith Protective Service, Inc., 723 S.W. 2d 653, 655 (Tex. 1987) and Guisti v. Galveston Tribune, 105 Tex. 497, 507, 150 S.W. 874 (1912)) insisted on examining all aspects of a work – from subject matter to syntax to format – and viewing these factors collectively. Allied Marketing Group, 111 S.W. 3d at 176.

Here, the court is presented with an anti-cult treatise directed to an Evangelical Christian readership. The book’s publisher is a company with a long and highly visible history of publishing material that disparages cults and the occult. The book is touted as an “Encyclopedia” that provides, “at your fingertips,” the “most up-to-date facts” on the groups discussed in its pages. Its Introduction contains an unrestrained anti-cult diatribe designed to induce guilt in any reader who is not “intolerant” of “cults.” So that the reader will not understand the word “cult” as a vague or subjective term, the book defines it by ascribing specific “characteristics” to “cults.” Those “characteristics include unambiguously illegal and immoral practices.

⁴ Defendants have offered no evidence of any kind that it is.

The individual chapters that follow the book's inflammatory Introduction are relatively innocuous. They set forth – often in skeletal fashion – various basic facts about each organization. But by the time the reader reaches these chapters, the reputations damage has already been done.

Defendants repeat this approach at the end of the book in the Doctrinal Appendix. There again, they make disparaging statements about cults in general without making specific references to particular cults. But, in this context, it simply cannot be said that a reasonable reader will dissociate the Appendix's statements about cults from the specific groups in the book -- all of whom are presumably included therein precisely because they are cults. Simply stated, reasonable readers will not read the defamatory statements in a vacuum. They will read them in context and will thereby associate them with the groups discussed in the book.

As to defendants' argument to the effect that plaintiffs' names do not appear in the Introduction of the Encyclopedia and are not directly connected with the statements in the Appendix, plaintiffs can only reiterate that defamatory references need not be direct to be actionable. Plaintiff need not be named at all and the reference to him may be an indirect one. Poe v. San Antonio Exp – News Corp., 590 S.W. 2d 537, 542 (Tex. Civ. App. – San Antonio 1979, writ ref'd n.r.e.). See also Outlet Co. v. Int'l Sec. Group, 693 S.W. 2d 621, 626 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.) (wherein the court reached its defamatory meaning determination by relying, in part, upon the testimony of witnesses who understood the challenged statements as defamatory). Again, the question of whether a work refers to plaintiff – like the question of whether a work can be understood as defamatory of plaintiff – must be resolved by analyzing the work as a whole in light of surrounding circumstances and by viewing them from the perspective of an ordinary, reasonable reader. New Times, Inc. v. Isaacks, 91 S.W. 3d 844, 854 (Tex. App. – Fort Worth 2002, pet. filed); Dolcefino v. Randolph, 19 S.W. 3d 906, 917 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). Defendants' sterile “grammatical” analysis does not come close to meeting this standard. It should not be used to guide the court's reasoning here.

However, defendants' admission that they intended the material in the Introduction and Doctrinal Appendix to apply to the Local Church *should* influence the court's decision. Weldon stated that those who "read the Introduction and took a careful look at the content that would have helped him see the Local Church is not a fully orthodox Christian group." (Weldon Depo., p. 140, l. 3-10). This testimony amounts to an admission that the language of the Introduction, can be read to apply to the Local Church. Weldon speaks in theological terms, but the Introduction as Weldon readily admitted, contains much more than theological information. With respect to the non-theological allegations such as financial fraud and criminal activity, Weldon acknowledged this material was included in the Introduction to "illustrate" that some of the organizations in the ECNR "may even practice" these evils. (Weldon Depo. p. 142, lines 12-22.) Weldon acknowledged that he wanted the Introduction to communicate to people with family members in one of the named groups that some of these groups actually practice non-theological evils. (Weldon Depo. p. 143, lines 5-10.)

As clearly set forth in earlier briefing, this Court is entitled to and should consider the affidavits filed by Plaintiff in determining the defamatory meaning issue. As the Court stated in Gibler v. Houston Post Co., 310 S.W. 2d 377, 384 (Tex. Civ. App. 1958, writ ref'd n.r.e.) the Court stated: [T]he weight of authority is that such testimony is admissible, and we think that such testimony should be admitted."⁵

C. The Sole Authority Cited in Support of Defendants' Defamatory Meaning Argument is a Statute That Is Not Applicable In The Defamation Arena .

⁵ Plaintiffs refer the Court to the their extensive analyses of the defamatory meaning issue in past briefs and affidavits filed in connection with that issue. These briefs were incorporated by reference in Plaintiffs opposition to the current motion on page 3, footnote 1 of Plaintiffs' brief and made part of the appendix filed concurrently therewith. If there is any doubt as to that incorporation, Plaintiff's hereby incorporate in entirety Plaintiffs Opposition to Motion for Summary Judgment dated March 10, 2003, the supporting affidavits filed in connection therewith, and plaintiff's Sur-Reply to Defendant's Memorandum Brief in Support of Defendants Amended Motion for Summary judgment filed April 15, 2003 and Plaintiffs' Opposition to Motion For Partial Summary Judgment, filed July 22, 2002.

Defendants cite only one legal authority in support of the proposition that the defamatory meaning question may be resolved by resort to the “rules of English grammar.” That authority is Tex. Gov’t Code Sec. 311.011, a code section intended to offer guidance in interpreting legislation. Sec. 311.011 provides in pertinent part that “Words and phrases shall be read in context and construed according to the rules of grammar and common usage.”⁶ Defendants’ reliance on Sec. 311.011 is misplaced for two reasons. First, as alluded to above, the code section applies only to “codes,” “amendments,” “repeals” and “re-enactment of codes” “enacted by the state legislature. See Tex. Gov.’t Code Sec. 311.002 (“Applicability”). Nothing in the language of the “Code Construction Act” in which these Sec. 311.011 appears remotely suggests that these rules are applicable in cases calling for an interpretation of non-legislative matter. Second, Sec. 311.001 is not even the exclusive means by which legislative writings are construed. Sec. 331.003, “Rules Not Exclusive,” makes that point clearly. Sec. 331.003 provides: “The rules provided in this chapter are not exclusive but are meant to describe and clarify common situations in order to guide the preparation and construction of codes.”

Since defendants may not invoke the Code Construction Act in the context of this lawsuit, they are left with no authority to support their defamatory meaning argument. Their unreasonably narrow interpretation of the challenged language is nothing more than self-serving, non-expert opinion and is not binding on this court.

D. The Juxtaposition of the Plaintiffs with the Other Cults in the Book Together with the Omission of Material Facts Creates a Defamatory Impression for the Reader with respect to the Local Church.

In their Reply Brief, Defendants admit that, under Texas law, a publication can convey a false and defamatory meaning by omitting or juxtaposing facts. This principle is illustrated by Golden Bear Distributing v. Chase Revel, Inc., 708 F. 2d 944 (5th Cir. 1983) (applying Texas law). There, a magazine article focusing on investment fraud made allegations against a company in a different state whose name was the same as plaintiffs. The court held that an

⁶ It cannot escape notice that this section admonishes that even the words and phrases of writings of the legislature are to be construed in context.

ordinary reader could reasonably interpret the article as defamatory of plaintiff. As in Golden Bear, although the book does not expressly say that the Local Church practices fraud or deception in fundraising, an ordinary reader could interpret it in that way as defamatory of plaintiff. As that court explained, "The basis of the libel lies in the juxtaposition of truthful statements about one company with truthful statements about the illegal operations of an independent company of the same name located in a different state". Plaintiffs are named as a cult in the Book. This information is juxtaposed with "cult" practices such as child molestation, financial fraud, rape, human sacrifice, prostitution, drug smuggling, and other criminal activities. Because an ordinary reader could interpret the article to accuse the Plaintiffs of the practices in its complaint, the court should reject the Defendants argument that "In neither the chart nor the subsection where The Local Church is mentioned is there found any statement of conduct alleged to be defamatory." See also, Turner v. KTRK Television, 38 SW 3d 103 (Tex. 2000) noted, "...(T)he meaning of a publication, and thus whether it is false and defamatory, depends on a reasonable person's perception of the entirety of a publication and not merely on individual statements...a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way." Turner, supra at 115.

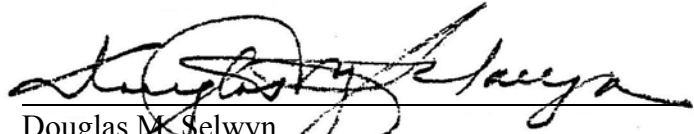
IV. CONCLUSION

For all of the foregoing reasons, Defendants summary judgment motion should be denied in its entirety.

Dated: December 3, 2003

Respectfully submitted,

DAVIS & SELWYN



Douglas M. Selwyn
State Bar No. 18022250
1600 Smith Street, Suite 4050
Houston, Texas 77002
Telephone: (713) 650-3850
Facsimile: (713) 650-3851

STROOCK & STROOCK & LAVAN

Barry B. Langberg
Deborah Drooz
Matthew D. Moran
2029 Century Park East, Suite 1800
Los Angeles, California 90067
Telephone: (310) 556-5800
Facsimile: (310) 556-5959

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiffs' Sur-Reply to Defendants' Second Motion for Summary Judgment with Affidavits in support were directed to Defendants Harvest House Publishers, Inc., John Weldon and John Ankerberg, by and through their attorneys, on this 3rd day of December, 2003:

J. Shelby Sharpe, Esq.
Sharpe Penley & Tillman
6100 Western Place, Suite 901
Fort Worth, Texas 76107


Via First Class Mail

Thomas J. Williams, Esq.
Haynes and Boone, LLP
201 Main Street, Suite 2200
Fort Worth, Texas 76102-3126

Via First Class Mail

Donald D. Jackson, Esq.
Haynes and Boone, LLP
1000 Louisiana Street, Suite 4300
Houston, Texas 77002-5012

Via Hand Delivery



DOUGLAS M. SELWYN