No. 01-04-00231 CV

IN THE COURT OF APPEALS

FOR THE FIRST DISTRICT OF TEXAS AT HOUSTON

HARVEST HOUSE PUBLISHERS, JOHN ANKERBERG, and JOHN WELDON,

Appellants
(Defendants below)

vs.

THE LOCAL CHURCH, LIVING STREAM MINISTRY, ET AL.

Appellees
(Plaintiffs below)

BRIEF OF APPELLEES

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I. STATEMENT OF THE CASE.

This is an interlocutory appeal from the denial of summary judgment in a libel action that arose from the publication of a book entitled *Encyclopedia Of Cults And New Religions.* The book was written by Appellants John Weldon and John Ankerberg and published by Appellant Harvest House Publishers (collectively "Appellants"). (See Appellants Opening Brief) ("AOB"), pg. xiii.) Living Stream Ministry and 94 individual churches - all non-profit corporations based in Texas and elsewhere, - which share the name The Local Church. Appellees herein are sometimes referred to collectively as the "Church"). (I CR 2-5.) The AOB makes three arguments. The first raises the issue of defamatory meaning; the second asserts that the 96 individual churches should be deemed public figures and the third contends, albeit curiously, that plaintiffs below did not act with constitutional malice. All of these arguments - particularly that of defamatory meaning - have been extensively and vigorously litigated in no less than three unsuccessful judgment motions by Appellants.

On July 5, 2002, Appellants sought to dismiss the claims of the individual churches on the theory that the challenged statements allegedly were not "of and concerning" those entities. (1st Sup. I CR 1-8.) That motion for partial summary judgment was denied. (1st Sup. III CR 344.) On February 19, 2003, Appellants filed an amended motion for summary judgment that sought dismissal of the entire action on the grounds that (1) the challenged statements are "not defamatory as to the Churches" and (2) are not legally capable of any defamatory meaning. (1st Sup. I CR 346-356.) That motion was also denied in entirety. (1st Sup. IX CR 1303.) On October 15, 2003, Appellants filed yet another motion for summary

judgment. This motion also sought to dismiss the suit on the ground that the challenged statements are not legally capable of a defamatory meaning as to the Churches. In addition, Appellants argued that the challenged publication was not made with constitutional malice; and that the case was barred by the statute of limitations. (I CR 30-31.) That motion was also denied in entirety. (II CR 358.) The instant interlocutory appeal followed. (II CR 365.)

II. ISSUES PRESENTED

1. Whether, as a matter of law, the statements challenged in the complaint are incapable of any defamatory meaning.

2. Whether, as a matter of law, the individual Local Churches can be characterized as public figures.

3. Whether, as a matter of law, defendants could be unequivocally found to have published the challenged text without constitutional malice.

III. STATEMENT OF FACTS

The *Encyclopedia of Cults and New Religions* (the "Book") is styled as a "reference" work and is divided into alphabetically arranged chapters, each of which is devoted to a religious organization that ostensibly qualifies as a "cult." Preceding these chapters is a lengthy introductory section[1] that provides instruction on "How To Use This Book," and offers information that is applicable to the "cults" described in the subsequent chapters. As if to dispel any doubt, the Introduction proclaims that *"[T]he groups herein deserve the title [cult]."* (ICR201.)

The Introduction's tone is decidedly pejorative. Cults are described as "destructive," (I CR 200-201) "harmful," "kaleidoscope[s] of deception," "detrimental to individuals and to society," (I CR 200) and "dangerous." (I CR 201, 203.) The reader is warned that "cults kill slowly." (I CR 206.) The Introduction goes much further than subjective disparagement, however. It proceeds to define cults in terms of their objective "characteristics." It states, for example, that cults engage in "fraud" in "fundraising and financial costs," subject their members to "physical harm," engage in "occult practices," "deny their followers blood transfusions and medical access," "engage[] in drug smuggling and other criminal activity, including murder," and more. (I CR 204-205.)

The Book also contains a "Doctrinal Appendix" (the "Appendix"). As the reader learns in the Introduction, the Appendix provides a more "thorough general treatment" of the various subjects discussed in the chapters. Thus, the reader is told, *"it is important to peruse*

the contents" of the Appendix. (2nd Sup. IV CR 475.) Predictably, the Appendix is not confined to doctrinal matters. Many passages inform readers of the illegal and immoral acts allegedly perpetrated by "cults," including "snake worship," "prostitution," "idolatry," and idolatry's *"inevitable"* consequence, "human sacrifice." (I CR 265, 269, 276-277.) Neither the Introduction nor the Appendix even suggests that *any* organization discussed in the Book is completely innocent of these acts. On the contrary: as Appellants admit, the Introduction states that all of those organizations engage in at least some of the acts, and a number engage in all or nearly all of them. (AOB 24.) There is no language that would enable a reader to determine whether a particular organization is guilty or innocent, and much language to suggest that all organizations are guilty to some unspecified extent.

A full chapter of the Book is devoted to The Local Church. (I CR 213-214.) By choosing The Local Church for inclusion in the Book from among the "5000 cults [that exist] worldwide,"[2] the authors inform the reader that this particular organization is an apt subject for a cult reference work, and, more significantly, that it partakes - at least to some extent - in the crimes and abhorrent acts that are "characteristics" of the cults in the Book.

In 2001, following Harvest House's second publication of the Book, representatives of the Local Church sent a series of letters to Hawkins, Weldon and Ankerberg. (2nd Sup. III CR 413, 415; 2nd Sup. VII CR 1045-1063.) The letters protested The Local Church's presence in the Book, and vehemently denied that it was a "cult" or that it participated in any

[1] The introductory section comprises an "Introduction" and a section entitled "How To Use This Book." For ease of reference, Appellees refer to these sections jointly as the "Introduction."

of the repugnant and illegal acts and practices attributed to cults in the Book. These letters were more than protests: All contained urgent requests for dialogue so that the incipient dispute might be resolved amicably. Harvest House never investigated the Local Church's claims and never agreed to meet with its representatives until litigation commenced. Nor did it investigate the related claims of individuals who decried The Local Church's inclusion in the Book. (2nd Sup. III CR 417-418; 2nd Sup. VI CR 891-892.) Instead it published two more editions of the Book - one in March of 2001, the other in February of 2002 ~ which re-printed the defamatory statements in entirety.

The Local Church filed the underlying libel action on December 31, 2001, alleging that the Book's allegations of illegal and reprehensible conduct (the "Challenged Statements") were false as to them. In the course of discovery, the following evidence emerged[3]:

- At the time of publication, neither the authors nor the publisher had any evidence whatsoever that the Challenged Statements were true of the Churches. (2nd Sup. II CR 160-161, 164-170, 193-199.)
- At the time of publication, the authors intended that the Introduction and Appendix be read in conjunction with the other chapters in the Book, including the chapter on the Local Church, and further intended that those sections

[2] The authors repeatedly emphasize the dangers posed by the proliferation of cults and twice state that cults number in the thousands. (I CR 196.)

[3] The text contains further details on each point, infra.

would be understood as applicable to the organizations discussed in the Book. (2nd Sup. II CR 178, 180-181; 2nd Sup. VII CR 1085-1087.)

- The authors and the publisher have a long history of imputing cult status to religious organizations with whom they do not agree, and have published many works that vilify those purported "cults." (2nd Sup. II CR 191; 2nd Sup. III CR 385.)
- In the course of preparing the Book for publication, neither the authors nor the publisher attempted to contact the Churches. (2nd Sup. II CR 155-156; 2nd Sup. UCR 643; 2nd Sup. VII CR 958.)
- The authors wrote material for publication that directly contradicts the Books defamatory statements.
- Prior to publication, the publisher did not employ any fact vetting personnel to work on the Book, did not engage in or arrange for a substantive edit of the Book and did not even read the Book. (2nd Sup. II CR 213, 234;; 2nd Sup. III CR 301-303, 306, 328; 2nd Sup. VI CR 879, 887.)

IV. SUMMARY OF THE ARGUMENT

Appellants' *defamatory meaning* argument is without merit because the challenged statements are defamatory per se, are statements of objective fact, and refer to the Church both directly and indirectly.

Appellants' *public figure* argument is without merit because Appellants employ the wrong legal criteria and because they offer no evidence that would establish public figure status.

Appellants' *constitutional malice* argument is without merit because the Church introduced overwhelming evidence - both direct and circumstantial - that, at the very least, raises a genuine issue of fact on the malice issue.

V. THE CHALLENGED STATEMENTS ARE REASONABLY SUSCEPTIBLE TO THE INTERPRETATION ADVANCED BY THE PLAINTIFFS.

Appellants spill considerable ink in a hyper-technical, supposedly 'grammatical' analysis of the statements at issue. They parse each sentence, speculate on the effect of "limiting" words and phrases, and delve into the cognitive impact of commas. While such an analysis may be appropriate in a linguistics classroom, it misses the mark in the libel courtroom. The question before this Court is whether the Challenged Statements are susceptible to a defamatory meaning. Courts have never resolved that question by resorting to the sort of artificial, grammatical hair-splitting that Appellants engage in here. On the contrary, the courts have traditionally employed a broad-based analysis that takes into account not merely the challenged statements themselves but the circumstances under which they were published, the context in which they appear and their objective verifiability. And the viewpoint that matters is not that of the trained grammarian (or lawyer) but that of the lay reader.

Texas law is clear: The issue of defamatory meaning is resolved by analyzing the challenged statements "as a whole," "in context," "in light of surrounding circumstances,"

and from the perspective of "the ordinary, reasonable reader." See Allied Mktg. Group, Inc. v. Paramount Pictures Corp., 111 S.W.3d. 168, 176 (Tex.App. - Eastland, pet. denied) ("[T]he trial court construes the allegedly defamatory publication as a whole in the light of surrounding circumstances based upon how a person of ordinary intelligence would perceive the publication."); accord Dolcefino v. Randolph, 19 S.W.3d 906, 916 (Tex.App. - Houston [14th Dist.] 2000, pet. denied) (The court "construe[s] the statement as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive the entire statement."), citing Musser v. Smith Protective Services, 723 S.W.2d 653, 655 (Tex. 1987); Guisti v. Galveston Tribune Co., 150 S.W. 874, 878 (Tex. 1912) (same). Moreover, it has been repeatedly held that defamatory meaning is determined *"not on a technical analysis of each individual statement,"* but rather by what a "reasonable person" would understand the statement in question to mean. Turner v. KTRK Tel., Inc., 38 S.W.3d 103, 113, 115 (Tex. 2000) (emphasis added), citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990); see also Allied Marketing Group, 111 S.W.3d at 176.

In the first instance, the question of whether a statement is capable of a defamatory meaning is one for the court. But when a publication is of ambiguous or of questionable import, the issue of defamatory meaning must be submitted to a jury. Musser, 723 S.W.2d at 655; Turner, 38 S.W.3d at 113. As the trial court in this case recognized, if the statement is in any way susceptible to a defamatory meaning or if the statement's meaning is ambiguous or subject to doubt, the question cannot be resolved on summary judgment. Golden Bear Distrib. Sys. v. Chase Revel, Inc. 708 F.2d 944, 948 (5th Cir. 1983) (applying Texas law).

In evaluating challenged publications "as a whole," the Texas courts have routinely considered factors such as tenor, tone, diction (i.e., the words chosen to convey the challenged message) and the frequency and/or vehemence with which that message is conveyed. See e.g., Bentley v. Bunton, 94 S.W.3d 561, 581-585 (Tex. 2002) and cases cited therein. In evaluating the "circumstances surrounding publication," Texas courts employed a wide range of criteria, including the nature of the challenged publication and the medium in which it is published, the identity of the author and/or publisher, and the identity of the intended audience. In every analysis, however, one criterion always holds sway: the challenged statements' verifiability, i.e., their ability to be proven false by objective evidence. Bentley, 94 S.W.3d at 581, citing Milkovich, supra.

In their brief, Appellants pay lip service to a selected few of these factors. They acknowledge, for example that "the court must look at the entire communication and not examine separate sentences or portions." (AOB 18.) They note that defamatory meaning cannot be determined by taking statements "out of context." (AOB 18.) But, having made these points, they proceed to devote the next 18 pages of their brief[4] to an analysis that simply ignores them. In this brief, we will address Appellants' 'grammatical' arguments and will demonstrate that none supports the finding that the challenged statements are incapable of any defamatory interpretation. Before doing so, however, Appellees will analyze those

statements properly, by using the legal criteria established by the courts of this state and by the United States Supreme Court. Several different legal theories can be asserted to challenge a publication's defamatory meaning. One of the problems presented by Appellants' brief is that it does not identify the legal theory under which it proceeds. Thus, we must proceed by process of elimination.

A. **The Challenged Statements Are Capable of Causing Reputational Injury.**

The most straightforward way to challenge defamatory meaning is to argue that the statement in question does not cause reputational injury. That is, even though it is false, it does not expose the plaintiff to "public hatred, contempt, ridicule, financial injury" and the like. See TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997) (statutory definition of libel). Thus, a statement to the effect that, e.g., "plaintiff declined to be interviewed," when in truth he did not, is false but not defamatory. Brewer v. Capital Cities/ABC, Inc., 986 S.W.2d 636, 643 (Tex.App. - Fort Worth 1998, no pet.). Clearly, that theory is ***not*** applicable here. The statements at issue here involve imputations of extreme acts, all of which are repugnant and many of which are unlawful.[5] They include inflicting "physical harm" on members, committing "fraud or deception concerning fundraising and financial costs," "drug smuggling," "murder," "rape[]," the "molest[ation] of children," "human

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[4] Appellees are compelled to point out that Appellants' brief is printed in 12-point proportionally spaced typeface rather than the 13-point mandated by Texas Rules of Appellate Procedure 9.4(e). If printed in the correct font size, the brief would clearly fill more than the 50 pages authorized by TRAP 38.4. Appellees would not mention this technical violation if it were not so probative of Appellants' desperation. Appellants apparently have so little faith in the persuasiveness of their argument that they deemed it necessary to use more than 50 pages to explain why The Local Churches could not possibly have been defamed by their publication. If the statements are unequivocally non-defamatory as appellants claim, why must so much verbiage be expended to demonstrate the point?

[5] The defamatory statements are set forth in entirety at pages 5 and 6 of Appellants' brief.

sacrifice," "prostitution," and more. There can be no argument among reasonable people as to whether false charges of this kind can cause reputational injury; it is obvious that they can. To paraphrase the court in Columbia Valley Regional Med. Ctr. v. Bannert, 112 S. W.3d 193, 199 (Tex. App. - Corpus Christi 2003, no pet.), "The words are so obviously hurtful that they require no proof that they caused injury in order for them to be actionable." By way of legal argument, it is enough to say that false imputation of criminal conduct is defamatory per se in Texas. Bentley, 94 S.W.3d at 582; Christy v. Stauffer Publ'ns, Inc., 437 S.W.2d 814 (Tex. 1969); Leydendecker & Assoc., Inc. v. Wechter, 683 S.W.2d 369 (Tex. 1984). Thus Appellants cannot legitimately argue that the Challenged Statements lack defamatory meaning because they do not communicate a reputationally injurious "sting."

B. The Challenged Statements Are Not Theological and Are "Provable as False."

Another way to challenge defamatory meaning is to argue that the statements in question are ones of "opinion."[6] While Appellants do not make this argument directly, they allude to it when they argue that the Book focuses on "doctrinal and apologetic issues of theology." (AOB 22.) Appellants' "opinion" theory is unsound for at least three reasons.

[6] In Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) — a decision that has long been followed by the courts of this state (see, e.g., Shearson Lehman Hutton, Inc. v. Tucker, 806 S.W.2d 914, 920 (Tex.App. - Corpus Christi 1991, writ dism'd w.o.j.) — the high court held that there is no blanket constitutional protection for all statements that might be labeled "opinion." This holding was founded on the recognition that statements of opinion that imply, or are founded upon, false statements of objective fact can be just as injurious as false statements that are not couched in the language of opinion. Accordingly, the high court concluded that any statement — regardless of form — may be actionable if it is "provable as false." Thus, if a statement can be objectively disproved, it may give rise to a libel action. Despite the fact that Milkovich rendered the phrase "constitutionally protected opinion" obsolete, it left the fact/opinion dichotomy intact as a practical matter. Thus for ease of reference, we use the word "opinion" to refer to the statements of "non-fact" that are entitled to constitutional protection under Milkovich.

First and foremost, the notion that the challenged statements consist of non-actionable opinion is belied by the fact that *all are susceptible to objective proof.* As the court observed in Bentley v. Bunton, "Facts, which can be proved true or false, are actionable," whereas ideas which are incapable of proof are not. 94 S.W.3d at 582. Whether an organization has committed or abetted the crime of "drug smuggling" can be proven true or false. Witness the criminal convictions that are handed down every day for exactly this offense. The charge of murder is equally capable of being proved. Either an organization has committed or abetted the crime of murder or it has not. Child molestation, fraud, assault, denying members access to medical services — each of these charges rests on a core of objective evidence and can be proven false. Under Milkovich and Shearson Lehman Hutton, a statement's susceptibility to objective proof is by far the most important component of the fact/opinion analysis. Milkovich, 497 U.S. at 19-20; Shearson Lehman Hutton, 806 S.W.2d at 920.

When we compare the statements at issue here with those that have been labeled non-actionable opinion by the Texas courts, their status as actionable statements of fact is thrown into high relief. For example, in Simmons v. Ware, 920 S.W.2d 438, 449 (Tex.App. - Amarillo 1996, no writ) the charge that a reporter's stories were "biased" was deemed a non-actionable opinion on the ground that bias was "in the eye of the beholder," and incapable of definitive proof one way or the other. Similarly, in Associated Press v. Cook, 17 S.W.3d 447, 454 (Tex.App. - Houston [1st Dist.] 2000, no pet.) the statement that the head of the Texas Rangers was "a blight on law enforcement" was deemed a non actionable opinion given its wholly subjective nature. The statements here involve no such subjective

amorphousness. Whether one has committed a crime is not a relative matter nor is it a matter of belief. It is one of fact.

The second point that must be made is that Appellants themselves do not argue that the challenged statements are *not* susceptible to proof.[7] Instead Appellants' opinion argument — to the extent that it is made at all — rests on the erroneous premise that the Book's ostensibly "theological" subject matter somehow renders its entire contents subjective and thus insulates them from defamation liability. This theory is not only illogical but contrary to the author's own testimony. During his deposition, Weldon acknowledged that the Book's Introduction and Appendix convey "non-theological" information. (2nd Sup. V CR 635.) When asked whether "nontheological evils" perpetrated by "cults" are listed in this section of the Book, Weldon answered in the affirmative. (2nd Sup. V CR 635.) When asked *why* he listed non-theological evils, Weldon replied: *"It was to illustrate that some cults can get to an extreme point... There can be bad things that happen if groups ... have no concern with good, no concern with evil. Some of them may even actually practice evil... and that can lead to the practice of evil things."* (2nd Sup. V CR 635.) With these words, Weldon underscored the fact that his purpose in listing non-theological evils in the Introduction was to communicate to readers that some of the cults in the Book actually engage in criminal practices ranging from financial fraud to murder. Since the authors do not distinguish which

[7] On the contrary, the authors and publisher repeatedly stated under oath that they possess no information that would prove those statements true, thereby acknowledging that they are susceptible to proof. (2nd Sup. II CR 160-161, 164-170, 193-199.)

"cult" practices which vile acts, the reader is left to believe that each "cult" practices at least some, and that some practice all, of those acts.

Thus, whether or not the Book has a theological "focus," the fact remains that the statements at issue are decidedly not theological; they turn not on faith but on evidence. Objective charges of financial fraud, rape and murder simply cannot be equated with subjective charges of "un-Christian beliefs," "counterfeit Christianity" and the like. The former do not lose their factual character because they appear in text that also treats theological matters. The Churches complain of false charges that allude to real world conduct - not religious doctrine.

There is a third reason that the challenged statements cannot be viewed as non-actionable opinions. Every aspect of the *context* in which those statements appear tells the reader that s/he is reading facts rather than opinion. In Allied Marketing Group, Inc. v. Paramount Pictures Corp., 111 S.W.3d 168, 175-76 (Tex. App-Eastland 2003, pet. denied), the court emphasized that the defamatory meaning issue must be resolved by evaluating challenged language in context and as a whole, giving consideration to, e.g., tone, tenor structure, format and circumstances surrounding publication. When we bring those considerations to this analysis, the results are telling. We begin with the undisputed fact that the challenged publication is styled as an *"encyclopedia,"* specifically, an Encyclopedia of Cults and New Religions. It comprises 57 individual chapters and purports to "provide comprehensive *information* on major religious groups from both the Western and Eastern traditions." (1st Sup. IV CR 469.) It boasts authors who hold "advanced degrees," and are a

"highly respected research team." It claims that it is a *"valuable reference book"* and an "essential tool" for "teachers," "students" and others. It advertises that it contains the *"most up-to-date facts* on the major religions of the new millennium." (1st Sup. IV CR 469.)[8] When consulting such a text, the reasonable reader expects to find accurate, well-researched, objective information about the organizations discussed in its pages. When confronted with statements that are couched in the language of opinion, the reader is likely to understand them as statements *based* on objective facts. Even the publisher's well-publicized motto supports this conclusion. That motto is: "Books you can believe in." (2nd Sup. III CR 322.) The Churches submits that, the Challenged Statements can be construed *only* as actionable statements of fact given their clear susceptibility to proof, their non-theological character and their context — an "essential reference work." However, the burden upon Church at the time of summary judgment was not nearly that rigorous. Rather, it was the movants — Appellants herein — who were required to establish as a matter of law demonstrate that the statements are *unambiguously* ones of opinion and cannot reasonably be interpreted as ones of fact. But if the statements are ambiguous — if they can reasonably be understood to be statements of opinion *or* statements of fact — the question of defamatory meaning goes to the trier of fact. Put another way, when the issue before the court is that of defamatory meaning, *ambiguity precludes summary judgment.* Sellards v. Express News Corp., 702 S.W.2d 677, 679 (Tex.App. - San Antonio 1985, writ ref'd n.r.e.); Guisti Tribune v. Galveston Tribune, 150 S.W. 874 (Tex. 1912) (holding that summary judgment on

[8]If this were not enough, the authors themselves state that "facts are facts," and that those "facts" are "mentioned in

ambiguous statements is improper); see also RESTATEMENT (SECOND) OF TORTS § 614 (1977). Unless the challenged communications "could not possibly have a defamatory effect on the plaintiff," the court must refer the defamatory meaning question to the jury. Under Texas law, an ambiguity exists if there is a question as to whether the reader or hearer could reasonably understand the statement in a defamatory sense. Columbia Valley, 112S.W.3dat 198; Ramos v. Henry C. Beck Co., 711 S.W.2d 331, 334 (Tex.App. - Dallas 1986, no writ). It cannot legitimately be disputed that - at the very least - there is ambiguity on the "opinion" issue.

C. The Challenged Statements Are "Of and Concerning" The Churches.

Defamatory meaning may also be challenged by arguing that the statements in question cannot reasonably be understood to refer to the plaintiffs. In Texas, as in every other state since the United States' Supreme Court's decision in New York Times v. Sullivan, 376 U.S. 254 (1964), a statement is not actionable under defamation law unless it refers to some ascertainable person or entity, and that person or entity must be the plaintiff. Poe v. San Antonio Express-News Corp., 590 S.W.2d 537, 541 (Tex.Civ.App. - San Antonio 1979, writ ref'd n.r.e.); see also Newspapers Inc. v. Matthews, 161 Tex. 284, 288, 339 S.W.2d 890 (Tex. 1960). In legal parlance, the challenged statements must be "of and concerning" the plaintiffs.

As they did in the court below, Appellants avoid tackling the "of and concerning" analysis head on. It is apparent, however, that they assert some variation of the doctrine

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this Introduction." (I CR 199-200.)

when they argue, for example, that the challenged statements are not capable of a defamatory meaning because the charges of criminal conduct appear in the Book's Introduction and Appendix and not in close proximity to the Churches' name. (AOB 25.)

Notably, Appellants offer no authority on the issue. However, we do so here. Like all questions of defamatory meaning, the "of and concerning" issue must be resolved by analyzing the challenged statements in the publication as a whole, by considering the context in which the publication was made and by viewing the statements from the perspective of the ordinary, reasonable reader or hearer. Allied Mktg. Group, Inc. v. Paramount Pictures Corp., 111 S.W.3d. 168, 176 (Tex.App. -Eastland, pet. denied); Dolcefino v. Randolph, 19S.W.3d 906, 916 (Tex.App. - Houston [14th Dist.] 2000, pet. denied); Musser v. Smith Protective Services, Inc., 723 S.W.2d 653, 654 (Tex. 1987). One of the cardinal rules of the "of and concerning" analysis is that *the reference to the plaintiffs need not be a direct one.* Texas courts have repeatedly held that defamatory statements can be "of and concerning " plaintiff even if they do not refer to him directly. Indeed, *they need not refer to plaintiff by name at all.* In Poe v. San Antonio Express, the court addressed the issue as follows: " A publication may be clearly defamatory as to somebody, and yet on its face make no reference to the individual plaintiff. He need not, of course, be named and the reference may be an indirect one." 590 S.W.2d at 542 (quotation omitted); see also Outlet Co. v. International Sec. Group, Inc., 693 S.W.2d 621, 626 (Tex.App. - San Antonio 1985, writ ref'd n.r.e.) ("[Plaintiff] need not… be named and the reference may be an indirect one.").

It goes without saying that the Churches are expressly referred to in the Book. The name "The Local Church" appears on the first page of the Book's table of contents in bold faced, capital letters. It appears again in a roughly 24 point bold-faced chapter heading on pages 211-212. (I CR 213-214). It appears twice more on that page in standard type, and can also be found on pages 369, 377 and 386 in contexts such as "[C]ults ... such as *The Local Church* of Witness Lee." The name "The Local Church" also appears twice in the Book's appendix on pages 673 and 689, and in the index on page 730. (I CR 228, 244.) The name "Living Stream Ministry appears on pages 211, 212 and 692 of the text. (I CR 213-214, 247.) The Churches are also identified as cults by virtue of their very inclusion in *The Encyclopedia of Cults.* Thus, an unidentified number of the "characteristics of cults" are directly imputed to them.

In addition to these direct references, the Book refers to the Churches *indirectly* every time it uses the word "cult." It is evident from the Book's title and from its introductory sections that the organizations described in its pages are to be understood as "cults." The term "cult" is given a detailed definition on pages xxii - xxvi under the heading "Characteristics of Cults." Appellees are labeled cults (as that term is defined in the Book) by virtue of their inclusion in the Book, and are held out to the reader as such. Significantly, the Book contains no statement that exempts Appellees (or any of them) from cult status. Nor is there any language to the effect that even one of the many "Characteristics of Cults" is not applicable to Appellees.

Appellants make various attempts to avoid the legal consequences of these facts. First, they repeatedly misstate their opponents' position, insisting that the Churches contend that the entire "list" of abhorrent acts can only be interpreted as applicable to "all the groups in the book." (AOB 23-27.) The Churches did not make that argument below[9] and do not make it here. Rather, we argue that the Book's introductory materials lead readers to the understanding that the organizations discussed in the book are "cults" that comport, to some extent, with the Book's definition of that term. Significantly, the Book expressly states that, *"with varying degrees of applicability, the groups herein deserve the title [cult] even if they disagree."* (I CR 201.) Having established that the organizations discussed in its pages are cults, the Book proceeds to define "cult" by listing specific practices in which cults purportedly engage. This definition is presented under the sub-heading "Characteristics of Cults." Neither this subsection or any other section in the book contains any language that exempts any particular organization from this definition. Nor does the book expressly ascribe particular behaviors to a particular cult with the caveat that the behavior is unique to that group and is not practiced by others. On the contrary, the authors clearly *intend* to convey that any of the cults described in the Book could well participate in any of the characteristics of cults and that some participate in many such characteristics. This intent is evinced by their use of such phrases as "[S]uch things [rape, denial of medical access,

[9] It cannot be overemphasized that the Churches were not required to make such a showing in order to prevail on summary judgment. All that was required was a showing that a reasonable reader might conclude that the Book conveyed the message that any of The Local Churches and/or Living Stream Ministry could have participated in or condoned one or more of the abhorrent behaviors in question. If an ambiguity existed on this point — that is, if the text was susceptible to an interpretation that defamed plaintiffs but was also susceptible to an interpretation that did not, summary judgment could not be granted; the matter would have to be sent to the jury.

prostitution, beatings, witchcraft, drug smuggling, murder] *have occasionally happened* even in what many people regard as 'respectable cults.'" (I CR 205.)

When deciding the "of and concerning" issue, the court should carefully consider whether the libel defendant intended to refer to the plaintiff.[10] Here, Weldon's intent that readers interpret the challenged statements to apply to The Local Church is established by his own testimony. When asked about the Introduction's intended effect on a reader who happened to be a member of the Local Church, Weldon responded " ... *in providing an overview of some of the characteristics of cults, [] they [Local Church members] would be able to see that some of those — one or more of those characteristics — would apply to themselves. "* (2nd Sup. II CR 180; 2nd Sup. V CR 632-634.) Weldon also acknowledged that if the Introduction and Appendix were read in conjunction with the chapter on The Local Church, a defamatory message could be conveyed. In that regard, he wrote in a note that *"As to defaming LC, readers would have to connect the dots ...they [Local Church members] did."* (2nd Sup. II CR 171.) Of course, the entire purpose of any Introduction is to explain and lead into the main text. That this was the purpose of the subject introductory materials is evinced by the sub-heading "How To Use This Book." (2nd Sup. IV CR 475.)

The record contains more powerful evidence that the authors intended the challenged statements be understood as potentially applicable to any of the groups in the Book. In an

internal memorandum to the individual who assisted him with the manuscript for the Book, Weldon issued the following "guidelines":

- *"The quotes you want to concentrate on are the [subject organization 's] founder or leader's demonization, if that exists, and the followers' demonization ..."* (2nd Sup. III CR 338);
- *"Always use the most damaging material. we have to have the best stuff that's really going to hit these guys [the organizations] hard"* (2nd Sup. III CR338);

The author expressed the desire to "save …. space" by not referring to "all these subjects in every chapter." (2nd Sup. III CR 339.) Plainly, he made a conscious decision to print the disparaging statements in the Introduction and Appendix only once, and in a manner that would lead the reader to believe that those statements were — or at least could be — applicable across the board. Given Weldon's admission that he intended the Introduction and Appendix to be read as applicable to the groups in the Book - including the Churches - the proposition that the challenged statements are utterly incapable of being understood as references to Appellees is preposterous.

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[10] See RESTATEMENT (SECOND) OF TORTS § 546, cmt. a (1977) (if a defendant intends to refer to a particular person, the communication will be deemed "of and concerning" that person if it is so understood by the recipient of the communication, no matter how bizarre or extraordinary it is that the communication was in fact so understood.) See also L. Eldredge, THE LAW OF DEFAMATION § 10 at 50 (1978); PROSSER & KEETON ON TORTS § 111 (4th ed. 1971). In other words, if the author intends the statement to refer to the plaintiff, the "reasonableness" component of the defamatory meaning analysis need not be met provided that someone — reasonably or otherwise — understood the statement to refer to plaintiff.

D. Appellants' "Grammatical" Arguments Are Without Merit.

Appellants argue that the meaning of the Challenged Statements is "limited" by certain words and phrases in the text. The purported effects of these limitations, according toe Appellants, stem from "accepted rules of English grammar." (AOB xv.) Preliminarily, we note that *no case* holds that the resolution of a defamatory meaning dispute should hinge on the "accepted rules of English grammar" — whatever those rules might be.[11] Although some cases have held that the court may refer to a dictionary to determine the standard meaning of particular words, the notion that a grammar manual can settle the question is belied by the many cases that require the court to employ a "totality of the circumstances" analysis, and to interpret the text from the perspective of an ordinary reader. Moreover, if we allow that the "rules of English grammar" are to be considered, then the questions of what those rules consist of and how they apply here is a subject of expert testimony. Since Appellants have not cited to any authoritative grammar treatise and have not introduced the testimony of a credentialed grammarian, they have given the court no basis for concluding that the "rules" they refer to are either correctly stated or correctly applied. Moreover, Appellants themselves have argued vigorously against the use of expert testimony to assist the court in the defamatory meaning analysis (AOB 19-20) and therefore cannot legitimately contend that its use would be appropriate here. Accordingly, Appellants' grammar-based arguments should be rejected out of hand. This said, however, we address those arguments in turn.

Appellants first argue that the applicability of the challenged statements is limited by the phrase "Not all groups have all the characteristics [of cults] and not all groups have every characteristic in equal measure." (AOB 23-24.) This phrase, they claim, tells the reader that "some groups could have as few as one characteristic, some might have only two or three and some might have as many as 11 or 12." (AOB 24.) The Churches could not agree more with this interpretation. Inherent in the phrase "Not all groups have every characteristic in equal measure" is the premise that *each group has some characteristics in some measure.* If it did not, it would not have been included in an *Encyclopedia of Cults.* Whether inadvertently or by design, Appellants ignore the fact that this language enforces - rather than obviates - the potential defamatory impact of the challenged statements. Because the Book provides the reader with no means of determining whether a given group engages in a particular abhorrent behavior, it leaves open the very real possibility that each engage in at least some of them. At the very least, this construction creates an ambiguity on the defamatory meaning issue.

Appellants next contend that this language sends the message that "the only way to find out which groups has which characteristics is to read the chapters in the Encyclopedia." This contention is bizarre. Nowhere does the Introduction (or any portion of the text) instruct the reader to look for specific criminal conduct in the Book's main chapters. And if one were to do so, one's efforts would not be rewarded. For example, one could read the entire Book from cover to cover and find no organization to whom "drug smuggling" is specifically

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[11] Appellants cite the respected commentator Robert Sack in support of the proposition that grammar governs defamatory meaning. Sack says no such thing - either at the cited section or anywhere.

imputed. The reader is left to assume that the charge of drug smuggling (or any of the other defamatory charges) could apply to any "cult" in the Book, including the Churches.

Appellants fare little better with the argument that the challenged statements are rendered unambiguously non-defamatory by the phrase " ...if we were to make 'the perfect cult...'" (AOB 24.) In that connection, Appellants argue that the sentence's conditional subjunctive construction (its use of the word "if") informs the reader that the 'perfect cult' is purely "hypothetical," and, according to Appellants, it is therefore unreasonable to conclude that the subsequently listed "characteristics of cults" are applicable to the real "cults" described in the Book. If ever an interpretation required logical gymnastics, this one does. Whether or not the "perfect cult" can be viewed as "hypothetical," the fact remains that the *phrase in which appears in does not — and was not intended to — negate the message of the previous sentence.*[u] That sentence, as Appellants readily admit, tells the reader that each of the groups discussed in the Book possess at least some of the "characteristics of cults."[13] Moreover, the "perfect cult" phrase does nothing to suggest that a group somehow loses its status as a "cult" if it does not possess all of the characteristics. Reasonable readers interpreting the "perfect cult" language in context would understand that a hypothetical 'perfect cult' would have all of the "characteristics of cults," and that the *real* cults in the Book might posses fewer than all of those characteristics. But they would nevertheless come

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[12] I.e., the sentence that reads: "Not all groups have all of the characteristics [of cults] and not all groups have every characteristic in equal measure."

[13] Ironically, after having accused Appellees of taking language "out of context" and viewing it in "isolation," Appellants embark on exactly such a gambit when they suggest that the 'perfect cult' phrase obviates defamation liability.

away with the understanding that the groups in the Book are cults that possess some "characteristics of cults." That is all that must be shown to create defamatory meaning.

Appellants' "perfect cult" argument is unpersuasive for another reason: it ignores the fact that the Book provides the reader with no way of knowing whether a particular group does or does not engage in a particular practice and thus begs the inference that any group is suspect of any of the listed crimes and offenses.[14]

Another 'grammatical' argument advanced by appellants subsists in the notion that some of the calumnies in the Book's introduction are imputed to "cult leaders" and "gurus" rather than to the "cults" themselves. (AOB 26.) In essence, they contend that that defamatory statements about cult leaders who are acting in that capacity cannot possibly be understood as statements about the cults they lead. Even if that were the case, the argument would founder for the simple reason that the reader can reasonably infer that cult members who are bidden by their leaders to, e.g., rape, molest children and practice black magic, do in fact participate in[15] those activities.[16] There can be no question that false imputations of this kind are defamatory. It is worthy of note that both the authors and the publisher have testified that they have never had any evidence that any of these charges is true as to the Churches. (2nd Sup. II CR 160-161, 164-170, 193-199.)

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[14] Appellants argue that the Book's definition of cults excludes 'criminal cults,' and that this exclusion somehow sends the message that none of the groups in the Book could be understood to have committed crimes. (AOB 24.) The flaw in this reasoning lies in the fact that the "characteristics of cults" subheading mentions many, many forms of criminal conduct, including the ultimate crime: murder. The clear implication of this language is that at least some of the cults in the Book do commit crimes.

[15] Or, at the least, abet or condone

[16] The text speaks of "cult leaders who encourage their followers" to do the acts in question.

Even more significantly, the distinction that Appellants attempt to draw between cults and their leaders evaporates when the quoted passage is examined as a whole. After reciting the inventory of cult leaders' crimes and abhorrent acts, the passage concludes with the following words: **"And such things *have occasionally happened* - even in what many people regard as 'respectable cults."** (I CR 205.) Fairly interpreted, this language informs readers that the cults themselves actually participate in these activities. And, although the Book does not assert that every cult engages in every activity, it raises the specter that some surely do, and that any of the cults may have committed any of these criminal, socially condemned acts.

One final point should be made in connection with Appellants' grammatical arguments. At AOB 28 and 29, they assert that the phrases "occult powers" and "occult practices" cannot carry a defamatory sting because the *text* "define[s]" them as "either divine powers or powers of the human mind." Not true. That "definition," according to the authors, is the definition used by *"cults."* Specifically, the text states: "All groups in this volume accept occult powers ... but define them as either divine powers or powers of the human mind." (I CR 9.) This is obviously *not* the authors' definition. On the contrary: the authors state that occult powers and practices literally involve idolatry and its "inevitable" consequence, human sacrifice. These statements do not constitute indefinite doctrines, musings or scriptural analyses. They communicate the message that cults engage in occult practices and that its consequences - idolatry and human sacrifice - are "increasingly occurring in the world today.

At the very least, it must be conceded that the challenged statements concerning occult practices and their "inevitable" consequences are ambiguous on the "of and concerning" issue. And "[I]f the statement is ambiguous, that is, if the statement may have a defamatory meaning [as to plaintiff] but is not necessarily defamatory [as to him], the issue must be submitted to a jury.' Sellards, 702 S.W. 2d at 679, citing Guisti, 105 Tex. at 497.

It has long been the majority view — and the view adopted by the Restatement (Second of Torts — that "a defamatory communication is made concerning the person to whom its recipient, correctly or mistakenly but reasonably, understands that it was intended to refer." RESTATEMENT (SECOND) OF TORTS § 564 (1977). Texas law is in accord. It has been uniformly held that "if the language [of a publication] and the surrounding circumstances are such as to cause those to whom the matter is supposed to refer, or their friends and acquaintances to understand that it was so intended, then a action will lie.' Harris v. Santa Fe Townsite Co., 125 S.W. 77 (Tex.Civ.App. 1910); Gibler v. Houston Post Co., 310 S.W.2d 377 (Tex.App - Houston [1st Dist.] 1958, writ ref'd n.r.e.) The Churches and their thousands of members have understood the statements in question as defamatory, as have their friends and neighbors. The question of whether a reasonable reader would in fact construe those statements as defamatory is one for the jury.

VI. THE TRIAL COURT DID NOT ERR IN ADMITTING TESTIMONY ON THE ISSUE OF DEFAMATORY MEANING.

A. The Extrinsic Evidence Offered By The Local Churches Does Not Mandate Reversing the Trial Court's Denial Of Summary Judgment.

Appellants contend that the Trial Court erred in admitting the affidavits of expert and lay witnesses on the issue of defamatory meaning. (AB 20.) Appellants further imply that when such extrinsic evidence is excluded, the language of the ECNR cannot be defamatory of The Local Churches. (AB 18-21.) Appellants' contentions are meritless.

1. The Expert And Lay Evidence To Which Appellants Allude Have Nothing To Do With The Defamatory Meaning Analysis.

On November 19, 2003, Plaintiffs filed "Plaintiffs' Response to Defendants' Second Motion for Summary Judgment." In support of that response, Appellees filed the affidavits of one publishing standards expert (Allan Wittman) and two lay witnesses (James Miller, Matthew Moran). (2nd Sup. I-IV CR 9-590.) In their brief, Appellants allege that these affidavits were offered in support of The Local Churches claim in their Original Petition that the ECNR's Introduction defames them. (AB 20.) Inexplicably, Appellants offer no evidence that the affidavits were indeed offered by The Local Churches for that reason. Nor could they. A review of the Wittman, Miller and Moran affidavits finds that they are devoid of any reference to the defamatory meaning issue.[17] Appellants' conduct below confirms this point. Although they objected to certain aspects of these affidavits (see I CR 58-63),

[17] For example, the Wittman affidavit merely addresses whether Appellants adhered to acceptable publishing standards in the reference work industry in authoring and publishing the ECNR. (2nd Sup. I CR 14-46.) Similarly, the Miller affidavit focuses on whether Appellants were guilty of negligence and/or constitutional malice in publishing the ECNR. (2nd Sup. I CR 49-133.) And the Moran affidavit simply authenticates various deposition transcripts, documents produced by the parties and other documents related to this case. (2nd Sup. I-IV CR 135-590.)

presumably because the affidavits addressed other topics, none of Appellants' objections concerned the issue of "defamatory meaning". (I CR 58-63.)

Therefore, the Wittman, Miller and Moran affidavits are totally irrelevant to the determination of whether the challenged statements could be defamatory. Accordingly, the Trial Court did not err in overruling Appellants' objections to the affidavits.[18]

2. The Trial Court Properly Considered Expert And Lay Evidence When Deciding Whether The Language Was Defamatory.

Whether the challenged statements are defamatory of The Local Churches required the Trial Court to consider the "totality of circumstances" surrounding publication. Allied Mktg. Group, Inc. v. Paramount Pictures Corp., 111 S.W.3d 168, 176 (Tex.App. -Eastland2003, pet. denied) (court construes statement "in light of surrounding circumstances"). The totality of circumstances necessarily takes into account, among other things, the type of language used, the tone, tenor and layout of the publication, whether the statement is verifiable, and the broader social circumstances in which the statements appeared.

In overruling Appellants' objections to Appellees' extrinsic evidence (see 1st Sup. IX CR 1443), the Trial Court effectively held that lay and expert testimony may be considered as part of the "totality of circumstances" analysis that must be applied in resolving the defamatory meaning question. The Trial Court holding is consistent with the approach that

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[18] On December 3, 2003, The Local Churches filed the affidavit of Keith Walters wherein he offered opinions on issues of defamatory meaning. (2nd Sup. VII CR 1161-1193.) Appellants objected to Mr. Walters affidavit on December 5, 2003. (2nd Sup. VII CR 1194-1197.) Although the Walters affidavit was presumably considered by the Trial Court, Appellants fail to object on appeal to this evidence being admitted. (AB 20-21.) Although not the epitome of clarity, Appellants' brief appears to focus only on their "objections" made "[b]efore oral argument" (see AB 20) which excludes the Walters affidavit since that piece of evidence was not filed until nine days after the Trial Court heard oral argument on the motion for summary judgment. Further, as explained below, even if the Trial Court considered the Walters affidavit, such consideration was proper, or in the alternative, harmless error.

the Texas courts have employed for years. See Allied Marketing, 111 S.W.3d at 176; Gibler, supra, 310 S.W. 2d 377; Gaylord Broad. Co. v. Francis, 7 S.W.3d. 279 (Tex.App. - Dallas 1999, pet. denied).

For example, in Allied Marketing, witness testimony was considered by a court. Indeed, in holding a television segment was reasonably capable of a defamatory meaning, the court emphasized that the "[plaintiff] presented evidence that a viewer [of the subject television program] did perceive that [plaintiff] Sweepstakes Clearinghouse was engaging in the scam." Allied Marketing, 111 S.W.3d at 176. Accordingly, the court reversed the trial court's grant of summary judgment on plaintiff's defamation claim.

Furthermore, in Gibler, the court squarely addressed the question of whether to admit the testimony of individuals who read an allegedly libelous publication and then concluded that it referred to the plaintiff. The court stated:

> "[T]he weight of authority is that such testimony is admissible, and *we think such testimony should be admitted.* As stated in Prosser on Torts, 2d Ed., p. 583, with supporting authorities: 'A publication may clearly be defamatory as to somebody, and yet on its face make no reference to the individual plaintiff * * * He need not, of course, be named and the reference may be an indirect one; and it is not necessary that every listener understand it, so long as there are some who reasonably do.' *In the instant case, there can be little question but that the friends and acquaintances of the appellant, as well as men engaged in newspaper work, identified the party accused in the broadcast in question as appellant, Frank GiblerT*

Gibler, 310 S.W.2d at 384-385 (internal quotations omitted) (emphasis added).

Similarly, in Gaylord, a criminal district court judge sued a broadcasting company for defamation arising out of a series of news stories wherein based on seemingly scientific

statistics, defendants accused the plaintiff of "hardly working." The court determined that the stories carried a defamatory sting. Gaylord, 7 S.W.3d at 283. In so concluding, the court noted that "[t]he summary judgment evidence offered reflects that in fact [plaintiff] was ridiculed by persons who saw the broadcasts." Id. Accordingly, because the evidence presented fact issues as to whether the complained-of statements *could* be perceived as defamatory, the denial of summary judgment was affirmed. Id.

Finally, it must be emphasized that Appellants have cited no defamation case that holds a court is prohibited from considering extrinsic evidence when construing an allegedly defamatory publication in light of "surrounding circumstances."[19] In light of this authority, Appellants' assertion that the Trial Court erred in admitting the expert and lay witness affidavits offered by The Local Churches must be rejected.[20]

3. The Trial Court's Ruling Must Be Sustained Even Without The Objected-To Affidavits Of Expert and Lay Witnesses.

Even if the Trial Court erred in admitting the expert and lay affidavit testimony, the error was harmless because the outcome of the defamatory meaning analysis is the same — i.e., the language of the Book is reasonably capable of a defamatory meaning. As

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[19] Appellants reliance on Musser v. Smith Protective Servs., 723 S.W.2d 653 (Tex. 1987) is misplaced. There the court simply disagreed with the extrinsic evidence offered by the plaintiff in support of his assertion that a statement was defamatory and instead substituted its own judgment under a totality of circumstances test and concluded that the witnesses reactions were "not typical of the meaning an ordinary reader would impute to the statements."

[20] Of course, the affidavits of Wittman, Miller and Moran have no bearing on the defamatory meaning analysis as they fail to address the issue. Notably, Appellants make absolutely no effort to demonstrate to this Court how these affidavits touch upon the defamatory meaning analysis. If Appellants mean to imply that the Walters affidavit was improperly considered by the Trial Court — a proposition seemingly refuted by Appellants' brief — then they are also mistaken since that affidavit is relevant to the issue of whether a reasonable reader would find the ECNR defamatory. See Allied Marketing, 111 S.W.3dat 176; Gibler, 310 S.W.2d at 384-385.

demonstrated above, even excluding the objected-to evidence from the record,[21] the challenged statements are still susceptible to a defamatory interpretation when analyzed under the "totality of circumstances" test. Bentley v. Bunton, 94 S.W.3d 561, 581 (Tex. 2002) (defamatory meaning is determined by focusing on "entire context" in which statement was made); Milkovich, 497 U.S. at 9 (same).

VII. APPELLANTS FAIL TO ESTABLISH THAT THE INDIVIDUAL CHURCH DEFENDANTS ARE PUBLIC FIGURES.

At the time of the summary judgment below, The Local Church and Living Stream Ministry had acknowledged limited public figure status. Thus, that issue need only be resolved as to the individual church Appellees.[22] In Texas and throughout the 5th circuit, the limited public figure analysis is governed by a three part test that is based on the Gertz principle that a limited purpose public figure has thrust himself into the forefront of a particular public controversy in order to influence its outcome. Id. The burden of proof as to each of these parts is on the defendant. First, "the controversy at issue must be public both in the sense that people are discussing it, and people other than the immediate participants in the controversy are likely to feel the impact of its resolution." WFAA-TV, Inc. v. McLemore,

[21] It must be reiterated that Appellants inexplicably fail to identify precisely what expert and lay witness evidence they claim the Trial Court erroneously admitted. As set forth above, if Appellants are referring to the affidavits of Wittman, Miller and Moran, then their objections are without merit since not a single word of those affidavits speak to whether the language of the ECNR was legally capable of a defamatory meaning. (See 2nd Sup. I-IV CR 9-590.)

[22] Even though Appellants make several references to cases in which "all purpose" public figure status was at issue, we cannot fathom that they allege in earnest that any of the individual churches have acquired the degree of name recognition and overall renown that such status requires. As the Supreme court stated in Gertz v. Welsh, 418 U.S. 323, 345 (1974) "Some public figures occupy positions of such great power and influence that they are public figures for all purposes." But these "all purpose" public figures are exceedingly rare. The Gertz court emphasized that a plaintiff should not be deemed an "all purpose" public figure "[a]bsent clear evidence of general fame or ... and pervasive involvement in the affairs of society." Id. None of the individual church plaintiffs can reasonably be said to approach that that level of fame. More to the point, Appellants offer no evidence that they do.

978 S.W. 2d 568, 571 (Tex. 1998) Second, "the plaintiff must have more than a trivial or tangential role in the controversy," and third, "the alleged defamation must be germane to the plaintiff's participation in the controversy. Id. Appellants do not and cannot satisfy any part of this test because they lack the evidence to do so. We begin with the "judicial admissions that purportedly establish public figure status "as a matter of law." (AOB 38.) Each of these five "admissions" does nothing more than establish that each individual church is known in its community as The Local Church. No "admission" establishes the existence of a "public controversy," demonstrates that any church played a significant role in the controversy or suggests that the "controversy" - whatever that might be - bears a relationship to the Challenged Statements. Indeed, Appellants do not even attempt to demonstrate that any individual church has thrust itself into the vortex of a public controversy about "drug smuggling," "rape," "murder," "financial fraud" or any of the acts described in the those statements.[23] Instead, Appellants attempt to establish public figure status by the novel means of association. In essence, they argue that merely because the individual churches are known by the same name as the established public figure plaintiff[24], they all should be deemed public figures too. This is an intellectually dishonest argument that attempts to graft the criteria of the "of and concerning" analysis onto the "public figure" analysis. The "of and concerning" test hinges on whether a reasonable reader would understand that the statements

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[23] Appellants reference the individual churches' internet presence without offering any evidence of the content of the postings. If such evidence had been offered, it would reveal that the only arguably "controversial" matters that appear on church websites involve matters of religious doctrine. But, as explained at length hereinabove, the defamatory statements do not involve religious doctrine. They consist of false accusations of crime and abhorrent behavior.

[24] i.e., the unincorporated association known as The Local Church.

in question refer to the plaintiff. The purpose of the test is to determine whether plaintiff may sue - *not* what his burden of proof will be. The public figure test, by contrast, hinges on whether a particular plaintiff has engaged in conduct that makes it appropriate to subject him to a higher standard of proof. It is simply not relevant that another plaintiff with the same name has acceded to public figure status. It is unnecessary to address each point asserted by Appellants on this issue.[25] It suffices to say that, when Appellants' public figure "evidence" is measured against the public figure test that is recognized in this state, the evidence is found to be sorely wanting.

VIII. OVERWHELMING EVIDENCE OF CONSTITUTIONAL MALICE PRECLUDES SUMMARY JUDGMENT ON THAT ISSUE

Appellants take great pains to demonstrate that the individual Local Churches are public figures. But having done so, they devote less than a page to the argument that they did not publish the challenged statements with constitutional malice. Given the copious evidence of constitutional malice that the Churches presented to the trial court,[26] Appellants' decision to give such short shrift to this issue is baffling: They do little more than note that the chapter on the Local Church was added to the Book toward the end of the editorial process. (AOB 46.) Appellees will address that argument at length. First however, we set forth the rules

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[25] For example, Appellants contend that the all of the Local Churches are highly litigious (AOB 42-43.) but fail to identify more than one lawsuit apart from this one in which any church has engaged. Bare accusations like these are not evidence and should not be given no consideration.

[26] Because Appellees' constitutional malice evidence is so voluminous, we can only offer highlights in this brief. The Court is urged to turn to the record - particularly to the following pages: 2nd Sup. II CR 160-161, 164-170, 172, 178-180, 182, 191, 193-199, 201, 213, 234, 240-242; 2nd Sup. III CR 301-303, 307, 310, 328, 338, 340, 379-382, 384, 393, 435; 2nd Sup. V. CR 708; 2nd Sup. VI CR 807, 827, 879, 881, 887, 910-912; 2nd Sup. VII CR 958, 982, 1031-1035, 1066-1072, 1076. Those pages contain all of the evidence submitted to the trial court in support of plaintiffs' argument that the appellants acted with constitutional malice.

that govern the constitutional malice analysis, together with the Appellees' strongest evidence on the issue.

New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964) gives us the seminal formulation of constitutional malice: A defamation defendant acts with constitutional malice when s/he publishes libelous material "with knowledge of its falsity or reckless disregard for the truth." As the Texas Supreme Court observed, "knowledge of falsity is a relatively clear standard." Bentley v. Bunton, 94 S.W. 3d 561, 591 (Tex. 2002). *Direct evidence* that, at the time of publication, defendants had no basis in fact for their statements, establishes constitutional malice with out more. Id. Reckless disregard for truth, on the other hand, is "incapable of being encompassed in "one infallible definition." St. Amant v. Thompson, 390 U.S. 727, 730 (1968). "It is a subjective standard that focuses on the conduct and the state of mind of the defendant." Bentley, 94 S.W.3d at 591. Evidence of constitutional malice rarely comes from defendants' own testimony. "[W]e have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article published." Eastwood v. National Enquirer, Inc., 123 F.3d 1249, 1253 (9th Cir. 1997); Brown v. Petrolite Corp., 965 F.2d 38, 47 (5th Cir. 1992). For that reason, the courts have uniformly recognized that constitutional malice may be demonstrated by a cumulation of *circumstantial evidence.* Bentley, 94 S.W. 3d at 591; Eastwood, 123 F.3d at 1253. In Bose Corp. v. Consumers Union, 692 F.2d 189, 196 (1st Cir. 1982), aff'd, 466 U.S. 485 (1984), the court explained the constitutional malice analysis as follows. "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 inference supports the existence of actual malice." In this case, the record contains both direct evidence of the Appellants' knowledge of the falsity of their statements and circumstantial evidence of their reckless disregard for the truth.

A. All Appellants Admitted That They Never Had Reason To Believe That The Challenged Statements Were True Of Any Appellee.

Direct evidence of constitutional malice is found in the authors' and publisher's admissions that they never had reason to believe that any of the charges in the Book was true as to any Appellee. (2nd Sup. II CR 160-161, 164-170, 193-199; 2nd Sup. VII CR 959-971.) The publisher's lack of information was even more abysmal that the authors: He admitted that he did not even know exactly who plaintiffs were or what they did when he sent the Book to press. (2nd Sup. II CR 213; see also 2nd Sup. VII CR 1031.)

Under Texas law, a publisher who publishes a work with absolutely no basis in fact to believe that its statements about the plaintiff are true has acted with constitutional malice. See Bentley, 94 S.W. 3d 561; see also Dickens v. Whole Foods Mkt. Group, Inc., No. Civ. A. 01-1054, 2003 U.S. Dist. LEXIS 11791, at *3 (D.C. Cir. Mar. 18, 2003); Glenn K. Jackson, Inc. v. Roe, 273 F.3d 1192,1202 (9th Cir. 2001).. Here, Appellants acted with constitutional malice when they published the Challenged Statements with no reason to believe them to be true of any Appellee.

Appellants' rejoinder is that the defamatory material was drafted before the decision was made to include The Local Churches in the Book. In essence, they contend that, if they did not have The Local Church in mind when they penned their calumnies, they could not

have possessed the requisite mental state *at the time of publication.* The argument makes no sense. The authors and the publisher do not deny that they knew, ***prior to publication,*** that the Local Church would occupy a chapter in the Book. Indeed, the evidence shows that the Local Church was on a list of "smaller cults" that Weldon prepared and the publisher debated over at length. (2nd Sup. VI CR 827.) They also knew that, by virtue of its inclusion in a reference book about "cults," that The Local Church would be understood by readers as a "cult."[27] From these facts flow the inference that Appellees not only knew but *intended that* at least some of the reprehensible conduct imputed to "cults" would be understood to apply to the Local Church. Since they had no reason to believe that the Local Church had engaged in any of this conduct, they published with constitutional malice.

B. Appellants Purposefully Avoided The Truth

The United States Supreme Court has made it clear that constitutional malice exists where defendants have purposefully avoided the truth. "Although failure to investigate will not alone support a finding of actual malice, purposeful avoidance of the truth is in a different category." Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 692 (1989); Bentley, 94 S.W.3d at 599. Purposeful avoidance of truth exists when a defendant decides not to investigate a certain issue for fear that investigation could lead to evidence that would conflict with the preconceived idea for, or theme of, the publication. In Harte-Hanks, for example, a newspaper rushed to publish a story about a judicial candidate's involvement in

[27] It should be remembered that Weldon testified that he wanted the Book to *"help " the members of the Local Church;* he wanted them to *"see that some of... those characteristics would apply to themselves. "* (2nd Sup. II CR 180.) This testimony clearly demonstrates that the authors intended the Book to be understood as applicable to The Local Church, and that intent - coupled with the admission that they have no reason to believe the statements to be

bribery. It did not contact obvious sources and went to press even though it knew that additional evidence might soon emerge. This conduct suggested to the court that defendants had made the decision to publish "regardless of how the evidence developed" and regardless of whether its single source was credible. Harte-Hanks, 491 U.S. at 684-685. Similarly, in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975 (1967),[28] purposeful avoidance of truth was found when a magazine published an article that accused a football coach of fixing a game. This article was based upon the statements of a single source, and was otherwise unsubstantiated. The evidence showed, moreover, that the publisher was predisposed to write a piece with a negative point of view and theme, and assigned an inexperienced reporter to cover the story. In its opinion, the court stated that this evidence supported a finding of constitutional malice, particularly given defendants' "highly unreasonable conduct," and "extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers." As shown below, the instant case is analogous to Harte-Hanks and Curtis in material respects.

1. Appellants Were Predisposed to Malign Organizations That They Viewed as Unorthodox.

As noted above, Appellants were all strongly predisposed to disparage any religious organization whose beliefs strayed even slightly from their narrow definition of "true Christianity." During their careers at Harvest House, the authors devoted themselves to writings intended to provoke intolerance, fear and hatred toward other faiths - including

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true of the Local Church - equals constitutional malice. [28] A case relied upon heavily be Appellants.

other Christian faiths. (2nd Sup. II CR 191.) The Book falls squarely into this category. Introductory subheadings like *"The Price of Tolerance "* and *"The Virtue of Intolerance "* bear this out.

Weldon's particular predisposition to malign The Local Church is evinced by his continuing involvement in anti-cult vigilante groups who refer to themselves a "apologetics ministries." Among these is the Spiritual Counterfeits Project, ("SCP") a group that has aggressively attacked the Local Church and its founder since the 1970s. (2nd Sup. I CR 50-53, 59,66-67, 69-95; 2nd Sup. IV CR 514-519.) Weldon conducted "research" for SCP from 1974-1984. (2nd Sup. IV CR 458.) He also edited materials that were used in SCP's "contemporary cults resource kits" - sets of anti-cult materials that were distributed by SCP during a "campus crusade" at colleges across the country. These "kits" vilified The Local Church. (2nd Sup. II CR 186-188; 2nd Sup. IV CR 514-519.) During this period, Weldon learned of a libel lawsuit that a Local Church filed against SCP and others in connection with a book entitled *"The God-Men."* Like the subject encyclopedia, *The God Men* characterized the Local Church as a cult and accused it of illegal and immoral conduct. The Local Church prevailed in that lawsuit. In a written opinion dated June 26, 1985, California Superior Court Judge Seyranian found that the Local Church and its founder (1) did not qualify as cult leader or cult; (2) did not engage in deceptive recruiting practices; (3) did not engage in "brainwashing"; (4) did not encourage members to engage in immoral behavior; (5) did not use fear tactics; (6) were not coercive and (7) were not guilty of any "financial mismanagement." (1st Sup. IX CR 1382-1413.) Weldon admitted that, prior to the

publication of the Book, he knew that the lawsuit had resulted in a victory for the Local Church. He also admitted that he had read commentary about the case - from both viewpoints. (2nd Sup. II CR 185.) Thus, long before the Book was published, Weldon knew that a court of law had expressly found the Local Churches innocent of some of the very acts and practices that he would impute to "cults" in the Book.[29]

Like Weldon, Harvest House was predisposed to publish a work that disparaged organizations whose beliefs did not comport with its own. It had already published a number of alarmist books on "cults" and the "occult," including *Cult Explosion* (Hunt) and *Cult Watch* (Weldon Ankerberg).[30] Its publications portray cults as dangerous, evil and anathema to "true Christianity." Hawkins strongly believes that it is his mission to help people decide whether a given belief is sound Christian doctrine. (2nd Sup. V CR 708.) He believes that certain people "need to be enlightened as to the truth," and that it is his job as a publisher to enlighten them. (2nd Sup. V CR 708.) He also believes that some organizations that purport to be Christian are actually "pseudo Christian," or "counterfeit Christian," and he would like to "inform" people about the "worldly" as well as spiritual "evils" practiced by those groups. (2nd Sup. V CR 708.)

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[29] Weldon was aligned with SCP and against the Local Church on *The God-Men* case, and before the case was decided, he shared his then-existing manuscript on the Local Church with the defendants therein. (2nd Sup. V CR 630-631.) It is no coincidence that, when he prepared the manuscript for the subject Book, he relied on an "extensive section by the Spiritual Counterfeits Project" that focused on the Local Church - even though he knew that SCP was hostile toward the Local Church and was obviously a biased source. Harvest House was aware of this bias and, at all relevant times, knew that Weldon was relying on SCP materials. (2nd Sup. VI CR 899-900.)

[30] At 2nd Sup. III CR 384 the Court will find a chart that lists Harvest House's anti-cult/occult publications by year, as shown, Weldon and Ankerberg are among the company's most prolific authors on these subjects.

From the foregoing, a reasonable inference can be drawn that Appellees never intended to publish a true "encyclopedia" that offered the reader objective information about selected religious organizations. Rather their predetermined objective was to publish a work that vilified, condemned and inspired antipathy toward the groups with whom they disagreed.

One additional piece of "predisposition" evidence must be mentioned. In 1981, Harvest House published a book entitled *Satan's Underground.* The book - a purportedly true, first person account of the ritual abuses suffered by a young female victim of a Satanic cult - sold well. Some time after publication, the book was revealed to be fraudulent. After the debunking, Harvest House issued a press release. Without admitting that the book was a hoax, Harvest House conceded there were "errors" in the text and that those errors were found when "further information ... which our initial research did bring to light" was uncovered. (2nd Sup. III CR 435.) In the press release, Harvest House expressed the view that *"it is the responsibility of the publisher to use reasonable efforts to substantiate the validity of unusual testimonies included within its publications. "* (2nd Sup. III CR 435.) Yet, when asked what the company had done to verify the story prior to publication, Hawkins stated that it merely "asked the author questions." No "research" - as that term is ordinarily understood - was conducted, and no independent attempt was made to verify the author's story.[31] (2nd Sup. II CR 241-242.) When asked why Harvest House risked the publication of *Satan's Underground* under such circumstances, Hawkins stated that he "thought it would help people." (2nd Sup. V CR 767.) In a comment to the press on this same question, a

Harvest House representative stated that the company believed "the risks in publishing a story like *Satan's Underground were* more than offset by the importance of the information." (2nd Sup. III CR 411.) What emerges is a picture of a publisher intent on crusading against cults, and determined to warn readers of their "dangers" - real or imagined. He is not only predisposed to malign such organizations but is willing to "risk" publishing a text that he has no reason to believe to be true.

2. Appellants Failed to Consult The Most Obvious Source - The Churches

As the Harte-Hanks court established, failure to consult an obvious source is powerful evidence of constitutional malice. It demonstrates that the author or publisher did not want to uncover information that might refute their preconceived concept for their publication. Here, neither the authors nor the publishers bothered to contact the Churches (or any of them) prior to publication to determine whether the Challenged Statements were true of them. Even after they received letters protesting the Churches' inclusion in the Book, they steadfastly refused to communicate with the Churches - must less investigate them. (2nd Sup. II CR 115-156; 2nd Sup. U.C.R. 643; 2nd Sup. CR 958.) This conduct demonstrates that Appellants were determined to publish a book that maligned the "cults" - whether or not its statements were true as to each of them. It is a classic example of turning a blind eye to the truth.

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[31] As will be shown, infra, Harvest House took an even more *laissez-faire* approach to the editorial process in connection with the subject encyclopedia. It simply accepted the authors' work as accurate.

C. Appellants Deviated From Their Own Professional Standards and From Industry Standards In the Course of the Editorial Process.

Evidence to the effect that an author or publisher failed to meet the standard of care commonly employed in the industry is highly relevant to the constitutional malice analysis - particularly when the deviations are as extreme as they are in this case.[32] This principal obtains even though evidence of negligence, *standing alone,* is insufficient to demonstrate constitutional malice. Here, evidence of negligence on the part of Harvest House is overwhelming, and presents a compelling case of constitutional malice when combined with other evidence on that issue. We begin with the fact that no one there — not even the publisher himself— ever read the Book. (2nd Sup. II CR 213, 234; 2nd Sup. III CR 301-302, 328; 2nd Sup. VI CR 879.)[33] Thus, no one bothered to read the Introduction and Appendix for content or meaning. (2nd Sup. VI CR 879.) Betty Fletcher, the Harvest House employee most involved in the editorial process, explained that she "...do[esn't] generally read appendices." (2nd Sup. III CR 307.) Fletcher's supervisor, Carolyn McCready, wasn't worried because "most people don't read appendices." (2nd Sup. VI CR 881.) Obviously,

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[32] See, e.g., Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189, 196 (1st Cir. 1982), aff'd 466 U.S. 485 (1984); Brown v.Petrolite, 965 F.2d 38, 47 (5th Cir. 1992); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 667 (1989); Bentley v. Bunton, 94 S.W.3d 561, 596 (Tex. 2002); New Times, Inc. v. Wamstad, 106 S.W.3d 916, 926 (Tex. App. -Dallas 2003, pet. denied).

[33] Fletcher did testify that she "skimmed" the Introduction. (2nd Sup. VI CR 822.) She confirmed that she was involved in determining which of the "small cults to include in the Book. As noted above, the Local Church was on Weldon's list of "smaller cults." Thus, at the time of publication, Harvest House was undoubtedly aware that the Introduction's statements could not read to apply to The Local Church.

since no member of Harvest House's editorial staff ever read the Book, no one bothered to verify its statements of fact.[34]

Harvest House assumed a cavalier stance when questioned about its duty to fact check a work that it has marketed as an "essential reference book" with "up-to-date-facts": In stark contrast to its public acknowledgement that it is the "publisher's responsibility" to take reasonable steps to ensure the accuracy of its publications, Harvest House simply averred that *"it is up to the author"* to check the accuracy of each of its statements of fact in his own text. (2nd Sup. II CR238; 2nd Sup. III CR303; 2nd Sup. VI CR877, 879.) When asked whether he thought the company had an independent responsibility to verify facts, the publisher testified that *"[i]fwe happen to see something* ... that we thought was wrong, it is our responsibility to notify the author and have them re-check ... ." (2nd Sup. II CR 240.) (Of course one cannot "happen to see" anything unless one reads the text.) Notably, the publisher characterized the charges against the Local Church as "outrageous" and "extreme," and acknowledged that the presence of "extreme charges" in a book weighs in favor of fact checking its contents prior to publication. (2nd Supp. II CR 223-228, 231-233; 2nd Sup. V CR 758-759.) Why no factchecking was undertaken in connection with the encyclopedia was never explained.

No one at Harvest House arranged for or engaged in a substantive edit of the Book. Instead, it hired independent contractor Charles Strohmer to "edit" the book. But, by Harvest

[34] Harvest House did not engage a single fact checker to review the Book's 700+ purportedly fact filled pages. (2nd Sup. III CR 303; 2nd Sup. VI CR 887.)

House's own admission, Strohmer's job was to "copy edit" the text - not to fact check or to parse the text for meaning.[35]

Although it consistently denied that it followed any standard editorial practices or policies, Harvest House did concede that it belongs to, and complies with the standards of the Evangelical Christian Publisher's Association ("ECPA"), an industry consortium. (2nd Sup. VI CR 899, 973.) Among those standards is the pledge to "...seek to document all sources and validate all research." (2nd Sup. III CR 356.) When asked what the company did to verify Weldon's research, Hawkins stated, in effect that Harvest House was discharged from that obligation by a boilerplate provision in Weldon's book contract in which the author represents that his work contains no libelous material. (2nd Sup. VI CR 797-798.) That same contract, however, specifies that it is the publisher who must determine whether any given manuscript is "satisfactory in content and form." (2nd Sup. III CR 396, 401.)

Notwithstanding Harvest House's self-serving assertions that it lacks editorial standards and practices, the fact remains that such standards exist in the publishing industry. In opposition to the underlying Summary Judgment motion, Appellees provided expert testimony to the effect that Harvest House's violations of those established standards were

[35] Harvest House confirms that Strohmer was hired to correct grammatical and spelling mistakes and minor errors in form and to make suggestions to the author and mark for style. (2nd Sup. III CR 306.) Strohmer's invoices confirm that he performed only these tasks, and Strohmer himself confirmed that he was not asked to, and did not, fact check Weldon's manuscript. (2nd Sup. III CR 379-382.)

myriad and egregious - particularly given that the book is held out to the public as a "reference" work.[36] (2nd Sup. I CR 14-19.)

The authors, on the other hand, *did* purport to follow at least one editorial standard: *They never write anything for publication that they do not believe to be true.* (2nd Sup. II CR 150, 192.) However, the evidence shows that *both of them authored writings intended for publication that utterly contradict the Book's statements about the Local Church.* In what was intended to be part of a new edition of the Book, Weldon wrote:

"The Local Church... is unique among the groups in this encyclopedia. It is not a cult nor do the characteristics of cults in the introduction generally apply to them. " (2nd Sup. IV CR539.)

Similarly, Ankerberg provided the following language to a colleague, stating "We are going to put this into our Encyclopedia of Cults and New Religions." (2nd Sup. III CR 360.)

"The Local Church, with about 2500? churches globally, is unique among the groups in this encyclopedia. It is not a cult in the negative sense of the term, nor do the characteristics of cults in the Introduction generally apply to them. " (2nd Sup. III CR 360-361.) These statements clearly demonstrate that the authors knew that the Challenged Statements are not true as to the Churches.

Other evidence that the authors deviated from publishing industry standards litters the record. For example, the authors did not base their statements on facts backed up by

[36] It is well settled that the court may receive expert testimony on the issue of whether a defendant adhered to the standards of his industry. Scripps v. Texas Newspapers, L.P. v. Belalcazar, 99 S.W.3d 829, 838 (Tex.App. - Corpus Christi 2003); Purcell Constr., Inc. v. Welch, 17 S.W.3d 398, 402 (Tex.App. - Houston [1st Dist.] 2000).

appropriate evidence, including primary sources. (2nd Sup. I CR 16.) Notably, Weldon stated publicly that one of the primary requisites for good research is "the use of primary sources." (2nd Sup. II CR 153-155.) They failed to maintain any semblance of the objectivity that is fundamental to the writing of a reference work. Instead, they advanced their own agenda of intolerance. (2nd Sup. I CR 16.) They also failed to include references, footnotes and other back-up information that would enable readers to verify their statements. (2nd Sup. I CR 17.) Perhaps most telling is the fact that the Book's chapter on the Local Church was written more than 25 years before the Book was published. Nothing was done to update or verify that information prior to the publication of the Book. Such conduct is a gross departure from standard editorial procedures. But it is probative in another way: it demonstrates that the authors had the Local Church in mind when they wrote the Book's Introduction and Appendix. The record contains other evidence to refute Appellants' notion that the chapter on the Local Church was added to the Book after the Challenged Statements were written. The implication here is that the chapter was simply tacked on wily nilly and without consideration for the resulting defamatory implications. The argument does not hold. First, and foremost, Weldon admitted that one of his revisions of the Book's Introduction was written with the Local Church in mind. (2nd Sup. V CR 652.) Second, Harvest House's Betty Fletcher testified that the chapter on the Local Church was added to the manuscript *at the same time* as the Introduction and Appendix. These were among the last editorial tasks performed on the Book. (2nd Sup. VI CR 847.) Thus the Appellants were

clearly aware that the statements in those sections would be read as applicable to the Churches. (2nd Sup. II CR 151.)

One final point should be made here: Appellants state that "author Ankerberg did not write any of the parts of the Encyclopedia that the Local Church... alleged to be defamatory." (AOB 46) Certainly, this is what Ankerberg stated during his deposition. However, it does not absolve him of liability. He is a named author of the book. (1st Sup. IV CR 469.) His academic credentials are touted on the books cover and in Harvest House's advertising. (1st Sup. IV CR 469.) He signed a book contract with Harvest House under which he was obliged to write the Book. (2nd Sup. III CR 401-406.) But most important, Ankerberg admits that he approved the Book and its contents prior to publication. (2nd Sup. II CR 202-203.) Thus, he knew what the Book said and permitted it to go out under his name. That he did not physically wield the pen is of no moment.

Taken together, this evidence (and the additional evidence of malice contained in the record) creates a triable issue of fact on the issue of constitutional malice. The trial judge declined to grant appellant's motion on that point for good reason and its decision should be affirmed.

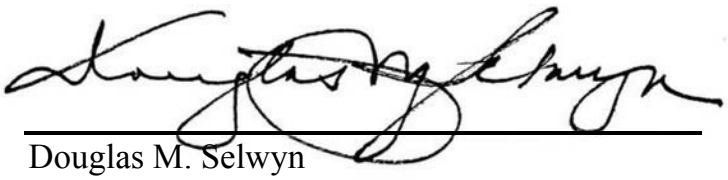
IX. CONCLUSION

For the foregoing reasons, Appellees The Local Church, Living Stream Ministry, et al. respectfully request that the Court sustain the March 9, 2004, Order of the Honorable Kent C. Sullivan denying Defendants' Second Motion For Summary Judgment.

Dated: September 14, 2004

Respectfully submitted,

DAVIS & SELWYN



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing "Brief of Appellees" was directed to Appellants Harvest House Publishers, Inc., John Weldon and John Ankerberg, by and through their attorneys, J. Shelby Sharpe, Esq., Sharpe & Tillman, 6100 Western Place, Suite 1000, Fort Worth, Texas 76107, via First Class U.S. Mail, and to Thomas J. Williams, Esq., Haynes and Boone, LLP, 201 Main Street, Suite 2200, Fort Worth, Texas 76102-3126, via First Class U.S. Mail, and to Donald Jackson, Esq., Haynes and Boone, LLP, One Houston Center, Suite 2100, Houston, Texas 77010-2007, via First Class U.S. Mail, on this 14th day of September, 2004.

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