In the

Supreme Court of the United States

ELMER GERTZ,

Petitioner,

v.

ROBERT WELCH, INC.,

No. 72-617

Washington, D.C.
November 14, 1973

Pages 1 thru 44

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ELMER GERTZ, Petitioner,	:	
v.	:	No. 72-617
ROBERT WELCH, INC.	:	

Washington, D.C.

Wednesday, November 14, 1973

The above-entitled matter came on for argument at 10:48 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WAYNE B. GIAMPIETRO, ESQ., 120 S. LaSalle Street, Chicago, Illinois 60603 Attorney for the Petitioner

CLYDE J. WATTS, ESQ., 219 Couch Drive, Oklahoma City, Oklahoma 73102 Counsel for the Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: we will hear arguments next in No. 72-617, Elmer Gertz against Robert Welch, Inc.

Mr. Giampietro, you may proceed whenever you are ready.

ORAL ARGUMENT OF

WAYNE B. GIAMPIETRO, ESQ.,

MR. GIAMPIETRO: Mr. Chief Justice, and may it please the Court:

This matter comes before the Court as a diversity action for libel brought within the State of Illinois, concerning an article published both in magazine and in reprint form by an entity entitled Robert Welch, Inc.

The central thesis of this article was that there was, in Chicago, a conspiracy headed or composed of communists and allied persons to discredit the police of the City of Chicago and that in this particular case, the form of that conspiracy was to frame a police officer for the crime of murder.

This police officer has shot a young man in the back and the man died almost immediately. The police officer has, in fact, been convicted of murder and is now serving his sentence, after that conviction having been affirmed by the Illinois Supreme Court.

Q Under Illinois law, would the acts charged,

that is, this conspiracy to frame , be, in itself, criminal act?

MR. GIAMPIETRO: Your Honor, I believe it would be. I believe it would constitute, perhaps, a violation of two statutes, number one, obstruction of justice and number two, perhaps a criminal conspiracy to do so, so that I think that under the laws of the State of Illinois, the things charged in this article would, in fact, constitute a crime, yes. Yes, indeed.

The statements made about the Petitioner in this matter did, in fact, charge him with being an integral part of that conspiracy. One additional statement about the Petitioner I noticed in the article which is not set forth in our brief states at the beginning of the article on page four of the article itself that teenagers at a hot dog stand would not know how to arrange the carefully-orchestrated publicity the case soon acquired and, of course, you are correct, they wouldn't. But Elmer Gertz, for instance, would.

And then the article goes on to state that he filed civil suits on behalf of the parents of the deceased boy, which totalled $1 million, I think.

I might point out that the statement that the Plaintiff had filed civil suits on behalf of the parents of the deceased and that he had appeared at the inquest and that, perhaps, at one time he had been a member of one of the

But other than that, all the rest of the statements in the article are false and there was evidence in the record in this case, testimony not by -- not only by the Plaintiff but also by others which indicated that these things were, in fact, false. So --

Q Would you say that, Mr. Giampietro, under Illinois law, is the statement that someone is a member of the American Civil Liberties Union, is that defamatory?

MR. GIAMPIETRO: Not at all, Mr. Justice Rehnquist, and I would not argue that it is. My only point is that the statements regarding the various organizations to which the Plaintiff had allegedly belonged are untrue. Certainly, I wouldn't say that a statement regarding the American Civil Liberties Union is defamatory in any way.

What is defamatory, I think, is the appellation put upon that association by the Defendant, where the Defendant says, "If you are a member of the American Civil Liberties Union, you are a communist, because that is a communist society," or words to that effect.

Q So these were just supporting facts, basically, that they realized that the statement was actually libelous, that the man was a communist?

MR. GIAMPEITRO: That is correct. That is correct. Actually, that is the way in which the article chose to prove or allegedly prove or state that the Plaintiff was a

communist. They said, "You have belonged to all of these various communist organizations,"as well as having said, particularly in the caption under the Plaintiff's picture in the article that he was a Leninist. So that is just a supportive statement.

I think we have a situation here, therefore, where we depart from the situations which this Court has considered in previous cases of this kind. The Petitioner was not, in fact, a public official of any kind. I don't think there is sufficient evidence in the record to indicate that he was a public figure in that he was a person whose very existence and presence would require public comment.

And now we come to the situation where you have a fact situation where his actions were not, in fact, a part of any matter of public interest and importance. Until this article was printed, the Petitioner had done absolutely nothing in connection with the matter that was being discussed. He had made no public statements. He did not, in fact, have anything whatsoever to do with the criminal prosecution of the police officer involved in this matter.

He had appeared at the inquest along with other attorneys, had asked certain questions and that was all and, parenthetically, the inquest itself really did not have any direct bearing upon the ultimate trial and conviction of the police officer because the inquest reached an open verdict

with no recommendation of any kind, one way or the other.

So we have a person who really has acted in a way which had nothing to do with this article until the statements in the article attempted to connect him with that and then the article didn't even really present any facts as to what the Petitioner had done in connection with the statements that they made about him. They just said, "You have done this in the past. Therefore, you were part of this conspiracy." But there is no supportive fact of any kind to support the underlying assumption -- not assumption, actually, the charge, that the Petitioner was a part of any conspiracy.

Q Was there any argument about the innuendo on that score in the case?

MR. GIAMPIETRO: Any argument as to whether the innuendo is, in fact, there?

Q Yes.

MR. GIAMPIETRO: I don't believe so, your Honor. I don't think there is any question but that the thesis of the article was that the Petitioner was, in fact, a part of this conspiracy. One of the -- again referring to the caption under his picture, it said "Leninist Gertz harrasses Nuccio," words to that effect. I don't think there can be any question that that is what was intended to be said.

So we have a situation where the party was not really involved in the matter that is being discussed, except

in the mind of the Defendant.

Q Mr. Giampietro, Mr. Gertz was detained by the parents of the decedent, was he not, to initiate civil proceedings against the police officer?

MR. GIAMPIETRO: That is correct, sir.

Q Was that lawsuit initiated?

MR. GIAMPIETRO: Yes, it was. There was a lawsuit.

Q Before or after the first publication of --

MR. GIAMPIETRO: Before the first publication.

Q So that had happened?

MR. GIAMPIETRO: That had happened. That is correct. That is true.

Q And you told us the outcome of the trial of the police officer. What was the outcome of this civil action?

MR. GIAMPIETRO: The was a civil action filed in the Federal District Court in Chicago, alleging a violation of the decedent's civil rights. There was a bench trial and a judgment was awarded to the Plaintiff in the amount of $20,000.

Q Against the policeman?

MR. GIAMPIETRO: Against the policeman and solely against the policeman. That judgment has not been collected.

Q I suppose that trial and judgment occurred after the publication?

MR. GIAMPIETRO: It occurred long after the

publication.

Q Long after, umn hmn.

MR. GIAMPIETRO: Yes. It also occurred after the initial conviction of the police officer for murder. As a matter of fact, if I recall, the court granted summary judgment on the issue of liability for the plaintiff based upon the conviction. There was not actually a trial as to the facts of the case. There was, of course, an evidentiary hearing on the matter of damages.

Q Of damages.

MR. GIAMPIETRO: That is correct. And, of course, that trial occurred long after this suit was instituted, as well.

So I think we have a situation where there is, in fact, no legitimate public concern here as to this Plaintiff in this matter. I think to hold in a situation such as this that the Plaintiff must prove actual malice as initially defined in New York Times versus Sullivan, in effect, would deprive him of a reasonable opportunity to obtain recompense for the violation of his right of privacy. I think that what we have here is not only a matter of the traditional laws of libel, but I think we have a situation where we get into a violation of the Constitutional right of the individual which has been recognized by this Court.

That is, the right to be let alone, the right to

privacy. I think that right is a civil right which is entitled to protection just as much as any other right not to be subjected to an unlawful search and seizure in matters of that nature.

Q You don't have to rest your case on that ground, I suppose? If it is enough for your purpose that the State of Illinois has recognized this right and that unless there is a Federal Constitutional restriction on that recognition, as Illinois District Court, sitting in a diversity case, should apply Illinois law.

MR. GIAMPIETRO: That is correct, Mr. Justice Rehnquist. I might point out that the Illinois Constitution provides that for every wrong, there shall be a remedy and that has been held by the Illinois Supreme Court to be a substantive provision, one under wich, if there is no known remedy, the courts will, in fact, fashion a remedy. That is not just a statement of hope but is a statement of actual Constitutional construction within the courts of the State of Illinois. I agree, we would not need to rely upon the right of privacy. But I think that it is, in fact, a valid right that is held by all people.

As this Court has pointed out, the lines between the Government and private action are becoming blurred, more and more. I think that in a situation such as this that in many instances, the press can do just as much damage to an

individual as the Government can, especially in a sensitive area such as this. We have, of course, the problem where there is alleged prejudicial pretrial publicity. That is just another area in which the press can do damage and, of course, the press must have freedom and I would not, for one moment, quarrel with the right of the freedom of press. I think it is one of our most basic rights.

On the other hand, I think there must be some check upon that right. There must be some way to protect the rights of the individual, the private party who is unknowingly and unwantingly and unwillingly thrust into the public limelight only as a result of what the Defendant has done.

Now, I know many of the opinions written by the various members of this Court in other cases in this area have expressed a great concern about the possibility of self-censorship on the part of the press. I think, in some areas, however, that such self-censorship is not entirely a bad thing. I think in some areas the press ought to have to stop and consider what they are about to do to an individual and, again, I am limiting my argument only to private individuals, those who have not become involved by their own actions in public matters.

So I would think that perhaps some kind of limitation upon the right of the press in this one particular area is, indeed, appropriate because, as I have indicated, I think

that the rights that are being protected by libel are not just common-law rights but are, in fact, Constitutional rights.

Q May I ask this question? You made a statement that there was no public or general interest in the representation in the civil suit by Mr. Gertz.

Who determines whether or not there is a public or general interest in a libelous statement?

MR. GIAMPIETRO: Mr. Justice Powell, I would suppose that the ultimate arbiter as to whether there is or is not public interest must be the courts and, certainly, ultimately, this Court.

I think some guidelines can be laid down to that determination. I think that if the statement is about what the person has done, for example, if the statements in this article had said that in conducting the civil suit, the Plaintiff had done certain particular things, then, perhaps, that might be a situation which constituted appropriate comment which would then bring into play the requirement that the Plaintiff prove actual malice in the Constitutional sense.

I think that, however, in this case, there was no such statement. We have a linking of the Plaintiff with something that he had absolutely nothing to do with.

Q Did the other newspapers in Chicago carry stories to the effect that Mr. Gertz had been employed in the private litigation?

MR. GIAMPIETRO: I think there were one or two small stories which appeared on one day, on one day only, which just noted in about two paragraphs that a civil suit had been filed on behalf of the parents and that -- and I think they did mention that Mr. Gertz had been one of the attorneys that filed it.

Q Suppose the Daily News and Chicago Tribune had both published stories on the front page about the institution of this suit? Would the fact that the press itself had considered this story of sufficient interest to give it that play establish that it was a matter of public or general interest?

MR. GIAMPIETRO: I think I would have to say that that would, indeed, be a very strong factor in reaching that conclusion. I think, certainly, to a certain extent, the press might be allowed to determine what, in their opinion, is a matter of public interest.

Q Well, doesn't this enable the press to decide, in almost every case, what you said might be a Constitutional question, that is, whether or not a particular story is or is not a matter of general or public interest?

MR. GIAMPIETRO: I think it might, indeed, and that is one of the things that concerns me, that the press may be able to, in effect, just by doing what it wants to do or what it chooses to do, thereby insulate itself. That is what

concerns me because if we allow that to happen, then we are, in effect, saying that the individual has no protection. He has no way in which to gain recompense for the damage that is done to him and I am, I must say, very concerned about that.

Q But isn't that just about what the lead opinion in Metromedia adds up to?

MR. GIAMPIETRO: Mr. Justice Stewart, I think it does. I think it does, indeed.

Q Your only answer is, well, that wasn't an opinion of the court?

MR. GIAMPIETRO: Well, I would say, yes, number one, that was not the opinion of the court. Number two, I would say, perhaps that it ought to be reexamined in fec situations such as this, where the Plaintiff is not someone who was, in fact, an actor within the manner that is being spoken about.

Q Well, I think if you read Justice Brennan's opinion carefully, you will see that he pointed out that Mr.Rosenbloom had made himself the central actor and figure. It wasn't the press that made him the central actor, it was the nature of the business in which he engaged, namely, selling the pornographic -- allegedly pronographic material.

MR. GIAMPIETRO: I would agree, your Honor.

Q And now, this lawyer, is quite different from Mr. Rosenbloom.

MR. GIAMPIETRO: That is exactly right.

Q Well, actually, do I correctly read what the

trial judge did here? He used rather a two-step approach, did he not? He said, first, that the killing of a criminal suspect and the policeman's subsequent indictment at a time when the police, generally, were the subjects of attack within the community, commanded wide public attention and interest. Therefore, it was a subject of general public concern.

MR. GIAMPIETRO: Then he went on to say that that is not the only thing that has to be established. There also has to be established whether or not Gertz thrust himself into the vortex of that controversy and concluded, rightly or wrongly, that, yes, he had thrust himself in by reason of his representation of the family in the civil suit against the police officer. Wasn't that it?

MR. GIAMPIETRO: That is correct.

Q And so I gather you are arguing two propositions. The first is that this was not a -- the killing was not a subject of general public interest and, secondly, that even if it was, you cannot say that this attorney thrust himself, as the court found, into the vortex of that controversy. Is that right?

MR. GIAMPIETRO: Let me say, in response to that, Mr. Justice Brennan, let me say that I don't think for the purposes of my argument we even have to get to the qeustion of whether the killing by the police officer was not a matter

of public interest and importance. My point is simply that the Plaintiff was not, in fact, involved in that situation.

Q That is saying, was not in the vortex of that subject.

MR. GIAMPIETRO: That is correct. So I think it really doesn't make any difference to my position whether the killing itself by the police officer was or was not a matter of public interest.

Q But you can readily concede that the killing of this man was a very important matter of public interest, the killing by a policeman, but that the civil suit for recovery was arguably quite a different matter.

MR. GIAMPIETRO: That is correct. That is correct. That is right and I would, indeed, agree with what you have said.

Speaking in line, I should say, of the opinion and decision of the District Court, I think I should, at this point, point out that I think that his actions deprived the plaintiff, in fact, of due process. His actions in not allowing a new trial for the Plaintiff, I think, was clearly erroneous. He informed the Plaintiff and instructed the jury that insofar as he was concerned, this was a normal libel case under normal Illinois rules of libel and so submitted it to the jury and the jury reached its determination on that basis.

Subsequently, on the motion for new trial, he concluded that he had had a change of heart, that he concluded that the Plaintiff was a public figure or had thrust himself into the vortex and that the plaintiff had been required to prove actual malice, that he had not done so and, therefore, he granted judgment, notwithstanding the verdict. I think that was clearly erroneous.

Q He should have had an opportunity to prove actual malice as long as he was now going to apply the Constitutional test and not just the state law rules.

MR. GIAMPIETRO: That is correct. I think, clearly, we should have been entitled to a new trial at that point. If we were, in fact, or are, in fact, required to prove actual malice, we must be given an opportunity to do so. I think in that respect the District Court was clearly in error. The Court of Appeals didn't mention that at all. So I think insofar as that point is concerned, that, clearly, this case ought to be reversed and remanded for purposes of a new trial at the very least.

I think, in speaking in matters of this kind, that we are actually talking about the conduct of the people involved. It is the conduct of the Petitioner which makes him a subject of articles or newspaper stories of this kind. I think that it is only fair to judge the Defendant, then, by its conduct and I think the conduct of the Defendant in

this case, even without the actual requirement by the trial judge that we prove actual malice, I think the evidence shows that the Defendant in this case was, in fact, guilty of actual malice in any event.

Q Even on this record?

MR. GIAMPIETRO: Even on this record. I think that --

Q Mr. Giampietro, this is the complete trial record?

MR. GIAMPIETRO: Well, the Appendix didn't -- we didn't reprint everything, all of the testimony of everyone in the Appendix. There is testimony of other persons. I would say that I think the Appendix contains the majority of the testimony.

Q Well, have you filed the complete trial transcript?

MR. GIAMPIETRO: With the clerk, yes, we have.

The Defendant admitted that the statement, the gist or sting of the article was not true and I might point out at this point that, in Illinois, under the laws of libel, a Defendant is not required to prove each and every element of what it says to be true in order to have a defense. All that it needs to show is that the gist or the sting of the article is true and that the central thrust of the article is true, even though certain of the minor points might be

false. That would not deprive the Defendant of his defense of truth.

Secondly, Illinois law does not -- has other protections. They have the innocent construction rule, which requires that if a statement can be read, either innocently or in a guilty manner, it must be read innocently. So there are substantial protections for the Defendant.

I think that the continued publication of the article for at least a year after the suit was brought, with no attempt to determine the truth, the fact that the Defendants admitted at trial that the statements about the Plaintiff were not true, the fact that there was a great rushing to put this article in print, even though there was a monthly publication which could have waited a month, is another element of malice.

So I think, on this record, that there is, in fact, enough evidence to show that there was actual malice in the New York Times Constitutional sense.

Finally, I'd just like to make one final comment about the assessment of costs by the Court of Appeals. We feel, in a situation such as this, where the Court of Appeals extended the rules in regard to libel and extended the Constitutional protection, that it was grossly unfair to saddle the Plaintiff with the entire costs of that appeal, especially since he had prevailed in the trial court and

that in the exercise of the supervisory jurisdiction of this court that the costs ought to have been apportioned at least equally between the parties.

Q What did they amount to, Mr. Giampietro?

MR. GIAMPIETRO: In the neighborhood of $5,000. It was a substantial sum.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Watts.

ORAL ARGUMENT OF

CLYDE J. WATTS, ESQ.,

MR. WATTS: Mr. Chief Justice and if it please the Court:

The first impact upon myself as Counsel in this case is whether the basic issue is not equal justice under the law. Personally, I have a great deal of sympathy for Counsel's position in this case. I have been on both sides of this issue and am on both sides of it at the current time. I feel that the penudlum has swung, as it must, in the administration of justice.

I feel that the Court, as, very properly, it should, is evaluating the present status of the rule of freedom of speech.

Incidentally, during my research in the Federal Digest, I find there are 57 pages under key number 90, of Constitutional law in the advance sheets of freedom of speech.

But the issue that I respectfully submit to the Court in this case is, under the law as existent at the time the trial courts very reluctantly reviewed his action in the case, very reluctantly granted a judgment notwithstanding the verdict, did the trial court --

Q The reluctance didn't show up very much when it came to this extraordinary assessment of costs.

MR. WATTS: Your Honor may be right about that.

Q It was a great change of heart, wasn't it, from the beginning of this case to the end?

MR. WATTS: Well, I am at a disadvantage in that, sir, in that I did not participate in the trial of the case and I didn't accurately answer the Chief Justice's question there, other than just what the record does show. But I do know that I presented the motion NOV and it was very virogously resisted and was very carefully considered by the trial court.

The trial court considered in simple language that application of the law under the New York Times family of cases required the conclusion that there had been no proof of actual malice, either knowingly false or in reckless disregard for the truth.

That judgment was carefully and exhaustively considered by the Appellate Court with the very piercing and penetrating decision that is summarized for the purpose of

ascertaining whether the case does simply involve equal justice under the law when Judge Stevens, in his concluding paragraph, ended with these words: "Finally --" Sir?

Q Where are you reading from?

MR. WATTS: I am reading from page 10 of the decision of the Court of Appeals.

Q Where does it appear?

MR. WATTS: I don't -- it's in --

Q In the Appendix?

MR. WATTS: Yes. "Finally, by reference to matters not in evidence, Plaintiff, in effect, asks us to take judicial notice of a reckless disregard for the truth on the part of the John Birch Society and its affiliates."

Now, there we come into the issue. Counsel has very ingeniously, if not ingenuously, injected into this case the fact, falsely, that the John Birch Society said General Eisenhower was a communist, that any number of people, high-level individuals in the United States, were communists. There again, this group has received the same image-making, the same adverse publicity, as exists all too frequently in the United States.

It has been my observation that this image-making can go to the extent of subconsciously even convincing a judge that here is an outfit that deserves to be accepted. The trial -- the Appellate Court goes on to say,

"Unquestionably, a judge's sympathetic reaction to the point of view expressed in an article which had been found to contain libelous matter may make it easier for him to afford a publisher First Amendment protection."

In other words, if I were sympathetic to the John Birch Society, it wouldn't be very hard to find in this case that there had been no proof of malice.

We cannot, however, apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.

And that, I respectfully suggest to the Court is the basic issue in this lawsuit.

Both courts very carefully evaluated the article and I say respectfully to the Court that this article at no place within its perimeter caused Mr. Gertz unkindness. It merely pointed out that there is a very critical situation existent in Chicago. There is, admittedly and it was documented and established, a strategy by the communist enemy to downgrade the police by false charges of police brutality. There is an effective program afoot to destroy the confidence of the American people in their police protectors.

Q Where do we --

MR. WATTS: Sir?

Q What you are telling us now, is this part of

the record?

MR. WATTS: Well, that is the impact of the article. See, the article recognized and there are in the record --

Q You are merely describing --

MR. WATTS: Yes, sir.

Q --what is the complaint?

MR. WATTS: Yes, sir. They are in the record, if the Court please, several very credible articles, one in the Reader's Digest, outlining the problem of the communist strategy of downgrading the police.

Now, the author of this article recognized that situation existed in America. He recognized the problem of Officer Nuccio in Chicago. He analyzed, primarily, the case, as the court was stating, the reference to Mr. Gertz is very, very incidental to this article.

Q Mr. Watts?

MR. WATTS: Yes?

Q I understood Counsel for the Petitioner to say that it had been conceded at the trial that the article was libelous. Do you deny that?

MR. WATTS: Well, sir, I was -- as I say, I was not at the trial.

Q What does the record show?

MR. WATTS: As I get the record, there was an

inference that the article was not libelous because if it had been libelous, it would have involved reckless disregard for the truth or knowingly false.

It was conceded that some of the remarks in the article were false.

Q I am speaking now about common law libel.

MR. WATTS: Yes, sir.

Q On page 23 of the Appendix, it states, "The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift."

MR. WATTS: Yes, sir.

Q Now, as a lawyer, I assume you would concede that that is libelous, per se.

MR. WATTS: I doubt it, sir.

Q You doubt it?

MR. WATTS: Mr. Justice, I doubt that that, in effect, the police investigators could have a file on a lawyer without anything criminal appearing in the file.

In other words, as we pointed out in the article, he belonged to several organizations that had been established as fronts, at least, and, perhaps -- I couldn't answer that specifically because, as I say, I did not participate in the trial. But under Illinois law, the inference and impact of the argument -- I mean of the article, absent the New York Times concept, would be libelous in Illinois. I think the

Court is accurate in that observation.

But, under the New York Times concept, the both courts, the trial court -- I say again reluctantly, and the appellate court, very carefully analyzed the action of the editor of American Opinion in taking the article of the author Stanley without any knowledge of any falsity and I suggest again that there is nothing in that article that says that Mr. Gertz was a communist -- as Counsel so repeatedly suggests in his brief.

There is nothing in the article that says even -- that I could find, that said he had done any criminal acts whatsoever.

The only thing the article says is that in this very critical situation where an officer in Chicago is charged with murder, which is a continuation of the communist strategy of destroying the police, in that situation, at a critical time, Lawyer Gertz appeared at an inquest and the inference in the article was that he -- that his influence at the inquest -- and raised the question -- it didn't say in so many words -- raised the question as to whether the appearance of an attorney of the influence in this type of -- in this area of public concern may have had some impact on the charge against Officer Nuccio and, possibly, on the covering up of certain evidence.

For instance, as I read the article, there was

never any evidence brought out about the young lad having a knife and there was an inference there, a question raised as to what happened to that evidence? And the only --

Q Well, Mr. Watts, I think a lot of the points you are covering are probably matters of Illinois libel law as to how the article should be read and that sort of thing, that I think this Court would be disinclined to review, apart from the New York Times type of issue.

MR. WATTS: I agree with that specifically, Mr. Justice Rehnquist. It has nothing to do with this lawsuit. The sole issue in this lawsuit is, did the trial court and did the appellate court apply New York Times in the concept that it would apply in protection of the New York Times or protection of Reader's Digest or in protection of Time or Life Magazine, did it apply the same rule with respect to this American Opinion that it would have applied with any other publisher and I feel sincerely --

Q On relevance, Mr. Watts, you know, there is a question of whether New York Times applies at all.

MR. WATTS: I would -- would the Court please elaborate that just a little so I could understand it a little better?

Q Well, isn't there an issue in the case as to whether or not the knowing or reckless falsehood rule of New York Times applies at all in this case?

MR. WATTS: Well, to me, it is so apparent, as the trial court and the appellate court pointed out, that New York Times specifically requires the conclusion that the author -- the editor of this magazine --

Q That isn't my question. My question is whether that rule applies at all or not.

MR. WATTS: Oh. Well, I cannot see how it can possibly be avoided in the application of this case since it is a publication, since it involves a question of whether there was malice. Under New York Times, whether the --

Q I know, but under the New York Times, the New York Times talked about a public official.

MR. WATTS: Oh, oh, excuse me, sir. Here is the rule -- here is my --

Q And a public and --

MR. WATTS: Yes, here is my knowledge as to that --

Q So, how do you get under the New York Times rule, sir?

MR. WATTS: All right, number one, as pointed out by the appellate court, this --

Q Well, let me ask you, it is an issue in this case?

MR. WATTS: Yes, sir, it certainly is.

Q So it isn't -- the sole issue just isn't whether the two courts below correctly ruled as to whether or

not malice was proved? That is not the only issue.

MR. WATTS: No, sir.

Q The issue is whether it was of any necessity at all to prove malice.

MR. WATTS: Yes, sir. I would say it was broader as to whether the trial in the appellate court correctly ruled that New York Times applied. Now, does it apply?

Q May I just ask, Mr. Watts, do I correctly read what both the court of appeals and the trial court said about this case? Neither thought that this was a case involving a public official. You agree with that, don't you?

MR. WATTS: Not quite, sir.

Q Oh, you don't?

MR. WATTS: No, sir.

Q Is this attorney a public official?

MR. WATTS: Well, I think, under these circumstances, where he appeared at the inquest and actually injected himself into the trial, I think he is a de facto public official.

Q Oh, I see, and is he also a public figure?

MR. WATTS: I was going to answer that. I was going to suggest that in answer to --

Q Is he also a public figure?

MR. WATTS: I think very definitely he is a public figure.

Q All right, now, but if I read what the trial

court thought of this, though, it felt that this was not a case involving either public official or public figure but, rather, a case involving an issue of public interest --

MR. WATTS: Yes.

Q -- into which this fellow injected himself, this lawyer injected himself and that, thus, under Metromedia, that brought in the application of the New York Times rule. Isn't that the way they handled the case?

MR. WATTS: That was partially the trial court's concept. For instance, at page 5 of the Opinion, he says, "At the trial, Gertz testified as to his stature and reputation in the community." In other words, that he was a public figure. "He is a prominent attorney in Chicago, having represented clients who sometimes command a wide floowing in the press and media."

Q Well, now, let me ask you --

MR. WATTS: Yes?

Q What are you going to say -- what would you say, if we disagreed with you that this lawyer was either a public figure or a public official?

Let's assume we disagreed with you on that. Are we to conclude that you -- that the New York Times rule would therefore not apply?

MR. WATTS: I think there would be one other relatively minor collateral problem that the Court would

have to approach. This is a matter of very definite public interest. Mr. Gertz, admittedly, is a part of a -- a very complicated and very vital matter of public interest.

Assuming that he was not a public official de facto, as I respectfully suggested, assuming that he was not -- had not injected himself into the area as a public figure, then the question would arise as to whether, not being a public figure, whether he indirectly and rather in a minor capacity, is involved in a very vital public controversy. I believe --

Q Or whether he thrust himself into it.

MR. WATTS: Yes, sir.

Q The language that we have been using is, "Thrust himself into the vortex of public controversy."

MR. WATTS: That is --

Q That, then, would be the issue and isn't that, finally, what the trial court determined this on?

MR. WATTS: I would suggest to the Court, there is an additional issue in this case. Now, that certainly, is an issue. But I don't think it is the sole and controlling issue. We have this additional issue where the author of this article very --

Q Why didn't you just say "yes," to Mr. Justice Brennan's question?

MR. WATTS: Well, I'd say "no," sir.

Q You'd say "no?"

MR. WATTS: It isn't the sole issue. It is an issue, and I'd like to elaborate on this, with the Court's permission, that we have this final issue of a controversy of extreme public interest, where the author of the article recognized that this man had injected himself -- let's assume not a public figure -- not had become even a public figure -- but he had been injected in such a manner as it was a matter of public interest, in a public controversy.

I believe sincerely that the concept of New York Times would protect the author in the absence of knowingly false or reckless disregard for the truth, in making the relatively minor comments in this big article involving the persecution of Officer Nuccio.

Even though Mr. Gertz was not even a public figure, I believe that the author would be protected by the concept of New York Times where we have a very critical public issue.

Q Let me ask you this question, Mr. Watts.

MR. WATTS: Yes.

Q Suppose, instead of bringing a civil suit against the police officer for the death, that Mr. Gertz had been retained by the family to collect on an accident insurance policy where there was some debate? Would you say that he had thrust himself into the vortex of the controversy?

MR. WATTS: I should doubt it. No, sir.

Q You doubt it, then?

MR. WATTS: Yes, sir. Unless he was participating, as the article indicated.

Q But the root factor is the death --

MR. WATTS: Yes, sir.

Q -- of this man.

MR. WATTS: But I don't see how a publisher -- and, again, I am on Counsel's side of this phase of the lawsuit -- I don't see how a publisher can just expand New York Times all over the world. I feel that it must be reasonably relevant and the relevance in this case is that he got -- appeared, according to the article, at the coroner's inquest in the support --

Q Did he take -- you've mentioned that, now, three or four times. Did he take any part in the inquest?

MR. WATTS: Yes, he interrogated witnesses and the inference in the article is that, due to his cleverness, due to his capacity in the community, there was an impact on the court there that possibly caused the questions raised as to whether that could have caused the charge against Officer Nuccio.

Q But his part was not as a public officer of the State of Illinois, was it?

MR. WATTS: Sir?

Q His part was not as a public official?

MR. WATTS: Well, except where he appeared,

voluntarily at the inquest and asked questions in support of an investigation of Officer Nuccio, I have suggested respectfully to the Court that he then became even a de facto public official. So I have three --

Q Well, did he have a right to do that, as a lawyer?

MR. WATTS: Yes, sir, he did. And when he did --

Q Would that be a duty?

MR. WATTS: Yes, sir, and he exercised it.

Q And you said that the whole purpose of the article was to show how he influenced the Coroner's inquest and the answer is that the Coroner's inquest left it open. They didn't decide anything.

MR. WATTS: Well, Mr. Justice, I didn't say the sole --

Q Is that right?

MR. WATTS: I didn't say the sole purpose. I said a very minor part of the article --

Q Well, is it true that the Coroner's jury left it open?

MR. WATTS: Well, as I say, I was not a participant in the trial.

Q Well, the record. Is it in the record?

MR. WATTS: Yes. It's my understanding in the record that the Coroner's inquest left open the --

Q Well, I don't consider that great influence. Would you?

MR. WATTS: No, sir, I don't think it did but, again, I --

Q And you keep talking about the persecution of this police officer. Is this the same police officer. Is this the same police officer that was found guilty?

MR. WATTS: Yes, sir.

Q And you call that persecution?

MR. WATTS: No, sir, I do not call that persecution, but, I --

Q I'm sorry, I misunderstood you.

MR. WATTS: -- do think there is enough of a widespread public issue to where an author could reasonably raise the question.

In other words, there has been, in America, persecution of police officers and this article was intended to raise the question of whether our Officer Nuccio was actually guilty or was being victimized by this widespread strategy of persecuting police officers and that is the area that I feel sincerely brings this case squarely within the rule of the New York Times of dealing as to whether the editors were accurate, as to whether they made a mistake, the Court is not concerned.

The question is, at the time this article was

published, was it for the purpose of raising the question as to whether persecution of police officers was a widespread public phenomenon, a strategy of the communist advancement, which, incidentally, has never been curbed nor even been exposed adequately, so I feel that an article of this kind provides a public purpose in raising in the minds of the American people the perimeters of and the nature and extent of, the power of unseen forces to downgrade our police.

And I feel that insofar as that is concerned, insofar as they are raising the question of the propriety of Mr. Gertz' activities in connection with this, the case, as found by the trial and the appellate courts is squarely within New York Times.

I don't think there is any way, without abolishing New York Times, that the author of this -- the publisher of this article, can be deprived of the protection requiring proof of actual malice.

Q Well, on that argument, I would think that you would have to apply the rule to almost anything, to any kind of a report.

MR. WATTS: Well, there again, we come into the fact that freedom of speech, having --

Q So, why don't you just embrace the idea that anything of substantial public interest is covered by New York Times?

MR. WATTS: I should think it would go almost to that extent and there, again, I am being ordered to --

Q Or, even insubstantial to the public interest?

MR. WATTS: -- to identify the perimeter of a general rule which I just, frankly, feel incompetent to do so, but I do sincerely feel that so long as New York Times exists, an activity of this type, where the author and the publisher raise an issue as to what has occurred, where they have not specifically -- and I challenge the Counsel to find one place, as he repeatedly says in his brief, where Mr. Gertz --

Q So a newspaper discussing, say, a particular serious disease, a situation with respect to a communicable disease in the community, and in the course of discussing that disease and its existence and extent and the trends of it, it incidentally says that somebody has that disease in the city and it so happens that it is false, absolutely false and let's assume that under standard rules, that that would be a libel per se.

Now, there is no question that it is a matter of public interest, that this disease that kills, say, 10,000 people a year, is a very vital matter. But would you suppose that the New York Times would be applicable to that?

MR. WATTS: Mr. Justice White, I would say if the individual who was alleged to have had that disease had been seen participating in some remote, even a remote activity,

involving this basic incident that was suggested --

Q Well, like a doctor who has been treating it.

MR. WATTS: Sir?

Q Like a doctor who has been treating it, and the press says that he has the disease. He has just inserted himself in an --

MR. WATTS: If I might add one additional element, if the press would raise the question that since here is a doctor who has been treating this very dangerous communicable disease, is it possible that he might have become a carrier? I think, under those circumstances --

Q Well, that isn't what I said. I said --

MR. WATTS: No, I --

Q -- they said he had the disease.

MR. WATTS: Yes, sir.

Q And he did not and it is false.

MR. WATTS: But that is not quite parallel to this article, because they didn't say he had --

Q Well, is your suggestion that the New York Times would not cover that or not?

MR. WATTS: There again I can only answer that by saying it would depend on the particular circumstances. I'd say the New York Times could cover it under certain circumstances.

Q Well, you --

MR. WATTS: If it was just a deliberate, blatant --

Q It's not. They thought it was true. They thought it was true. They just happened to be wrong and under conventional libel law, common law libel law, they would be, whether they were negligent or not, they would have to pay.

MR. WATTS: Well, Mr. Justice White, that is getting awfully close and I am afraid New York Times would apply to it.

I have had such a fact in New York Times in my Walker case that I recognize --

Q Then I still wonder why you didn't answer Mr. Justice Brennan "yes" awhile ago, with respect to his question about what the trial court held here, which is wholly consistent with the lead opinion in Metromedia.

MR. WATTS: Well, Mr. Justice White, I feel so incapable of riding the perimeters of this rule that about all I can do is raise questions and the impact that I have of this case is, that the trial court and the appellate court fairly and properly applied New York Times to a man who had injected himself into the controversy by appearing at the inquest involving an officer charged with murder and, under the circumstances, I find nothing in this record --

Q The trouble, Mr. Watts, is in saying he -- you say two things, that Mr. Gertz represented the parents of the deceased person. Right?

MR. WATTS: Yes, sir.

Q And that he injected himself in the Coroner's inquest involving that very same matter. How can you use the word "inject?"

MR. WATTS: Well, that is language somewhat relative to Walker, where he entered the vortex of the controversy, and Mississippi. Again, this lawyer appeared at the Coroner's inquest. The author of this article raises the question, what was that lawyer doing here when he was a member of various organizations that have leftwing leanings?

He raised the question. He never did say so in the article, raised the question --

Q Was his effort decried at any time he appeared in any case?

MR. WATTS: I should think, sir, under these circumstances, it would, yes.

Q Yes, but any lawyer, once he gets in a lawsuit, even going into a Coroner's inquest, loses all of his rights under New York Times.

MR. WATTS: No, sir. He doesn't lose his rights. But he loses the right to merely say, "You have spoken falsely of me."

Q He loses all those rights.

MR. WATTS: Yes, sir. I think that puts --

Q The lawyer does it.

MR. WATTS: Well, that is one of the penalties, perhaps, we pay for involving ourselves in highly controversial and challenging conflicts.

Q It didn't pay to be a magazine seller in Rosenbloom against Metromedia, did it?

MR. WATTS: Excuse me, sir?

Q You have the same situation as -- or even a stronger one, I should suppose, than Mr. Rosenbloom's case in Rosenbloom against Metromedia, where the only injection of himself he did into any vortex was just to run a magazine stand.

Q It was selling girlie magazines and the alleged libel was that he sold girlie magazines.

Now, in some places, Mr. Watts, it would be regarded as libel per se by some people to be called a John Bircher, a member of the John Birch Society.

MR. WATTS: I recognize that.

Q Then, I take it from your response to the prior questions that you have subjected yourself to being called a John Bircher by appearing in this case?

MR. WATTS: And if I have, sir, done so, I feel that the person who raised that question, unless he was knowingly false or in reckless disregard for the truth, I think he is certainly protected by the rule.

And there again, as I say, the John Birch

Society has a very, very adverse public image that has been built up over a period of years and I am sympathetic with any concept that would put the piercing hand of truth, the finger of truth on all of these problems that are faced by our society. But the fact remains, editors and authors are entitled to the protection of New York Times concepts in cases involving public controversies in matters in which the public is vitally interested and this certainly, by any theory, any approach that we make, this is a matter in which the public was supremely interested --

Q Well, by your test, everything but the funnies would be privileged, wouldn't it?

MR. WATTS: Excuse me, sir. I have a little touch of artillery in my ears and I can't --

Q By your test, everything in a newspaper except the funnies would be under New York Times?

MR. WATTS: I think so, and I believe even the funnies could be, under certain circumstances, and if our little editor of the funnies was not in reckless disregard for the truth, if he presented me as a screwball, a crackpot, and he was in reasonable good faith about it, I think he'd be protected by New York Times.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Watts.

MR. WATTS: Thank you, sir, very much.

MR. CHIEF JUSTICE BURGER: You have about two

minutes left, Mr. Giampietro.

REBUTTAL ARGUMENT OF

WAYNE B. GIAMPIETRO, ESQ.,

MR. GIAMPIETRO: Well, first of all, I'd like to, perhaps, correct a misimpression I may have had in regard to the matter of costs. The actual costs with which were taxed was just slightly over $2,000 and they were taxed by the Court of Appeals, not by the District Court. So I just wanted to clean up any misimpression I may have made on that score.

I think that any argument that the article did not call the Plaintiff a communist is really a distinction without a difference. The article says, "The only thing Chicagoans need to know about Gertz is that he is one of the original officers and has been vice-president of the Communist National Lawyers Guild, which has been described by the House Committee on UnAmerican Activities as 'One of the foremost legal bulwarks of the Communist Party' and which probably did more than any other outfit to plan the communist attack on the Chicago police during the 1968 Democrat Convention."

If they didn't call him a communist, they came so close at to make no difference at all, I think. I don't really think there is any question as to what the damage, what the gist or the sting of the article was all about.

One final comment, I think, in regard to whether attorneys do become, in essence, public figures and public officials by just becoming involved in cases of this kind, I think the result is not that attorneys will be harmed. I don't think that is the gravest result of such a holding.

I think the gravest result would be that clients will be harmed, of attorneys, because if the rule becomes that once an attorney gets involved in a case that might have some public interest and importance on a private level, he becomes subject to attack of all kinds, then attorneys are going to be very reluctant, indeed, to become involved in cases of this kind and then other individuals are not going to be able to get legal representation. I think that may be the ultimate result. I think that is the thing which would be the most dangerous and cause the most harm in the long run.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 11:47 o'clock a.m., the case was submitted.]