

General Westmoreland was brought back to Washington where he became the Chief of the Army. (Id. at 14)

* * *

Adams has chronicled that *conspiracy* with unbelievable detail *all the way to General Westmoreland's doorstep*. It is for us to go beyond—to find out whether Westmoreland was acting on his own authority or whether, as it seems more likely to me, he was receiving direct authorization or at least encouragement from above. (*Id.* at 15) (emphasis added)

In short, the documentary CBS commissioned—and the one they got—charged a conspiracy in which General Westmoreland was a principal member.

(2) The production of the Broadcast centered on General Westmoreland. Editor Ira Klein has stated in an affidavit: "All the way through the production process Crile was (sic) adamant about maintaining Westmoreland's presence throughout the show." (Klein affidavit ¶ 25; see also JX 452, an internal CBS memorandum to Zigman—"Caroline should have ordered Evening News broadcast of Westie being hung in effigy during his trip to Wash.").

(3) Crile's memoranda during the preparation of the Broadcast reveal its intended thrust. One to Wallace just before General Westmoreland's interview:

Now all you have to do is break General Westmoreland and we have the whole thing a-ced. (JX 911, p. 24106)

After the interview, Crile wrote Wallace:

The interview was a classic. . . . Now for the reaction. I can't imagine Westie taking this lying down. (JX 505, p. 24660)

The same day he wrote Colloff:

The interview went exceptionally well. . . . In the meantime I think you should be prepared for the possibility of a Westmoreland counter attack. (JX 451, p. 12661)

(4) Adams had the following to say about the focus of the Broadcast in a letter to Col. Hawkins, sent on January 20, 1982:

I'd appreciate any comments you have on the documentary. Overall, I think it's reasonably good, but, as I mentioned before, there's a major problem. The documentary seems to pin the rap on General Westmoreland, when it probably belongs higher than that. (JX 380).

b. *The first Three Publications: CBS Morning News, the Full-Page Newspaper Advertisements and the Broadcast*

CBS published the publications that form the bases for counts I, II and III and part of V within a three-day period. On January 21, 1982, Wallace and Crile appeared with moderator Diane Sawyer to discuss the Broadcast, and on January 22 or 23, 1982, CBS placed full-page advertisements in the *New York Times*, the *Washington Post*, the *Chicago Tribune* and the *Los Angeles Times*. On the evening of January 23, 1982, hundreds of CBS affiliates aired the Broadcast. There can be no doubt that the publications can reasonably be construed as charging General Westmoreland with criminal acts as well as dishonest and unethical conduct. The transcripts of the publication demonstrate this; the actual visual elements of the two television shows are even more clearly directed at General Westmoreland:

Thus, CBS Morning News showed excerpts from the Broadcast; it stated that General Westmoreland "blocked" a report and ordered a "ceiling" on estimates.

The second of the three contemporaneous publications was the Broadcast advertisement which appeared in some papers on January 22, 1982, and in the others the day of the Broadcast. The advertisement pictures eight figures seated at a table with the word "CONSPIRACY" emblazoned across its length in the largest lettering contained in the ad. The text briefly summarizes the premise of the Broadcast, then asks several questions, beginning with "Who lied to us?" The ad continues, "tomorrow night the incredible answer . . . at last." Thus, the reader is invited to fill in the silhouetted figures with names, to be provided shortly, of course, by CBS. Those viewers who had previously seen the CBS Morning News segment were already able to fill in General Westmoreland's name in answer to the question.

The third contemporaneous publication was the Broadcast itself. Defendants contend that portions of the Broadcast are not defamatory because either as a whole, or in individual statements, it is not "of and concerning" General Westmoreland, a necessary element of both defamation and false light privacy. This claim is utterly frivolous. Even the most cursory review of the Broadcast transcript demonstrates not only that General Westmoreland is repeatedly mentioned (some 58 times in the Broadcast) and pictured (numerous on-camera interview segments and on all "bumpers"), but that defendants charged General Westmoreland directly and indirectly

with conspiracy to deceive his military and civilian superiors, to suppress and alter critical military intelligence prior to the 1968 Tet offensive, and to cover up those wrongdoings.

c. *Post-Broadcast Events*

The focus of the publications on General Westmoreland was recognized by both the media and defendants.

(1) The media reacted understandably, focusing on General Westmoreland. The lead in the *Christian Science Monitor* story of January 21, 1982, reads:

Did top-level US military officials conspire to suppress and alter critical intelligence on the enemy during the Vietnam war?

The charge is made by CBS News correspondent Mike Wallace and producer-reporter George Crile in a coming TV report. They say Gen. William Westmoreland gave President Lyndon Johnson the inaccurate figures to get him to commit 300,000 additional soldiers to the war effort. The general denies the charges. (JX 783D)

The lead in the January 21, 1982, *Washington Post* story gave a similar account:

The American military command systematically understated the true strength of Vietcong forces during the year before the Tet offensive on orders from Gen. William C. Westmoreland, the American commander in Vietnam, according to a CBS News documentary. (JX 783F)

A *New York Times* editorial likewise saw the focus on General Westmoreland:

Even after so many years, General Westmoreland still tries to explain away the falsification of intelligence, even to the Commander in Chief.

William F. Buckley, Jr., in his syndicated column joined those who echoed the Broadcast. For example, in his column which was entitled "General Westmoreland's Appalling Conduct" in the Pittsburgh, Pa. *Post-Gazette*:

The documentary absolutely establishes that Gen. Westmoreland for political reasons withheld from the President, probably from the Joint Chiefs, from Congress and from the American people, information about the enemy which was vital to any sensible

reordering of one's thoughts toward the war, whether one were dove-minded or otherwise.

(2) On January 26, 1982, Dan Rather on CBS Evening News described the Broadcast as making "charges" against General Westmoreland:

The commander of U.S. forces in Vietnam during the height of American involvement there, General William Westmoreland, held a news conference in Washington today to refute charges made against him in a CBS News broadcast. . . .

CBS News, in a statement today, said it stands by the accuracy and fairness of the CBS Reports broadcast. The statement added that because of the issues involved, CBS News—quote—"will give further study to the specific allegations made at the news conference." (JX 877, p. 57177)

(3) In the Spring of 1982, Alex Alben, the researcher for the Broadcast, told *TV Guide's* Don Kowet that he felt the Broadcast focused heavily and excessively on General Westmoreland:

We probably could have gone into the White House . . . my feeling is this wasn't a conspiracy directed by Westmoreland up . . . It was a conspiracy directed by Rostow, and the National Security staff, with heavy pressure from Johnson to show progress down . . . in a historical sense I think, you know, by just showing one side, our documentary was a, you know, had it out of focus . . . Not that it didn't, wasn't truthful about what it said . . . about suppression took place but no, it wasn't generated by Westmoreland.

(4) Executive Producer Howard Stringer told Kowet the same thing:

I had the sneaking feeling that at the end of the broadcast—I always did have the sneaking feeling that Westmoreland would cover for somebody else. If Westmoreland was involved in the conspiracy, your question is, would he really have the nerve to defy Washington? And the chances are there would be a cover-up there too. You could go on with that indefinitely. But George is a conspiracy thinker.

(5) On or about May 23, 1982, the May 29-June 4, 1982, issue of *TV Guide* reached the newsstands. It described the Broadcast:

the program attacked the reputation of Gen. William Westmoreland, the former commander of U.S. military forces in Vietnam. The evidence amassed by CBS seemed to prove the

U.S. military's intelligence operation in Vietnam, led by General Westmoreland, conspired to deceive President Lyndon Johnson, the Congress and the American public.

There is no evidence of which plaintiff is aware that anyone connected with CBS ever challenged this description of the Broadcast prior to the institution of this lawsuit by General Westmoreland.

(6) In a June 1982 letter to Wallace, Crile said:

the real battle in everyone else's mind is over substance—over that *TV Guide* cover that says we SMEARED Westmoreland. Our silence is viewed as an admission of guilt. (PTX 3, p. 37221)

Crile's letter continued:

What I was saying again is that we produced the documentary that CBS News commissioned. Everyone knew that Adams was a whistle blower and a nemesis of Westmoreland. (PTX 3, p. 37221)

d. *The Sauter Memorandum.*

(1) Following the publication of the *TV Guide* piece, CBS embarked on a review of how CBS produced the Broadcast. It announced its intended review to the press:

The president of CBS News has launched an exhaustive investigation into allegations that his network "broke the rules" in preparing an unfavorable documentary about Gen. William C. Westmoreland. (JX 925, Chicago Tribune 6/10/82)

See also, e.g., JX 927, Salem 5/29/82, Or., *Statesman Journal*, JX 926, *Tacoma News Tribune*, 5/29/82.

(2) Burton Benjamin, the man CBS picked to investigate the Broadcast, shared the view that the Broadcast focused on General Westmoreland. The Benjamin Report identified its scope:

The core of this report is a point by point examination of the charges leveled by *TV Guide*. But it goes beyond that. It includes an examination of the charges made in the January 26, 1982 news conference called in Washington by General William C. Westmoreland, commander, U.S. Military Assistance Command, Vietnam, from 1964 to 1968. General Westmoreland was joined by five of his military and civilian associates from Vietnam.

The *TV Guide's* summary of the Broadcast is quoted in the preceding subsection.

Benjamin's interview with Crile contains the following exchange:

GC: Westmoreland was not the show.

BB: He came out as the heavy, George. (PTX 2, p. 26)

(3) In fact, the Benjamin Report identifies *every person* appearing on the show other than General Westmoreland and General Graham as supporting Adams' thesis against his "adversary," General Westmoreland:

The question must be asked: was this broadcast fair and balanced?

The role of Sam Adams is pivotal here. If one assumes that he is the principal adversary on one side, having leveled the charges, and that General Westmoreland is the principal adversary on the other side, having to defend against the charges (an argument which Bob Chandler, Howard Stringer, and Andrew Lack agree with), then the lineup of the broadcast was as follows:

PRO ADAMS THESIS

Sam Adams
Col. Gains Hawkins
Gen. Joseph McChristian
Richard McArthur
George Allen
Col. George Hamscher
Col. Russell Cooley
Joseph Hovey
Commander James Meacham

OPPOSED

Gen. William Westmoreland
Lt. Gen. Daniel Graham

That is a 9 to 2 equation. Or, eight supporters for Adams and one for Westmoreland, and that one (Graham) was given 21 seconds on screen.

Measured another way, Westmoreland and Graham spoke for 5 minutes and 59 seconds. Adams and the eight supporters of the premise spoke for 19 minutes and 19 seconds. (PTX 2, pp. 10-11)

(4) Next, CBS distributed to its affiliates and outside reporters a "press release" (Order of April 21, 1983 at 8), commonly known as the Sauter Memorandum. The eight-page release mentions General Westmoreland by name seven times, referring to "General Westmoreland's January 26, 1982 news conference about the broadcast"; "a letter from General Westmoreland" and whether "a Westmoreland memorandum included within

these documents would have served to clarify the General's position"; and "an individual who lent support to General Westmoreland's position." The release mentioned no other military officer by name.

The Sauter Memorandum announced:

CBS News stands by this broadcast.

* * *

Because of this documentation, we support the substance of the broadcast.

2. *The Applicable Legal Principles*

In order to maintain this action, General Westmoreland must plead and prove that the defamatory publications were "of and concerning" him. The inquiry into whether a publication refers to a plaintiff is whether:

the libel designates the plaintiff in such a way as to let those who knew him understand that he was the person meant. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant.

Fetler v. Houghton-Mifflin Co., 364 F.2d 650, 651 (2d Cir. 1966); *see also*, e.g., *Hicks v. Casablanca Records*, 464 F. Supp. 426, 430-31 (S.D.N.Y. 1978); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 726-27 (S.D.N.Y. 1978); *Negri v. Schering Corp.*, 333 F. Supp. 101, 103-05 (S.D.N.Y. 1971).

Whether they *can* be viewed as reasonably referring to Westmoreland is a question of law for this Court; but whether they, in fact, *do* refer to him is a question for the jury. *See, e.g., United Medical Laboratories, Inc. v. CBS*, 404 F.2d 706, 708 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969); *Fetler v. Houghton-Mifflin Co.*, 364 F.2d 650, 653 (2d Cir. 1966); *Brayton v. Crowell-Collier Publishing Co.*, 205 F.2d 644 (2d Cir. 1953); *Handelman v. Hustler Magazine, Inc.*, 469 F. Supp. 1048 (S.D.N.Y. 1978); *Foltz v. News Syndicate Co.*, 114 F. Supp. 599 (S.D.N.Y. 1953).

In determining whether the four publications at issue in this case are actionable, the Court must examine each one as a whole and all of them together in context, and not as a series of isolated incidents. *See, e.g., Pierce v. Northwestern Mutual Life Insurance Co.*, 444 F. Supp. 1098 (D.C.S.C. 1978); *James v. Gannett Co., Inc.*, 40 N.Y. 2d 415, 386 N.Y.S. 2d 871, 353 N.E. 2d 834 (1976); *Tracy v. Newsday, Inc.*, 5 N.Y. 2d 134, 182 N.Y.S.2d 1, 155 N.E.2d 853 (1959). Although General Westmoreland is not mentioned

in every passage of each publication or in every act in furtherance of the conspiracy, he is portrayed as either being directly involved in or ordering each of the acts discussed in the Broadcast and as being responsible for the "tragic" consequences of the suppression and deception he ordered.

Rosenblatt v. Baer, 383 U.S. 75 (1966), likewise establishes that it is up to the jury to decide whether the publications were "of and concerning" General Westmoreland. Baer sued for libel based on a newspaper column that did not mention him by name and merely asked the question, "What happened to all the money last year? and every other year?" The Supreme Court concluded that the jury would be entitled to find for Baer on the basis of extrinsic evidence:

Were the statement at issue in this case an explicit charge that the Commissioners and Baer or the entire Area management were corrupt, we assume without deciding that any member of the identified group might recover. The statement itself might be sufficient evidence that the attack was specifically directed at each individual. Even if a charge and reference were merely implicit, as is alleged here, but a plaintiff could show by extrinsic proofs that the statement referred to him, it would be no defense to a libel suit by one member of an identified group engaged in governmental activity that another was also attacked.

Id. at 81.

Because the trial had occurred prior to *New York Times v. Sullivan*, the Supreme Court remanded for a new trial at which the jury could determine, after being properly instructed, whether the column was "of and concerning" Baer and whether the defendant published it with actual malice. Baer disposes of all of defendants' claims. See also, e.g., *Nieman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (jury may conclude that publication which referred to 9 models and 25 salesmen was of and concerning plaintiff); *Fawcett Publications, Inc. v. Morris*, 377 P. 2d 42, cert. denied, 376 U.S. 513 (1964) (Okla., 1962) cert. denied, 376 U.S. 513 (1964) (jury may conclude that publication which referred to all members of Oklahoma University football team was of and concerning plaintiff).

Just as pictures can supply the identification or "target" for defamatory written words, the prior and subsequent specific and detailed discussions of General Westmoreland's role in the suppression and deception scheme supply the identification of General Westmoreland in the newspaper advertisement. Cf. *Regan v. Sullivan*, 557 F.2d 300 (2d Cir. 1977);

Rosenfeld v. Curtis Publishing Co., 163 F.2d 660 (2d Cir. 1947); *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305, 306 (D.D.C. 1948); *Kent v. City of Buffalo*, 29 N.Y.2d 818, 327 N.Y.S.2d 653, 277 N.E.2d 669 (1971); *Metzger v. Dell Publishing Co.*, 207 Misc. 182, 136 N.Y.S.2d 888 (N.Y. Co. 1955). In such cases the writing and pictures must be considered together in their entirety. See *Martin v. Johnson Publishing Co.*, 157 N.Y.S.2d 409, 411 (N.Y. Co. 1956).

Given the interrelation of the various parts of the Broadcast and the interrelation among the three publications between January 21 and 23, 1982, there is no basis for defendants' claim that a jury would be acting unreasonably in concluding they all related to General Westmoreland. Defendants argue, in effect, that a jury would be required as a matter of law to conclude that the Broadcast said that the transfer of General McChristian was a fortuitous act of God that occurred at the precise moment General Westmoreland confronted his "dilemma." That is asking too much of credulity. Similarly, the advertisement which appeared after *CBS Morning News* and on the same day or the day before the Broadcast, cannot be read in a vacuum. Finally, as 18 U.S.C. § 2388 states, those who participate in a conspiracy are criminally responsible for acts in furtherance of it. That alone would make every allegation in the publication defamatory of General Westmoreland.

The cases defendants cite are inapplicable. *Sullivan* involved a situation in which the advertisement did not mention the plaintiff by name, title or office, or even mention the commission on which he served. Defendants also argue, citing *Sullivan*, that the instant case is an attempted "personalization of general allegations against governmental operations." But *CBS Morning News* and the Broadcast repeatedly identified General Westmoreland by name. They accused him, moreover, of willfully acting against the best interests of the Government by deceiving his superiors. The fact that General Westmoreland's suit may set the record straight and clear the names of other military officers of participating in a conspiracy to lie to their superiors is legally irrelevant. There is no "indispensable party" rule that requires the class of libel plaintiffs to be coextensive with those injured by a false publication. Finally, this is not a "group libel" case, such as *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) (article about sellers of Laetrile, numbering in the hundreds); *Nieman-Marcus v. Lait*, 13 F.R.D. 311 (S.D.N.Y. 1952) (reference to 382 saleswomen).

D. Defendants' Remaining Legal Arguments Are Without Merit.

1. Defendants Are Not Entitled to Any Privilege Based on Neutral or Fair Reporting.

CBS suggests, without detailed supporting argument, that the Broadcast is protected by a privilege for "fair comment" or "neutral reportage," citing *Edwards v. National Audobon Society*, 556 F.2d 113 (2d Cir. 1977), *cert. denied*, 434 U.S. 1002 (1979). Such a privilege would protect from liability for libel the accurate and disinterested reporting of serious charges made by a responsible organization regardless of the validity of the charges. 556 F.2d at 120. There are at least three reasons why CBS cannot prevail on the basis of its claimed privilege for "fair comment" or "neutral reportage." First, there is no such privilege under the laws of either New York or South Carolina. *Hogan v. Herald Co.*, 84 App. Div. 2d 470, 446 N.Y.S.2d 836 (4th Dep't), *aff'd*, 58 N.Y.2d 630, 458 N.Y.S.2d 538, 444 N.E.2d 1002 (1982); *Hellman v. McCarthy*, 10 Med L. Repr. 1789, 1794 (N.Y. Sup. Ct. 1984); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 292 S.E.2d 23 (1982). Second, even if a qualified privilege were available, the most that courts would require is that a plaintiff prove actual malice, a burden which General Westmoreland must already meet due to his status as a public figure. Third, there was no neutral reportage. *See Cianci v. New Times Pub. Co.*, 639 F.2d 54, 68-69 (2d. Cir. 1980); *McManus v. Doubleday & Co.*, 513 F. Supp. 1383 (S.D.N.Y. 1981).

2. Defendants Did Not Simply Repeat Previous Charges.

CBS argues that Westmoreland's action is barred because CBS simply republished charges previously made against him and General Westmoreland took no action. This contention is without merit for several reasons. First, Sam Adams' prior allegations regarding the order of battle debate were directed mainly against the CIA and alleged deception in which a wide variety of government officials participated. *See, e.g.*, Adams' article in *Harper's* entitled, "Vietnam Cover-Up: Playing War with Numbers—A CIA Conspiracy Against Its Own Intelligence." (JX 340) Defendants cite no other claim that General Westmoreland deceived his superiors, including the President. Moreover, the allegations of suppression of infiltration data and cover-up were original with CBS. Second, a number of the prior publications, such as Adams' testimony at the *Ellsberg* trial and before the Pike Committee, were apparently protected by an absolute privilege. Third, Adams' prior assertion of charges against General Westmoreland, rather

than aiding defendants, demonstrates bias and intent on his part and establishes knowledge of his position by the other defendants. *Hellman v. McCarthy, supra*. Fourth, at his deposition, Wallace acknowledged that at the time of the Broadcast, General Westmoreland enjoyed a good reputation for honesty and integrity. (Wallace Dep. Tr. 23)

3. *Count V Should Not Be Dismissed.*

Defendants also ask this Court to dismiss Count V of plaintiff's complaint. General Westmoreland alleges in this count that the four publications, taken together, invade his personal right of privacy by placing him publicly in a "false light," "portraying him, among other things, as dishonest, unethical and ruthless."

Defendants contend that plaintiff may not maintain a false light privacy action because of First Amendment considerations. All the First Amendment requires, however, is that "false light" plaintiffs who are public officials or public figures prove *Sullivan* actual malice in addition to the state law elements of their claims. *Time, Inc. v. Hill*, 385 U.S. 374 (1967). General Westmoreland has never disputed this obligation.

There is no tension between simultaneous counts for defamation and false light privacy. See, e.g., *Geisler v. Petrocelli*, 616 F.2d 636 (2d Cir. 1980); *Afro-American Publishing Co. v. Joffe*, 366 F.2d 649 (D.C. Cir. 1966); *Rozhon v. Triangle Publishing, Inc.*, 230 F.2d 359 (7th Cir. 1956); *Lorentz v. Westinghouse Electric Corp.*, 472 F. Supp. 946 (W. D. Pa. 1979); *Peay v. Curtis Publishing Co.*, 78 F. Supp. 305 (D.D.C. 1948); See also *Restatement (Second) of Torts* § 652E (1977). Cf. *Birnbaum v. United States* 588 F.2d 319, 323-26 (2d Cir. 1978). General Westmoreland is entitled to present his case on both theories of recovery to the jury. See, e.g., *Holmes v. Curtis Publishing Co.*, 303 F. Supp. 522 (D.S.C. 1969).

CONCLUSION

For the reasons set forth above, plaintiff respectfully requests the Court to deny defendants' motion to dismiss and for summary judgment and to schedule this case for trial before a jury at the earliest available time.

July 20, 1984

Very truly yours,

/s/ DAN M. BURT

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