

IN THE SUPREME COURT OF TEXAS

=====
No. 98-1018
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DEAN HUCKABEE, PETITIONER

v.

TIME WARNER ENTERTAINMENT COMPANY L.P., RESPONDENT

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
=====

Argued November 3, 1999

JUSTICE HECHT, dissenting.

Since a public figure cannot recover damages for defamation without clear and convincing evidence that the defendant acted with actual malice,¹ I would hold, like the United States Supreme Court² and the courts of thirty-seven states,³ that he likewise cannot defeat a motion for summary

¹ *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964)).

² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986).

³ *Camp v. Yeager*, 601 So.2d 924, 927 (Ala. 1992); *Read v. Phoenix Newspapers, Inc.*, 819 P.2d 939, 942 (Ariz. 1991); *Southall v. Little Rock Newspapers, Inc.*, 964 S.W.2d 187, 193 (Ark. 1998); *Reader's Digest Ass'n, Inc. v. Superior Court*, 690 P.2d 610, 614 (Cal. 1984) (predating *Liberty Lobby*); *DiLeo v. Koltnow*, 613 P.2d 318, 323 (Colo. 1980) (predating *Liberty Lobby*); *Jones v. New Haven Register, Inc.*, No. 393657, 2000 WL 157704, at *8 (Conn. Super. Ct. Jan. 31, 2000); *United Vanguard Fund, Inc. v. Takecare, Inc.*, 693 A.2d 1076, 1080 n. 15 (Del. 1997) (applying substantive evidentiary burden at summary judgment stage in breach of contract suit, relying on *Liberty Lobby*); *Cronley v. Pensacola News-Journal, Inc.*, 561 So.2d 402, 405 (Fla. Dist. Ct. App. 1990); *Gardner v. Boatright*, 455 S.E.2d 847, 848 (Ga. Ct. App. 1995); *Jenkins v. Liberty Newspapers Ltd. Partnership*, 971 P.2d 1089, 1093 (Haw. 1999); *Wiemer v. Rankin*, 790 P.2d 347, 355-57 (Idaho 1990); *Davis v. Keystone Printing Serv., Inc.*, 507 N.E.2d 1358, 1367 (Ill. 1987); *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 904 (Iowa 1996); *Knudsen v.*

judgment without evidence of the same quality and quantity. This does not mean that the plaintiff in such a case must prove actual malice in response to the defendant's motion for summary judgment. It means only that once the defendant has adduced summary judgment evidence that it did not act with actual malice, the plaintiff, in order to raise a genuine issue of material fact precluding summary judgment, must produce some evidence that if believed, and without regard to the defendant's evidence, would clearly and convincingly show that the defendant did act with actual malice. It is not enough for the plaintiff to produce merely *some* evidence — more than a scintilla — as it would be in other contexts.

This holding is, in my view, dictated by Rule 166a of the Texas Rules of Civil Procedure, which requires evidence showing a genuine issue of material fact to defeat a motion for summary judgment that should otherwise be granted.⁴ Evidence at trial that is less than clear and convincing

Kansas Gas & Elec. Co., 807 P.2d 71, 81 (Kan. 1991); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 771 (Ky. 1990); *Sassone v. Elder*, 626 So.2d 345, 352 (La. 1993); *Tucci v. Guy Gannett Publishing Co.*, 464 A.2d 161, 166 (Me. 1983) (predating *Liberty Lobby*); *Chesapeake Publishing Corp. v. Williams*, 661 A.2d 1169, 1178 (Md. 1995); *ELM Medical Lab., Inc. v. RKO Gen., Inc.*, 532 N.E.2d 675, 680 (Mass. 1989) (abrogated by statute on other grounds, see *United Truck Leasing Corp. v. Geltman* 551 N.E.2d 20 (Mass. 1990)); *Ireland v. Edwards*, 584 N.W.2d 632, 640 (Mich. Ct. App. 1998); *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 504 (Minn. Ct. App. 1989); *Johnson v. Delta-Democrat Publishing Co.*, 531 So.2d 811, 815 (Miss. 1988); *Lopez-Vizcaino v. Action Bail Bonds, Inc.*, 3 S.W.3d 891, 893 (Mo. Ct. App. 1999) (applying “clear and convincing” standard to summary-judgment motion in a punitive damages case, relying on *Liberty Lobby*); *Brill v. Guardian Life Ins. Co. of America*, 666 A.2d 146, 153 (N.J. 1995); *Freeman v. Johnston*, 637 N.E.2d 268, 270 (N.Y. 1994); *Gaunt v. Pittaway*, 520 S.E.2d 603, 608 (N.C. Ct. App. 1999); *State Bank of Kenmare v. Lindberg*, 471 N.W.2d 470, 475 (N.D. 1991) (applying “clear and convincing” standard to summary-judgment motion in a fraud case, relying on *Liberty Lobby*); *Perez v. Scripps-Howard Broadcasting Co.*, 520 N.E.2d 198, 202 (Ohio 1988); *Herbert v. Oklahoma Christian Coalition*, 992 P.2d 322, 328 (Okla. 2000); *Ertel v. Patriot-News Co.*, 674 A.2d 1038, 1042 (Pa. 1996); *Krueger v. Austad*, 545 N.W.2d 205, 211 (S.D. 1996); *Stewart v. Peterson*, No. 1184, 1988 WL 130313, at *5 (Tenn. Ct. App. Dec. 7, 1988); *Andalex Resources, Inc. v. Myers*, 871 P.2d 1041, 1046 (Utah Ct. App. 1994) (applying “clear and convincing” standard to summary-judgment motion in a fraud case, relying on *Liberty Lobby*); *Palmer v. Bennington Sch. Dist.*, 615 A.2d 498, 504 (Vt. 1992); *Herron v. Tribune Publishing Co.*, 736 P.2d 249, 255 (Wash. 1987); *Crain v. Lightner*, 364 S.E.2d 778, 782 n.1 (W. Va. 1987); *Oil, Chem. & Atomic Workers Int'l Union v. Sinclair Oil Corp.*, 748 P.2d 283, 288-89 (Wyo. 1987).

⁴T EX. R. CIV. P. 166a(c), (i).

does not raise an issue of actual malice for a fact finder to decide, and the same evidence should have no greater effect in summary judgment proceedings. In keeping with Rule 166a's policy of conserving the resources of litigants and courts by sparing them a trial when a party cannot show how he is going to raise an issue to be determined by a fact finder, a public figure should not be able to avoid summary judgment in a defamation suit without clear and convincing evidence of actual malice.

The Court's answer to these arguments is that applying an elevated evidentiary standard in summary judgment proceedings is too difficult for Texas trial judges to do. Yet the federal courts and courts in thirty-seven of thirty-nine states in which the issue has been decided are doing just that, and they seem to be managing. Only two states, Texas and Alaska, refuse to assess summary judgment evidence by the clear-and-convincing standard. I do not see why state trial judges in Texas cannot do what federal trial judges in Texas and state trial judges across America are doing. I would abandon the position the Court maintains today and allow Alaska the distinction of being the last adherent to a rule thoroughly repudiated by American jurisprudence.

The Court's extended analysis of the summary judgment record in this case shows, I think, that the plaintiff produced *some* evidence that the defendant acted with actual malice. To reach the contrary conclusion, the Court without admitting it applies a clear-and-convincing standard which, I agree, plaintiff has not met. Because I would raise the standard, I would remand the case to give the plaintiff a fair opportunity to produce clear and convincing evidence of actual malice. Accordingly, I respectfully dissent.

The United States Supreme Court has held that the First Amendment does not permit “[a] public figure [to] recover damages for a defamatory falsehood without clear and convincing proof that the false ‘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.”⁵ Moreover, the Supreme Court has held, “[j]udges, as expositors of the Constitution, 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.’”⁶ Thus, judges must apply the elevated evidentiary standard in deciding motions for judgment as a matter of law (including motions for directed or instructed verdict and for judgment notwithstanding the verdict) and on appeal. Because these rules are entailed by the United States Constitution, they govern proceedings in state as well as federal courts.⁷

In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court held that Rule 56 of the Federal Rules of Civil Procedure requires application of this same clear-and-convincing standard to motions for summary judgment in defamation suits by public figures.⁸ The Court explained:

Just as the “convincing” clarity requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under [*New York Times Co. v. Sullivan*, 376 U.S.

⁵ *Harte-Hanks*, 491 U.S. at 659 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964)).

⁶ *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984).

⁷ U.S. CONST. art. VI, ¶ 2.

⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

254, 279-280 (1964)]. For example, there is no genuine issue [of material fact precluding summary judgment] if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence.

Thus, in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. This conclusion is mandated by the nature of this determination. The question here is whether a jury could reasonably find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law *or* that he did not. Whether a jury could reasonably find for either party, however, cannot be defined except by the criteria governing what evidence would enable the jury to find for either the plaintiff or the defendant: It makes no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.⁹

Because application of the clear-and-convincing standard of proof to summary judgment proceedings in public-figure defamation cases is required only by federal procedural rules and not by the First Amendment, state courts are free to apply a lesser standard in denying a defendant summary judgment, even though they must apply the elevated standard in finally awarding damages. But because the basic logic of *Liberty Lobby* is sound — that a genuine issue of fact cannot be raised without evidence tending to prove that fact, which for actual malice is evidence that is clear and convincing — courts in thirty-seven states¹⁰ assess the evidence in summary judgment proceedings by the same standard applicable at trial in libel cases or other actions in which plaintiffs face an

⁹ *Id.* at 254-255.

¹⁰ *See supra* note 3.

elevated standard of proof. Nine states have not addressed the issue,¹¹ and the decisions in two others are inconclusive.¹² Only this Court, and the courts of one other state, Alaska,¹³ stubbornly adhere to the rule that a public-figure plaintiff in a defamation case may defeat a defendant's motion for summary judgment with evidence of actual malice that is less than clear and convincing, even though a plaintiff cannot prevail at trial with such evidence.

II

This Court first declined to follow *Liberty Lobby* eleven years ago in *Casso v. Brand*.¹⁴ Although the relevant language of the Texas summary judgment rule, Rule 166a,¹⁵ is identical to that of the federal summary judgment rule, Rule 56,¹⁶ the federal rule had been construed to shift the burden of producing evidence to the party responding to the motion if the movant asserted that no evidence favorable to the respondent existed,¹⁷ while the Texas rule had not.¹⁸ Thus, in Texas a

¹¹ The nine states that have not addressed the issue are Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina and Virginia.

¹² See *Kitco, Inc. v. Corporation for General Trade*, 706 N.E.2d 581, 588 n.1 (Ind. Ct. App. 1999) (noting split between *Heeb v. Smith*, 613 N.E.2d 416, 420 (Ind. Ct. App. 1993) (following *Liberty Lobby*), and *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 140-41 (Ind. Ct. App. 1990) (not following *Liberty Lobby*)); *Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 480 (Wis. 1997) (assuming, as parties agreed, without deciding that the clear-and-convincing-evidence standard applied at summary judgment).

¹³ *Moffatt v. Brown*, 751 P.2d 939, 943 (Alaska 1988).

¹⁴ 776 S.W.2d 551 (Tex. 1989); cf. *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988) (Gonzalez, J., concurring) (urging application of the clear-and-convincing standard to summary judgment proceedings in defamation cases, although the Court found it unnecessary to address the issue).

¹⁵ TEX. R. CIV. P. 166a.

¹⁶ FED. R. CIV. P. 56.

¹⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

¹⁸ *Casso*, 776 S.W.2d at 556.

plaintiff was never required to respond at all to a defendant's motion for summary judgment until the defendant conclusively established his position. Because application of the *Liberty Lobby* rule to Texas procedure was therefore impossible in many cases, the Court declined to follow *Liberty Lobby*. In 1997, however, the Court added subsection (i) to Rule 166a to align Texas procedure with federal procedure, and now, as the Court acknowledges, any relevant differences are all but "obviated".¹⁹ Consequently, the basis for the Court's decision in *Casso* no longer exists.

Nevertheless, the Court now says, "*Casso* was also consistent with practical considerations which remain valid today."²⁰ The Court cites two such considerations. The first is that applying the clear-and-convincing-evidence standard necessarily involves a weighing of evidence that judges cannot do in ruling on motions for summary judgment. This is simply untrue. Application of a clear-and-convincing standard no more requires a weighing of evidence than application of the usual scintilla standard. In cases in which there is no elevated evidentiary standard, a trial judge in deciding a motion for summary judgment must decide whether the respondent has adduced evidence that amounts to more than a surmise or suspicion. When the evidentiary standard is elevated, trial judges must decide whether the respondent's evidence meets the higher standard. The issue is not, as the Court seems to think, whether the respondent has proved his case or will prevail at trial; the issue is only whether the respondent has adduced evidence in quantity and quality sufficient to satisfy the elevated standard, assuming that the evidence is true, and disregarding the movant's evidence. This is the very same process that a trial judge uses in every summary judgment proceeding, only

¹⁹ *Ante*, at ____.

²⁰ *Ante*, at ____.

the bar is raised from evidence that is more than a scintilla to evidence that is clear and convincing.

For its assertion that application of the clear-and-convincing standard necessarily involves a weighing of evidence, the Court cites two authorities. The first is Justice Brennan's dissent in *Liberty Lobby*. The Court completely ignores the majority opinion in *Liberty Lobby*, which explained:

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.²¹

Justice Brennan's dissent in *Liberty Lobby* is not the law; the majority opinion is. The Court's refusal to notice the majority opinion is inexplicable. The only other authority on which the Court relies is a quote from an opinion of the Alaska Supreme Court, which in turn quoted an opinion of the New Jersey Supreme Court.²² But the New Jersey Supreme Court has since taken the opposite view.²³ Thus, the Court's conclusion that applying the clear-and-convincing evidentiary standard in summary judgment proceedings requires a weighing of evidence that is directly contradicted by the United States Supreme Court in *Liberty Lobby* and has for its sole support a dissenting opinion

²¹ *Liberty Lobby*, 477 U.S. at 255 (citations omitted).

²² *Ante*, at ___ (citing *Moffatt v. Brown*, 751 P.2d 939, 944 (Alaska 1988) (quoting *Dairy Stores, Inc. v. Sentinel Publishing Co.*, 516 A.2d 220, 235-236 (N.J. 1986))).

²³ *Brill v. Guardian Life Ins. Co. of America*, 666 A.2d 146, 153 (N.J. 1995).

in that case and a sentence from an opinion of a court that has since changed its mind. This Court should follow the New Jersey Supreme Court and recant.

Moreover, the Court's conclusion is at odds with reality. The Court acknowledges that judges must apply a clear-and-convincing standard in deciding a motion for judgment notwithstanding the verdict,²⁴ and that appellate judges must apply the same standard on appeal.²⁵ In neither situation is a judicial weighing of the evidence any more appropriate than with motions for summary judgment. How is it that a judge can decide without weighing the evidence whether it is clear and convincing to defeat a motion for instructed verdict, but cannot decide without weighing the evidence whether it is clear and convincing to defeat a motion for summary judgment?²⁶ And how have the federal courts and the courts of thirty-seven states managed to apply the clear-and-convincing-evidence standard in deciding motions for summary judgment? Can it really be that what is standard practice for trial judges in thirty-eight American jurisdictions is impossible for trial judges in Texas and Alaska?

Second, the Court says that the clear-and-convincing-evidence standard is too "vague" to be applied to motions for summary judgment.²⁷ The standard has long been applied in contexts

²⁴ *Ante*, at ____.

²⁵ *See Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 755 (Tex. 1984).

²⁶ *See Torgerson v. Journal/Sentinel, Inc.*, 563 N.W.2d 472, 478-80 (Wis. 1997) (suggesting that the problem of judicial weighing of evidence on motions for summary judgment cannot be so great if the same process is required on appeal by judges who also cannot weigh evidence).

²⁷ *Ante*, at ____.

numerous and varied,²⁸ and today is the first time of which I am aware that it has been criticized as “vague”. The Court does not bother to explain why the standard is vague, pronouncing only that its conclusion is clear. The use of the standard in so many different contexts seems to me to indicate rather strongly that it is as understandable and manageable as such things can be. But assuming the standard is vague, how does it suddenly become more definite mid-trial, when the defendant moves for an instructed verdict, or after trial, when the defendant moves for judgment notwithstanding the verdict, or on appeal? The Court says that a judge who has witnessed the trial can apply the standard more easily, but acknowledges in the same paragraph that appellate justices, who of course have not witnessed the trial, must also apply the standard.²⁹ An appellate court, of course, has all the evidence before it, but it cannot assess the credibility and demeanor of witnesses. How is an appellate court’s review of a “cold” record so different from a trial judge’s review of summary judgment evidence that one must apply an elevated evidentiary standard and the other cannot do so? If there is an explanation, the Court does not attempt it.

²⁸ *E.g.*, *Brown v. Edwards Transfer Co.*, 764 S.W.2d 220, 223 (Tex. 1988) (paternity of illegitimate person in a wrongful death case); *Doubleday & Co. v. Rogers*, 674 S.W.2d 751, 755-756 (Tex. 1984) (actual malice in a defamation case involving public officials and public figures); *State v. Addington*, 588 S.W.2d 569, 569-570 (Tex. 1979) (civil commitment proceedings); *In re G.M.*, 596 S.W.2d 846, 846-847 (Tex. 1980) (involuntary termination of parental rights); TEX. FAM. CODE §§ 11.15, 15.024-.025 (same); *id.* § 5.02 (separate property); *id.* §§ 12.02(b), 13.05 (paternity); *id.* § 21.32 (court-ordered child support); TEX. HEALTH & SAFETY CODE §§ 81.169, .171-.173, .190 (court-ordered management of persons with communicable diseases); *id.* §§ 462.067-.069, .075 (court-ordered treatment for chemically dependent persons); *id.* §§ 574.031, .033-.035, .069, .106 (court-ordered mental health services); TEX. PROP. CODE §§ 92.0563, .058 (landlord/tenant statutory remedies); TEX. TAX CODE §§ 151.159, .307 (tax exemption for export goods); TEX. PROB. CODE § 42 (paternity); *id.* § 145 (approval of independent estate administration); *id.* §§ 222, 761 (removal of personal representative, guardian); *id.* §§ 236, 236A, 776-77 (use of estate/trust corpus); *id.* § 684 (appointment of guardian); *id.* § 438 (presumption of revocable trust); TEX. R. DISCIPLINARY P. 9.04 (1992), reprinted in TEX. GOV’T CODE, tit. 2, subtit. G app. (Supp. 1999) (defense available to attorneys to avoid reciprocal discipline).

²⁹ *Ante*, at ____.

Again, the experience in three-fourths of American jurisdictions, and the necessity of applying the clear-and-convincing-evidence standard in many contexts that do not permit a weighing of evidence, come as close as possible to conclusively establishing that the Court's concerns are completely unfounded. One simply cannot maintain in the face of vast national experience to the contrary that applying an elevated evidentiary standard for summary judgment is unworkable. Why, then, does the Court persist in its refusal to apply the plaintiff's proof standard to motions for summary judgment? Only two explanations suggest themselves. One is that the Court simply does not trust trial judges to apply the law. The other is that the Court believes that it is appropriate to put defendants in defamation cases to the burden and expense of trial even though the public-figure plaintiff cannot win. Neither of these explanations can justify the Court's decision.

III

After rejecting an elevated evidentiary standard for plaintiff's response in this case to defendants' motion for summary judgment, the Court then assesses the evidence by what can only be an elevated standard. Not without a lengthy explanation can the Court conclude that the plaintiff failed to produce *any* evidence of actual malice. This was not evidence, the Court says, and neither was this, or this, or this, or even this, and certainly not this. Judge Huckabee's position, quite simply, is that given the conflicting evidence before him regarding the parents' conduct, his decision was justified, and since the defendants knew what that evidence was and acknowledged in their affidavits that it was important, they cannot have disregarded it without actual malice. I do not think Judge Huckabee's position is clear and convincing, given the several other sources the defendants consulted before airing their broadcast. But if every inference must be indulged in Judge Huckabee's

favor, as with any other respondent to a motion for summary judgment, I do not see how the Court can conclude that Judge Huckabee has failed to produce more than a scintilla of evidence that the defendant acted with actual malice, thereby precluding summary judgment on that issue, as the trial court concluded.

Conspicuously, the Court does not conclude that the defendants' statements were substantially true — because, I think, the Court does not believe that. Rather, the Court concludes, even if some of the defendants' statements were not true and every inference is indulged in Judge Huckabee's favor, there is not a scintilla of evidence of actual malice. I do not find Judge Huckabee's evidence clear and convincing, but the Court's assessment of the record under an ordinary standard of proof is far from convincing.

* * * * *

I would remand the case to the court of appeals to consider the respondent's other arguments. Should they fail to persuade, that court should remand the case to the trial court for further proceedings.

Nathan L. Hecht
Justice

Opinion delivered: May 4, 2000