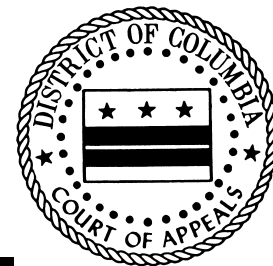


Nos. 14-cv-101 & 14-cv-126



Received 01/26/2017 05:45 PM
Clerk of the Court

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

COMPETTIVE ENTERPRISE INSTITUTE, *et al.*,

Defendants-Appellants,

v.

MICHAEL E. MANN,

Plaintiff-Appellee.

On Appeal from the Superior Court for the District of Columbia

No. 2012 CA 008263 B

Natalia M. Combs Greene, *Trial Judge*

Frederick H. Weisberg, *Trial Judge*

**BRIEF OF STEPHEN MCINTYRE AS *AMICUS CURIAE*
IN SUPPORT OF THE APPELLANTS' PETITION
FOR REHEARING OR REHEARING EN BANC**

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January 26, 2017

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INTEREST OF AMICUS CURIAE

Amicus Curiae Stephen McIntyre is the founder and editor of Climate Audit, a website devoted to the analysis and discussion of climate data. Climate Audit seeks to analyze data and methods used in climate science. Through Climate Audit and other academic writings, Mr. McIntyre has become a prominent commentator on the reliability of climate research in the United States, Canada, and the United Kingdom.

Mr. McIntyre has long followed Michael Mann’s work, including the “hockey-stick” representations. Through a series of publications, Mr. McIntyre has identified significant oversights and errors with Mr. Mann’s findings.¹ Mr. McIntyre also has published statistical criticism of paleoclimate techniques in academic journals. He has made invited presentations to a National Academy of Sciences panel, a subcommittee of the House Energy and Commerce Committee, and to a Union session of the American Geophysical Union. He met with the National Science Foundation Inspector General’s office, and submitted comments to the Muir Russell and Parliamentary Committees.

Mr. McIntyre strives to bring transparency to climate science. Such openness ensures that scientific conclusions can be reviewed, critiqued, and improved. Mr. McIntyre submits this *amicus* brief because he fears that the division’s erroneous decision will stifle open inquiry into the scientific process and chill speech on these important issues.

¹ See A. Regalado, “In Climate Debate, The ‘Hockey Stick’ Leads to a Face-Off,” Wall Street Journal (Feb. 14, 2005), archive.is/yIfxq.

SUMMARY OF ARGUMENT

The division incorrectly described the scope and findings of the government inquiries into Mr. Mann’s conduct. Because these inquiries excluded or ignored many troubling allegations about Mann’s work, their conclusions are open to considerable doubt. They thus cannot support a finding that the Appellants had a “high degree of awareness of probable falsity” of their challenged statements. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). This Court should grant rehearing to correct that error.

ARGUMENT

I. The Division’s Decision Depends On Its Incorrect Characterization Of The Governmental Reports Purporting To Exonerate Mann.

In holding that the Defendants had “obvious reasons to doubt the veracity” of their statements, Slip Op. at 84, the division expressly relied on four government reports that, in its view, “unanimously concluded that there was no misconduct” after “thorough[] investigations.” *Id.* at 86, 96. The division was mistaken. The reports were sloppy, not thorough; some of them contradicted others; one was not unanimous; and all were severely criticized, even by several climate-change advocates. In sum, the reports provide no basis for a finding of actual malice.

A. Mann’s Conduct Is The Subject Of Numerous Controversies.

Even before the release of the Climategate emails, numerous public concerns were raised about Mann’s conduct. *First*, there were issues of *falsification*. Academic codes of conduct define falsification to include “*manipulating* research materials, equipment, or processes, or changing or *omitting* data or results such that the research

is not accurately represented in the research record.”² This is distinct from *fabrication*, which is “making up data or results and recording or reporting them.”³ Falsification concerns about Mann’s research included:

- Mann’s undisclosed use in a 1998 paper (“MBH98”)⁴ of an algorithm which mined data for hockey-stick shaped series. The algorithm was so powerful that it could produce hockey-stick shaped “reconstructions” from auto-correlated red noise. Mann’s failure to disclose the algorithm continued even in a 2004 corrigendum.⁵
- Mann’s failure to disclose adverse verification statistics in MBH98. When the omission became known,⁶ it prompted questions from the U.S House Energy and Commerce Committee and widespread publicity.⁷ Mann also did not archive results that would permit calculation of the adverse statistics. Climategate emails later revealed that Mann regarded this information as his “dirty laundry” and required an associate at the Climatic Research Unit (“CRU”) to withhold the information from potential critics.⁸
- Mann’s misleading claims about the “robustness” of his reconstruction to the presence/absence of tree ring chronologies, including failing to fully disclose calculations excluding questionable data from strip bark bristlecone pine trees.⁹
- Mann’s deletion of the late 20th century portion of the Briffa temperature reconstruction in Figure 2.21 in the IPCC Third Assessment Report (2001) to

² Pennsylvania State University Policy RA-10, Addressing Allegations of Research Misconduct, archive.is/nHWKS.

³ *Id.*

⁴ Mann, M.E. et al., “Global-Scale Temperature Patterns and Climate Forcing over the Past Six Centuries,” 392 *Nature* 6678, 779-87. (1998).

⁵ Mann, M.E. et al., “Corrigendum: Global-Scale Temperature Patterns and Climate Forcing over the Past Six Centuries,” 430 *Nature* 105 (2004).

⁶ McIntyre, S. and R. McKittrick, et al., “The M&M Critique of the MBH98 Northern Hemisphere Climate Index: Update and Implications,” 16 *Energy & Environ.* 1, 69-100 (2005).

⁷ House Energy & Commerce Comm. (June 23, 2005), tinyurl.com/h98q6d8.

⁸ Climategate Email (July 31, 2003), archive.is/qrH8y.

⁹ See S. McIntyre, *Climate Audit* (Nov. 28, 2011), archive.is/XFSIk.

conceal its sharp decline, in apparent response to concerns that showing the data would “dilute the message” and give “fodder to the skeptics.”¹⁰

- Mann’s insistence in 2004 that “no researchers in this field have ever, to our knowledge, ‘grafted the thermometer record onto’” any reconstruction. But it was later revealed that in one figure for the cover of the 1999 World Meteorological Organization (WMO) annual report, the temperature record had not only been grafted onto the various reconstructions—and in the case of the Briffa reconstruction, had been substituted for the actual proxy data.¹¹
- Mann’s undisclosed grafting of temperature data for “Mike’s Nature trick,” a manipulation of data which involved: (1) grafting the temperature record after 1980 onto the proxy reconstruction up to 1980; (2) “smoothing” the data; and (3) truncating the smooth back to 1980.¹²

Second, there are numerous other instances of alleged unprofessional conduct by Mann.¹³ For example, Mann claimed that skeptics (including Mr. McIntyre) were “plainly dishonest” and falsely suggested that Mr. McIntyre was financed by ExxonMobil.¹⁴ Mann even labeled criticisms of his hockey-stick graph as “fraud,” “pure scientific fraud,” and “fraudulent.”¹⁵ And he went to considerable length to block publication of critics in journals and to organize opposition to those published criticisms.¹⁶ Mann also encouraged others to withhold data used in his work.¹⁷

¹⁰ See Climate Audit (Dec. 10, 2009), archive.is/TkfA; see also S. McIntyre, “Climategate: A Battlefield Perspective” (May 16, 2010), tinyurl.com/237sbba.

¹¹ See M. Mann, RealClimate (Dec. 4, 2004), archive.is/2aDc; Climate Audit (Nov. 20, 2009), archive.is/mQeMB.

¹² See S. McIntyre, Climate Audit (Mar. 29, 2011), archive.is/TuQZU.

¹³ See Pennsylvania State University Policy RP02, *supra*, n.2.

¹⁴ See M. Crok, N&T (Feb. 16, 2005), archive.is/XD7fe.

¹⁵ See S. McIntyre, Climate Audit (May 3, 2010), archive.is/4WKj5; Climategate Email (Jan. 4, 2005), archive.is/9v02L; E. Kancler, Mother Jones (Apr. 18, 2005), archive.is/zw6j2.

¹⁶ See F. Pierce, “Climate Change Emails Between Scientists Reveal Flaws in Peer Review,” The Guardian (Feb. 2, 2010), <http://archive.is/5YbC1>; S. McIntyre, Climate Audit (Nov. 28, 2011), archive.is/jx0tN; Climategate Email (Nov. 15, 2005), archive.is/6Bnsh; S. McIntyre, Climate Audit (Feb. 18, 2011), archive.is/w6BCO.

Third, the Climategate emails revealed Mann’s participation in an effort to delete emails requested under the U.K.’s Freedom of Information Act—a criminal offense. The UK Information Commissioners’ Office stated that “it [was] hard to imagine more cogent prima facie evidence” of the offense.¹⁸ The efforts involved the destruction of emails regarding procedurally questionable revisions to the IPCC’s Fourth Annual Assessment Report. As part of that effort, CRU scientist Phil Jones asked Mann to delete his emails and to forward the request to Eugene Wahl, the scientist involved in the most sensitive correspondence. Mann forwarded the request, and Wahl deleted the email—including attachments that have never been produced.¹⁹

B. The Division Overstated The Reports’ Scope And Reliability.

Each of the reports cited by the division either omitted, or gave scant or inaccurate treatment to, these long-standing controversies. They were in no sense “thorough,” as the division claimed, and certainly would not permit a finding of actual malice, given their failure to address much of the alleged misconduct described above.

1. *The Penn State Reports*

There were two stages to the Penn State investigations: The Inquiry Committee and the Investigation Committee. Both suffered from substantial flaws.

The Inquiry Committee declined to interview Mann’s critics (including Mr. McIntyre or Dr. McKittrick) about any of the allegations. Nor did it consider or

¹⁷ See Climategate Email (Feb 9, 2004), archive.is/NwKbr.

¹⁸ See G. Smith, (Jan. 29, 2010), archive.is/yXNdr; B. Webster, “Scientists in Stolen Email Scandal Hid Climate Data,” Times Online (Jan. 28, 2010), archive.is/8dc9N.

¹⁹ See S. McIntyre, Climate Audit (Mar. 8, 2011), archive.is/C3QCC.

address any of the published criticism (on Climate Audit and elsewhere) raising concerns about Mann’s use of data. As a result, the Inquiry Commission ignored most of the falsification issues outlined above. The Inquiry Committee purported to consider “Mike’s Nature trick,” but failed to examine what was done in the actual figures. The Committee stated that the term “trick” meant a clever technique for combining data sets that “has been reviewed by a broad array of peers in the field.”²⁰ This is untrue; the splicing had not been “reviewed by a broad array of peers in the field”—it was unknown before Climategate. Indeed, Mann himself had vehemently denied any such splicing. *See supra* at 4. The Muir Russell panel later reached an opposite conclusion: it found that the splicing showed an “intent to paint a misleading picture.”²¹ With respect to the deletion of emails, the Inquiry Committee was satisfied by Mann’s production of a zip-file of emails.²² But it failed to address Mann’s participation in Wahl’s deletion of the most sensitive emails or to report on whether Mann had removed the emails to an external drive with an intent to conceal.

The Inquiry Committee report was extensively criticized in the press and online.²³ And the NSF Inspector General later concluded that the Inquiry Committee had not “adequately review[ed]” falsification allegations and failed to “interview any

²⁰ Report of the Penn State Inquiry Committee, at 5, tinyurl.com/jzj9dct.

²¹ Muir Russell Report, at 13 ¶ 23, archive.is/ivRrT.

²² Report of the Penn State Inquiry Committee, at 4, tinyurl.com/jzj9dct.

²³ *See, e.g.*, E. Barnes, “Penn State Probe into Mann’s Wrongdoing a ‘Total Whitewash,’” Fox News (Feb. 5, 2010), archive.is/bMo3R; S. McIntyre, Climate Audit (Feb. 10, 2010), archive.is/EYVnh; R. McKittrick, “Understanding the Climategate Inquiries” (Sept. 2010), tinyurl.com/hrdr6bz.

of the experts critical of [Mann’s] research,”²⁴ even though NSF had instructed the Committee in writing to “review sufficient relevant documents and interview a sufficient number of knowledgeable individuals who may provide credible information about the allegations.”²⁵

The Inquiry Committee recommended that a committee be formed to investigate potential violations of Policy AD47 on professional conduct. The falsification claims were excluded from its stated task. It made no mention of Policy AD47 and looked only at whether Mann’s conduct “seriously deviated from accepted practices.” Like the Inquiry Committee, the Investigation Committee did not interview Mr. McIntyre or Dr. McKitrick. The Investigation Committee’s report likewise received heavy criticism.²⁶ One journalist—who supports government action on climate change—described it as “difficult to parody,” noting that “Mann is asked if the allegations (well, one of them) are true, and says no. His record is swooned over. Verdict: case dismissed, with apologies that Mann has been put to such trouble.”²⁷

2. *The Parliamentary Report*

Contrary to the division’s assertions, *see* Slip Op. at 86, 96, the Parliamentary Committee never investigated Mann’s conduct. Nor were its findings “unanimous” or “unequivocal.” The Parliamentary Committee did not consider most of the

²⁴ NSF OIG, “Closeout Memorandum for Case Number A09120086,” at 2 (Aug. 16, 2011), tinyurl.com/j88aztr.

²⁵ Kroll, Letter of January 22, 2010, tinyurl.com/hsnnbxh.

²⁶ *See* M. Morano, Climate Depot (July 2, 2010), archive.is/4r0vU; S. Milloy, “Penn State’s Integrity Crisis,” Junk Science (July 14, 2010), archive.is/RkCeS.

²⁷ *See* C. Crook, “Climategate and the Big Green Lie,” The Atlantic (July 14, 2010), archive.is/ym3WZ.

falsification or unprofessional conduct issues described above. The only falsification issue they considered was the “trick” email, on which the committee split 3-1.²⁸ Even on this point, the report was not “unequivocal” (as the division asserts); the Committee stated its expectation that the Science Panel would “address” the matter.²⁹ And the Parliamentary Committee did not clear the CRU scientists (let alone Mann) of the email-deletion charges. To the contrary, the Committee noted that “much of the reputation of CRU hangs on the issue,” and directed Muir Russell and the Information Commissioners’ Office to ensure that the matter was “resolved conclusively.”³⁰ The Committee’s inquiry was severely criticized. *The Guardian* stated that the “climate inquiry ha[d] dodged key questions,” while another observer found that “[t]he aim of the MPs’ investigation was not to uncover the truth, but to defend the moral authority of climate-change alarmism.”³¹

3. *The Muir Russell Report*

The Muir Russell inquiry likewise did not address any of the MBH98 falsification issues. With respect to IPCC Figure 2.21 and the “trick” email, its findings *contradicted* the Penn State and Parliamentary Committee reports. It found that the figures were “misleading” and that there was “evidence of intent to paint a misleading picture.”³² The division acknowledged this statement, but claimed that the

²⁸ H. of C. Sci. & Tech. Comm., “The Disclosure of Climate Data from the Climatic Research Unit at the University of East Anglia,” at 52-54 (Mar. 24, 2010).

²⁹ *Id.* at 21.

³⁰ *Id.* at 2, 32.

³¹ F. Pearce, “Hacked Climate Inquiry Cleared Jones But Serious Questions Remain,” *The Guardian* (Mar. 31, 2010), archive.is/4cKgQ; F. Furedi, “Climategate?: What a Pointless Investigation,” *Spiked* (Mar. 31, 2010), archive.is/QyUPr.

³² Muir Russell Report, at 13 ¶ 23, archive.is/ivRrT.

finding did not relate to the “statistical procedures.” Slip Op. at 91. This is wrong. As Dr. McKittrick has noted, the Muir Russell inquiry “found Jones guilty as charged.”³³

The Muir Russell investigation into the deletion of emails was comically inept: it made a plainly untrue finding that there had been no deletion of emails requested under FOI and later conceded that it never even asked the scientists about the deletion of emails. As *The Guardian* recognized, “[t]his is all, we may hope, cock-up rather than conspiracy. . . . None of the inquiries have cleared the air.”³⁴ When the Parliamentary Committee recalled Muir Russell to explain his failure to question Jones about deleting emails, he said he was unprepared to ask Jones whether he had committed a crime. The Committee issued a second report faulting Muir Russell for “not fully investigat[ing] the serious allegation relating to the deletion of emails.”³⁵

4. *The National Science Foundation Inspector General Report*

The division relied heavily on the National Science Foundation Inspector General Report (“NSF report”), which it said cleared Mann of all “other types of research misconduct.” Slip Op. at 90 n.57. This reliance was misplaced.

- The report is an unsigned, five-page “closeout memorandum”³⁶—hardly a “thorough,” “broad[],” “de novo” investigation. Slip Op. at 85, 90 n.57.
- Notwithstanding its brevity, the report still concluded that the Penn State investigation failed to interview experts critical of Dr. Mann’s research.³⁷

³³ See R. McKittrick, *supra*, n.23.

³⁴ See F. Pearce, “Moutford Lands Some Solid Blows in Review of ‘Climategate’ Inquires,” *The Guardian* (Sept. 14, 2010), archive.is/4BBHM; F. Pearce, “Climategate: No Whitewash, but CRU Scientists Are Far from Squeaky Clean,” *The Guardian* (July 7, 2010), archive.is/KzUmx.

³⁵ UK H. of Comm. Sci. & Tech. Comm., “Reviews into University of East Anglia’s Climatic Research Unit’s E-Mails,” at 3 (Jan. 17, 2011), tinyurl.com/z6wsk3c.

³⁶ See Closeout Memorandum, *supra*, n.24.

- The National Science Foundation (“NSF”) spoke to some of Mann’s critics (including Mr. McIntyre), but the report did not name them or discuss any of the falsification concerns.
- Nor was the NSF investigation “broadened” to the extent portrayed by the division. Its investigation was limited to misconduct as defined in the NSF Research Misconduct Policy, which concerns only “fabrication, falsification, and plagiarism . . . in research *funded by NSF*.”³⁸ It stated that Mann “did not directly receive NSF research funding as a Principal Investigator until late 2001 or 2002.”³⁹ Because the MBH98 and Figure 2.21 falsification allegations pre-dated 2001, the NSF had no jurisdiction over these allegations.
- There is no evidence that the NSF “broadened” its investigation to consider claims regarding Mann’s unprofessional conduct under Policy AD47 (over which it had no jurisdiction).
- Finally, the NSF (like Penn State) never investigated Mann’s role in getting Wahl to delete the most sensitive email correspondence.

In the end, an objective review of these reports quickly reveals their flaws and omissions. As *The Atlantic* has noted, competent investigations into these issues could “have been a first step towards restoring confidence in the scientific consensus. But no, the reports make things worse. At best they are mealy-mouthed apologies; at worst they are patently incompetent and even wilfully wrong.”⁴⁰ Given this accurate assessment, the reports cannot serve as the basis for a “clear and convincing” finding that the Appellants had serious doubts about the alleged falsity of their statements.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for rehearing or rehearing en banc.

³⁷ *Id.* at 2.

³⁸ *See* 45 C.F.R. 689.1(a) (emphasis added).

³⁹ *Id.* at 3.

⁴⁰ *See* Crook, *supra*, n.27.

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January 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2017, I caused a copy of the foregoing to be served by first-class mail, postage prepaid, upon:

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