Supreme Court, U.S.
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No. 21-298

In The

Supreme Court of the United States

BOBBY WILSON,

Petitioner,

v.

PHOENIX NEWSPAPERS, INC., GANNETT COMPANY, INC., HUGO PUBLISHING, CO. INC., DUSTIN GARDINER, ALISON STEINBACH, STAN STAMPER, AND GREG BURTON,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals, Div. 2, For The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

BOBBY WILSON, *Petitioner*
In Propria Persona
632 W. Rio San Pedro
Green Valley, AZ 85614
(520) 982-1658
bobbysvisa@gmail.com

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QUESTIONS PRESENTED

1. Is a per se false publication that was proven **fabricated solely** by the defendant sufficient proof alone of malice? Liability for the publication of information known to be false does not abridge freedom of speech or press. *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979). It follows therefore, "that unless the publication in the instant case was privileged or qualifiedly privileged, the proof of publication carries the presumption of its falsity and of malice toward the plaintiff." *Roscoe v. Schoolitz*, 105 Ariz. 310, 314 (1970).

2. If the libel defendants use their proven fabricated articles to engage in a vendetta to destroy a candidate's reputation is **that** not sufficient proof of malice in and of itself and is no longer protected speech? The context of the libelous articles becomes important in determination of the existence of malice. *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973).

PARTIES TO THE PROCEEDINGS

Petitioner was the plaintiff in the trial court (Superior Court of Pima County, Arizona) and the appellant in the court of appeals (Arizona Court of Appeals, Div. Two) proceedings. He was the petitioner in the Arizona Supreme Court. Respondents were the defendants in the trial court and appellees in the Court Of Appeals and respondents in the Arizona Supreme Court.

RELATED CASES

- *Bobby Wilson v. Phoenix Newspapers, Inc., Gannett Company, Inc., Hugo Publishing Co. Inc., et al.*, No. C2019 2032, Superior Court of Pima County, Arizona. Summary Judgment entered on January 10, 2020.
- *Bobby Wilson v. Phoenix Newspapers, Inc., Gannett Company, Inc., Hugo Publishing Co. Inc., et al.*, No. 2 CA-CV 2020 000 47, Court of Appeals, Div. 2. Entered Judgment on February 10, 2021.
- *Bobby Wilson v. Phoenix Newspapers, Inc., Gannett Company, Inc., Hugo Publishing Co. Inc., et al.*, No. CV-21-0066-PR, Arizona Supreme Court. Entered Denial on June 30, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner petitions for a writ of certiorari to review the judgment of the Court of Appeals, Div. 2 for the State of Arizona in this case. Petitioner contends the courts below have misapplied this Court's constitutional malice requirements to Petitioner's unique set of facts. This Supreme Court have never been confronted with facts such as are presented in this case.

OPINIONS BELOW

The Court of Appeals' (Div. 2) opinion (App. 1-30) supposedly applied this Court's requirements that a public figure must prove malice when he is complaining of being per se defamed by the named defendants. The trial court's comments on the record in granting summary judgment for defendants parallels the reasoning of the Court of Appeals in this case. The trial judge commented in the official record: "I have read all the pleadings, exhibits, and declarations submitted by the Parties in arriving at my decision, and what really happened is **debatable** and after looking at everybody's affidavits, statement of facts and their exhibits, I don't think a reasonable jury could find, by clear and convincing evidence, that these defendants acted with malice." (App. 58)

Petitioner has perfected his constitutional arguments of error from the trial court through the appeal stage of his case on the issues that the *Sullivan* case law requirement of proof of malice was misapplied by

those courts because of Petitioner's unique set of facts. (App. 87-89) Petitioner contends the lower courts errored in their construction and interpretation of constitutional malice and this Court needs to address and correct those errors in the interest of justice and to clarify the law of malice as applied to libel cases.

JURISDICTION

The Arizona Court of Appeals, Div. 2, opinion affirmed the trial court's summary judgment against Petitioner on February 10, 2021, thereby denying Petitioner's allegations set forth in his appellate opening brief (App. 52-92). Petitioner submits he produced adequate proof of malice in the lower courts to be entitled to submit his libel case to a jury.

The Petitioner filed a timely Petition for Review in the Arizona Supreme Court which Petition was denied on June 30, 2021. (App. 35).

This Court therefore has jurisdiction under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case does involve interpretation of the following constitutional provisions:

> Amendment I. Congress shall make no law . . . abridging the freedom of speech, . . . press., and,
>
> Amendment XIV. All persons . . . are entitled to: due process and equal protection of the law.

STATEMENT OF THE CASE

1. Defendants Fabricated Their First Libel Article

In the Spring of 2018 Petitioner was a seventy-two-year-old college law instructor with twenty-three years of consecutive college teaching for the Maricopa County Community College District (MCCCD) (App. 36-51) Petitioner qualified to become a Republican candidate campaigning for a state senate seat in the Arizona State Senate. It was his first time to be a candidate for any public office.

Shortly after qualifying, Petitioner was confronted by a reporter (Steinbach) for the *Arizona Republic Newspaper*, Arizona's largest newspaper and its worldwide internet outlet, *www.azcentral.com* (footnote 1) and she questioned him about a June of 1963, Hugo, Oklahoma newspaper headline article she had located. That fifty-five-year-old newspaper article's headline

stated Petitioner had "confessed to the murder of his mother and sister." Petitioner denied the article's truthfulness and told that reporter that he had never made any confession to murder and the that old headline article had been later proven in court to be fabricated and false when the truth came out at the two murder trials in the nineteen-sixties and all criminal charges against Petitioner had been formally dismissed by the district judge at the request of county attorney in 1973 who then apologized to Bobby for his long ordeal (App. 60).

[(azcentral.com is **the oldest and most-visited local site in Arizona**, bringing together the state's largest newspaper, The Arizona Republic; its most-watched television station, KPNX-TV Channel 12; and the Valley's leading Spanish-language publication, La Voz.) www.azcentral.com]

Petitioner explained to defendant/reporter Steinbach that a Hugo, Oklahoma newspaper editor/publisher/owner had solely created that false confession headline article in June of 1963 (Jack Stamper, now deceased, and the father of current Defendant Stan Stamper). The late Stamper had admitted under oath on the witness stand in open court at two separate trials that he had not in fact taken a confession of murder from Petitioner as he had reported previously in his newspapers. No confession to murder ever existed, nor was ever produced. Petitioner told Steinbach that he had written and published a memoir book in 2010 (*Bobby's Trials*), which had been widely read in Hugo, Oklahoma and was in worldwide circulation. That book

clearly described what really happened to him and his family in June of 1963 and that he had never made any confession to murdering his mother, his sister, or anyone else. The book described how the two separate juries that heard all the evidence and agreed that the editor, Jack Stamper, had taken advantage of Petitioner, a naïve teenage farm boy with no legal counsel at that time and that no confession to murder ever occurred. At that meeting with reporter Steinbach, Petitioner gave a free copy of his book, *Bobby's Trials* to Steinbach and told her to read it and told her that his memory returned of those tragic events ten years later in 1973 and that his published account of the deaths of his family had never been challenged by anyone and it clearly stated Stamper had tried to frame him for murder. Furthermore, a jury had made a fact finding in 1965 that Petitioner had no knowledge of the events in question, meaning that he could not have made a confession. Petitioner verbally warned Steinbach, that if she and her employer published that old 1963 false headline newspaper article that she and her employer would be sued for libel. (App. 60-63)

Reporter Steinbach would later deny in her sworn declaration filed as part of discovery in this case that Petitioner had given her a copy of his published book, *Bobby's Trials* at their meeting. (App. 60-63) Reporter Steinbach also had attached to her sworn declarations a copy of the Oklahoma district court judgment that had ruled Petitioner had total amnesia of events in June of 1963. (App. 62) There is no statute of limitation in Oklahoma for the charge of murder (22 Okla. Stat.,

Section 151 (2020)) and it is undisputed that no further legal actions have ever been taken against Petitioner growing out of those events in 1963.

Therefore, defendant Steinbach herself fabricated the false headline for publication that proclaimed the existence of a confession to murder by Petitioner. Steinbach's wrongful actions thereby set the stage for this inference rich defamation lawsuit. These Defendants were well aware of the false nature of that June of 1963 Hugo, Oklahoma headline newspaper article when they assumed the risk of publishing it, embedding it, and broadcasting it nationally and internationally in their newspapers and on their solely controlled *azcentral.com* social network **repeatedly** over a period of nine months for its shock value and to attract paying customers to Defendants' publications and social news outlets. Petitioner had demanded that Defendants print a retraction of that subject article after it first publication in July of 2018, but Defendants refused and reaffirmed its article's truthfulness. (App. 63)

2. Defendants Fabricate a Second Libel Article

Petitioner also proved conclusively that Defendants' reporter, Gardiner, fabricated a second per se libelous article and Defendants' showed their vindictiveness when on August 13th and 15th of 2018, a few days before the election, the three corporate Defendants published that false headline article to the general public about Petitioner, stating Petitioner had

"threatened to kill an HOA president" at a Mexican Condo resort two years previously. Petitioner contends that headline article was not only false, but it was also solely **fabricated** by the Defendants and their reporter (Gardiner). No person involved in that HOA incident, nor the Mexican police report filed in this case mention a threat to kill. Defendants' published article was libel per se on its face because it accused Petitioner falsely of a committing a criminal act and that article's publication caused him to not only lose the state senate primary election held on August 28, 2018 by a slim margin, that false headline publication proximately caused Petitioner's long time employer to terminate his employment without cause because that article labeled him a dangerous person. (App. 64)

On February 15th, 2019, when Petitioner was no longer a candidate for any public office, the Defendants again republished the two false newspaper headline articles by digitally embedding them in their February 2019 *azcentral.com* broadcasts to the general public in their continuing and vindictive efforts to totally and completely destroy Petitioner's reputation by using the shock value of those headlines to attract customers and increase their profits. Those later publications proximately caused him to seek medical care for severe depression for the first time in his life, which continues to date. (App. 64)

3. Dispositions in the Trial

The trial court heard the motions for summary judgments filed by both parties in this lawsuit. Petitioner's motion contented he was entitled to a partial summary judgment concerning the Defendants' liability on the (threat to kill) issue because there was "no evidence" to support the Defendants' article that Bobby threatened to kill someone. Petitioner's pleadings and response to Defendant's motion for summary judgment (App. 65-66) clearly challenged the application of this Court's malice requirements to Petitioner's set of facts. The trial court granted Defendants' Summary Judgment on the basis of no proof of malice and denied Petitioner's motion for partial judgment. Petitioner filed an extensive Motion for New Trial preserving his complaints of that court's errors in holding him to the Sullivan case malice requirements, and his timely filed motion was denied on February 19, 2020 (App. 67)

4. Disposition in the Court of Appeals

The Arizona Court of Appeals affirmed the trial court's judgment of inadequate proof of malice in its decision in case number 2CA-CV2020-0047 and affirmed the trial court's denial of Petitioner's summary judgment request. (App. 1-30) Petitioner has preserved his complaints of error concerning the lower courts' constitutional expressed malice requirements and that they should not apply to his unique set of facts. (App. 87-89)

5. Disposition in the Arizona Supreme Court

Petitioner filed a timely Petition for Review in the Arizona Supreme Court, case number CV-21-0066-PR, which was denied on (App. 35). That petition contended the lower courts application of *Sullivan's*, malice requirement to Petitioner case was error. The Arizona Supreme Court Denied the Petition for Review without comment on June 30th, 2021.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to decide the important questions this case presents and in the interest of justice.

1. Is a false publication that was proven to be fabricated solely by the defendant sufficient proof of malice? Liability for the publication of information known to be false does not abridge freedom of the speech or press. *Herbert v. Lando*, 441 U.S. 153, 171-72 (1979). It follows therefore, "that unless the publication in the instant case was privileged or qualifiedly privileged, the proof of publication carries the presumption of its falsity and of malice toward the plaintiff." *Roscoe v. Schoolitz*, 105 Ariz. 310, 314 (1970).

2. If the Defendants use their false and fabricated articles to engage in a vendetta to destroy a candidate's reputation is that not sufficient proof of constitutional malice in and of itself?

The context of the libelous articles becomes important in determination of the existence of malice. *Pittsburgh Press Co. v. Human Rel. Comm'n*, 413 U.S. 376 (1973).

Petitioner contends that the two subject false articles published by these Defendants were fabricated solely by them and therefore those articles by their very nature passed the test of constitutional malice when they were published. The creator of a false story certainly knows it is false without the need for further proof of malice. The very nature of these ugly per se libels in the case at bar screams for redress, to wit; to falsely accuse a public candidate of confessing to murdering his family fifty-five years ago and then adding to the damage done by then making up another story that he threatened to kill someone, thereby branding him a dangerous individual, forever. (App. 60-63; 118-119)

When a libel plaintiff makes allegations in the trial court that the subject libel article was fabricated by the defendant, the trial court has a duty to make a judicial determination as to that matter because that is what this Supreme Court has required in the past, yet has failed to enforce for political reasons. It is time to correct that error, to wit, because this Court has previously ruled:

> "The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called "actual malice," a term of art

> denoting ***deliberate or reckless falsification***." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 499 (1991).

Therefore, a trial court should be required to make a factual determination at the summary judgement stage that if the subject published a "deliberate or reckless falsification," and if the trial court in fact so finds, that finding satisfies the malice requirement by its very nature. And the case should proceed to trial.

See also: "The common law of libel overlooks minor inaccuracies and concentrates upon substantial truth. Thus, a deliberate alteration of a plaintiff's words does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) unless it *results in a material change in the statement's meaning*.

This Court should follow its own case law tests in deciding this case. To wit: (1) "where a story is fabricated by the defendant"; or, (2) "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation"; or, (3) "where there are obvious reasons to doubt" the basis for the story. *St. Amant v. Thompson*, 390 U.S. 727, 730-33 (1968); see also *Tavoulareas v. Piro*, 817 F.2d 762, 790 (D.C. Cir. 1987) (en banc.) If any of these *three tests* are met by the libel plaintiff, (and they are *all* met in the case at bar) a subjective inference of actual malice exists. This Supreme Court needs to make it mandatory on the lower courts that they must follow these

three dictates and make a factual finding on these points before it places the burden on a libeled plaintiff to prove constitutional malice. To continue to allow the publishers of false statements a free hand to spread lies and untruths is making a mockery of American jurisprudence and its common law. Our sister common law countries saw the dangers inherent in this Court's past requirements of proving constitutional malice and rejected it. *Hill v. Church of Scientology of Toronto*, 2 SCR 1130 (1995).

Silberman, Senior Circuit Judge in the *Tau* case cited herein, on page 246 states in his dissenting opinion states: "a story may be so inherently improbable that only a reckless man would have put them in circulation, . . . the cumulative force of the evidence to the contrary should give the publisher obvious reasons for doubt." The case at bar is such as case and demands this Court's attention and clarification or a new definition of when the facts of a case require the trial court to make a factual finding of the existence of the required malice when the issue of fabrication is raised by the plaintiff.

"It is not the court's province to dismiss a plausible complaint because it is not as plausible as to the defendant's theory" *Silberman, J.*, in *Palin v. New York Times, Co.*, 940 F.3d 804, 815 (2019); and also note: "At the summary judgment stage all reasonable defamatory readings must be analyzed for actual malice." *Weyrich v. New Republic, Inc.*, 235 F.3d 617, 627 (D.C. Cir. 2001).

"The *Sullivan* decision allows the deprecating of the reputation of ordinary citizens and renders them powerless to protect themselves." Justice White, dissenting, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370 (1974).

A very well written and appropriate law review article clearly states the accurate and current state of the news and social media outlets: "It seems that publishing without investigation, fact-finding, or editing has become the optimal legal strategy . . . ignorance is bliss." *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio L. J. 759, 778 (2020-Logan).

Petitioner pled two free standing per se defamation causes of action against these Defendants, to wit: (1) their newspapers' fabricated the discredited June, 1963, Hugo, Oklahoma newspaper headline proclaiming Petitioner had in June 1963 "confessed to murdering his mother and kid sister;" and (2) their fabricated newspaper headline that proclaimed Petitioner had "threatened to kill a HOA president."

Those two headlines were fabricated for publication by Defendants for the sole reason of their shock value to attract readers and customer profits and damage Petitioner and had nothing to do with the duties of a state senator.

In regards to the first defamation article, sworn proof was offered by Petitioner that he met face to face with Defendant reporter Steinbach, and expressly warned her that the June 1963 Hugo, Oklahoma

newspaper headline was false when published in June 1963 and Petitioner would sue for defamation if Defendants published that wholly discredited headline article. That reporter Steinbach totally and knowingly disregarded the known facts at that time: (a) the so-called confession to murder never existed; (b) two juries refused to find him guilty of any offense and in fact found he had no memory of subject events; and (c) no one has ever challenged Petitioner's version of those actual events in his 2010 memoir book that clearly stated he was framed for murder by the Stamper family newspaper in June of 1963. Furthermore, there is no statute of limitations for murder in Oklahoma [22 Okla. Stat., Section 151 (2020)] and over fifty years had passed without further prosecution efforts. (App. 60-63; 173-174)

Therefore, Petitioner's version of those events has to be taken as true. Why else would reporter Steinbach in her sworn declarations deny Petitioner gave her a copy of his book and that he told her to read it and warned her. That factual dispute alone is a strong inference that reporter Steinbach does not want to admit she was aware his Petitioner's book contents and its obvious warning about the factual basis of a fifty-five-year falsehood and its attempt to frame an innocent man.

Furthermore, the sworn declarations introduced in this case of the only two living witnesses to the events in June 1963 (Petitioner and R.D. Payne) clearly proved that no confession to murder ever took place. (App. 181-182) R.D. Payne's declaration states that the

late Jack Stamper also falsely quoted him in the same newspaper article saying that "Petitioner had made a full confession to murder him," and Payne he says that was "totally false."

In regards to the defamation count involving a so called threat to kill, Petitioner and his wife, Eileen, both swore no verbal threats to kill were ever made by Petitioner. The sworn declarations of Dan Dimovski and Bruce Turner, Defendants' only two witnesses (App. 63-64) totally fail to state the words "threats to kill" ever occurred. (App. 60-64) Taking into consideration this is the only testimony offered by Defendants about this event and their declarations do not state a threat to kill was ever made; Defendants' reporter had to know his headline about Petitioner was false because he fabricated it for its shock value.

The lower Courts erred in requiring Petitioner to prove constitutional malice when he had proved the subject articles were fabricated by the Defendants. Petitioner objected to these lower Courts' requirement that he must shoulder the burden of proving constitutional malice under the unique facts of his case and that it was an unconstitutional burden and a violation of Petitioner's Fourteenth Amendment Rights to due process and equal rights of the law. It is a violation of the Equal Protection Clause of the Arizona and United States Constitutions to require such an unfair burden proving constitutional malice in a defamation case such as this case. U.S. Supreme Court Justice Thomas, in his concurring opinion in the case *of McGee v. Cosby, Jr.*, 137 S.Ct. 675 (2019) said "the *Sullivan* case, *infra*,

federalized the law of libel and was a mistake and needs to be re-visited." Several other learned judges have agreed that the time has come to re-visit the *Sullivan* case, *infra* and modify its constitutional malice requirements in libel cases. Justice Gorsuch in *Berisha v. Lawson*, U.S. Supreme Court case No. 20-1063 (Jul. 2, 2021), Senior Cir. Judge Silberman, in *Tau v. Glob. Witness Publ'g, Inc.*, 991 F.3d 231 (D.C. Cir. 2021).

There has been a vast change in the print and social media world since 1964 when the *Sullivan* case became the law of the land. According to a respected media source (PEW Research Center) only a small fraction of this nation reads newspapers anymore; approximately 86% use other electronic methods. (App. 189-190) Therefore, the Supreme Court no longer needs to grant libel immunity to the news print industry in order to protect that industry, it is a dying industry. Society has moved on and this Court needs to update the current law of libel to meet the new world of rampant "fake news" that is undermining our society. This Court should restore the states common law libel standards or, at least, this Court should require a trial court to determine if a fabricated story was the creation of the defendant and what the consequences for such a finding are in relation to the malice proof requirement. The Justices of this Court are fair game just like the rest of us to false or fake articles. To quote a lawyer who once directed a question to a well-known political hack and liar who had enjoyed ruining peoples' lives with fabrications: "Have you no sense of

decency, sir?" It's time for this Court to restore decency to media output in our Country.

The accepted definition of fabrication according to *Black's Law Dictionary* is informative:

> To fabricate evidence is to arrange or manufacture circumstances or indicia, after the fact committed, with the purpose of using them as evidence, and of deceitfully making them appear as if accidental or undesigned; to devise falsely or contrive by artifice with the intention to deceive. Such evidence may be wholly forged and artificial, or it may consist in so warping and distorting real facts as to create an erroneous impression in the minds of those who observe them and then presenting such impression as true and genuine.

Therefore, Petitioner requests this Supreme Court's determination and formal ruling concerning his right to a fair trial in this libel case and he requests this Court overturn and reverse the lower courts' dismissal of his unique case based either on the fact he proved per se fabrication by Defendants and the trial court should have made a factual finding on those matters that would have constituted a finding of constitutional malice in this case; or in the alternative, Petitioner requests this Court reverse the lower courts who erred by requiring him have the additional burden of proving constitutional malice in these matters, because that requirement violates his due process and equal protection rights as guaranteed in the United States Constitution.

This Court should grant review to clarify the current law on these subjects and reverse the relevant rulings of the lower courts and order a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BOBBY WILSON
Petitioner

Dated: August 25, 2021