

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CACI PREMIER TECHNOLOGY,
INCORPORATED; CACI INTERNATIONAL,
INCORPORATED,

Plaintiffs-Appellants,

v.

RANDI RHODES; PIQUANT, LLC, d/b/a
Air America Radio,

Defendants-Appellees.

ALM MEDIA, INCORPORATED; THE
ASSOCIATED PRESS; COX
COMMUNICATIONS, INCORPORATED;
DOW JONES AND COMPANY,
INCORPORATED; GANNETT,
INCORPORATED; THE HEARST
CORPORATION; LANDMARK
COMMUNICATIONS, INCORPORATED;
MAGAZINE PUBLISHERS OF AMERICA;
NBC UNIVERSAL, INCORPORATED; THE
NEW YORK TIMES COMPANY; THE
NEWSPAPER ASSOCIATION OF AMERICA;
NEWSWEEK, INCORPORATED; THE
RADIO-TELEVISION NEWS DIRECTORS
ASSOCIATION; THE REPORTERS
COMMITTEE FOR FREEDOM OF THE
PRESS; TIME, INCORPORATED; THE
WASHINGTON POST,

Amici Supporting Appellees.

No. 06-2140

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Gerald Bruce Lee, District Judge.
(1:05-cv-01111-GBL)

Argued: January 31, 2008

Decided: August 5, 2008

Before MICHAEL, GREGORY, and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge Michael wrote the opinion, in which Judge Gregory joined. Judge Duncan wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Joseph William Koegel, Jr., STEPTOE & JOHNSON, L.L.P., Washington, D.C., for Appellants. Laura Rose Handman, DAVIS, WRIGHT & TREMAINE, L.L.P., Washington, D.C., for Appellees. **ON BRIEF:** John F. O'Connor, Frank H. Griffin, IV, STEPTOE & JOHNSON, L.L.P., Washington, D.C., for Appellants. David M. Shapiro, DAVIS, WRIGHT & TREMAINE, L.L.P., Washington, D.C., for Appellees. Jack M. Weiss, Joshua Wilkenfeld, Laura M. Leitner, GIBSON, DUNN & CRUTCHER, L.L.P., New York, New York; Theodore B. Olson, Theodore J. Boutrous, Jr., GIBSON, DUNN & CRUTCHER, L.L.P., Washington, D.C., for Amici Supporting Appellees.

OPINION

MICHAEL, Circuit Judge:

This defamation case centers on the notorious U.S.-run Abu Ghraib prison in Iraq. Abu Ghraib prison is the place where Iraqi detainees were subjected to horrific abuse. It is also the place where plaintiffs, CACI Premier Technology, Inc. and CACI International Inc. (together, CACI), interrogated Iraqi detainees for the U.S. military. Defendant Randi Rhodes, a talk-radio host, blamed CACI in part for the Abu Ghraib abuses on her show, which was broadcast by defen-

dant Piquant, LLC, d/b/a Air America Radio (Air America). In her scalding accusations against CACI — a military contractor with public figure status — Rhodes relied on a number of reputable sources, including two U.S. Army reports and the statements of an army brigadier general who was once the head of U.S. detention facilities in Iraq. Rhodes and Air America moved for summary judgment after CACI sued them for defamation. The district court granted the motion, concluding that Rhodes's statements were protected by the First Amendment, either because they were not made with actual malice or because they did not state actual facts about CACI. We affirm.

I.

A.

CACI is a U.S. government contractor that provides intelligence services to the military. CACI's principal place of business is in Virginia. In the post-invasion phase of the war in Iraq, CACI (beginning in September 2003) provided civilian interrogators for the U.S. Army's military intelligence brigade assigned to the Abu Ghraib prison, near Baghdad.

Air America is a liberal talk radio network. Air America's broadcasts reach the Commonwealth of Virginia through satellite radio and at least one commercial station. Rhodes began hosting The Randi Rhodes Show on Air America in March 2004. Her show aired for four hours daily during the week. Rhodes, a former member of the U.S. Air Force, views the war in Iraq as a "disastrous mistake." J.A. 126. She laced her show with fierce and colorful criticism of the President, the civilian leadership at the Pentagon, and military contractors for their role in the "initiation and continuation of the war." *Id.* Rhodes accepts *New York Magazine's* characterization of her style as "shrill, screeching," and "hectoring, cocksure." *Id.* She also admits to making frequent use of hyperbole, a common tool of the talk radio host, in criticizing "everything having to do with the war in Iraq." J.A. 127.

During the Saddam Hussein regime the Abu Ghraib prison "was one of the world's most notorious prisons, with torture, weekly executions, and vile living conditions." J.A. 318. Just before the 2002 invasion, the regime, aiming to create havoc for coalition forces, released

the detainees held at Abu Ghraib prison and other facilities. After the invasion the then-empty Abu Ghraib was taken over by the U.S. military for use as a detention facility for three detainee (or prisoner) categories: (1) common criminals, (2) security detainees accused or suspected of committing offenses against the Coalition Provisional Authority, and (3) "high value" detainees who might possess useful intelligence (insurgency leaders, for example). J.A. 318. The detainees at Abu Ghraib included women and juveniles. A U.S. Army military police brigade and a military intelligence brigade were assigned to the prison. The intelligence operation at the prison suffered from a severe shortage of military personnel, prompting the U.S. government to contract with CACI to provide civilian interrogators and with Titan Corporation (Titan) to provide civilian interpreters.

Abu Ghraib prison returned to public awareness with searing intensity in late April 2004 when CBS on *60 Minutes II* broadcast an extended report, with sickening photographic evidence, about U.S. soldiers abusing and humiliating Iraqi detainees at Abu Ghraib. The broadcast showed photographs of naked detainees stacked in a pyramid; a photograph of two naked and hooded detainees, positioned as though one was performing oral sex on the other; and a photograph of a naked male detainee with a female U.S. soldier pointing to his genitalia and giving a thumbs-up sign. Another photograph showed a hooded detainee standing on a narrow box with electrical wires attached to his hands. A final photograph showed a dead detainee who had been badly beaten. U.S. soldiers were in several of the photographs, laughing, posing, or gesturing. The abuses stunned the U.S. military, public officials in general, and the public at large.

Civilian interrogators and interpreters, operating under military contracts, were also responsible for detainee abuse at Abu Ghraib, according to media reports that were essentially contemporaneous with the *60 Minutes II* broadcast. Rhodes closely followed "the Abu Ghraib story [after] the shocking pictures were first broadcast on *60 Minutes [II]* in April 2004." J.A. 130. By the time Rhodes made the statements on her show in August 2005 that CACI challenges as defamatory, Rhodes had read a number of published reports that CACI interrogators at Abu Ghraib had abused detainees and directed or encouraged the abuse of detainees. These sources included two official military reports, a published interview of the brigadier general

formerly in charge of U.S. prisons in Iraq (including Abu Ghraib), news articles, and a journalist's speech. In addition to dealing with CACI's role at the Abu Ghraib prison, some of these sources also discussed the Pentagon's extensive use of military contractors in Iraq, a regular topic on Rhodes's show. We highlight some of the relevant information revealed in Rhodes's sources that are included in the record.

Concerns about abuse to detainees at the Abu Ghraib prison prompted Major General Antonio M. Taguba's investigation and report (Taguba report) on the 800th Military Police Brigade assigned to the prison. The Taguba report, made public in May 2004, found that both military and civilian contractor (CACI and Titan) personnel were responsible for "numerous incidents of sadistic, blatant, and wanton criminal abuses . . . inflicted on" Abu Ghraib detainees. J.A. 495. Words like "horrific" and "extremely disturbing" were also used to describe the abuses. J.A. 520, 494. Major General Taguba's investigation led him to suspect that an army colonel and lieutenant colonel and two civilians, Steven Stephanowicz (a CACI employee) and John Israel (a Titan employee), "were either directly or indirectly responsible for the abuses at Abu Ghraib." J.A. 519.

Major General Taguba documented the following acts of abuse, among others: punching, slapping, and kicking detainees; using unmuzzled military dogs to frighten, and in one case to bite, detainees; breaking chemical lights and pouring the phosphoric liquid on the detainees; positioning a naked detainee on a box with a sandbag on his head and attaching wires to his fingers, toes, and penis to simulate electrical torture; sodomizing a detainee with a chemical light and perhaps a broomstick; having sex with a female detainee and threatening male detainees with rape; stacking naked male detainees, handcuffed and shackled, in piles so that each one's penis touched the buttocks of another; videotaping and photographing naked male and female detainees; forcibly arranging detainees in sexually explicit positions for photographing; forcing groups of male detainees to masturbate while being photographed and videotaped; and taking photographs of dead Iraqi detainees.

Major General Taguba concluded that Stephanowicz of CACI shared responsibility for the abuse because he "[a]llowed and/or

instructed MPs [military police] . . . to facilitate interrogations by ‘setting conditions’ which were neither authorized [nor] in accordance with applicable regulations/policy." J.A. 519. "Setting conditions" was a euphemism for using abuse to break the will of a detainee being interrogated. Major General Taguba found specifically that Stephanowicz "clearly knew his instructions [to MPs to ‘set conditions’] equated to physical abuse." J.A. 519.

As information about the Taguba report began to emerge, the *Guardian*, a British newspaper, reported on April 30, 2004, that some of the soldiers accused of abuse at Abu Ghraib "claimed to be acting in part under the instruction of mercenary interrogators [CACI employees] hired by the Pentagon." J.A. 339. In a May 10, 2004, article in the *New Yorker*, "Torture at Abu Ghraib," investigative journalist Seymour Hersh wrote that the Taguba report described an Abu Ghraib where "much of the day-to-day management of the prisoners was abdicated [by military police] to Army military-intelligence units and civilian contract employees," who relied on intimidation and torture to gather intelligence. J.A. 323. Two months later, on July 8, 2004, Hersh spoke at an American Civil Liberties Union conference. There, Hersh said that acts that were even more atrocious — and yet to be disclosed by the government — were committed at Abu Ghraib:

Some of the worst things that happened . . . you don't know about. . . [W]omen [prisoners at Abu Ghraib] were passing messages out [to their families] saying please come and kill me because of what's happened. And basically what happened is that those women who were arrested with young boys, children, in cases that have been [video] recorded, the boys were sodomized, with the cameras rolling, and the worst above all of them is the soundtrack of the boys shrieking.

J.A. 331 (fourth alteration in original).

In August 2004 a second U.S. Army report provided further details of the abuses at Abu Ghraib. This report (the Fay/Jones report), issued by Major General George R. Fay and Lieutenant General Anthony R. Jones, focused on the military intelligence brigade assigned to the prison. The Fay/Jones report confirmed CACI employee involvement

in detainee abuse. To begin with, the Fay/Jones report revealed that several soldiers at Abu Ghraib said that they were supervised by CACI employees. Another soldier "indicated that CACI employees were in positions of authority, and appeared to be supervising government personnel." J.A. 609. The statements were confirmed by a prison organizational chart that showed a CACI employee as head of the DAB (Detainee Assessment Branch), with soldiers as his subordinates. Moreover, as the earlier Taguba report indicated, the fact that CACI and Titan employees wore desert camouflage uniforms caused confusion in the chain of command.

The Fay/Jones report expanded on the Taguba report in describing "shameful events" of abuse to detainees at Abu Ghraib "that violated U.S. criminal law" or "that w[ere] inhumane or coercive without lawful justification." J.A. 545, 528. According to the report, the abuse, "ranging from inhumane to sadistic," was inflicted "by a small group of morally corrupt soldiers and civilians," with CACI and Titan employees making up the latter category. J.A. 527. CACI or Titan employees were responsible in over one-third of the incidents.

The Fay/Jones report detailed forty-four incidents of abuse inflicted by both military and civilian contractor (CACI and Titan) personnel. CACI employees bore responsibility in fully one-fifth, or nine, of these incidents, including the following. *One*, a CACI interrogator, during the questioning of a detainee (an Iraqi policeman) threatened to, and did, call upon an MP to "soften up" the subject. Once enlisted, the MP covered the subject's nose and prevented him from breathing for a short time. At another point, the MP used a collapsible nightstick to push or twist the subject's arm, causing pain. *Two*, a CACI interrogator "grab[bed] a [handcuffed] detainee" from the back of a high vehicle, dropped him on the ground, and dragged him to an interrogation booth. J.A. 637. Each time the detainee "tried to get up," the CACI employee "would yank [him] very hard and make him fall again." J.A. 689. *Three*, a photograph shows a CACI employee and a Titan linguist interrogating a detainee who is being forced to squat on a chair, an unauthorized (and unsafe) stress position. *Four*, at least one CACI employee used unmuzzled dogs to facilitate detainee interrogation. In one instance, "[i]t appeared [that a CACI employee] was encouraging and even directing the MP abuse with dogs; likely a 'softening up' technique for future interrogations." J.A. 645. *Five*, a

CACI interrogator bragged about shaving the hair and beard of a detainee and forcing him to wear red women's underwear.

The Fay/Jones report detailed the account of an allegation that a contract interpreter raped a young (minor) male detainee while a female soldier took pictures. The alleged rapist, who was wearing military clothing, partially matched the description of a Titan interpreter. These allegations prompted the Army's Criminal Investigation Command to open an investigation.

The Fay/Jones report pointed out that the International Committee of the Red Cross, which visited Abu Ghraib, found that many detainees "suspected [of] security offenses or deemed to have intelligence value" were "subjected to . . . both physical and psychological coercion (which in some cases was tantamount to torture) in order to force cooperation with their interrogators." J.A. 622 (internal quotation marks omitted). One detainee death is discussed in the Fay/Jones report. The detainee, who was initially under CIA control and believed to be an insurgent, had been struck in the head with a rifle butt while resisting arrest. The detainee was brought to Abu Ghraib and shortly thereafter was found in a shower stall, handcuffed and dead, with a sandbag covering his head.

Finally, the Fay/Jones report concluded that many of the Abu Ghraib abuses cited could be criminal, and it recommended that its findings with respect to three CACI employees and two Titan employees "be forwarded to the Army General Counsel for determination of whether [the employees] should be referred to the Department of Justice for prosecution." J.A. 689-92. In commenting on the potential referral for prosecution, the *Washington Post*, in an August 26, 2004, article, commented that the Fay/Jones report "provided the clearest view yet of the role contractors [CACI and Titan] played in the prison abuses" at Abu Ghraib. J.A. 313.

In late July 2005 *Editor & Publisher* reported that U.S. Secretary of Defense Donald Rumsfeld had allowed certain members of Congress to view 87 photographs and four videos from Abu Ghraib that the Pentagon had "blocked from release" to the public. J.A. 334. Secretary Rumsfeld described the photographs and videos as "show[ing] acts [against detainees] 'that can only be described as blatantly sadis-

tic, cruel and inhumane,'" and U.S. Senator Lindsey Graham (R-SC) indicated that "they contained scenes of 'rape and murder.'" *Id.*

On August 24, 2005, *TruthOut.org* published an interview with Brigadier General Janis Karpinski, who was (at the relevant time) in charge of U.S. detention facilities in Iraq. In the interview Karpinski charged that "the Military Intelligence people" used "torture practices [at Abu Ghraib that] were developed and implemented down in Guantanamo Bay." J.A. 290. Karpinski had "no doubt in [her] mind" that "the civilian contractors — Titan, CACI" — "ordered these things [the abuses] to be done." J.A. 298. The civilian contractors simply "ha[d] a playground" at Abu Ghraib, and they "g[o]t out of control," according to Karpinski. *Id.*

The Pentagon's widespread use of military contractors in Iraq attracted scholarly and media attention prior to and while Rhodes was airing her shows that are the subject of this case. Rhodes read articles on this topic as well, including the following two. In a 2004 law review article, Peter Warren Singer, a National Security Fellow at the Brookings Institution, wrote about military contractors who "sell everything from small teams of commandos to massive military supply operations." J.A. 257. Singer surveyed current national and international laws and concluded that privatized military services are not effectively regulated. Singer found that

[s]ome [privatized military] firms have committed severe abuses in the course of their operations and have been employed by dictatorships, rebel armies, terrorist groups, and drug cartels. . . . Given the ultimate importance of the field in which they operate and the potential for serious abuses, a particularly worrying aspect is that the industry's position in the legal sphere remains ambiguous. . . . The result is that [privatized military firms] comprise one remaining industry whose behavior is dictated not by the rule of law, but by simple economics.

J.A. 259-60. In mid-August 2005 the *New York Times Magazine* published a lengthy article about the large-scale use of military (or security) contractors in Iraq. The article discussed the history of mercenary forces, including their involvement on the side of pro-apartheid forces

in South Africa. Some contractors, the article reported, "draw [personnel] from South African veterans of the wars to save apartheid," and one contractor once considered providing "help to Mobutu Sese Seko, the tyrannical dictator of Zaire." J.A. 353, 355.

Armed with the foregoing information and additional accounts from the media, Rhodes, in the period August 10, 2005, through August 26, 2005, devoted parts of her show to the abuses at Abu Ghraib, the issue of military contractor responsibility for those abuses, and the issue of the Pentagon's use of military contractors. CACI's defamation action is based on the following statements that Rhodes made on her show.¹

Statement 1, August 10, 2005 (torture and rape at Abu Ghraib):

[T]here are rape rooms and we are doing that and it is grotesque and there was no reason to go and the people that are torturing and raping are using our soldiers to film it and that the ones that are being paid to do this are not our troops but it's CACI and Titan and the people who relieved General Karpinski of her command in Iraq in Abu Ghraib and the other prison she was in charge of were CACI and Titan. They were independent contractors. . . . And the same independent contractors are doing the same grotesque things to little boys and girls now that we said Saddam was — you know. . . .

J.A. 176-77.

Statement 2, August 11, 2005 (torture and rape of children and misrepresentation of authority):

How about the defense contractors or the oil conglomerates or CACI or Titan International? What's their relationship with the President and why are they allowed to torture and

¹We use the district court's statement numbering and add our parenthetical description of each statement. The statements are taken from the joint appendix, and any stylistic errors or inconsistencies have not been corrected.

rape little children using low-level clerks, who then go to jail for 10 or 15 years? And how come you don't have a responsibility to report on those trials of those low-level specialists who went to jail for 10 or 15 years, who testified that they believed they were working for their government, and really they were working for CACI and Titan, as tools.

J.A. 181-82.

Statement 3, August 15, 2005 (mercenaries fought on side of apartheid and oppressive African regimes):

[Y]ou've got to read this *New York Times Magazine* article [about privatized military companies] . . . [I]t was the cover story, it was the most intensely eye-opening thing I have ever read. No one dared talk about the mercenaries. No one dared talk about all these companies, Blackwater, and CACI, and Titan, and now this new one, Three Canopies, that really didn't even exist until this was started. And then they got this idea, hey let's get a Department of Defense contract and we'll send killers over there. That's exactly what they did. And these people — there's no command and control. They don't report to anybody. They're not loyal to you, they're not loyal to me. They're not loyal to America. They're loyal to the corporation. And they have fought on the side of Apartheid, just like Cheney used to vote against abolishing Apartheid. He loves these guys. These guys literally fought on the side of Mobutu who used to chop peop—, little children's hands off. Why did he do that? Well the purpose of chopping little children's hands off was so that they would grow up as walking billboards for his — as a testament to Mobutu's power. . . . To anybody that might even have a thought about deposing the brutal dictator. And these same guys, same people, that are making up these mercenary companies, same ones, are now over in Iraq doing whatever. And we have no way, there's no law, there's no criminal law that applies to them in Iraq. There's no civil law that applies to them in Iraq.

J.A. 193-94.

