

Supreme Court of the United States

OCTOBER TERM, 1970

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In the Matter of:

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 OCALA STAR-BANNER COMPANY, ET AL., :
 :
 Petitioners, :
 :
 vs. :
 :
 LEONARD DAMRON, :
 :
 Respondent. :
 -----M

Docket No. 118

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Place Washington, D. C.
 Date December 17, 1970

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ARGUMENT OF

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 -----:

4 OCALA STAR-BANNER COMPANY, ET AL., :

5 Petitioners, :

6 vs. : No. 118

7 LEONARD DAMRON, :

8 Respondent. :

9 -----:

10 Washington, D. C.,

11 Thursday, December 17, 1970.

12 The above-entitled matter came on for argument at

13 10:58 o'clock a.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice

16 HUGO L. BLACK, Associate Justice

17 WILLIAM O. DOUGLAS, Associate Justice

18 JOHN M. HARLAN, Associate Justice

19 WILLIAM J. BRENNAN, JR., Associate Justice

POTTER STEWART, Associate Justice

BYRON R. WHITE, Associate Justice

THURGOOD MARSHALL, Associate Justice

HENRY BLACKMUN, Associate Justice

20 APPEARANCES:

21 HAROLD B. WAHL, ESQ.,

22 Jacksonville, Florida

Counsel for Petitioners

23 WALLACE DUNN, ESQ.,

24 Ocala, Florida

Counsel for Respondent

25 - - -

1 garage man. He was mayor of the municipality of Crystal River,
2 with a population of 1,523, and a candidate to succeed himself.
3 He was also practically a full-time candidate for county tax
4 assessor, politicking for that job while his brother, James
5 Damron, ran his garage.

6 In the middle of the election campaign for county tax
7 assessor -- and, of course, he was continuously running for
8 reelection as mayor and was subsequently defeated -- the
9 defendant, the Ocala Star-Banner, the daily newspaper in nearby
10 Marion County, ran the offending article.

11 In their article it was stated erroneously that
12 Leonard Damron, rather than his brother, had had a case contin-
13 ued which was an indictment for perjury in the federal court in
14 a civil rights case. Now, if there was anything that was of
15 more public interest in the rural South in April 1966 than
16 civil rights, it was an indictment for perjury of a Damron in a
17 civil rights case.

18 Now, the article was written by a man named Meir who
19 had just recently come to this position with the Ocala paper.
20 He had never even met the plaintiff, but he had written a
21 number of articles about the political goings on in Crystal
22 River where there were two factions and the plaintiff was the
23 head of one of them. And when the story was phoned in to him,
24 the reporter phoned in the correct name of James Damron, but
25 area editor had heard so much about and had written so much

1 about this politician brother that, through an error, he just
2 automatically wrote down the wrong name, and that is how the
3 name of Leonard got in rather than James.

4 Leonard then brought a suit for libel and he specific-
5 ally alleged, and I quote from his complaint, "that as a
6 public officer being elected to the office of mayor of Crystal
7 River and a candidate for the office of tax assessor of Citrus
8 County." Then he charged that the words of the article included
9 perjure, and again I quote his exact words, "to the electorate
10 of Crystal River and Citrus County."

11 He then went on to allege that the article was pub-
12 lished in the middle of the election campaign and cost him the
13 election, and he concluded by claiming damages to his reputa-
14 tion as a "public officer and candidate for public office." He
15 didn't even allege malice in his complaint. The word "malice"
16 doesn't appear in it, even though the court did submit the
17 issue of malice on punitive damages.

18 Q What is the significance of your position there?
19 In Florida, in pleading, must they allege --

20 A Malice in a libel suit, yes, sir. And certainly
21 under New York Times you have to allege malice. The newspaper
22 moved to dismiss the complaint because of failure to allege
23 malice and move to strike the public figure damages, where he
24 was claiming damages to him as mayor and as candidate for
25 public office. Both motions were denied. The case came on for

1 trial and the court, as I say, actually instructed the jury to
2 bring in a verdict on compensatory damages, the only question
3 being the amount of dollars.

4 Plaintiff testified that he had been defeated for
5 county tax assessor, he gave the salary of the office; he
6 further testified that he was defeated for reelection as mayor.
7 His twelve witnesses repeatedly testified as to the effect
8 that this article had had on his standing with the electors,
9 and that that is what cost him the election.

10 Motions for a new trial and judgment non standim
11 veridictum was filed. It expressly urged the New York Times
12 case. The motion was denied. The Florida District Court ap-
13 pealed the judgment on a directed verdict, holding that the
14 New York Times doctrine only applied to "official conduct of
15 a public official," and the alleged libel wasn't a libel that
16 he had done as a public official.

17 The Florida Supreme Court refused to review the case,
18 and this Court has granted certiorari.

19 Q Mr. Wahl, the salary of the office to which
20 this gentleman was an aspirant was \$9,000 a year?

21 A My understanding, and it is pure hearsay, is
22 that the jury verdict was a two-year salary, \$18,000, and the
23 extra was a little bonus. That is where the verdict came from
24 and --

25 Q Well, he also lost his bid for reelection as

1 mayor, didn't he?

2 A Well, he didn't get paid for that.

3 Q That was a non-paying job?

4 A That was a non-paying job. But the whole thrust
5 of the case, Mr. Justice Stewart, was that this article was
6 published right in the middle of the election campaign, when it
7 was too late for him to do anything about it. "I'm the mayor,
8 I'm trying to continue to be mayor. I'm a candidate for county
9 tax assessor, and this article is what has cost me the job."
10 Now I didn't say all that; he said it.

11 Q Would you think a jury could reasonably find that
12 he lost the election because of the article?

13 A Well --

14 Q Could decide all those factors?

15 A Yes, because there isn't any question that we
16 made a mistake.

17 Q Could they reasonably find it?

18 A Yes, sir. That was his whole theory, and if
19 you erroneously accuse a man of being indicted for perjury in a
20 civil rights case in rural Florida in 1966, he's a goner as far
21 as being elected to public office is concerned. There is no
22 question about that.

23 Q Was there any evidence of injury to him in addi-
24 tion to or except for this loss of office?

25 A Oh, he intermingled the two. He said that he

1 had lost business in this shop that his brother, the one who
2 was indicted, was running for him. And then, of course, he
3 said he felt bad and it made him feel bad, his neighbors and
4 so forth, to have been accused of this thing, and all that sort
5 of thing. He brought that in.

6 Q Yes.

7 A But the real thrust of his case was that "I have
8 been defeated for county tax assessor and I have lost my job as
9 mayor."

10 Now, clearly, New York Times applies to a situation
11 of this kind where the plaintiff made his own bed. I didn't
12 try the case, but the lawyer who tried the case didn't come in
13 and say that he was a public figure. The plaintiff brought his
14 suit and specifically alleged that he was a public figure, that
15 he was the mayor, running for reelection, that he was a candi-
16 date for tax assessor, and that he had been damaged as a candi-
17 date and as mayor.

18 Now, we say under those circumstances that this case
19 should not be sent back for another trial and have more expense
20 but that this Court should direct a verdict for the newspaper.
21 Now, he had ample opportunity in this case to prove his malice
22 because he was seeking \$500,000 in punitive damages in his com-
23 plaint, and he brought in everything he could on malice to
24 sustain his punitive damages. So he has had a chance to prove
25 his malice.

1 The only thing that he showed on malice was three
2 innocuous articles written not by the man who wrote this story
3 but by somebody else in the past about him, one of which said
4 that he had walked out of council meetings. And he said, well,
5 I had differences with the council but I never physically
6 walked out. Another one said he had clashes with the council.
7 He said, well, I had differences with them but I didn't have
8 any clashes. And the other one he said gave an erroneous
9 salary for the city attorney. Now, certainly those articles
10 are not sufficient to establish malice, and that is all he had.

11 As I say, the man who wrote the article made a mis-
12 take, there isn't any question. The reporter phoned it in and
13 she had the right name. Of course this man, the plaintiff, was
14 so much in the public eye, he was even keeping clippings, ac-
15 cording to his own testimony, of all the stories that the Ocala
16 people ran about him. He was an actor on the public stage. He
17 was trying to get people to know about him. He was seeking
18 publicity. And because of those public activities, because of
19 his seeking the public eye, this new newspaper editor who had
20 had this job about a month had heard of him, and he just auto-
21 matically assumed, when he read the name Damron over the phone,
22 that they were talking about a public figure and so he put the
23 public figure's name in the article and wrote the article
24 about the public figure rather than about his brother.

25 Q Did the publisher of the paper know that this

1 was false?

2 A Well, the reporter who called it in --

3 Q Knew it was false? Everybody else on the news-
4 paper knew it was false?

5 A That's right, everybody. The only man who made
6 the mistake was the man who wrote the article and sent it down
7 and had it published. The reporter who published it called in
8 the right name. This new man just simply made an error.

9 Q At what stage of the campaign was it published?

10 A Right in the middle of it.

11 Q What?

12 A Right in the middle, two or three weeks before
13 the election.

14 Q Two or three weeks?

15 A As I understand, right square in the middle of
16 it. And I can agree with you that the man who wrote the
17 story was in error, he was careless, he was negligent, but he
18 certainly wasn't guilty of express malice or a calculated lie
19 with attempt to harm. He just plain made a mistake.

20 Q What did they do about it, if anything?

21 A The next day the newspaper ran a retraction and
22 said, "We're sorry, we made a mistake. We got the wrong name."
23 The next day or a few days later, the plaintiff wrote a letter
24 in to the paper and again said, "I am mayor. I am candidate
25 for tax assessor. This has hurt me. You got it wrong. I

1 wasn't the man." They published that. A few days later one of
2 his supporters wrote a letter to the newspaper and said, "You
3 have done a grave injustice to this man. He is the mayor. He
4 is candidate for tax assessor. It has hurt him with the elec-
5 torate. You are a bunch of terrible people to run this." The
6 newspaper ran that. So three times the newspaper corrected it.

7 But what I say is that the New York Times doctrine
8 applies because this man made his own bed. He is the man who
9 filed the complaint and said he was a public figure. He is
10 the man who said he was hurt as mayor. He is the man who said
11 he was hurt as candidate for tax assessor. And having made
12 his bed, he is bound by it.

13 Q You mean he is bound by New York Times?

14 A That's right.

15 Q He has put himself in the New York Times case?

16 A He has gotten in bed with the New York Times
17 doctrine, yes, sir.

18 Q You are not suggesting he waived any of his
19 rights by doing that?

20 A No, no, certainly not. But I say that he has
21 pleaded himself and proved himself within the New York Times
22 doctrine.

23 Now, it is true that the story didn't say Leonard
24 Damron, mayor or Leonard Damron, candidate for tax assessor.
25 It merely described him as a businessman or something of that

1 kind. But the only reason that Meier put his name in that
2 story was because Meier thought that it was a public figure so
3 he wrote the story about the public figure.

4 Now, Garrison makes it clear that you can't separate
5 private reputation from public reputation, and the two are so
6 intermingled here that there is no way for him to get a verdict
7 for damage to his private reputation when he subjected his
8 public reputation.

9 Now, as our former President, the Honorable Harry
10 Truman, said, if you can't stand the heat, get out of the
11 kitchen. Mr. Damron, instead of staying out of the kitchen of
12 politics, he got in with all four feet. He sought publicity.
13 He even kept a record of his clippings. He was in one office,
14 trying to run this little town, trying to stay on. He was
15 trying to get a paying office in the county, and since he is in
16 the kitchen he can't complain because of comments.

17 We respectfully submit that under the circumstances
18 here, the New York Times doctrine applies because of his own
19 allegations and his own proof, and that we should not be put to
20 the expense of another trial since he has had a chance to put
21 on all of his evidence. This isn't like some other case where
22 maybe he can't get it all in. He was trying to get \$500,000 in
23 punitive damages so he put in all the evidence he had, and that
24 the court should be directed to render up a verdict for the
25 newspaper.

1 Q What was the verdict?

2 A \$22,000, which I understand, purely hearsay, was
3 two years salary, \$18,000, and then \$4,000 more for loss of
4 business or hurt feelings and that sort of thing.

5 Q It is all compensatory in your view, is it?

6 A Sir?

7 Q All compensatory damages, in your view, is it?

8 A Oh, yes, because he is specifically in Florida.
9 I was amazed to hear a case here yesterday where they didn't
10 know whether they were compensatory or punitive. In Florida,
11 you have to spell out blank dollars punitive, blank dollars
12 compensatory, and there was no verdict given for punitive
13 damages.

14 Q You mean compensatory for his having lost the
15 office?

16 A Yes, sir, because he lost the office. He also
17 claimed that he had had some loss of business. Of course, he
18 had the brother who was indicted for perjury running the busi-
19 ness, so it would be kind of hard to see how that could have
20 affected it significantly.

21 Q Nothing was submitted to the jury about whether
22 or not that had anything to do with his losing the office?

23 A Oh, yes, the judge specifically told the jury
24 that they could bring a verdict in for damages that he had
25 sustained as a public servant, or words to that effect.

1 Let me see just what the exact words were.

2 Q You don't mean the jury was permitted to guess
3 at whether or not he would have won --

4 A Yes. Here is what they told the jury, that the
5 jury could bring these damages. This is page 82 of the
6 Appendix. First, as to compensatory or actual damages, you may
7 award a sum that will fully and adequately compensate the
8 plaintiff for his mental suffering, embarrassment, and injury
9 to his reputation as a citizen and public official, and any
10 other damage that would naturally flow from being falsely ac-
11 cused of a felony.

12 Q But that doesn't seem to submit to the jury --

13 A Well, that is the whole theory --

14 Q -- to determine whether or not he would have won
15 the election if it hadn't been published.

16 A Well, Judge, the whole theory of the case was
17 that he lost the election. That is what all the witnesses
18 testified. That is the whole theory on which the case was
19 tried. That is what all of his twelve witnesses testified
20 about. He even gave the salary of the job as involved. That
21 was the basis on which the case was tried. And the whole
22 theory of damages primarily, as he alleged in his complaint,
23 was that he was the mayor, a candidate for reelection, and
24 that he suffered damages in that capacity.

25 Thank you.

1 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wahl.

2 Mr. Dunn?

3 ARGUMENT OF WALLACE DUNN, ESQ.,

4 ON BEHALF OF RESPONDENT

5 MR. DUNN: Mr. Chief Justice Burger, members of the
6 Court. In rebuttal to Mr. Wahl's comments --

7 MR. CHIEF JUSTICE BURGER: Would you raise your voice
8 a little bit, counsel?

9 MR. DUNN: Yes, sir.

10 I would like to point out some very salient features
11 in this case. I will concur with Mr. Wahl on one thing -- it
12 is an unusual case. The original complaint, and I filed the
13 original complaint, was filed in 1966, but this case was not
14 tried until January 1968.

15 As pointed out in my brief, just prior to the trial
16 of this case, the trial attorney admitted liability on behalf
17 of the defendants and we tried this case strictly on a question
18 of damages. However, in looking --

19 Q When the judge directed a verdict, to use the
20 term that your friend used, he was directing that in effect
21 pursuant to concession of liability.

22 A Yes, sir, this is quite correct, and this is the
23 reason for the --

24 Q Where is that in the record?

25 A Sir?

1 Q Where is that in the record that they admitted --

2 A It is not in the record.

3 Q It is not in the record.

4 A The only place in the record that has a direct
5 reference to it, sir, is the comment of the judge at the time
6 he directed the verdict. In other words --

7 Q Where do we find that in the appendix? I don't
8 have that --

9 A That is on page 80 of the appendix, at the bottom
10 of the page.

11 Q Page 80?

12 A Yes, sir. I had made my application for a di-
13 rected verdict at the conclusion of the evidence and the court
14 at the point of discussion pointed out, "well, I think liabil-
15 ity as to compensatory damages is admitted in this case" --
16 not proven, the word "admitted" was used, and this is exactly
17 what happened. And that is the reason for the candor in which
18 this case was tried.

19 Now, the record goes on to show that the defense at-
20 torney made no objections to this statement. He was only ask-
21 ing the court to define what type of damages would be return-
22 able by the jury and what findings the jury would have. Now,
23 in this connection, I would like also to point out that we have
24 very little statutory law in Florida relative to the trial of a
25 libel action. The statute in Florida only has been directed to

1 the award of punitive damages and provides that if a retraction
2 is printed of the same size type and general location in the
3 newspaper, punitive damages will not be awarded and the jury
4 was so instructed. As a matter of fact, they were instructed
5 twice, as shown by the record.

6 However, I would like to point out to the Court that
7 there is more to this case as shown by the record although we
8 did try it on a question of damages only, and I refer the Court
9 to page 75 of the appendix relative to the testimony of Mr.
10 Fred Meier who was the area editor, and in his testimony, start-
11 ing about half-way down the page, in answer to a question:

12 "Now, to the best of your recollection now, what word
13 did she actually use when she called in?

14 "Mr. Meier: The only word I caught was Damron and I
15 automatically put down Leonard.

16 "Why did you do that?

17 "He was the only Damron I knew. It was probably a
18 mental aberration. I just assumed it was Leonard Damron. I
19 didn't hear Leonard on the phone. I can't swear that I did.
20 I just heard the word Damron."

21 And the next to the last question on the page, "And
22 in his capacity as mayor of Crystal River, he had been writing
23 articles about Leonard Damron."

24 We turn over to page 76, and here is where the un-
25 usual part of this case begins. Starting in the middle of the

1 page:

2 "Question: Well, tell me, Mr. Meier, having written
3 as many stories about Mr. Leonard Damron" -- this is on cross-
4 examination, incidentally -- "weren't you aware that Mr. Damron
5 was in Crystal River?

6 "Answer: Yes.

7 "Mr. Meier, will you look at the dateline on the
8 story which was published in error and answer me, what is the
9 dateline on that particular story?

10 "Answer: Inglis."

11 The next question: "You had a mental aberration?"

12 "Answer: Yes.

13 "Question: A man you had been writing stories about
14 in Crystal River, Florida, and you suddenly get a story about
15 him in Inglis, Florida, and you make this change without
16 checking. What happened?

17 "It so happened I did."

18 And his next statement was he had spent thirty-seven
19 years in the newspaper business.

20 I refer the Court now to page 70 of the appendix,
21 which is the testimony of Miss Lucy Ware, who was the reporter
22 who called in the story. On page 70, she reads into the
23 record the first story that was printed about James Damron in
24 January of 1966, which is substantially correct.

25 Starting on page 72 -- that story, incidentally, is

1 reprinted in part in the appendix on 85, it was attached. Now,
2 here is where we really get the wreckless disregard and the
3 malice in this case. On page 72, the second question:

4 "This has been received in evidence as Defendant's
5 Exhibit No. 3" -- referring to the prior story. "Now, what
6 procedure" -- talking to Lucy Ware -- "what procedure do you
7 follow in writing a story and transmitting it to the Star-
8 Banner, Miss Ware?

9 "Answer: Well, I use one of two procedures. If a
10 story is not a particular news interest, I generally type it
11 and mail it in since the mail service is one day. If the story
12 is of a particular news value, I phone it in early in the
13 morning.

14 "Question: All right. What procedure did you follow
15 in transmitting the particular story 'Damron Case Passed Over
16 In Next U.S. Term'?" This is the article sued upon. "What
17 procedure did you follow in transmitting that story to the
18 Star-Banner for publication?

19 "Answer: I typed it first at home. I read it over
20 the phone the following morning, the same morning, to Mr.
21 Meier."

22 The next question: "And what is this? What is this
23 story?"

24 "Answer: The story is essentially the one that I
25 called in, the only change being that the city was changed,

1 referring to the dateline Gainesville, where the federal court
2 was sitting" -- and she goes on to state.

3 "When I phoned in that morning, I had a Gainesville
4 dateline which was where the action had occurred. I was in-
5 formed that our editor had given instructions that any story
6 appearing on this page was an area page and should have and
7 coming out of the area concerning the area people, should have
8 the dateline of the city that the people were concerned with
9 because people read datelines rather than the text of the
10 story.

11 "Question: Who did you telephone it to?

12 "Answer: Fred Meier."

13 Now, it doesn't take a great deal of logic for a man
14 to understand that when Fred Meier said he had a mental aberration
15 that this was not a true statement, the details shown in
16 Lucy Ware's discussion of how that story went to the newspaper
17 -- first of all, this was actually a reprint of a prior story.
18 The standing of the prior story is shown by the makeup in the
19 appendix on pages 84 and 85 for comparison. On 85 is the
20 first story; on 84 is the story complained of.

21 We go back to Lucy Ware, and she says that she found
22 out about this story typed up that night and for some reason
23 unexplained she called it in the next day. Within her conver-
24 sation they got into a big discussion about the dateline, a
25 story being changed from Gainesville, admittedly by Mr. Meier.

1 that this city was changed from Gainesville to Inglis. He had
2 written many stories about the plaintiff who lived in Crystal
3 River, was the mayor of Crystal River, and he knew was in
4 Crystal River. As I say, this whole text of this testimony
5 shows conclusively, when you refer back to the testimony of
6 the plaintiff on page 30 of the appendix, down at the bottom
7 of the page, this was the testimony of the plaintiff put on in
8 chief:

9 "Mr. Damron, have you ever had an occasion to call
10 the Ocala Star-Banner regarding news publications?

11 "Answer: Yes, I have called Ocala Star-Banner.

12 "Question: When did you call them?

13 "Answer: Back somewhere in 1965. I believe it was
14 about October, if I am not mistaken.

15 "Question: Who did you talk with?

16 "Answer: I talked with Mr. Loyal Phillips.

17 "Question: Do you know who Mr. Phillips is?

18 "Answer: Yes, sir.

19 "Question: Or was at that time?

20 "Answer: Yes, sir. He was the Vice President and
21 Publisher. That is the one I asked to speak to, and I asked
22 to speak to the General Manager, Mr. Dunn, and they got me on
23 the phone and got him on the phone.

24 "Question: What was the substance of your conversa-
25 tion with Mr. Phillips?

1 "Answer: I asked him to send someone to Crystal
2 River to publish the news as it happens, true facts and not
3 editorial on a subject they write on.

4 "Question: What prompted you to call the Ocala Star-
5 Banner?

6 "Answer: So many mistakes in the paper."

7 The newspaper publisher had been informed that his
8 publications were coming out erroneously. This, as I see, is
9 a classic case. Based on the evidence in the record, we have
10 to go no further than that, to show that it was malice in the
11 publication of this story, timely, in the middle of an election,
12 a story which the evidence also shows, the passing over part
13 occurred 13 days before the new story was broken. There was a
14 republication of a prior composition of the same newspaper,
15 published timely, right in the middle of an election.

16 Q Mr. Dunn, didn't your District Court of Appeal
17 affirm this judgment only on the basis of New York Times --

18 A What happened in --

19 Q -- was not to be applied?

20 A It affirmed on that basis because that was the
21 point presented by the appellant at that time.

22 Q And there was no further review in the Florida
23 courts?

24 A The Florida case was appealed to the Florida
25 Supreme Court but they reviewed the decision and dismissed it

1 of their own motion.

2 Q And so that we have the coming here of the judg-
3 ment of the Florida courts saying that on these facts New York
4 Times -- the New York Times rule is inapplicable?

5 A That is correct, yes, sir.

6 Q And you are arguing here that it is applicable
7 but that it was satisfied?

8 A I am saying three things, Your Honor: First,
9 the defendants admitted their liability before we ever tried
10 this case at a time when the decisions of this Court were well
11 known and well available to them to make any objections as to
12 this rule at the time of trial.

13 Q They admitted their liability?

14 A Yes, sir.

15 Q But only for compensatory damages?

16 A Yes, sir. The jury then -- and, as I pointed
17 out earlier also, Chief Justice Burger, we have the Florida
18 statute that prohibits the award of punitive damages unless if
19 the publication has been retracted and the jury made this de-
20 termination that it was properly retracted.

21 Q Is the only evidence of admitting liability and
22 not relying on New York Times that material that you pointed
23 out to us in the appendix?

24 A That is the only matter of record, yes, sir.

25 Q There never was a request for any objection to

1 the judge's instructing the jury on liability?

2 A No, sir. We went strictly on the issue of
3 damages and the preparation of the instructions.

4 Q Can you enlighten us on page 80 whether the
5 omissions at the bottom of the page, after the judge's state-
6 ment, "Well, I think liability as to compensatory damages is
7 admitted in this case." What dialogue, what colloquy took
8 place after that?

9 A We neither went into the discussion of the type
10 of damages to be awarded --

11 Q I should think that is quite relevant to the
12 question that you have impressed on us, that liability for
13 compensatory damages was admitted and perhaps you ought to
14 supply that omission from the record. Do we have it here?

15 A We have the record here, and I would be very
16 happy to supplement it, Your Honor.

17 Q Well, it may be, you are quite right, that he
18 should have been -- that the newspaper should have been pre-
19 cluded from raising this issue which they hadn't raised at the
20 trial, but the Florida courts, under the Florida procedure,
21 doesn't seem to -- don't seem to have taken that course. The
22 District Court of Appeal has taken the issue and decided it.

23 A That is the point I was trying to explain, sir.
24 At the time this case went to the District Court, the only
25 point that was urged on the District Court was New York Times

1 vs. Sullivan.

2 Q Well, I know, but --

3 A And the argument at that point was that the
4 libel complained of was a perjury charge unconnected with any
5 office sought or held, and it was not within the purview of
6 official conduct.

7 Q But if the New York Times issue was out of the
8 case because they admitted their liability, why would the
9 Florida court even deal with the issue? They would say you
10 have waived the question, you have admitted it.

11 A Mr. Justice White, I'm sorry, I cannot read into
12 the minds of why the judge wrote the opinion he did.

13 Q It is --

14 A It is obvious because the way in which they
15 went over the directed verdict aspect of it, they didn't even
16 give it any consideration.

17 Q Are you suggesting to us that we shouldn't reach
18 the New York Times issue because the newspaper admitted, that
19 couldn't apply, and yet the case comes here from the Florida
20 courts on the assumption -- on a wholly different assumption.

21 A I brought this point out in my petition for
22 certiorari.

23 Q How long was it exactly after this article was
24 published before the election took place?

25 A Fifteen days.

1 Q Fifteen days?

2 A Yes, sir.

3 Q Now, which office is it he claimed he was de-
4 feated for on account of that article?

5 A The evidence that went into the trial -- and I
6 might point out this point --

7 Q Well, there were two --

8 A He held the office of mayor at the time of this
9 election that we are speaking of. He was running for the
10 office of tax assessor.

11 Q In the county?

12 A In the county, yes, sir.

13 Q How many voters in that county?

14 A I believe the ballot is returned somewhere in
15 the neighborhood of 12,000, as I recall.

16 Q How big --

17 A And he ran a poor third.

18 Q How big an area?

19 A The area of Citrus County?

20 Q Of the county that he is running in. I am ask-
21 ing because frankly I can't understand myself how it would
22 be possible for a man to have a charge like that made and then
23 to recall, admit it wasn't right, and then fail to win.

24 A He ran a very poor third because circulation of
25 the retraction was so poor, although he went out himself and

1 tried every way he could. We didn't have television down there
2 or radio stations.

3 Q It sounds like such a serious thing to me down
4 in Florida.

5 A Well, in this particular county politics gets
6 real hot down there in that particular county, Mr. Justice.

7 Q In a civil rights case -- accused the -- a civil
8 rights case --

9 A Civil rights cases are passe in this thing and
10 the only reference to civil rights we had in this thing was the
11 original case that the brother, James Damron, was a witness in,
12 is totally remote to the thing involved here.

13 Q Well, I know a little about campaigns and I just
14 couldn't imagine how a man would have a thing like that said
15 about him and then prove it wasn't true and then not win over-
16 whelmingly.

17 A It would seem so but communication is very poor
18 in that county and politics is well fought.

19 Q But a candidate can get things out pretty quickly
20 if he has to by circular or anything.

21 A The record didn't show this.

22 Q What?

23 A The record did not show this. He had an off --
24 everybody went down on this man immediately when this publica-
25 tion came out. This is a well read newspaper in this

1 particular county, although it was not published in that county.

2 Q But it was read later, too, wasn't it? If it
3 was well read the first time, why wouldn't it have been read
4 the second time?

5 A The record shows that the retraction was printed
6 in the lower right-hand corner, a very small headline. This
7 was one of the issues in the trial, as to whether the headlines
8 constituted a grounds for having punitive damages, and the jury
9 held not.

10 Q Well, when you published it in the lower right-
11 hand corner, in a small headline, why didn't they go to him and
12 complain again and insist that he publish it differently?

13 A He did, he tried everything he could. And, as
14 pointed out --

15 Q How many times did he publish it?

16 A There was a retraction published the following
17 day.

18 Q Yes?

19 A There was a letter that Mr. Damron wrote to the
20 Star-Banner, which was published in Letters to the Editor,
21 which also was shown as a retraction. And there was a com-
22 mentary letter by one of his friends that was written.

23 Q Well, I don't know that that governs, but I have
24 just seen those things kicked back on people so often when they
25 make charges that are not true.

1 A This is true, sir.

2 Q It seems strange to me that it didn't help him
3 instead of hurt him.

4 A Not only did he lose this, but he also lost his
5 mayoral job which was more or less an honorary position, but he
6 lost it in the next election which is held on an annual basis.

7 Q How many times had he been elected mayor before?

8 A Four times, I believe, sir.

9 Q I don't see how they could attribute that to the
10 article.

11 A I can only go by the record, and the indication
12 was that it was very detrimental to him.

13 Q Well, he got beat.

14 A He sure did.

15 Q I suppose at this stage the posture of the case
16 is that the jury thought that he had lost these jobs because
17 of the defamatory statement.

18 A It is not in the record and I don't like to go
19 outside the record, but I will say this --

20 Q You don't have to go outside the record, do you?
21 The jury's verdict speaks for itself.

22 A The jury's verdict does speak for itself, but
23 forewarned of my opponent's closing argument, we both use the
24 analogy to the jury, you can't look in a crystal ball and
25 tell whether this man would have ever won this election, and

1 we both argued this point to the jury. And I think the jury
2 did not, this is only opinion on my part, could have considered
3 it because we both hammered it home. And it would be strictly
4 a conjectural damage, there is no question about it.

5 Q Mr. Dunn, may I just look again at pages 80 and
6 81 with you?

7 A Yes, sir?

8 Q I gather from your argument that there was an
9 admission of liability. Is this what you suggest, that the
10 judge states, when he says, "Well, I think liability as to
11 compensatory damages is admitted in this case"?

12 A Yes, sir.

13 Q Well, now, Mr. Ayers was your adversary, was he?

14 A Yes, sir.

15 Q What does this mean over at 81? I know there
16 are a lot of omissions, but by the court, "That is right, and
17 whether or not the plaintiff suffered any damage by reason of
18 it is a matter for them to decide."

19 A Right.

20 Q Mr. Ayers: In other words, I don't take it that
21 your ruling comprehends an instruction by you to the jury that
22 they must return a verdict for the plaintiff because of the
23 publication standing along without more.

24 A That is correct, sir.

25 Q So doesn't that imply that there was no

1 concession of liability or not?

2 A The format of the discussion of the court at
3 this particular point was whether the court was going to tell
4 the jury, and I believe this is what Mr. Ayers was after, "You
5 have got to return a verdict even if it is only for one
6 dollar," and the court said, "No, I am going to tell the jury
7 that you have admitted liability but whether they bring in
8 any damage is strictly within their own prerogative."

9 Q Well, now, where in what follows in pages 81 to
10 83 -- I notice there are omissions -- did the judge tell the
11 jury that liability was admitted? Was that --

12 A He told the jury that he had directed a verdict
13 for the plaintiff.

14 Q Would you point that out to me?

15 A It is not in the instructions, I believe, that
16 are in the appendix.

17 Q I think you will find it, if I may suggest, in
18 your brief in opposition to the petition for write in the
19 first place on page 5 in that colloquy, even though it is not
20 complete, with Mr. Ayers, your opposing counsel. He still has
21 to prove his damages. He still has to prove his damages as
22 part of the matter Justice Brennan just referred to as repre-
23 sented by an omission in the appendix.

24 A Yes, sir.

25 Q You argue, I take it, that this is consistent

1 with your position that he had waived any claims about liabil-
2 ity.

3 A That is correct, sir.

4 Q You realize we will rely on the complete record
5 when we see it.

6 A Yes, sir. As I take it, Mr. Chief Justice, you
7 would like me to have a transcript --

8 Q Do you know whether it is here?

9 A I have a copy here with me, yes, sir.

10 Q It should be left with the clerk if it isn't
11 already on file.

12 A All right, sir.

13 Q The original record is ledged with the court,
14 then?

15 A Yes, sir.

16 Q Unless our rules have not been followed in this
17 case?

18 A Yes, sir.

19 Q I am still puzzled by the action of the Florida
20 court of appeals. It seems to me that if the Florida court
21 read the record, and certainly it should be authoritative on
22 how to read that record for purposes of Florida law, if the
23 Florida court had read the record as indicating that the news-
24 paper had admitted liability in the sense that New York Times
25 applies but we have published maliciously, why would the

1 Florida court ever have affirmed on the basis -- not on that
2 basis but on the basis of the New York Times rule, has no rele-
3 vance to this case?

4 A I can't answer the question.

5 Q On that same subject, Mr. Dunn, did you oppose
6 on the appeal to the Florida court of appeals --

7 A Yes, sir, I did.

8 Q And was one of your arguments that they can't
9 have an appeal because they conceded liability?

10 A No, sir, it was not.

11 Q You did not make that argument?

12 A No, sir, I did not.

13 Q Because the Florida court of appeals starts
14 right out and says it is contended here that the New York Times
15 rule --

16 A That's correct.

17 Q -- requires the proof of malice and there wasn't
18 any.

19 A This is correct.

20 Q And that the district court was wrong, or that
21 the trial court was wrong in saying that malice need not be
22 proved?

23 A That's correct.

24 Q And the Florida court of appeals says that New
25 York Times has absolutely nothing to do with this case?

1 A That's right.

2 Q If you don't want to answer this question, don't,
3 Mr. Dunn, but why didn't you take the position in the Florida
4 court of appeals that they conceded liability?

5 A The reason the position wasn't taken, we went
6 out in left field of the ball park about that time and got off
7 on New York Times vs. Sullivan and it was a foreign language to
8 me at that time and I was taking the position at that time that
9 he was trying to say, yes, maybe we admitted liability but we
10 feel that these other cases govern. But that is the tack it
11 took.

12 ARGUMENT OF HAROLD B. WAHL, ESQ.,

13 ON BEHALF OF PETITIONERS -- REBUTTAL.

14 MR. WAHL: May it please the Court, I wasn't in the
15 trial of this case and I am in the same position that you
16 gentlemen are. I have to rely on the record, and the record
17 absolutely shows that there was no concession of liability.

18 Now, in answer to your question --

19 Q What do say that Mr. Ayers meant when he said,
20 at page 5 of the opposition to cert, "He still has to prove his
21 damages"?

22 A That is because the court had ruled against him.
23 Now, I gather what happened --

24 Q When the court announced, "I think liability is
25 admitted in this case," did he say anything?

1 A I don't know what he said. The record -- we had
2 a small town court reporter and I don't know how accurate his
3 reports are. All I know is what Mr. Ayers told me that he
4 didn't concede any liability. But I can tell you why he didn't
5 raise it on the district court of appeals. In the district
6 court of appeals I had Mr. Ayers with me and Mr. Ayers was
7 there to stand up and defend himself, had there been any accu-
8 sation that he had waived. Mr. Ayers participated in the appeal
9 to the district court of appeals, signed the brief, and was in
10 on that appeal, and he could have defended himself had there
11 been any charge.

12 Q Well, are you suggesting that the court, that
13 an appellate court in Florida would have taken some testimony
14 on the subject at that stage of the proceedings?

15 A Well, it wasn't raised. Now, let me --

16 Q Couldn't the court rely on the record?

17 A -- and nobody ever suggested to the district
18 court of appeals that this point had been raised, and it hadn't
19 been raised. I mean it had been raised, as the record yourself
20 will show. Why on earth would the court look at page 17 of the
21 appendix, look at the order -- when I got into the case and
22 moved for a new trial or judgment non standim veridictum on
23 New York Times, read paragraph two. The court specifically
24 says the decisions of the United States Supreme Court, and so
25 forth, relating to public officials or public figures in the

1 official conduct of their position or office are not applicable
2 to this course of action and so forth.

3 Now, why did the judge have entered that, he would
4 simply have said, "Well, your motion for a new trial is denied
5 because your trial counsel admitted liability." And then when
6 it gets over to the district court of appeals, as Mr. Justice
7 White said, why did the whole opinion have been on the basis
8 that we agree with the trial court that the New York Times has
9 nothing to do with the case if trial counsel had admitted
10 liability. It is just something -- I don't blame my friend for
11 bringing it up, but it isn't supported by the record, and all
12 I can tell you is that the lawyer who tried the case told me
13 he didn't concede liability.

14 Q Well, isn't there confusion in admitting liability
15 in the sense of publishing the article which would occasion
16 mistaken identification and admitting liability as to the con-
17 sequences in terms of damages that flowed from it?

18 A I think that is clear. I think --

19 Q That is all there is to it, isn't it?

20 A I think --

21 Q There is a directed verdict in effect as far as
22 liability for publishing the article is concerned. The only
23 issue that went to the jury was the quantum of damages.

24 A That is correct.

25 Q And your issue up here is simply whether or not

1 damages are to be measured under the New York Times rule or
2 under state law.

3 A That's right.

4 Q That's the whole case, isn't it?

5 A That's correct, and we take the position that
6 the plaintiff's own pleading have brought him under New York
7 Times.

8 Q What would have been the normal Florida rule on
9 law if on this appeal to the district court of appeals where
10 your side claimed the benefit in New York Times, the other
11 side had come back and said, "We're awfully sorry, this issue
12 is not in the case because there were no objections to the in-
13 structions, no request for an instruction on New York Times,
14 although this was tried after New York Times, and the appellant
15 isn't entitled to have the case reversed on the basis of New
16 York Times." Now, what is the Florida law?

17 A I think the Florida court of appeals at this
18 point, had this point been raised in the district court of
19 appeals, the district court of appeals would have looked at
20 the record and if it had found that trial counsel Ayers did
21 what my friend here accuses him of, they would have said that
22 ends it.

23 Q Well, I know, but the newspaper didn't request
24 any instructions under New York Times, and didn't object to the
25 instructions based on New York Times.

1 A Correct, but --

2 Q What is the Florida law about that in appellate
3 court?

4 A Were it not for the holdings of this Court as
5 exemplified by Beckley, it doesn't make any difference how bad
6 a mess trial counsel makes of a case, Beckley vs. Hanks, this
7 Court will go into it itself and even though trial counsel has
8 stood there and not objected to instructions --

9 Q What was the case you mentioned?

10 A Beckley vs. Hanks, which is cited in our brief.
11 You held in that case that even though the newspaper council
12 actually requested the wrong instructions, you would examine
13 and if you found the Constitution of the United States, as
14 exemplified in New York Times and succeeding cases, had been
15 violated, you gentlemen yourselves --

16 Q Well, I don't know if the Florida appellate
17 court said this issue is not an issue on appeal because it was
18 not raised in the trial court, I am not so sure we would --

19 A Well, of course, I don't know about that, but
20 that issue was not, and both the trial judge, when I moved for
21 a new trial and cited all of these constitutional cases, there
22 was no question, he didn't say --

23 Q Let me ask you this: Let's assume that we re-
24 versed and the case went back to the Florida district court of
25 appeals. Would the issue still be open as to whether the New

1 York Times question had been waived in the trial court?

2 A I don't think so, because that issue wasn't
3 raised there in the first place, and I don't think you can go
4 back. I would certainly argue strenuously, and I am sure the
5 court would agree with me, that you can't come up here and then
6 go back and say, well, now, I forgot to raise something here
7 and now I want to raise it. I don't think so.

8 Q I know, but you forgot to raise something in
9 the trial court and you raised it in the appellate court.

10 A It was raised in the trial court and when I
11 came into the case, the first thing I did was to file a motion
12 and under Florida procedure at that time you can raise these
13 points and file the motion and not only have a motion but
14 cited the cases by name.

15 Q That puts the issue in the case, you think?

16 A Yes, sir, I certainly do. And there was no
17 intimation under the Florida appellate courts that that wasn't
18 correct. And the district court of appeals assumed that the
19 issue had been properly preserved and wrote its entire opinion
20 upon the one issue where they erroneously said that official
21 conduct of a public official was not involved therefore New
22 York Times doesn't apply.

23 But I am rather surprised what you gentlemen say
24 about Beckley, because you held in Beckley vs. Hanks, in that
25 case the newspaper lawyers themselves had requested the wrong

1 instructions, and you said that these constitutional issues
2 were of such importance that even though they hadn't raised
3 the issue, since they had in a motion for a new trial raised
4 the question as to whether the sufficiency of evidence was
5 there, that you would pass upon the question. And here I file
6 a motion for a new trial and went into all of these issues and
7 cited the cases. And I wasn't at the trial but I say that
8 this --

9 Q Have you read all of this record?

10 A Yes, sir.

11 Q All the evidence?

12 A I read it extensively. This is the --

13 Q Is there any evidence that points to its tending
14 to try to prove damages upon any kind?

15 A Well, his whole testimony was that he had lost
16 -- that he had gotten in so bad with the electorate they
17 wouldn't vote for him.

18 Q You mean that he got defeated?

19 A Yes, sir.

20 Q Is that all that is in there about damages?

21 A Well, he says that the people didn't treat him
22 as nicely as they used to, they kind of looked down at him
23 when he passed by, and he wasn't feeling so good any more, and
24 he lost some campaign contributions, and people said a man
25 like that shouldn't run for office, that's all, and the fact

1 that he claimed that he lost some business in his garage that
2 was run by the fellow who wasn't up.

3 But New York Times -- my own surmise of what happened
4 is that trial counsel was knocked down so hard when he filed
5 his motion to strike the New York Times damages as a public
6 figure and move to dismiss for want of malice, he was thrown
7 down so hard then that he didn't want to antagonize the judge
8 and prejudice himself with the jury by raising some more stuff
9 before the jury or at the trial in which he was going to get
10 knocked down again. That is just my own speculation as to why
11 my friend Ayers didn't say more.

12 But this record does not support a concession of
13 liability.

14 Q Is all the record here or is it limited, what is
15 here, to what is in print?

16 A No, the --

17 Q Do we have all the record?

18 A You have the whole record. You have the whole
19 record. You have everything, of course, as is customary. As
20 Mr. Justice Harlan pointed out, the trial counsel was so con-
21 cerned with the punitive damages and the fact that there was
22 no question that we did run the article, that we did run the
23 mistake, that there had to be a concession that we had run the
24 article and that we had made a mistake. He conceded that but
25 he certainly did not concede the question of liability.

1 Q Well, what I understood the record, which I
2 don't pretend to have read, but as you get the flavor from the
3 briefs, whatever happened in the record, this judgment cannot
4 be supported on an adequate state ground, the dismissal of the
5 -- by the court of appeals, by the Florida Supreme Court, be-
6 cause the district court, the district court of appeals passed
7 on the question that you are raising here.

8 A Mr. Dunn --

9 Q What you are arguing to us is that having passed
10 on it, you're entitled to a reversal on the theory that there
11 were no damages available at all except under the strictures
12 and limitations of the New York Times rule.

13 A Absolutely correct.

14 Q Is that right?

15 A Right. And I am very much disturbed that this
16 opinion, being in the printed Southern Reporter, which says
17 that New York Times only applies to official conduct of a
18 public official, leaving out candidates, matters of public in-
19 terest and all the rest of the things.

20 Q Well, I understood the court of appeals, the
21 district court of appeals, it was called --

22 A Yes, sir.

23 Q -- said two things: Number one is that New York
24 Times doesn't apply except for official misconduct or criticism
25 of the conduct of the public official's office; and, secondly,

1 that anyway there was nothing referred to in the so-called
2 libel that related to his public activities.

3 A That's right. They said that it didn't come
4 within New York Times because it didn't relate to official con-
5 duct of public affairs.

6 MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The
7 case is submitted.

8 (Whereupon, at 11:50 o'clock a.m., argument in the
9 above-entitled matter was concluded.)

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