UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MICHAEL SKAKEL	:	
	:	**Case No. 3:12-cv-01669 (VLB)**
Plaintiff,	:	
	:	
vs.	:	
	:	
NANCY GRACE, TIME WARNER INC., TURNER BROADCAST SYSTEM, INC., and BETH KARAS	:	
	:	
Defendants.	:	**March 20, 2014**

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION OF THE DENIAL OF THEIR MOTION TO DISMISS

Defendants respectfully submit this memorandum in support of their motion for reconsideration of the Court's March 10, 2014 order [Dkt. 22] denying their Rule 12(b)(6) motion to dismiss (the "Order"). In finding the Complaint sufficient, the Court overlooked or misperceived constitutional burdens imposed on this plaintiff that bear directly upon the grounds advanced for dismissal.

First, the Court failed to recognize that the First Amendment *reverses* the common law burdens when a libel plaintiff challenges a statement on a matter of public concern, which Skakel does here as a matter of law because the statements he challenges discuss a murder prosecution. Citing Connecticut cases involving private libels alleged against non-media defendants, the Court mistakenly considered it to be defendants' burden to establish truth as an affirmative defense, and found it premature to resolve truthfulness at the pleading stage. Under binding Supreme Court precedent, it is *plaintiff's* burden to plead

and prove that a challenged statement is *substantially* false when it involves a matter of public concern, and this issue is often resolved on a pre-discovery motion to dismiss. On the facts alleged here, and those of which the Court may take judicial notice, plaintiff cannot meet this overlooked burden. His claims should properly be dismissed.

Second, the Court failed to recognize that plaintiff is a public figure as a matter of law for reporting on his murder conviction. Acknowledging plaintiff's public figure status at this stage is important because this status means plaintiff must establish substantial falsity by "clear and convincing" evidence. He has no ability to meet this heightened constitutional burden, and this further confirms that his claims are properly dismissed at this time.

Reconsideration of these issues is particularly warranted given the important First Amendment issues at stake. Courts repeatedly have emphasized the special duty of a trial court to ensure that claims lacking merit are terminated at the earliest possible stage in cases, like this one, that directly implicate the freedom of speech and press. This ensures that the burden of litigation through discovery and trial does not itself chill speech on matters of public concern. Defendants respectfully request reconsideration.

BACKGROUND[1]

1. In a highly publicized trial in June, 2000, plaintiff was convicted of murdering Martha Moxley. In this lawsuit he challenges statements made during

[1] **The alleged facts are set forth in defendants' memorandum in support of their motion to dismiss [Dkt. #11], and for the sake of brevity are not repeated here.**

a live television discussion of the case presented at his trial, a decade after the fact (the "Report"). In the specifically challenged exchange, defendant Karas referred to plaintiff's "DNA" being "found" up in a tree, which prompted defendant Grace to fault Karas for her "delicate" use of the term "DNA" and to clarify that it was plaintiff's "sperm" that trial evidence placed in a tree. Based on trial testimony about the admissions made by plaintiff to several friends, Grace explained that it was plaintiff who "places himself there up in a tree masturbating looking down at her window…." Compl. ¶ 16 [Dkt. 1].

2. Two witnesses did testify during the murder trial that plaintiff admitted to masturbating in a tree outside Ms. Moxley's bedroom the night of the murder. Stracher Decl., Exs. 2, 3 [Dkt. 12]. A third witness testified that plaintiff admitted masturbating later on the body. *Id.*, Ex. 4 [Dkt. 12].

3. Defendants moved to dismiss for failure to state a claim on the grounds that the allegedly defamatory statements are not substantially false, are barred by the "subsidiary meaning" doctrine, and caused no actionable harm to plaintiff's reputation. *See* Defs. Mem. at 7-18 [Dkt. 11].

4. The Court denied defendants' motion. It held, *inter alia*, that plaintiff had "successfully alleged that the statements were prima facie false," defendants had the burden of proving truth as a defense, and it would be inappropriate "to opine on the substantial veracity" at this stage. Order at 11, 14-15 [Dkt. 22]. The Court also found the record on the motion to dismiss insufficient to establish whether plaintiff is a public figure for purposes of his libel and privacy claims.

ARGUMENT

A motion for reconsideration should be granted where "the moving party can point to controlling decisions or data that the court overlooked -- matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). *See Barnett v. Conn. Light & Power Co.,* 2013 WL 4813083, at *4 (D. Conn. Sept. 9, 2013) (Bryant, J.) (granting reconsideration due to misreading of a decision). Here, the Court overlooked the First Amendment requirement that plaintiff must bear the burden of proving substantial falsity. He cannot meet this burden. The Court also overlooked controlling Connecticut precedent establishing that plaintiff must be treated as a public figure when he challenge statements about his murder conviction, further raising his threshold burden.

I.
THE COURT DID NOT TAKE INTO ACCOUNT THE CONSTITUTIONAL BURDEN IMPOSED ON PLAINTIFF TO PLEAD AND PROVE SUBSTANTIAL FALSITY

In rejecting defendants' demonstration that the Complaint fails to state a claim because the challenged statements are not substantially false and defamatory, the Court incorrectly applied a Connecticut common law requirement that libel defendants bear the burden of proving substantial truth as a defense. Order at 14-15 [Dkt. 22]. That principle, however, applies only in claims alleging private libels against non-media defendants.[2] In *Philadelphia Newspapers, Inc. v.*

[2] *See Cweklinsky v. Mobil Chem. Co.,* 837 A.2d 759 (Conn. 2004) (libel claim by former employee suing employer for private defamation, among other claims); *Woods v. Connection, Inc.,* 2012 WL 1592162 (Conn. Super. Ct. Apr. 11, 2012) (same); *Mauer v. Gadiel,* 2004 WL 2164947 (Conn. Super. Ct. Aug. 27, 2004) (board of education chairman suing letter writers to local newspaper for defamation).

Hepps, 475 U.S. 767 (1986), the Supreme Court reversed the common law burden of proof for all defamation cases involving a matter of public concern. In such cases, the Court held, the "common law's rule on falsity" must fall "to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages." _Id. at_ 776; _see also, Masson v. New Yorker Magazine, Inc._, 501 U.S. 496, 510-11 (1991). Where, as here, the libel plaintiff is a public figure (_see_ Point II, _infra_), his burden is even higher—to establish substantial falsity "by clear and convincing evidence." _DiBella v. Hopkins_, 403 F.3d 102, 115 (2d Cir. 2005).

What constitutes a matter of "public concern," the Supreme Court has further held, must be construed broadly, lest "courts themselves . . . become inadvertent censors." _Snyder v. Phelps_, 131 S. Ct. 1207, 1216 (2011). Speech involves a matter of public concern when it relates "to any matter of political, social, or other concern to the community." _Id._ at 1211 (internal marks and citations omitted); _see also, Konikoff v. Prudential Ins. Co. of Am._, 234 F.3d 92, 102 n.9 (2d Cir. 2000) (sphere of public concern is "extraordinarily broad with great deference paid to what the publisher deems to be of public interest"). R. Sack, SACK ON DEFAMATION § 3:3.2[A] (4th ed. 2010) at 3–9 (public concern must be given broad scope to avoid court assuming "the constitutionally suspect role of super-editor, deciding on a case-by-case basis what is newsworthy").

On the facts alleged in the Complaint, there can be no doubt that this case involves a matter of public concern for purposes of shifting the burden of proof to plaintiff, an issue the Court failed to consider in mistakenly assigning to

defendants the obligation to demonstrate substantial truth.[3] The Complaint alleges that plaintiff was convicted of murdering Martha Moxley and challenges statements made about the evidence in the case against him. *E.g.*, Compl. ¶¶ 12-18 [Dkt. 1]. As the Supreme Court repeatedly has underscored, "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975). And "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). *See also Reuland v. Hynes*, 460 F.3d 409, 418 (2d Cir. 2006) ("Certainly crime is a 'matter of political, social, or other concern to the community.'") (citation omitted); *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F.3d 158, 164 (2d Cir. 2006) ("Any community would be acutely interested in such an incident that constitutes nothing less than a criminal attack on a minor.").

The Court thus misperceived that evidence should be developed before addressing the public concern issue. No such evidence is needed. The substance of the statements at issue and the allegations in the Complaint themselves establish as a matter of law that this case involves a matter of public concern. Indeed, plaintiff conceded that his prosecution, in particular, was a matter of intense public concern. Opp. Mem. at 12 [Dkt. 16-1].

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[3] The Court noted the "public concern" issue briefly in considering application of the subsidiary meaning doctrine (Order at 17 [Dkt. 22]), but that doctrine applies if plaintiff is a public figure. His public figure status is a distinct issue from whether the challenged statements involve a matter of public concern. *See, infra,* Point II.

Given this inescapable conclusion, and correctly allocating to plaintiff the burden to demonstrate substantial falsity with convincing clarity, it is evident that plaintiff cannot meet his burden. Plaintiff's claims challenge an interchange that begins with a question to defendant Karas about whether evidence at his trial indicated that plaintiff "apparently was up in a tree masturbating trying to look into [Moxley's] bedroom window the night of the murder?" In fact, the evidence did. *See* Compl. ¶¶ 12-18 [Dkt. 1]; Stracher Dec., Ex 2, 3 [Dkt. 12]. When Karas politely responds, "well his DNA was found yes … up in the tree," defendant Grace chastises her for not saying that "it was sperm" in the tree, and explains that plaintiff's statements to others established this fact: "[S]o he places himself up in a tree masturbating looking down at her window, and whoa, she turns up dead within a couple of hours."

Read in full and in context, as it must be,[4] this exchange is not substantially false—the Complaint nowhere denies that two witnesses at the trial where he was convicted of murder testified to plaintiff's own admission that he left his sperm in the tree. That is the gist of the challenged statements.

The Court misperceived that it could not take judicial notice of the trial testimony, Order at 7 [Dkt. 22], but it is well settled that a court can properly notice such judicial records "not to prove the truth of their contents" but "to determine what the documents stated." *Kramer v. Time Warner Inc.*, 937 F.2d 767,

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[4] *See, e.g., Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997) (in defamation case, court must be "guided not only by the meaning of the words as they would be commonly understood, but by the words considered in the context of their publication"); *Bordoni v. N.Y. Times Co.*, 400 F. Supp. 1223, 1228 (S.D.N.Y. 1975) (court must not "fragmentize and dissect" the challenged publication but instead must "read it as a whole and in context").

774 (2d Cir. 1991). *See also, e.g.*, *Schubert v. City of Rye*, 775 F. Supp. 2d 689, 698 (S.D.N.Y. 2011) ("In the motion to dismiss context . . . a court should generally take judicial notice 'to determine what statements [the records] contain [ ] . . . not for the truth of the matters asserted.'") (quoting *Kramer*, 937 F.2d at 774); *Biro v. Conde Nast*, 2013 WL 3948394, at *6 (S.D.N.Y. Aug. 1, 2013) (same, addressing motion to dismiss defamation claims). It is irrelevant whether the testimony concerning plaintiff's admission to having left his sperm at the crime scene is true or not—the Court can take judicial notice that defendants' statements at issue are not materially false in their depiction of the trial evidence.

The challenged statements do not say that DNA evidence was presented at trial, or that plaintiff was convicted by scientific proof of a DNA match. Quite to the contrary, Karas's off the cuff answer that plaintiff's "DNA" was "found… up in a tree" was immediately explained by Grace, who clarified that Karas was delicately referring to plaintiff's sperm and to testimony about plaintiff's admission that he had masturbated outside Ms. Moxley's window. Weighed against the actual trial testimony, the only factual error actually alleged is the statement that plaintiff's sperm was "found" in the tree, when the trial evidence was that plaintiff admitted leaving it there.

This alleged discrepancy is not a materially false fact and cannot sustain a claim for defamation. In *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005, 1008-09 (Conn. 1984), for example, the Connecticut Supreme Court rejected as not substantially false the statement that plaintiff had taken trips with a mobster to Las Vegas and the Superbowl because even though they never travelled

together they were in Las Vegas and at the Superbowl at the same time. In *Rouch v. Enquirer & News of Battle Creek Michigan*, 487 N.W.2d 205, 210 (Mich. 1992),[5] the Michigan court rejected as not substantially false the statement that plaintiff had been "charged" with sexual assault, when he was only investigated and never arraigned. Just as in these and many other cases presented in support of the motion, the statement that plaintiff's sperm was "found" in a tree is not substantially false when he admitted leaving it there.[6] *See* Def. Mem. at 9-14 [Dkt. 11] (citing cases); Def. Reply at 4-6 [Dkt. 17] (citing cases).

On the facts alleged and the testimony subject to judicial notice, plaintiff cannot meet his constitutional burden to prove by clear and convincing evidence that the challenged statements are substantially false and defamatory. In such circumstances, courts routinely dismiss libel cases on pre-discovery motions to dismiss after concluding that plaintiffs cannot meet their burden to establish substantial falsity. *See, e.g., Biro v. Conde Nast,* 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012) (granting motion to dismiss, in part, on substantial truth)*; Croton Watch Co. v. Nat'l Jeweler Magazine, Inc.,* 2006 WL 2254818, at *6 (S.D.N.Y. Aug. 7, 2006) (same); *Jewell v. NYP Holdings, Inc.,* 23 F. Supp. 2d 348, 369 (S.D.N.Y.

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[5] The Court discounted this and other out of state holdings cited by defendants because they had not explained whether those holdings applied law similar to Connecticut's common law. Order at 14 n.2 [Dkt. 22]. All of the cited cases provide relevant authority because they all apply the First Amended standard that a plaintiff must prove "substantial falsity."

[6] By misallocating the burden to prove falsity, the Court also mistakenly concluded that an allegation of "literal falsity" is sufficient at the pleading stage. Order at 12-13 [Dkt. 22]. It is not. A literally false statement is not substantially false for purposes of stating a libel claim "unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson*, 501 U.S. at 517 (quoting Sack, LIBEL, SLANDER AND RELATED PROBLEMS 138 (1980)).

1998) (same); *Chung v. Better Health Plan,* 1997 WL 379706, at *2-4 (S.D.N.Y July 9, 1997) (same).

The Court's failure in this case to "opine on the substantial veracity of Defendants' statements" inverted the proper burden of proof and abdicated its responsibility under the First Amendment to examine the "material falsity" of the allegedly defamatory statements. *Masson*, 501 U.S. at 510.

II.
THE COURT MISAPPREHENDED PLAINTIFF'S STATUS AS A PUBLIC FIGURE ON THE FACTS ALLEGED

The Court also misperceived or overlooked controlling precedent establishing that plaintiff is indeed a public figure for purposes of this libel lawsuit. In declining on the present record to decide whether plaintiff is a public figure, Order at 17-20 [Dkt. 22], the Court failed to appreciate the few facts that are sufficient to make the public figure determination in this case, which is itself a question of law for the court. *See, e.g., Fuller v. Day Publ'g Co.*, 2004 WL 424505, at *5 (Conn. Super. Ct. Feb. 23, 2004), *aff'd*, 872 A.2d 925 (Conn. App. Ct. 2005); *Cohen v. Meyers*, 2012 WL 4377824, at *10 (Conn. Super. Ct. Aug. 27, 2012).

The Court acknowledged Connecticut precedent holding that plaintiffs who challenge reports about criminal cases are limited purpose public figures as a matter of law, but pointed to language in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), cautioning that not everyone who engages in criminal conduct becomes a public figure. Order at 19-20 [Dkt. 22]. Whatever individuals the Supreme Court had in mind, its caution has no bearing here.[7]

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[7] The Court's reliance on *Wolston v. Reader's Digest Association, Inc.,* 443 U.S. 157 (1979) is misplaced. In that case plaintiff's contempt citation for failing to appear

There is no dispute that this case does not involve a run-of-the-mill criminal prosecution. For purpose of the public figure analysis, the controversy here involves a libel plaintiff's conviction for murder in a high profile case. Plaintiff's own pleadings allege that he was convicted in a case that was closely followed by the national press—so closely followed that defendant journalists allegedly had "covered" the whole trial, closely followed all post-conviction proceedings, and devoted an entire hour in primetime to re-capping the trial for a "huge audience" a decade after the fact. *See* Compl. ¶¶ 19, 25, 27-28 [Dkt. 1].[8]

Under Connecticut law, no further evidence is required to establish that plaintiff is a public figure for purposes of reporting about his conviction. *See, e.g., Fuller,* 2004 WL 424505, at *5 (plaintiff involved in murder trial is a limited purpose public figure). Connecticut has long followed the principle that "a prisoner becomes a public figure by virtue of his crime and subsequent trial," and "remains a public figure during his imprisonment or until he has 'reverted to the lawful and unexciting life led by the great bulk of the community.'" *E.g., Travers v. Paton*, 261 F. Supp. 110, 117 (D. Conn. 1966) (quoting Restatement (First) of Torts § 867, cmt. C). Indeed, we have been unable to locate *any* precedent in Connecticut ever holding to the contrary.

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before a grand jury was entirely tangential to the alleged defamatory statement that he was a Soviet spy. Similarly, in *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), the controversy at issue was a divorce, not a murder trial.

[8] All of this is alleged in the Complaint and does not require further proof of the massive public attention to this case, although evidence of the many books and documentaries about plaintiff's prosecution, and the extensive television, magazine and newspaper coverage of this case, can readily be ascertained from a simple Google search.

III.
RECONSIDERATION SHOULD BE GRANTED GIVEN THE SUBSTANTIAL FIRST AMENDMENT INTERESTS AT STAKE

The Court should grant reconsideration because the mere pendency of this case has a significant chilling effect. Recognizing that this case involves a matter of public concern shifts the burden of proving substantial falsity and warrants the immediate dismissal of these claims; declaring plaintiff a public figure raises substantially his burden of proving both falsity and fault, and further compels prompt dismissal.

The statements at issue involve the ongoing debate over the guilt (or innocence) of a convicted murderer, and are at the core of the protections provided by the First Amendment. The Constitution places on a trial court presented with such libel claims an obligation to terminate the litigation at the earliest appropriate stage to prevent plaintiffs from using the legal process to silence speech on matters of public concern. Indeed, courts in Connecticut and elsewhere repeatedly have emphasized that meritless claims against the press should be "nipped in the bud" "before burdensome discovery and other legal costs are incurred." *Woodcock v. Journal Publ'g Co.*, 646 A.2d 92, 103, 108 (Conn. 1994) (Berdon, J., concurring).

As the New York court put it in *Armstrong v. Simon & Schuster, Inc.*, 649 N.E.2d 825, 828 (N.Y. 1995), dispositive motions are of "particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms." In such cases, delaying dismissal serves "not only to countenance waste and

inefficiency but to enhance the value of such actions as instruments of harassment and coercion inimical to the exercise of First Amendment rights." *Immuno AG v. Moor-Jankowski*, 145 A.D.2d 114, 128 (N.Y. App. Div. 1989), *aff'd,* 567 N.E.2d 1280 (N.Y. 1991). Federal courts have repeatedly said the same. *See also, e.g.*, *Biro*, 2013 WL 3948394, at *18 ("In defamation cases, Rule 12(b)(6) not only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive."); *Coles v. Wash. Free Weekly, Inc.*, 881 F. Supp. 26, 30 (D.D.C. 1995) ("it is particularly appropriate for courts to scrutinize [defamation] actions at an early stage of the proceedings to determine whether dismissal is warranted"), *aff'd*, 88 F.3d 1278 (D.C. Cir. 1996); *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992) ("'because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable'") (citation omitted).

As demonstrated above, plaintiff's claims can, and should, be dismissed as a matter of law prior to discovery.[9] To protect the First Amendment interests at stake, this Court should reconsider its order denying defendants' motion to dismiss.

[9] **Because plaintiff cannot state a claim for defamation, his false light claim also fails. *See* Def. Mem. at 18-19 [Dkt. 11].**

CONCLUSION

For the foregoing reasons, this Court should reconsider its March 10, 2014 Order, and dismiss the complaint, with prejudice.

Dated: March 20, 2014

Respectfully submitted,

/s/ Cameron Stracher
Cameron Stracher (ct28146)
4 North Pasture Rd.
Westport, CT 06880
Phone/Fax: (203) 222-7169
Email: cam@stracherlaw.com

Of Counsel:

David Schulz
Levine Sullivan Koch & Schulz
321 West 44th St., Suite 1000
New York, NY 10036
Phone: (212) 850-6100
Email: dschulz@lskslaw.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on March 20, 2014, a copy of the foregoing document was filed using the CM/ECF system, which will send notification of such filing to:

Stephen Seeger, Esq.
810 Bedford Street, Suite #3
Stamford, CT 06901
seegerkid2@aol.com

ATTORNEY FOR PLAINTIFF

/s/ Cameron Stracher
Cameron Stracher (ct28146)
4 North Pasture Rd.
Westport, CT 06880
(203) 222-7169 (phone & fax)
Email: cam@stracherlaw.com