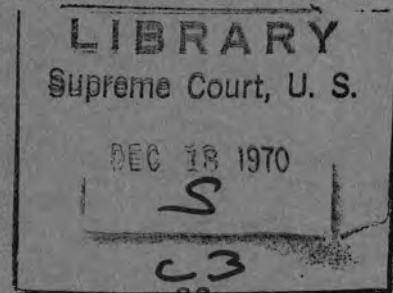


Supreme Court of the United States

OCTOBER TERM -- 1970



In the Matter of:

GEORGE A. ROSENBLOOM

Petitioner

vs.

METROMEDIA, INC.

Respondent.

Docket No.

PT 1

Duplication or copying of this transcript
by photographic, electrostatic or other
facsimile means is prohibited under the
order form agreement.

Place Washington, D. C.

Date December 7, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

RECEIVED
SUPREME COURT, U.S.
MARSHALL'S OFFICE
DEC 18 9 38 AM '70

141-032
24
27

C O N T E N T S

1		
2	<u>ARGUMENT OF:</u>	<u>PAGE</u>
3	RAMSEY CLARK, ESQ.	4
4	On Behalf of Petitioner	
5	BERNARD G. SEGAL, ESQ.	20
6	On Behalf of Respondent	
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 IN THE SUPREME COURT OF THE UNITED STATES
2 OCTOBER TERM - 1970

3 -----
4 GEORGE A. ROSENBLOOM

5 Petitioner

6 vs.

7 No. 66

8 METROMEDIA, INC.

9 Respondent
10 -----

11 Washington, D.C.
12 Monday, December 7, 1970

13 The above entitled matter came on for argument at
14 2:35 p.m.

15 BEFORE:

16 WARREN E. BURGER, Chief Justice
17 HUGO L. BLACK , Associate Justice
18 WILLIAM O. DOUGLAS, Associate Justice
19 JOHN M. HARLAN, Associate Justice
20 WILLIAM J. BRENNAN, JR. , Associate Justice
21 POTTER STEWART, Associate Justice
22 BYRON R. WHITE, Associate Justice
23 THURGOOD M. MARSHALL, Associate Justice
24 HENRY BLAUM, Associate Justice

25 APPEARANCES:

26 MR. RAMSEY CLARK, ESQ.
27 Washington, D.C.
28 On Behalf of Petitioner

1 APPEARANCES, (Continued)

2 MR. BERNARD G. SEGAL
3 Philadelphia, Pennsylvania
4 On Behalf of Respondent
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

1 MR. CHIEF JUSTICE BURGER: We'll hear arguments in No.
2 66, Rosenbloom against Metromedia. Mr. Clark, you may pro-
3 ceed whenever you're ready.

4 ARGUMENT OF MR. RAMSEY CLARK, ESQ.

5 ON BEHALF OF GEORGE A. ROSENBLOOM,

6 PETITIONER

7 MR. CLARK: Mr. Chief Justice, and may it please the
8 Court.

9 This is a defamation suit brought under the laws of the
10 State of Pennsylvania, in the United States District Court,
11 jurisdiction being under diversity.

12 Before stating the facts, let me state the question,
13 briefly. New York Times v. Sullivan, of course, began to apply
14 the first amendment to the laws of defamation and liable which
15 had interfered historically. It began in that area of conduct
16 of public officials, engaging in official conduct, and said
17 that only where actual malice can be shown can the state
18 statutes permitting recovery for defamation apply. Otherwise
19 there will be a chilling effect. There will be inadequate breath-
20 ing room for freedom of speech.

21 The question here is whether that rule is to be extended
22 to the very private individual. To the two hundred million
23 Americans who are not famous, who are not public officials,
24 and who are not public figures such as Coach Butts or General
25 Edmund Walker. But just plain people engaging in ordinary life.

1 This petitioner, George A. Rosenbloom, was a successful
2 salesman for the major magazine and book distributor in the
3 United States. In that capacity in 1962 he was offered a major
4 distributorship for American Outdoor Publishing Corporation,
5 which publishes nudist magazines. He carefully considered, be-
6 cause he was concerned as the record shows, about his repu-
7 tation, whether to take this opportunity. He even consulted a
8 lawyer.

9 He was advised that the Supreme Court of the United States
10 had held that these publications were legal, and after many
11 months on the first of May he accepted the distributorship and
12 became the distributor in the Philadelphia area, for this
13 publishing company.

14 Q Mr. Clark, you're putting an emphasis on that, I'm
15 not quite sure I follow it. Are you suggesting that if the
16 situation might be different, if there were some doubt about
17 the legality of the publications, that he was---

18 A The emphasis arises---

19 Q cloudy on---

20 A The emphasis arises from what I believe is the con-
21 stitutional and certainly the national concern for reputation.
22 Here was a man who was concerned about his reputation. This is
23 a defamation action, and as the facts will disclose, a jury
24 found he was defamed and he was a man who was cautious enough
25 before getting into this business to be sure that it was a

1 proper business. a legal business, and it happened to be a
2 business that the Supreme Court itself had reviewed and up-
3 held.

4 On October the first---

5 Q --- the falsity of the defamation, ultimately, doesn't
6 it, the fact that he consulted a lawyer to be sure that he
7 was carrying on a law-abiding business?

8 A It certainly bears on that, yes, it bears also on
9 his care for his reputation, too, which I think is important.

10 On the first of October, 1963, there was a series of
11 raids on newsstands, in the city of Philadelphia, by city
12 police. On that day approximately twenty newsstand employees
13 were arrested. This petitioner, George Rosenbloom, who happened
14 to be making a delivery of his magazines at the time was
15 also arrested.

16 And on October the fourth, of 1963, there began a series
17 of more than twenty-one broadcasts, of which this respondent
18 here, referred to him and his business. The first broadcast
19 which came over the air at 6:00 p.m. on October the fourth,
20 began. "City cracks down on smut merchants." There had been
21 seven or eight arrests on October the fourth, and on that day
22 the WIP the Metromedia station in Philadelphia announced that
23 Mr. Rosenbloom's home had been raided, they gave his whole name
24 and his address, they referred to no other one else arrested,
25 they stated that there had been confiscated at his home a

1 thousand magazines and that he had been arrested on the charge
2 of possession of obscene literature.

3 In addition it stated that a barn that he rented had been
4 raided and there were confiscated obscene books. It did not
5 say allegedly obscene books, it said obscene books. It said,
6 too, that Captain Ferguson, who was in charge of the special
7 investigating unit in the city of Philadelphia, at that time
8 believed that the police had hit the supply of the main dis-
9 tributor of obscene material in the Philadelphia area.

10 They broadcast through the night and through the next day,
11 they repeated generally this, the word allegedly obscene books
12 was added to subsequent broadcasts.

13 The second series of broadcasts began on October twenty
14 first, and repeated, on variations, on the twenty-fifth, and
15 on November the first. These addressed themselves to a lawsuit
16 that the petitioner here had filed to enjoin the police depart-
17 ment and the radio station in Philadelphia from harassment,
18 interfering with his business. It did not endeavor to enjoin
19 generally their conduct but only insofar as he was concerned.

20 Q Did he make any reference to the federal case, Gen-
21 eral Clark?

22 A Yes, sir, this was a---

23 Q What was the outcome of that federal suit?

24 A The record doesn't show. The last records in the re-
25 cord indicates that the judge will decide next week.

1 This damage suit filed later and came up before the same judge,
2 Judge Joseph Lord, III, in the city of Philadelphia.

3 The broadcasts characterized plaintiffs as smut distri-
4 butors, girlie book pedalers, and as attempting to force the
5 defendants, which included the Chief of Police and newspapers
6 and radio stations to lay off the smut literature racket.

7 Q Mr. Clark, if the word obscene, without the adjective
8 alleged, or allegedly obscene, had not been in the case, if
9 they had just said he was a pedaler of girlie book magazines,
10 et cetera, what would be your view of his claim then?

11 A Well, I think the characterization by its choice, by
12 the radio station of the materials of obscene is certainly a
13 major element. But there are many other elements. I think to
14 have relied upon the Captain of Police who had phoned this in
15 under the impression that he had some duty to inform the public.
16 In other words, in contrast to Sullivan v. New York Times, here
17 you have Sullivan calling the New York Times and giving them
18 a story about some fellow out in the street. And this situation
19 he has not known to anybody.

20 Q But what I was trying to get after, was would you
21 regard it as libelous if they said that he was a pedaler of
22 girlie book magazines?

23 A I think I would agree with Judge Lord that the edit-
24 orialization and the sensational way in which they characterize
25 his conduct to be defamatory. I think it would diminish him

1 in the eyes of his fellow man and I think it would damage his
2 business, as certainly this damaged his business, very severely.
3 He lost 34 out of 60 accounts that he had been able to build up
4 and he went out of business, in fact. The other things that were
5 said that would add to that of course, were that he was the
6 main distributor of obscene material in Philadelphia, Now they
7 were relying on Captain Ferguson, perhaps, but do they really
8 have a right to rely upon him without any examination? Is this
9 going to protect free speech or is it really going to interfere
10 with free speech when the police use the press as an extension
11 of their enforcement arm or vice versa?

12 Q But the term obscene becomes quite important in your
13 position, then, doesn't it?

14 A That is an important element, yes, sir.

15 Q This implies, then, I take it you're arguing that
16 that would imply an illegality which conceivably might not be
17 present in the others.

18 A The defamatory nature of that is certainly perfectly
19 clear to me. I think that there could be very little doubt about
20 it. But the impression, too, that he's trying to prevent law
21 enforcement from doing its duty, to lay off the smut literature
22 racket, is just erroneous. He was just trying to protect his
23 own interests, as a successful small business man in these sales.

24 Q What was the time interval between the raid and the
25 first broadcast?

1 A. The raid was on the day of the fourth, October the
2 fourth and the first broadcast was at 6:00 p.m. on the fourth.
3 Now in the subsequent broadcasts, because this went on from
4 October fourth through November first.

5 The first---

6 Q Every day?

7 A No, sir. October fourth, fifth, October twenty-one,
8 twenty five and November one. There were over twenty-one dif-
9 ferent broadcasts going out to the entire radio audience in
10 that entire metropolitan area. Of course, Mr. Rosenbloom can't
11 have every radio station on -- he doesn't really find out until
12 people tell him what's been said about him and he has to go
13 down to confirm it. But there was a delay of more than a week
14 from the time he filed his injunction suit trying to prevent
15 harassment and interference with his lawful business and the
16 time that the second series, as we've described them in the
17 litigation of these broadcasts began on October twenty one, so
18 it could hardly be called "hot news".

19 A week had gone by before they came on and characterized
20 him as a smut distributor and a girlie book pedaler and attempt-
21 ing to force the police and the District Attorney to lay off
22 the smut literature racket.

23 On October twenty seventh, Mr. Rosenbloom went to the
24 radio station, he had heard this, the people were complaining
25 to him about this, the record shows, the people that he had

1 sold to, his friends wouldn't talk to him. And he asked to
2 see copies or to hear some of the broadcasts

3 He was not permitted to see anybody. This is the plight
4 of somebody trying to engage in robust dispute in mass society
5 with the media. But he was put on the phone with a part-time
6 employee who dug up one of the tapes and played it back to
7 him.

8 Mr. Rosenbloom protested that the Supreme Court had said
9 that this material was not obscene. The individual who was
10 working the radio station said the DA had said it was obscene
11 and Mr. Rosenbloom replied that the DA had said at that time
12 in fact it was legal and at that time they hung up on him.

13 That's the extent of his opportunity to speak out. Wally
14 Butts can get on television as he did. General Edmund Walker
15 is on television before he leaves Dallas to go to Oxford, Miss-
16 issippi telling the public what it ought to do because he's a
17 public figure.

18 George A. Rosenbloom is like most people in this world,
19 the overwhelming majority, not a public figure. The jury
20 charge said that there would be four elements in the proof of
21 defamation for general damages.

22 First, that there was harm to the reputation of the plain-
23 tiff. That it had lowered him in the estimation of his peers,
24 and that it deterred third persons from engaging in commerce
25 with him.

1 Second, that the allegations that were made could reason-
2 ably be taken to refer to the plaintiff. That his name and
3 his address were give, in this case.

4 Third, that the people exercise reasonable care to deter-
5 mine the truth of what they were saying and for which they
6 were sued.

7 And fourth that it was false.

8 To recover punitive damages it was required that malice
9 be shown under the Pennsylvania law, and the malice charge
10 there, roughly, was that it was published, or caused to be
11 broadcast with a bad motive or reckless indifference to the
12 rights of others.

13 The jury name in with a verdict of general damages in the
14 amount of \$25,000, and punitive damages in the amount of
15 \$725,000. The jury had seen some of the magazines.

16 The judge required a remmitature of \$500,000, but he
17 found that malice was present, that there were at least three
18 substantial indications of it in the record, and that the
19 defendant there had broadcast in a sensational way and in an
20 editorializing way about the rights of this private citizen.

21 He refused to apply New York Times v. Sullivan, because
22 he felt that it applied only to public offifials, it had no-
23 thing to do with individuals. That first amendment protection
24 was intended to protect the processes of government in the con-
25 duct of government offials, the elective officials and such

1 things, and did not intend to permit people to defame the pri-
2 vate citizen in America and destroy the quality of his life,
3 only if he could show that there was actual malice in a broad-
4 cast.

5 On appeal, the Court of Appeals reversed on the basis of
6 New York Times. The---

7 Q The Times was accepted to public figures in Butts
8 over the dissents of four of us. What do you say of Time against
9 Hill. Do you think that-- that's a right to privacy case, but
10 the New York Times rule was applied by the majority in that
11 case too, wasn't it?

12 A Yes, it was. That was of course,---

13 Q Well, what I'm getting at, do you think that this
14 Court has yet decided the question that you're presenting to
15 us?

16 A I don't think it's reached this question at all and
17 I guess that, I believe Butts and Walker are substantial evi-
18 dence of it. they, after all, were decided after Times v. Hill.
19 Time v Hill was a right to privacy case. And that is a right
20 that is cherished by civilized man, but the invasion of pri-
21 vacy that arises in a defamation case, that destroys the rep-
22 utation of an individual is the thing most cherished by every-
23 one, what people think of him, what his reputation is in the
24 -community has not been addressed by this Court.

25 The question was specifically reserved by Mr. Justice

1 Brennan in the opinion for the Court and it was referred to by
2 others there. Mr. Justice Goldberg and another Justice have
3 stated their view at that time that it would not apply to the
4 private citizen. The distinctions really are many.

5 It is a concomitant, in my judgement, of civilized life
6 that there will be invasions of privacy. I think that we need
7 to cherish privacy and we need to enlarge it to the extent that
8 we can but in mass urban society there are going to be invasions
9 of privacy and there's some value to the public of invading.

10 But when the invasion reaches a defamatory level, and
11 comes up under the old and historic legal action for degamation
12 where there is injury to an individual from untruth, then I
13 think other factors come into play and I don't believe there's
14 any abridgement to freedom of speech or freedom of the press
15 where such untruthful allegations are made and defame and damage
16 as they did Mr. Rosenbloom here, and that privacy comes under
17 just another field of law.

18 After all, as difficult and awkward and embarrassing as
19 it may have been for the Hills, the family there was character-
20 ized as heroic, not as engaged in obscenity, the Life magazine
21 had banner leads on the pages that talked about "brave try,"
22 and "courageous daughter" and things like that, and which it
23 may have been of a nature that wasn't entirely true, it may have
24 been fictionalized, at least it was not derogatory and damaging
25 to the individual and it lowered him in the eyes of those with

1 whom he had to live.

2 I think if we really want to protect free speech, we're
3 going to have to look at the powerlessness of the individual
4 in mass society and the great power of the concentration of the
5 media because of technology in the area of free speech, and the
6 idea that there can be uninhibited and robust and wide-open
7 debate between the George Rosenblooms of this world and the
8 combination on the other side of the Captain Fergusons and
9 the Metromedia. It's contrary to our experience. There's no
10 marketplace for debate here.

11 If this man's going to have an opportunity to speak at
12 all it will be very difficult for him. He is not a famous
13 person.

14 When you look at the stand for obscenity that Captain
15 Ferguson used here, and when you realize the close and constant
16 communication between the police and the press you realize
17 what a very difficult problem this is for the laymen who get
18 arrested. Because clearly, under Captain Fergusons' test as
19 stated in the criminal trial as is revealed in this record here
20 in which there was a directed verdict of Not Guilty, the
21 creation of Adam by Michaelangelo in the Sistine Chapel would
22 be obscene, as would the Birth of Venus by Botticelli.

23 That's how, that's what his standard of obscenity really
24 is, is the revealing of the private parts of the human anatomy.

25 Now, if an individual is to have any protection in his

1 free speech I think that, and I do think that there's a con-
2 stitutional standard that applies, I think that those who would
3 speak out, the press, against the private individual that they
4 exercise reasonable care.

5 There's a great value in the exercise of reasonable care.
6 The real purpose of the First Amendment is truth. The truth is
7 hard to know and therefore it has to have wide breathing room
8 But the vigor of the debate in the public area and the impor-
9 tance to the nation, that we vigorously debate public conduct
10 in public figures doesn't extend to the individual and the
11 private individual.

12 We can debate the issues to the extent of our heart. We
13 can debate nudism, we can debate magazine distribution but when
14 we bring that debate to bear on a private individual who has
15 no voice then we're going to have to exercise reasonable care.

16 And if the constitution can permit the states to require
17 reasonable care when someone makes allegations---

18 Q If you're right, that is to the private individual,
19 there ought not be any application of anything like New York
20 Times. It seems to me that the first Amendment ought not apply
21 but that this is an area in which state law in the old sense
22 has free prevail. Now, if I understand you, if you're applying
23 reasonable care, is this what, a First Amendment test to the
24 private individual, is that it?

25 A My judgement of the needs of free speech and there-

1 fore the dimension and strength of the First Amendment is that
2 even as to the private citizen, he's not a public official and
3 he's not a public figure. That he cannot recover for defamation
4 if the person who is defaming has used reasonable care to as-
5 certain the truth because even in that area---

6 Q Even if state law is to the contrary?

7 A Well, this is, of course, based on state law, yes.
8 In other words the state law, the real question is how much
9 can state law encroach on speech in the defamation area. That's
10 the real question.

11 Q In the case of the non-public figure, or non-public
12 official---

13 A Yes, of course---

14 Q The ordinary citizen, but state laws differ all over
15 lot, don't they without any First Amendment restraints, in
16 that area?

17 A Well, the question here is what the First Amendment
18 restraint is because the Third Circuit here has tried to place
19 a First Amendment restraint---

20 Q Well, then what I want to get is you do concede that
21 even in this area of the private individual, so called, there
22 is a First Amendment restraint?

23 A That's my judgement as to what the First Amendment
24 should do.

25 Q Would the record in this case satisfy your standard?

1 I don't see any instructions about reasonable care in this
2 case.

3 A Yes, that was the instruction. That was the instru-
4 ction for general damages and there was a malice instruction
5 for punitive damages.

6 Q Under state law?

7 A Under state law, yes.

8 Q Not First Amendment law?

9 A No. This is under the state law.

10 Q Under state law?

11 A Yes, under state law.

12 Q As I understand you your argument is that there is
13 a role for the First Amendment in a case like this, but it's
14 a different standard than is applicable to the public figure,
15 or the public official, is that it?

16 A That, of course, if it were your view that the First
17 Amendment had no application to a private citizen then the
18 disposition in this case would be perfectly clear, if you agree
19 that this is a private citizen.

20 Q Then there'd be no question---

21 A Yes, the First Amendment would have no application
22 at all. I---

23 Q Well, I'm trying to get what your view is. Is your
24 view---

25 A My view is that is the First Amendment has a little

1 greater application than that. That, I think on issues that
2 debate has to be robust and wide open, but when it comes to
3 damage individuals, if the individual is a public figure or
4 a public official then the importance of speech is such that
5 -unless actual malice is shown, no recovery should be allowed.

6 If it's a private individual, if it's a person that has
7 no real opportunity for counter-argument, if it's a person
8 who hasn't assumed the risk or stepped forward in this area,
9 then in my opinion only reasonable care is necessary because
10 -it is important too for the press to talk about the private
11 citizen and about the little people, but they ought to be care-
12 ful and they can be careful about slandering them or libeling
13 them.

14 Mr. Chief Justice, I'll reserve the rest of my time.

15 Q I think we'll suspend at this time, until tomorrow
16 morning.

17 (Whereupon argument in the above-entitled matter was
18 suspended until 10:00 o'clock a.m. on December 8, 1970)