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COURT OF APPEALS

STATE OF NEW YORK

THREE AMIGOS SJL REST., INC.,

Appellant,

-against-

No. 131

CBS NEWS INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
September 06, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 JUDGE PIGOTT: Three Amigos SJR Restaurant
2 Inc. v. - - - d/b/a The Cheetah Club v. CBS News.

3 The Chief Judge is recused from this case.

4 Mr. Whitehorn, welcome.

5 MR. WHITEHORN: May I have a brief rebuttal
6 of three minutes (indiscernible)?

7 JUDGE PIGOTT: Three?

8 MR. WHITEHORN: May it please this
9 honorable court and Your Honorable Judges.

10 I appear here today on behalf of the
11 plaintiffs-appellants, Three Amigos. I believe the
12 application is as simplistic as it could be, and the
13 solution is as equally simplistic.

14 We have a complaint that alleges certain factual
15 components of a cause of action sounding in defamation.

16 JUDGE PIGOTT: Before you get started with
17 that, what I noticed in the complaint was each one of
18 the individuals, O'Neill, Callahan, and Stein, are
19 recognized in the complaint as employees of someone
20 else. They're not suing in their individual
21 capacity; is that true?

22 MR. WHITEHORN: I don't - - - I didn't read
23 it implying the same thing; I thought it was clear,
24 both in the opposition during the motion practice - -

25 -

1 JUDGE PIGOTT: "O'Neill was at all times
2 relevant to this action, president of Times Square,
3 and involved in daily operations. Callahan at all
4 times employed by Times Square. Stein, manager and
5 consultant."

6 MR. WHITEHORN: Correct. It does - - -

7 JUDGE PIGOTT: They're all suing as - - -
8 as employees and/or managers of the place.

9 MR. WHITEHORN: And in addition, the
10 entities appearing the Times Square 1 - - -

11 JUDGE PIGOTT: Right. But they don't - - -
12 they don't sue individually in their own names,
13 right?

14 MR. WHITEHORN: I - - - I believe they did,
15 Your Honors.

16 JUDGE PIGOTT: Okay. Well, that's just
17 something I noticed. I - - -

18 MR. WHITEHORN: Okay. I appreciate that.

19 What - - - what appears, again, what - - -
20 when I was getting into the simplicity of it is that
21 we have a - - - an arguably sufficiently pled cause
22 of action for defamation, then we have a pre-answer
23 motion to dismiss that seeks to attack that
24 presumption that we have to rely on, that the
25 allegations of the plaintiff are considered to be

1 true for purposes of determining the motion.

2 And then we have the assistance of 30 - - -
3 of CPLR 3016(a), which further identifies what
4 sufficiently pleads a cause of action for libel, and
5 applying that, we're supposed to look to - - - we, as
6 a court and as a state, are supposed to look to the
7 elements of that cause of action, see if factually
8 there is reference to this component of libel and
9 defamation/slander, for being of and concerning. So
10 did the complaint, in fact, allege of and concerning?

11 Now, I think, as the most simplistic
12 perspective, if we have the Appellate Division hearing and
13 ruling three majority and two dissenting, clearly could
14 argue just in and of itself there is an ambiguity. I have
15 some learned judges in New York that - - -

16 JUDGE STEIN: So what - - - what's the
17 standard? Is it whether a - - - whether a reason of
18 - - - a person could reasonably understand - - -

19 MR. WHITEHORN: Yes.

20 JUDGE STEIN: - - - the allegations to be -
21 - -

22 MR. WHITEHORN: It's critical - - -

23 JUDGE STEIN: - - - about the plaintiffs.
24 Is that the standard?

25 MR. WHITEHORN: Critical to the analysis,

1 it is. It's not a judge could reasonably interpret,
2 not - - - not a - - - a law-based fact finder that
3 has access to hyper-technical analysis of what is or
4 isn't "run by".

5 So we have the majority ruling what is the
6 definition of "run by", when the standard Your Honor
7 just referred to, which appears regularly in the case
8 that was cited on, the Appellate Division of our - -
9 - of our district, and of course we referred to
10 federal as well, that states clearly and
11 unequivocally, it's - - - it can be interpreted
12 through intrinsic evidence. It can be interpreted
13 through the perspective of the reader.

14 Now - - -

15 JUDGE PIGOTT: Well, what - - - let me ask
16 you about that. Let's assume for a minute that the
17 owner or the operator of Cheetahs is a guy by the
18 name of Sam Zurka, and that he's in jail for a whole
19 bunch of things.

20 MR. WHITEHORN: Right.

21 JUDGE PIGOTT: Now, if he's running it,
22 isn't that a - - - why isn't that a matter of law? I
23 mean, it's - - - to say that these people who work
24 for other corporations that work for Cheetah, are
25 somehow running it, I can see where a jury could say,

1 well, you know, they're serving drinks so they're
2 running it. Well, that's not true.

3 MR. WHITEHORN: Well - - -

4 JUDGE PIGOTT: Or somebody can say, you
5 know, they're hooking up the dancer with a private
6 room, therefore they're running it; that's not true.

7 MR. WHITEHORN: Look at - - - apply what
8 you just suggested to the actual - - - the limited
9 scope of factual information that we're dealing with.
10 We have a statement made on live broadcast on video
11 by two people of the Defendant. One says that it
12 involves the - - - the - - - "Mary Calvi states
13 developing story", blah blah blah, "that the club
14 behind me is at the center of a global scheme to
15 bring women into the United States."

16 JUDGE PIGOTT: Right. And the - - - and I
17 think it was the Appellate Division, it might have
18 been the lower court, he said that the only picture
19 there was Cheetahs.

20 MR. WHITEHORN: Right.

21 JUDGE PIGOTT: None of - - - none of your
22 clients.

23 MR. WHITEHORN: My reference to the, bring
24 women into the United States, the next article - - -
25 the next statement made by Ms. Brown, again, refers

1 to the women. When you look at the statements of
2 facts submitted by the plaintiffs in the case, who
3 controls the women? They run - - -

4 JUDGE PIGOTT: Cheetahs.

5 MR. WHITEHORN: No. The individuals that
6 are - - -

7 JUDGE PIGOTT: No.

8 MR. WHITEHORN: The plaintiffs in the case
9 - - -

10 JUDGE PIGOTT: It's nowhere - - - it's
11 nowhere in the report. No one knows who your clients
12 are until you sue.

13 JUDGE FAHEY: That's a - - - I want to
14 follow up on that point because it seems to me that
15 Judge Pigott's hit on - - - one of the difficulties I
16 see in your argument is, is that the plaintiffs are
17 not identifiable in a statement.

18 So the only way that they can become
19 identifiable is under the theory that was set out on
20 the defent - - - in the dissent, I think Judge
21 Kapnick talked about small group defamation. I'm
22 assuming that's the essence of what you're arguing
23 here; that this group is so small, but federal
24 authorities say this club is run by the mafia, does
25 not identify them in any fashion, except for by the

1 size of the group it's involved. But you are a self-
2 selected group since you brought the defamation
3 action.

4 MR. WHITEHORN: Again, your reference to
5 self-selected group, your reference to this scope of
6 facts is this is a pre-answer motion to dismiss.

7 JUDGE FAHEY: Well - - -

8 MR. WHITEHORN: There hasn't been a
9 discovery.

10 JUDGE FAHEY: No. Yeah, that's true.

11 MR. WHITEHORN: In all the other cases - -
12 -

13 JUDGE FAHEY: That - - - that's true, but
14 that still doesn't get you over the hurdle. You
15 still have to be able to say that you - - - that
16 you've alleged a defamation here, and in the
17 statement, and that's what I'm asking you about. Are
18 they identified? If so, how?

19 MR. WHITEHORN: We referred to the
20 complaint, and then the court as well during the
21 trial, during the trial judge's determination of the
22 motion, they can look to affidavits, you see the
23 affidavit of Mr. Stein referring to factual control
24 made by him throughout the entire time that he's been
25 there, where he controls the booking of the girls, he

1 controls the calendaring.

2 JUDGE STEIN: But - - - but is your
3 argument about who controls, or is your argument
4 about what the people who go to that club, and know
5 them, and see them, reasonably would believe when
6 they heard that statement on the TV?

7 MR. WHITEHORN: We are saying it's both.
8 We're saying that the impact - - - so this analysis
9 of of and concerning, it's just one component of this
10 libel.

11 Our greater argument and then our specific
12 argument, they both touch on the same thing, which
13 covers both of what you just asked. So of the
14 elemental requirement, we say that the sworn
15 affidavits presented to the court during trial court
16 indicate unrefuted, they can't even be refuted; it
17 has to be presumed as if it's a fact. They state
18 factually, we are the people that are in control and
19 are being affected by this. The analysis - - -

20 JUDGE RIVERA: So your argument is the
21 patrons would understand that - - -

22 MR. WHITEHORN: From that perspective, yes.

23 JUDGE RIVERA: - - - "runs" Cheetah, that
24 colloquialism "runs" Cheetah - - -

25 MR. WHITEHORN: Correct.

1 JUDGE RIVERA: - - - means what these
2 people do.

3 MR. WHITEHORN: Correct.

4 JUDGE RIVERA: What your clients do.

5 MR. WHITEHORN: And the colloquialism of
6 the term - - - the use of the term "mafia", mafia has
7 been known throughout the past forty yea - - - fifty
8 years of our history as a wheel. And the spoke of
9 every portion of that wheel is a component of that
10 organized crime, that syndicate of crime.

11 So where is it? Where is it? With an
12 article that's not just printed, you have a live
13 video. It's not taken in all the other clubs. It's
14 not taken on some anonymous street corner; it's taken
15 in front of this club.

16 The patrons of that club can see and
17 perceive it as one thing. The court ignored it. The
18 trial court and then, no disrespect to the majority,
19 they did as well. They backed into this analysis of
20 owned and controlled by through their own self-
21 contained definition of the word run.

22 They said, we never saw a reference to the
23 ownership of the club and the factor allegations,
24 therefore they couldn't have run it, and then they
25 referred to - - -

1 JUDGE ABDUS-SALAAM: Was there - - - has
2 there ever been a case that you can point to where
3 employees of entities not of the club, not of the
4 entity itself - - -

5 MR. WHITEHORN: There is the Baker case
6 that we referred to where the police department
7 officers fall under that same reference that the
8 dissent made reference to.

9 It's worthy enough of a strong case to
10 support - - - again, if it was in any other criteria
11 that we're applying this case, if it was one that the
12 light most favorable to the non-mover, if it was any
13 other scenario, then I would agree, then this case is
14 not that strong. But because we never made it past
15 go, all we have to do is presume the facts stated in
16 either the complaint or in a supplemental affidavit,
17 can support that an allegation sufficient to satisfy
18 the element for a cause of action for defamation
19 exists, analysis over. The majority of - - -

20 JUDGE PIGOTT: Thank you, Mr. Whitehorn.
21 You have your three minutes. Let's - - - let's hear
22 what Mr. Brown has to say. (Indiscernible).

23 MR. BROWN: Thank you, Your Honor.

24 May it please the court.

25 The fundamental problem with the plaintiff's

1 argument and with the dissent's position in the Appellate
2 Division is that it confuses pleading a fact with pleading
3 a question of law.

4 And the question whether a particular challenged
5 statement like the statement federal authorities say, this
6 club is run by the mafia, in the context of the noon
7 report here, the question what that statement is
8 reasonably capable of meaning is quintessentially a
9 question of law, and although the plaintiff is entitled to
10 plead what they or it believes is the correct conclusion,
11 that's not a fact to be plead which this court or any
12 judge is required to credit when - - -

13 JUDGE PIGOTT: You're saying of and
14 concerning is a matter of law?

15 MR. BROWN: The reasonable meaning of the
16 statement in evaluating this motion, which raised the
17 point that this statement is not reasonably
18 understood in the first instance as of and concerning
19 these plaintiffs, that presents a question of law for
20 the court. The cases are clear on that. We look - -
21 - the court then looks to the statement - - -

22 JUDGE RIVERA: Why - - - why isn't it a
23 reasonable meaning? I mean, "run by the mafia".
24 That "run", isn't that a colloquialism as opposed to,
25 owned, controlled, or some other - - - managed,

1 something that's more specific. But run, doesn't
2 that include potentially these plaintiffs?

3 MR. BROWN: Well - - -

4 JUDGE RIVERA: And couldn't patrons view
5 this to refer to them?

6 MR. BROWN: No, Your Honor, for two
7 reasons. And they are the reasons laid out quite
8 clearly by Justice Coin in the IAS Part, and then
9 also by the majority in the Appellate Division.

10 The court is - - - the cases from this court are
11 clear that the court is required to consider the words
12 actually used in the context in which they were peered,
13 which is a noon report focusing - - - it's a brief report
14 focusing on an ongoing government bust of an organized
15 crime ring; were told that organized crime figures were
16 bringing women illegally into United States and forcing
17 them onto clubs as dancers - - -

18 JUDGE PIGOTT: Suppose - - - suppose
19 instead of saying "run by" it says, the club not only
20 is run by, but is permeated with mafia figures in its
21 employment.

22 MR. BROWN: It - - - that would be a very
23 different situation, Your Honor. You'd then turn to
24 whether these plaintiffs can satisfy the small group
25 libel hurdle, and I'll turn to that in a moment.

1 JUDGE STEIN: But well, before you do, and
2 I'd like to - - - but when I heard the statement - -
3 -

4 MR. BROWN: Um-hum.

5 JUDGE STEIN: - - - I thought, oh, that
6 means that the mafia is in there running this club.

7 MR. BROWN: Um-hum.

8 JUDGE STEIN: That's what I - - - that's
9 how I interpreted it. So I - - - this is - - - this
10 is maybe an unfair question, but is that
11 unreasonable?

12 MR. BROWN: With all respect, Your Honor,
13 yes. Because you have to look at the common meaning
14 of the phrase.

15 JUDGE STEIN: What - - - what - - - what if
16 four of us on this court think it's reasonable?

17 MR. BROWN: If four of you on the court
18 think that's reasonable, then I go to my fallback
19 argument, Your Honor, which is the small group libel
20 part.

21 But let me just spend one moment on why
22 that wouldn't be reasonable. And it's one of the
23 reasons we cite to the court, the criminal cases in
24 which judges have used the phrase controlled by or
25 run by the mob in - - -

1 JUDGE STEIN: Well, controlled by, run by
2 might be two different things.

3 MR. BROWN: The point being, Your Honor,
4 that there is a common understanding, perhaps not
5 universal, but that's not the question. There is a
6 common understanding what the phrase, "run by the
7 mafia", means particular - - -

8 JUDGE STEIN: And how do we know - - - how
9 do we know about that common understanding? How do
10 we know that the court is - - - the Appellate
11 Division is right as a matter of law? Especially
12 when they are three - - - they split three, two.

13 MR. BROWN: Your Honor, you look at the
14 context of the report and evaluate it in that
15 context. And I may not be able to persuade you that
16 that is the reasonable reading of that.

17 JUDGE RIVERA: You're saying the context is
18 that the people involved are external to the club,
19 and that's why you can't read "run by the mafia" as
20 including people who are somehow employed in a
21 particular way already in the club.

22 MR. BROWN: Exactly, Your Honor. The whole
23 context of the noon report is about outside extortion
24 and forcing of conduct on clubs. The - - - it is not
25 reasonably understood as referring to the staff. We

1 have here the hostess, who apparently seats people -
2 - - according to the affidavit, seats people, makes
3 sure they're comfortable, the fellow responsible for
4 making sure the liquor supplies get in, and the
5 fellow responsible for identifying and scheduling the
6 dancers. It's the staff who do day-to-day
7 operations.

8 JUDGE RIVERA: So is that external group a
9 group of Russians? Is that what the report means?

10 MR. BROWN: According to both the report
11 and the indictment, there are - - -

12 JUDGE RIVERA: So why not say the Russian
13 mafia - - -

14 MR. BROWN: With that - - -

15 JUDGE RIVERA: - - - to clarify that?

16 MR. BROWN: There are - - - there are - - -
17 it refers to mafia figures from both Russia and the
18 United States, Your Honor. Exactly.

19 JUDGE RIVERA: Okay. So why couldn't
20 someone think they are the - - - they are the
21 American-based mafia members - - -

22 MR. BROWN: I think the court is entitled -
23 - -

24 JUDGE RIVERA: - - - running the club?

25 MR. BROWN: I think the court is entitled

1 to take judicial notice that made-members of the mob
2 do not generally work as hostesses or stockmen in
3 commercial operations.

4 JUDGE RIVERA: But that's not what they are
5 arguing, right? They are not arguing about the
6 barmaid or the barperson.

7 MR. BROWN: That's who these three
8 plaintiffs alleged themselves to be in the affidavit
9 by Dominique O'Neill, which is part of the record.
10 None of that is in the complaint; it's all in the
11 affidavit.

12 But - - - but, Your Honor - - -

13 JUDGE STEIN: I think - - - you know, when
14 you talk about though looking at it in the context of
15 the report, it's just - - - it starts to sound to me
16 like it's a factual question, not a legal question.

17 MR. BROWN: The cases are legion, Your
18 Honor, that this is an initial determination to be
19 made by the court. And the key point here is
20 exclusively by looking at the language of the report.
21 And that's important not only for this issue, which I
22 may not be able to persuade you on, but the second
23 issue, which is that if you are prepared to find that
24 reasonable people would understand this statement,
25 "Cheetahs is run by the mafia", in the context of

1 this report, could reasonably refer to the staff
2 operating Cheetah.

3 Those plaintiffs still need, in order to
4 proceed with their claim, to satisfy the bar on group
5 libel claims. That is, when a statement doesn't
6 refer to someone expressly, but rather to a group,
7 plaintiffs have to satisfy the requirements for
8 pleading that kind of claim.

9 And as the cases that both parties rely on for
10 that made clear, you evaluate that as a question of law,
11 as a threshold matter, by looking to the statement, the
12 challenged allegedly defamatory statement, for whether it
13 defines the group, a group that plaintiff's claim to
14 belong to, in the words of the DeBlasio case, objectively
15 and unambiguously - - - or in the words of the Brady case,
16 which is perhaps the leading case, it's out of the Second
17 Department and it's the most frequently quoted case on
18 this point, you isolate - - - you define the group by the
19 terms of the alleged defamatory comment itself, and you
20 look to see whether the group is explicitly defined,
21 whether it's a highly organized "group" that exists, has a
22 structure independent of the allegedly defamatory comment,
23 and you look, the court said in Brady, to see whether the
24 composition of the group is definite and fixed from the
25 comment itself. And that's where both the dissent below

1 and plaintiffs get off track.

2 You do not look to the allegations of the
3 complaint for that, in the first instance; you look to the
4 comment itself. And here, the ultimate problem for
5 plaintiffs is that, "run by the mafia", with reference to
6 the Cheetah Club, is simply too indefinite in terms of
7 what the parameters of that group are.

8 There is no objective way for the court to
9 determine how many members that group has or who they were
10 in any - - - with any certainty, or sufficient certainty -
11 - -

12 JUDGE RIVERA: Were any of those - - -

13 MR. BROWN: - - - at any point in time.

14 JUDGE RIVERA: - - - factual questions that
15 cannot be decided on this motion?

16 MR. BROWN: No, Your Honor, it's the
17 language itself - - -

18 JUDGE RIVERA: Okay.

19 MR. BROWN: - - - that's too ambiguous.

20 And for example in the Brady case, which I believe
21 counsel referred to, involving certain police
22 officers at a police department, the editorial
23 expressly criticized those people who had been police
24 officers on a certain date, and who were not
25 indicted, and accused them all of having guilty

1 knowledge.

2 And the Second Department, Brady
3 painstakingly went through application of the small
4 group libel exception to the rule against group
5 libel, and said, this is a situation where it is
6 absolutely clear what the parameters of the group
7 were, it's very specifically stated on the face of
8 the allegedly defamatory editorial, a fact finder ca
9 - - - is capable of determining conclusively who is
10 within that group, and therefore, the one officer who
11 brought a libel claim saying - - - alleging, I was a
12 police officer on this date, and I was not indicted,
13 so I'm a member of that clearly defined group, could
14 proceed.

15 Quite simply, the phrase, "run by the mafia",
16 with reference to a business establishment, doesn't define
17 which group we mean.

18 As Your Honor's question - - - I believe it was
19 Your Honor's question about the owner of the club,
20 signifies, what of the chef? This is a restaurant. They
21 - - - we know from the record that they serve elaborate
22 sushi dishes and steaks. Is the chef not part of the
23 group that runs the organization?

24 The court can take judicial notice that clubs of
25 this nature have security departments. Where - - - where

1 are they in reference to defining the group?

2 The difficult - - -

3 JUDGE RIVERA: Well, maybe that's a
4 reasonable understanding, but that's not someone
5 suing.

6 MR. BROWN: It - - - it - - - but the
7 reasonable understanding must derive from the
8 definition - - -

9 JUDGE RIVERA: Um-hum.

10 MR. BROWN: - - - of the group found within
11 the defamatory comment itself. It would require
12 overruling literally decades of precedent to find
13 otherwise.

14 This goes all the way back to this court's 1936
15 - - - and I see my time is up, may I - - -

16 JUDGE PIGOTT: You can finish your thought,
17 yeah.

18 MR. BROWN: I just want to refer the court
19 to Gross v. Cantor, which is the radio editors' case.
20 In that case, the court allowed the claim to proceed
21 in part because the allegedly defamatory statement
22 was directed specifically at people holding a job
23 title, radio editor, of which there were apparently
24 only twelve in New York City at that time, one of
25 whom had been expressly excluded by name from the

1 eleven who were allegedly defamed. The group was
2 definable by the words of the statement itself. And
3 that is my final point.

4 I'd ask the court to make this ruling based
5 on the words of the statement in the noon report, not
6 the allegations of the complaint.

7 Thank you.

8 CHIEF JUDGE DIFIORE: Thank you, Mr. Brown.

9 Mr. Whitehorn.

10 MR. WHITEHORN: Thank you, Your Honors.

11 I will take a minute, respond - - - reply the -
12 - -

13 The majority did say the portions that we
14 acknowledge, the decision is clear on, and they made those
15 on the matter known as Tracy, and the other matter they
16 referred to was Springer.

17 In Tracy, there was no dismissal; it was full
18 blown trial. Full opportunity from all the parties to
19 present hard evidence, witnesses, testimony, affidavits,
20 photos. We didn't have that. Tracy didn't apply to us.

21 Springer referred specifically to a fictional
22 piece, not a true piece. The perceiver in a fictional
23 piece was analyzed under Springer to be different than the
24 analysis made by the viewer in real life. So transmitting
25 - - - comparing a fictional piece to a real person is

1 different than a video taken, statements made that include
2 - - -

3 JUDGE PIGOTT: Well, the point of Springer
4 was that of and concerning is a matter of law; isn't
5 that what it was cited for?

6 MR. WHITEHORN: True, true. And both of
7 those, that reference Tracy and Springer touch on
8 this matter of law component, where the majority made
9 a mistake. The factual references made by those
10 matters that the majority relied on, they don't apply
11 to us; we don't have those same facts. We have
12 something dramatically different. We have - - -

13 JUDGE PIGOTT: You're saying there are
14 circumstances under which of and concerning may be a
15 question of law?

16 MR. WHITEHORN: Clear - - - not - - - yes,
17 there are in Springer, where the perceiver, they step
18 in the shoes of the perceiver, and they say, it's not
19 worth the factual analysis of what the extrinsic
20 evidence will reveal. It's so clear that a fictional
21 piece, in order for it to be interpreted and applied
22 against an individual is something that the trier of
23 fact can determine as a matter of law. So that was
24 the Springer basis.

25 But in our case, we have a sentence. I don't

1 have a book; I don't have an entire - - - I don't have the
2 list of items that the - - - that the court can refer to
3 and transpose to real life. It's - - - we have - - -

4 JUDGE STEIN: Could - - -

5 MR. WHITEHORN: "Run by" - - - if I may
6 just finish this one point. "Run by" is stated in
7 there, "managed by" is stated in there, "run by the
8 mafia". The word mafia elicits such a broad
9 perspective of factual inclusion of every single
10 person - - -

11 JUDGE PIGOTT: Hold on, you don't want to
12 miss Judge Stein's question. Hold on.

13 JUDGE STEIN: Yeah. My - - - yeah, I would
14 really like you to address these small group - - -

15 MR. WHITEHORN: I will.

16 JUDGE STEIN: - - - libel test - - -

17 MR. WHITEHORN: Under the small group - - -

18 JUDGE STEIN: - - - in that very little
19 time left.

20 MR. WHITEHORN: If the details of our case
21 were broader, then I believe the application defining
22 the group under the small group libel, it's
23 available. Under this case, we have to presume the
24 facts stated in both the affidavits submitted during
25 trial court and the complaint - - -

1 JUDGE STEIN: But if you look at this - - -
2 your opposing counsel wants us to look at the
3 statement itself. And if we look at the statement
4 itself, can we determine who's in - - - who is in the
5 group of "run by"?

6 MR. WHITEHORN: Say that because the
7 material that the court is left to work with, to
8 apply to this test, because it is so small, the words
9 are - - - I could reduce them to - - - I think it's a
10 total of thirty words that we're referring to. In
11 the use of those words, you're - - - you're required
12 to take such a small scope of words and apply it to,
13 could it have been objectively or unambiguously
14 referring to the employees.

15 The video alone shows the backdrop, people being
16 arrested. There is a pan and scan on people that are
17 actually coming out of the club in handcuffs. There's no
18 distinction, they don't wear shirt that says, hi, I'm the
19 owner; there are people that are being arrested. There is
20 references to FBI. The facts stated in the report
21 compared to the video that plays behind it, it clearly
22 includes objective ability for the court, and
23 unambiguously referring to these people.

24 And does the terms included in the statements -
25 - - does it - - - does it define the group; is it a

1 definite and fixed group? And again, you're asking - - -
2 the court is - - - I'm asking you to review the trial - -
3 - the Appellate Division's interpretation of the words,
4 "run by", "managed by", and then once you throw in the
5 word "mafia", with this - - - this - - - this analysis to
6 just organized syndicate of crime, there was reference
7 made to the cook. Anyone that works there, the
8 implication could be that somehow or another they're
9 related to the mafia or else they wouldn't have got a job.
10 So - - -

11 JUDGE PIGOTT: Thank you, Mr. Whitehorn;
12 we'll take a look at it.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Three Amigos SJL Rest., Inc. v. CBS News Inc., No. 131 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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