Written by **Steve Byas** on February 14, 2017

Climate Lawsuit Threatens Free Speech

"As a practical proposition … if I enjoy normal life expectancy, this case will consume the bulk of my remaining time on earth. In the event that I don't, the thuggish Mann will come after my family, as has happened to my late friend Andrew Breitbart's children."

This is how well-known political commentator Mark Steyn recently summed up his opinion about the libel suit filed against him by Penn State "climate scientist" Michael Mann, which is expected to be set for trial soon.

"I did not seek this battle.… But I will not shirk the fight, and I will prevail," Steyn predicted in a recent blog.

Remarks made by Rand Simberg, a policy analyst with the Competitive Enterprise Institute (CEI) in 2012 were the genesis of the Mann suit. Simberg referred to Mann as the "Jerry Sandusky of climate science." Sandusky was a coach with the Penn State university's football team who had been convicted of child molestation. The university has been roundly condemned for neglect in allowing Sandusky's antics to continue for so long.

This hyperbolic statement of comparing the Sandusky case to Mann's was an effort to lambast Penn State for clearing Mann of accusations of scientific misconduct. Apparently, since Penn State's administration had failed to rid itself of Sandusky, Simberg was saying that the exoneration of Mann by that same university was suspect.

Political commentator Steyn said as much, declaring in *National Review* magazine that any "investigation by a deeply corrupt administration was a joke."

This was no doubt a strong comment by Steyn, but it was an opinion, and an opinion, regardless of how harsh it is, about a public figure is held to be protected speech press, under the First Amendment, according to the 1964 Supreme Court decision *New York v. Sullivan*.

Mann is most famous for his development of the so-called hockey stick image to illustrate his assertion that global temperatures have spiked over the last century, a spike Mann and others attribute mostly to human activity in the industrial age.

After Mann responded by suing CEI, Simberg, *National Review*, and Steyn for defamation, the defendants all asked that the lawsuit be dismissed on the grounds that their remarks were constitutionally protected free speech. The original trial judge allowed Mann's suit to continue. Judge Natalia Combs Greene even argued that Mann's defamation suit was "likely" to succeed. She said, "To call his work a sham or to question his intellect and reasoning is tantamount to an accusation of fraud."

Surprisingly, the D.C. Court of Appeals declined to dismiss. Judge Vanessa Ruiz spoke for the three-

judge panel when she wrote, “Tarnishing the personal integrity and reputation of a scientist important to one side may be a tactic to gain advantage in a no-holds-barred debate over global warming. That the challenged statements were made as part of such debates provides important context and requires careful parsing in light of constitutional standards.”

Despite these words, which would seem to have favored the defendants, Judge Ruiz then concluded, “But if the statements assert or imply false facts that defame the individual, they do not find shelter under the First Amendment simply because they are embedded in a larger policy debate.”

The D.C. appellate court said, in remanding the case back to the district court for trial, “Dr. Mann has supplied sufficient evidence for a reasonable jury to find, by a preponderance of the evidence, that statements in the articles written by Mr. Simberg and Mr. Steyn were false, defamatory, and published by appellants to third parties, and, by clear and convincing evidence, that appellants did so with actual malice.”

Steyn, in an article for *National Review’s* online blog, “The Corner,” cited Simberg’s analogy of the Mann and Sandusky cases. “I’m referring to another cover-up and whitewash that occurred [at Penn State] two years ago, before we learned how rotten and corrupt the culture at the university was. But now that we know how bad it was, perhaps it’s time that we revisit the Michael Mann affair, particularly given how much we’ve also learned about his and others’ hockey-stick deceptions since.”

Then, Steyn added the biting words that precipitated Mann’s retaliatory lawsuit: “Mann could be said to be the Jerry Sandusky of climate science, except that instead of molesting children, he has molested and tortured data in service of politicized science that could have dire consequences for the nation and planet.”

Steyn did note, “Not sure I’d have extended that metaphor all the way into the locker-room showers with quite the zeal Mr. Simberg does, but he has a point,” adding that Mann’s hockey-stick graphic was used to advance the “fraudulent climate-change” thesis, and that Mann was the “ringmaster of the tree-ring circus.” (Editorial note: This is typical of Steyn’s wit, using “tree-ring,” instead of “three-ring.” Of course, animal-rights activists, the close cousins of the radical environmentalists, have now succeeded in shutting down the largest of the circuses).

While *National Review* has recently been dismissed as a defendant in this particular case, leaving Steyn and Simberg as the defendants, Dr. Judith Curry had previously filed a very interesting *amicus curiae*, or friend-of-the-court brief on the side of *National Review* and the individual defendants. An *amicus curiae* brief is often filed in high-profile cases by parties who, while not actual litigants in the case, have a strong interest in the case’s outcome.

Dr. Curry recently announced she was leaving academia due to “the poisonous nature of the scientific discussion around human-caused global warming.” She had challenged some of the assertions of the advocates of the climate change theory, and Mann had responded by calling her three books and nearly two hundred scholarly articles a “meager” contribution to science and stating she “played a particularly pernicious role in the climate change denial campaign [by] laundering standard denier talking points but appearing to grant them greater authority courtesy of the academic positions she has held.”

In short, Mann dismissed Curry’s work as “boilerplate climate change denial drivel.”

A comparison of anyone to a convicted child molester, as was done by Simberg, even though a reasonable person could see that it was simply a hyperbolic statement, is certainly a harsh statement. But the use of the expression of “climate change denier” to scientists like Curry is even stronger. As

despicable as the analogy to the sexual molestation of little boys is, the "denier" label used so freely by the climate change crowed, including Mann, conjures up a comparison to the denial of the Holocaust — the systematic murder of millions in Hitler's gas chambers.

For his part, Mann has repeatedly attacked those who disagree with him on this issue as peddling "pure scientific fraud," and "fraudulent denial of climate change," and even taking "corporate payoff for knowingly lying about the threat climate change posed to humanity."

The Curry brief noted, "As it relates to this case, Dr. Curry has been critical of Appelle Michael Mann's methodological approach to climate science and the conclusions he has reached. Dr. Curry has experienced personal and professional attacks from Dr. Mann for her criticism of his work. Dr. Mann has a pattern of attacking those who disagree with him and this case is another in a long line of tactics to silence debate over the science of global warming."

Dr. Curry said that she has "tried to understand Michael Mann's perspective in suing so … many people, while at the same time so freely throwing insults at others and even defaming other scientists. My understanding is this. Michael Mann does not seem to understand the difference between criticizing a scientific argument versus smearing a scientist."

The *amicus* brief of Dr. Curry highlighted its concern about allowing such a lawsuit to continue. If Dr. Mann and others like him who use libel laws to silence critics are allowed to prevail, "those who use normal scientific debate will find themselves disadvantaged in the marketplace of ideas."

This is why libel suits involving public figures such as Mann are required to overcome significant hurdles in order to succeed. The plaintiff in a libel suit must prove not only that the statements found offensive are false, the plaintiff must additionally prove to a jury by "clear and convincing evidence" (a higher standard than the "preponderance of the evidence" of most civil actions, and closer to the "beyond reasonable doubt" requirement of criminal cases) that the defendant *knew* the statement was false. And the statement must have been made with "actual malice," or a desire to cause damage. (For example, writing that a football player won the Heisman Trophy would not be libelous, even if the writer knew that was not true, because such a statement is not damaging and no intent to cause harm exists).

Finally, a plaintiff must show that some actual *damage* was caused to his reputation.

Jonathan Adler, a professor at Case Western Reserve University law school, explained the dangers of making it too easy for public figures to win such lawsuits. "It threatens to make it too easy for public figures to file lawsuits against their critics, and, as a consequence, threatens to chill robust political debate."

Adler also expressed concern over the reasoning of the appellate court, when it held that, because Penn State had investigated and then exonerated Mann of doctoring scientific evidence to support his thesis of global warming, Simberg and Steyn cannot then criticize *that* investigation. "It cannot be that once some official body has conducted an investigation of an individual's conduct, that further criticism of that individual, including criticism that expressly questions the thoroughness or accuracy of the investigatory body, is off limits."

This would preclude criticism of a judicial processes that exonerated individuals found not guilty, Adler notes.

"Nor is it consistent with existing First Amendment doctrine to suggest that hyperbolic accusations of bad faith or dishonesty against public figures involved in policy debates is actionable," Adler added. In

other words, the opinions expressed by Steyn and Simberg were just that — opinions.

Even the *threat* of a libel suit is often enough to inhibit the free expression of honest political opinions, because of the potential enormous costs of litigation. "Winning" in a successful defense, but nevertheless out thousands of dollars, does not make one feel much like a winner. As one federal court once put it in the context of controversies in the field of science (and applicable in other fields, as well), "More papers, more discussions, better data, and more satisfactory models — not larger awards of damages — mark the path toward superior understanding of the world around us."