In the

Supreme Court of the United States

Joan Roe, Peter Poe and
Coe Press, Inc.,

Petitioners,

v.

No. 73-1446

Jane Doe,

Respondent.

Washington, D. C.
December 18, 1974

Pages 1 thru 50

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JOAN ROE, PETER POE and COE PRESS, INC., Petitioners,	:	
v.	:	No. 73-1446
JANE DOE, Respondent.	:	

Washington, D. C.,

Wednesday, December 18, 1974.

The above-entitled matter came on for argument at 1:10 o'clock, p.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:

MARVIN M. KARPATKIN, ESQ., Karpatkin, Ohrenstein & Pollet, 1345 Avenue of the Americas, New York, New York 10019; on behalf of the Petitioners.

EPHRAIM S. LONDON, ESQ., 575 Madison Avenue, New York, New York 10022; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-1446, Roe against Doe.

Mr. Karpatkin.

ORAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.,

ON BEHALF OF THE PETITIONERS

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

The critical question in this case is whether the First Amendment's prohibition against prior restraint is violated by the grant of a preliminary injunction against the distribution of a scientific book, a psychotherapeutic case history, where the only finding which has been made by any judge, concerning disguise of the patients, is that the defendant doctor took reasonable steps to meet the usual standards for disguising the patient's identity.

The injunction has been in effect since May 7th of 1973, more than 17 months --

QUESTION: Is that conceded, that the usual steps were taken?

MR. KARPATKIN: It is conceded that that is what was held by the Justice presiding at Special Term, New York County, Mr. Justice Silverman, and it's set forth at page A83 in the record, Mr. Justice Blackmun.

QUESTION: Where in the Appendix do we find that, or

is it there?

MR. KARPATKIN: The words appear at A83, Mr. Chief Justice. A83 in the Appendix, and if I may read:

"Defendants have taken some steps to disguise the identity of the patients. I think those steps reasonably meet the standards for such disguising of the patients' identities."

That is the only finding which has been made concerning disguise, and then the Court engages in this bit of speculation as to who might be able to penetrate the disguise.

The Court says, "While I have not read this one thousand-page book, the examples of possible identification given by plaintiff in the moving affidavit must be assumed to be the more striking ones. I do not think that they would rea-ly identify plaintiff as the patient to someone who did not already know that plaintiff was the patient."

Necessarily subsumed into this primary question of the prior restraint is the connective question of what are the constitutional limits of any cause of action which would seek to impose liability on a doctor for publication of a case history, inasmuch as there can be no provisional remedy, equitable or otherwise, in the absence of a constitutionally sufficient cause of action, this second question is, of necessity, subsumed in the first.

While the constitutionality of a prior restraint on

publication is hardly a novel question for this Court. Its attempted imposition in this case, on a concededly truthful, non-obscene, scientific book, in fact a book-length case history of a course of psychotherapeutic treatment which is more than ten years over, is most decidedly a case of first impression.

The book in question has more than 1,000 pages, 1716 footnotes. The list price is $20. The original print order was for 3,000. In the three months that it was on sale prior to the injunction, approximately 200 copies were sold.

The subject of the book is the treatment of a man and wife, both diagnosed as schizophrenic, without drug or shock therapy. The form is a transcription of approximately one-fifth of the psychiatrist's session notes, with copious footnotes written by the psychiatrist.

The therapy is more than ten years completed. It was commenced in 1956, 18 years ago, and terminated in 1963, eleven years ago.

The book was published in February of 1973.

Defendants are a psychiatrist, her husband a late therapist, and a small publishing house. The plaintiff is a former patient.

The other individual subject of the book is the patient's former husband, now deceased, but divorced from

plaintiff prior to his demise.

His widow, who is also claimed by plaintiff to be identifiable in the book, did not join plaintiff in this action.

A preliminary injunction was granted at Supreme Court, New York County, Special Term, without a trial, or an evidentiary hearing of any kind; indeed, under the New York Civil Practice Law and Rules, there is no mandatory right to someone facing an injunction to have a testimonial hearing, much less a full trial on the merits.

QUESTION: Is that on the preliminary, or on the permanent, too?

MR. KARPATKIN: On the -- a permanent injunction, Mr. Justice Rehnquist, I presume is an injunction after a trial, and there are all the rights which would normally take place on the trial.

QUESTION: But a preliminary you can hear just on affidavits?

MR.KARPATKIN: That is correct, Mr. Justice Rehnquist, and that is what happened in this case, and that, indeed, is the usual practice in New York. It is unusual, but it happens occasionally, for a Justice at Special Term to order a testimonial hearing.

And there is no absolute right to it, and we cite a case in our brief which indicates that it's within the

discretion of the Justice.

The Justice moreover states in his opinion that he has not even read the book. What's more, he made the following observations, findings and statements, which seem incomprehensibly inconsistent with his conclusion; namely, that it is a well-established practice in the medical profession and in the public interest for a physician to publish case histories. This being a tradition started by Dr. Freud. Indeed, the only citation of authority in the opinion at Special Term is the citation to Dr. Freud.

Also an observation that the scientific value of the book is not a fit subject for judicial evaluation. Also the statement that defendants have taken steps to disguise, which I read to the Court in response to the Chief Justice's question.

And with respect to the many examples, 34 in number, of claimed identification given by plaintiff in her moving affidavit, there was not a sentence of oral testimony or cross-examination on that. The Court found: "I do not think they would really identify plaintiff as the patient to someone who did not already know that plaintiff was the patient."

I respectfully submit that by the use of this double negative, the Special Term Justice eliminated any possible finding of general identifiability, and he found an impossibility of identifiability, limited to an obviously

small and discreet number of persons who met all of the following requirements:

These must be persons who know the plaintiff, and who know of the existence of the doctor, and who know -- now, mind you, in 1973 and 1974 -- that plaintiff and the doctor had a doctor-patient relationship that ended more than ten years ago.

And even there Justice Silverman merely speculated, that those might be the only ones, or the only ones who might be able to know would be persons who would be within that discreet group.

I submit that the Justice at Special Term and the Appellate Division, which affirmed the Justice at Special Term, and the Court of Appeals had an ample basis in the record for finding that normal standards of disguise for a case history publication were met, inasmuch as plaintiffs were given false first names. Plaintiffs were given no last names, no location was indicated.

The patient's family group was radically altered, fictionalized, so as to make it appear that they had only one child, when in fact they had two children.

The book was not published until ten years post-treatment, and after the divorce and the death of the husband.

And all that plaintiff was able to produce in the three months between the publication and the injunction to

support her claim of identifiability was a single affidavit of a friend, which does not refer to even a single one of the 34 allegedly identifying characteristics which plaintiff herself identified in her moving affidavit.

QUESTION: These factual representations that you're making, Mr.Karpatkin, are you thereby implying that if there had been identification this book couldn't have -- the publication of this book could have been enjoined?

MR. KARPATKIN: No court has ever so held, --

QUESTION: Well, what's your submission?

MR. KARPATKIN: -- Mr. Justice Stewart.

My submission is that if there would be a complete and total identification, such as, for example, if the identifying information in the Kinsey Institute of Sex Research files were suddenly to be made public, I would concede that with appropriate safeguards for hearing and testimony and cross-examination to ascertain the truth of those allegations, that injunctive relief would be permissible and a prior restraint would be permissible.

QUESTION: Or, let's say, you got the idea of writing a book, "The Secrets of My Clients", and wrote it up and had it printed, could that, the publication of such a book be enjoined -- if you identified all your clients and disclosed all their -- the confidences they had reposed in you?

MR. KARPATKIN: If there was a sufficient identification in breach of a professional attorney-client relationship, where in fact that identification had been established and where in fact there was not consent, I would have to answer in the affirmative to your question, Mr. Justice Stewart; but I would assume --

QUESTION: And nothing in the Constitution at least would grant the injunction of the publication of such a book?

MR. KARPATKIN: We do --

QUESTION: My hypothetical book.

MR. KARPATKIN: Yes, sir. We do not maintain, Mr. Justice Stewart, --

QUESTION: That's not to say that the plaintiff would have any constitutional right to have the book enjoined, but that would be up to the State, wouldn't it?

MR. KARPATKIN: It would be up to the State, Your Honor, but it would be subject to any cause, any underlying cause of action being subject to constitutional limitations which would not impermissibly entrench on First Amendment guarantees.

QUESTION: Well, my hypothetical case of these authors actually disclosing, concededly disclosing the identity and thereby violating the confidences of their patients or, in the alternative hypothetical case, you the author of a book, "The Secrets of the Clients of a Lawyer's

Lifetime", you would concede that there's nothing in the Constitution that would prevent a State from enjoining the publication of such a book, if the State chose to do so, would you?

MR. KARPATKIN: I would say that it would have to meet all of the standards which --

QUESTION: Well, would that meet them? What are the standards?

MR. KARPATKIN: The procedural standards, Mr. Justice Stewart, which this Court has said must be met before a prior restraint.

QUESTION: Well, let's say, after a full hearing, this was found.

MR. KARPATKIN: I would agree with Your Honor's hypothetical suggestion that it would be within the power of the State to --

QUESTION: I thought the command of the First Amendment was in terms absolute.

MR. KARPATKIN: The command of the First Amendment, Mr. Justice Douglas, is in terms absolute.

QUESTION: So you're talking about a watered-down version of it, that it's been adopted by a Constitutional Convention assembled here today --

QUESTION: Of course the First Amendment directs itself to Congress, and we're not dealing, if we're taking it

literally, we're not dealing here with anything that Congress has done.

MR. KARPATKIN: For purposes of my argument, Mr. Justice Douglas and Mr. Justice Stewart, I must take the First Amendment as it comes to me in decisions of this Court, beginning with Near v. Minnesota.

QUESTION: Well, since the Court can make it applicable to the States.

MR. KARPATKIN: Again I would have to say that in Near v. Minnesota, this Court set down the absolute proscription against prior restraints, pointed out the nature of prior restraint in violation of the First Amendment, and indicated the absolutely limited and demarcated conditions and circumstances under which exceptions could be permitted. Exceptions being permitted, perhaps, in the field of obscenity, perhaps in the area of national security, even though this Court declined to allow prior restraint in the New York Times' Pentagon Papers case, notwithstanding allegations of national security issues being at stake.

QUESTION: Mr. Karpatkin, is there any rule of New York practice that would have prevented you or the respondents, for that matter, while you were appealing the preliminary injunction up through the New York Appellate system, from asking the case to come on for hearing on the final injunction before the Supreme Court?

MR. KARPATKIN: No, there is no such rule, and, indeed, the Justice at Special Term and the Appellate Division indicated that either party or both parties could apply for a preference of the trial.

QUESTION: Well, why didn't you do that, if you were concerned about getting the book on the streets, so to speak?

MR. KARPATKIN: Because of the unique circumstances of this case, Mr. Justice Rehnquist, were such that it was counsel's view, representing the defendants in this case, that a trial in the face of a preliminary injunction and without adequate pretrial discovery of a plaintiff who makes allegations that she's identified throughout the 1,000-page book, and can be recognized by persons going back to her earliest childhood -- and there are such allegations which are made -- that to undertake a trial of that kind, it would not have been proper and expeditious to do unless there had been adequate and complete pretrial discovery.

QUESTION: Can't you get pretrial discovery in connection with an injunction action in New York?

MR. KARPATKIN: I would assume that the answer to that would have to be yes, but that would have to be under the direction of the -- that would have to be under the direction of the Justice to whom the application for a preliminary injunction was made.

QUESTION: And you think he wouldn't have granted it in this case?

MR. KARPATKIN: Again I would have to speculate. But, obviously, there was a great push on the part of my learned adversaries for the quickest possible decision by the Justice at Special Term.

QUESTION: Well, I can see their point of view, they've got what they want, they've got a restraining order; but I would think from your point of view, if you want to get rid of the thing as expeditiously as possible, at least one thing you would consider is having the thing come out in the same court that granted the preliminary.

MR. KARPATKIN: After having read the preliminary injunction, the -- what I might say with respect to the Justice at Special Term, the baseless preliminary injunction and opinion supporting it, and the opinion of the Appellate Division, it was our view that the wisest course to follow would be to seek reversal of the preliminary injunction by courts in the Appellate system.

It was our view that there was a prior restraint on publication in effect, and we just had to find a court with power to dissolve it.

QUESTION: In that connection, I take it what you're saying would satisfy any requirement of finality for an appeal here?

MR. KARPATKIN: I think that's clear, Mr. Justice Blackmun, under decisions of this Court, and I think that this Court has held that a decision of a State court, even though nominally interlocutory, is final for purposes of Section 1257, if it concerns an important question of national policy. And I believe that's precisely what this Court held in the Keith case, and it's difficult to conceive of any more important national policy, I respectfully submit, than that which is so frequently rearticulated by this Court, that there is a presumptive invalidity to a prior restraint on expression.

QUESTION: Would you think the time factor works in relation to the Keith case? As I recall it, in the Keith case, the temporary injunction had been in effect for about three years, and here it's a little over one year.

MR. KARPATKIN: I would say yes, Your Honor; it's a year and five months.

QUESTION: Yes.

MR. KARPATKIN: Well, I suppose I would have to stand by the First Amendment and take the view that even a day of a prior restraint is an assault, which has to be justified.

QUESTION: Well, the thing is whether there's a -- the same question that Mr. Justice Rehnquist was addressing to you, whether you have a final judgment;in the Keith case,

I think the Court took some pains to say, or indicate that the temporary injunction having continued for three years, it was reasonable to assume that that was quite permanent.

MR. KARPATKIN: I think it is equally reasonable to assume, Mr. Chief Justice, in the light of the opinion at Special Term, the unanimous decision of the Appellate Division, the unanimous decision of the Court of Appeals, that it would be most unlikely for any court, other than this Court, to have dissolved the injunction before the case had gone its way.

QUESTION: May I pertain for a moment to Mr. Justice Stewart's question or questions: let's assume for the moment that your clients -- or that the patient's identity had been disclosed clearly, unequivocally, in this book; would you be here today in that situation?

MR. KARPATKIN: I do not think I would be here today, to answer your question, Mr. Justice Powell.

QUESTION: In other words, the basis of your case here is that, as a matter of fact, the patient's identity was not revealed in this book?

MR. KARPATKIN: Well, I respectfully submit that my argument does more than that. It is not just that as a matter of fact, but it's that as a matter of law a prior restraint, preliminary injunction cannot be entered on the basis of a record which is as deficient as this record is.

And that any underlying cause of action, whatever it is, and I doubt if anyone can read the melange of opinions from Special Term and from the Appellate Division and ascertain what the cause of action was supposed to be; but that there has to be an articulated cause of action. There has to be an indication of harm to the patient from identification; there has to be findings of disguise -- findings of insufficiency of disguise and of identification, and the judge has to say so in his opinion.

And it seems to me that some of the things that this Court said in the case of Mayo v. Canning, about which there was some discussion in the argument which preceded mine, even though the Court of course was dealing --

QUESTION: But that's under the rule -- that's under the Federal Rules of Civil procedure, where we're administering a very explicit system of rules over courts over which we have supervisory authority; but we don't have supervisory authority over the New York Court system.

MR. KARPATKIN: That is of course correct, Mr. Justice Rehnquist. But I think it is possible to at least see some due process gloss, or some notions of due process gloss, at least in some of the words that Mr. Justice Roberts, in Mayo v. Canning Company, and I believe that he talks about the statements of fact are mingled with arguments and inferences for which we find no sufficient basis, either

in the affidavits or in the oral testimony. In our case, of course, there was no oral testimony.

And such findings as there are, if they can be called findings, run in petitioners' favor.

But it seems to me that there is a suggestion in that opinion that this intermingling of arguments and inferences, and this absence of elucidated statements of fact, is precisely what makes difficult, if not impossible, the course of appellate review.

And therefore, I think it's possible to read from that case in due process clause as to the views of this Court.

QUESTION: Mr. Karpatkin, in response to Mr. Justice Stewart, you indicated that in the attorney's example he gave that the State would have power to enter such an injunction, would that -- was that answer based on the breach of the confidential relationship that was inherent in Mr. Justice Stewart's question, or was it the nature of the disclosures that would be involved? Wholly aside from whether they were a breach of any confidential relationship.

MR. KARPATKIN: I don't wish to evade an answer to your question, Mr. Justice White, but all that I can say is that learned amicus, representing the American Psychiatric Association and two other organizations, have postulated five different possible theories of liability, and said that it's unclear which of them, or which combination of them would be

involved.

QUESTION: Well, you gave -- you answered Mr. Justice Stewart, however, I wondered what your basis was.

MR. KARPATKIN: I would suppose that it would be possible for a State court to formulate a standard of liability based on the breach of the confidential relationship between a professional person and someone coming to see the professional person.

Assuming that all of the standards have been met, and that all of the procedural necessities have been met.

QUESTION: Well, the State might assert a variety of interests, but it may be the same interest expressed a variety of ways, one might be a breach of a confidential relationship, another way of perhaps putting the same thing is the violation of an implied contract, another way might be of saying if the State law is so protective of this confidential relationship that it will not allow a physician or a lawyer to testify even in a court of law, where the whole purpose is to get at the truth, certainly that interest is strong enough to prevent anybody, for his own profit, violating the same secrets and hawking them around in the bookstores of the State.

And there might be others. There might be just a regulation of the professions, as such, either the medical profession or the legal profession, the ethics of the pro-

fession. And a variety of other State interests. None of these is a constitutional interest.

The constitutional question is on the other side of the coin: can a State, even with a full disclosure, in the interest of furthering of these objectives, prevent in advance the publication of a book that would amount to full disclosure of these confidences?

MR. KARPATKIN: Well, I submit that those are the issues which are in the case.

QUESTION: But the State interest, it's not for us to say what ground the State might have put its interest on, that's not a constitutional question. The question is, Does the Constitution permit the State from enjoining the publication?

MR. KARPATKIN: My adversary has suggested in his brief, I don't --

QUESTION: Prevent the State.

MR. KARPATKIN: -- that there might be a constitutional right of privacy which would justify an action by the wife here.

QUESTION: Well, none was asserted here in this cause of action, was it? It's a State cause of action under the State tort laws, isn't it?

MR. KARPATKIN: But as -- that is the way the cause of action is phrased, Mr. Justice Stewart.

QUESTION: That's what I thought.

MR. KARPATKIN: But to indicate the difficulties in attempting to comprehend what happened in the State courts in New York, the decision which is cited by the Appellate Division is this Court's decision in the abortion cases, in suggesting that there is a merging constitutional right of privacy.

How that can be read into this case is beyond me, but there it is.

QUESTION: I suppose it's a little early to expect that you've read Mr. Justice Stewart's opinion in the case that came down this morning, or perhaps you did --

[Laughter.]

MR. KARPATKIN: I was able to glance at it.

QUESTION: You read that during lunch hour. Well, that -- was that something like this kind of a case, do you think, or not? A tort, a claim for violation of privacy that sounds in tort.

MR. KARPATKIN: The Cantrell case, Mr. Chief Justice, turns on the -- on one of the recognized sub-divisions, which has been established in the State law of many States, and I believe appears in the restatement, of the false light notion of a cause of action for privacy violation.

And it seems to me that all that the decision of

this Court says, and I hope I have not left anything out in my brief reading, is that the law is still the law as it was handed down by this Court in Time v. Hill, and nothing which may have been said or may have been intimated, or which anyone may seek to try to derive from the decision by this Court in the Gertz case, changes the law in Time v. Hill.

QUESTION: Well, it said we don't even have to consider that question, because in this case the Court followed Time v. Hill.

MR. KARPATKIN: Yes, Mr. Justice Stewart, and we --

QUESTION: You read it essentially correctly; I didn't mean to be correcting you.

MR. KARPATKIN: Thank you.

[Laughter.]

MR. KARPATKIN: And we urge that the standard of Time v. Hill, which is the only occasion when this Court posited a standard of liability in the case of a confrontation between an alleged violation of right of privacy and the First Amendment, is the only standard which is applicable here.

QUESTION: Well, your case is stronger, too, isn't it, because here you were enjoined, and in Cantrell it was just an action for damages, and in Time v. Hill it was an action for damages.

MR. KARPATKIN: Yes, of course. But I do -- I do that the case is stronger; but --

QUESTION: But don't overlook the dissent in the Cantrell case.

MR. KARPATKIN: I have not overlooked it, Mr. Justice Douglas.

[Laughter.]

MR. KARPATKIN: I never overlook any of the dissents written by any of the members of this Court.

But, as I said before, in answer to the Chief Justice's question, that -- perhaps Mr. Justice Stewart's question -- that a lawyer arguing before the bar of this Court has to take the First Amendment as it's come down from decisions of this Court, and that is exactly how we urge this Court should treat this case.

And under the decisions of this Court, from Near to date, this is clearly an impermissible prior restraint, and any acts of semantics or overlooking or exceptionalizations, which have been attempted, either by my learned adversary or in the decisions of the New York courts, simply will not wash, when compared against the clear writing of Chief Justice Hughes in Near v. Minnesota and in decisions since then.

With the Court's permission, I'll save the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. London.

ORAL ARGUMENT OF EPHRAIM S. LONDON, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This doesn't involve a simple case of a publication of a case history that is being enjoined. What we have in this case is a patient's confidences, divulged to her psychiatrist, copied almost verbatim; notes made during each session, psychiatric session between the psychiatrist and her patient, who is the respondent in this case, and the patient's husband.

In those notes, written out at length after the sessions, and then made into a book and, as I understand from the brief of the amicus in this case, or the amici, the Psychiatric Associations, in these sessions a patient is encouraged to dredge up from the unconscious thoughts that would never be expressed ordinarily, memories that have been too distressing to keep in mind and the like. And all these were written down, were evoked by the psychiatrist's questions, were then written down and then published, and they relate to such matters as the patient's thoughts during intercourse, her husband's masturbation, her own masturbation, her fantasies about incest and the like.

All this then published in a book and retailed in discount houses, department stores, trade book stores, even

music stores.

This is the kind of book, and this is the problem we have here today. And this is again just not a case history. I can't imagine a situation in which there has been a greater assault on a person's dignity, on a person's self respect, to have these thoughts set out for one's neighbors, for one's children, for one's students to read, because the patient here is an assistant professor in a university. She is herself a psychotherapist. One can imagine what would happen if this got into the hands of her pupils or her own patients or her own children, or her own friends.

QUESTION: Do you disagree with that, or challenge that figure of 3,000 volumes, copies of the book having been published?

MR. LONDON: I don't know, Your Honor. This, I think, is a statement made by the psychiatrist here --

QUESTION: Well, isn't that in the record?

MR. LONDON: Pardon me?

QUESTION: Isn't that in the record?

MR. LONDON: Those are statements made which we haven't verified as yet.

And I am going to come to this question of the status of the case, and why we are so little advanced, and why a year and a half had passed since the preliminary injunction was granted.

Now, the first preliminary injunction in this case was an injunction which prohibited the sale only in the trade stores and the department stores and the discount houses, but allowed sale in medical schools, in libraries that dealt with scientific books and the like.

And as soon as that injunction was issued, the limited injunction was issued, we, representing the patient, wrote a letter to the court saying we would like an immediate trial, and we suggest that the court allow ten days for pre-trial examination, pretrial discovery, before the full trial starts. And we received no response.

That letter is at A91 of the record.

We received no response. The order or the injunction, the limited injunction was slightly modified and the case was assigned to a judge for all purposes including trial. And we wrote that judge, and we said: May we have an immediate trial?

Then the attorney for the psychiatrist wrote back and said: We don't join in that application. As a matter of fact, we probably will appeal, and this is a very complicated case, and we want a long pretrial examination.

Now, of course, the appeals were taken, so that it would have been difficult to have a trial. I think the State could have been secured without any difficulty. I think Your Honor, Mr. Justice Stewart, asked that question before,

and I -- a stay would be issued on appeal, a stay of the trial if the question of the right to injunction were challenged.

QUESTION: Well, under New York law, did the trial court not lose jurisdiction as soon as an appeal was filed?

MR. LONDON: Well, it retained jurisdiction of the case, Your Honor.

QUESTION: Well, but --

MR. LONDON: But -- but --

QUESTION: -- but it would lose jurisdiction in the sense of being able to do anything about it, without leave of the Appellate Court.

MR. LONDON: I think it would have been necessary to apply to the Appellate Court for a stay, but those stays are automatically granted, as indeed they should be if there's a real question to be determined.

But now coming back to this procedure here. As I said, when the case was assigned to a second -- to a judge for trial and for all other purposes, we again asked for the immediate trial, and we again had the opposition of the psychiatrist here.

And they said they had a long pretrial examination, and, indeed, it took -- occupied a long period of time, because it was completed only last week. Exactly one week ago. And we got it completed only by applying to the court to

compel the completion of the examination.

But only the parts of six days -- I'm now quoting from the psychiatrist's brief, reply brief -- only the parts of six days were taken over this year and a half for that examination before trial.

So that any delay or duration of this preliminary injunction is entirely the fault of the psychiatrist here, and indeed over the opposition of the patient, who wanted a quick trial and disposition of this case.

Now, Mr. Karpatkin stated, in answer to a question of Mr. Justice Stewart, that if there were identification of the patient in this book, an injunction could issue after trial.

And I think that that virtually disposes of the case.

May I first tell you factually what the identification in the book is?

The book does give fictitious names to the parties and says they are fictitious. But then goes on to give a great many details of the lives of these people, indicates that the patient's husband was a professional speech writer, --

QUESTION: Mr. London, why are you making this argument?

MR. LONDON: I want to show that there's a factual base for identification, because Mr. Karpatkin says if there is identification, then there's an end to the matter.

QUESTION: Well, what do we do with this -- I don't

know -- how do you characterize this statement of the Special Term, where the judge says: "I think these steps reasonably meet the usual standards for such disguising of patients' identities"?

MR. LONDON: Mr. Karpatkin failed to indicate that that was modified.

QUESTION: Well now, --

MR. LONDON: By the Appellate Division, and is no longer a holding that --

QUESTION: -- do you think it was modified by the statement which characterized the publisher's acts as an attempt to disguise their identity?

MR. LONDON: Well now, what it says is that the claimed justification for publication --

QUESTION: Yes?

MR. LONDON: -- the attempt to disguise her identity, does not provide a sufficiently --

QUESTION: Well, that may be so, but do you think that is an Appellate Division's rejection of this factual --

MR. LONDON: I think so, but I think we can go a great deal further, Your Honor, and say that as a matter of law --

QUESTION: Well, I know, but you're not -- you're not -- on that basis this just becomes a fact-bound case that may not --

MR. LONDON: Certainly not.

QUESTION: --interest a lot of people. I'm suggesting -- I just -- are you suggesting -- let us assume for the moment that we accept the finding of the Special Term. I guess that's the finding, that this meets the usual standards for disguising identity.

MR. LONDON: May I say, Your Honor, that, as I understand the law, you should not. And may I ex pand on that for just a moment, or does Your Honor have some other question?

QUESTION: No, no, you go ahead. But you might get back to telling me, at some point, what if we do accept that finding in the Special Term; what happens to your case, if anything?

MR. LONDON: Well, I still think we have a cause of action, Your Honor. I think we have a cause of action based --

QUESTION: Well, so did both of the lower courts.

MR. LONDON: Yes, Your Honor.

There was unquestionably a violation of a statute, and, as Mr. Justice Stewart pointed out, an implied contract between the parties.

QUESTION: Mr. London, I asked Mr. Karpatkin the question that you've just referred to, whether or not he conceded that if, after full due process procedures, there

were a finding that this book did identify your client and did disclose and publicize the confidences reposed by your client in the defendant authors of the book, could New York constitutionally enjoin the publication of the book; and I understood him to say yes, it could.

Now, may I ask you the opposite question: If, after a due process hearing, it was determined that there was no identification of your client in this book, do you think New York could constitutionally enjoin its publication?

MR. LONDON: Yes, Your Honor, I think New York --

QUESTION: On what basis?

MR. LONDON: -- could. On two bases.

One basis is there has been a violation of the statute, giving rise to a cause of action without identification. The law is very clear and says the doctor may not disclose --

QUESTION: Well, I'm -- I was --

MR. LONDON: -- it doesn't say "and identify" in the court's disclosure.

QUESTION: Well, disclosure implies identification, doesn't it?

MR. LONDON: No, no, I don't think so, Your Honor. I think that the cause of action exists, and I think that the cause of action exists just by the publication, because the patient has been injured by that publication.

QUESTION: Well, that wasn't my question. My question wasn't whether or not a cause of action might exist under the statute or common law of New York, but whether or not if such a cause of action could constitutionally exist if there were no identification whatsoever of your client?

MR. LONDON: Again, the answer, I believe, is yes.

QUESTION: And the answer isn't that New York gives this cause of action, because the question is not -- does not have to do with the law of New York, it has to do with the Constitution of the United States.

MR. LONDON: As I understand the First Amendment, it applies to speech, but where conduct is prohibited by a lawful statute, the mere fact that that conduct is brigaded with communication, that it is that conduct comes into effect through communication, doesn't prevent -- the First Amendment does not prevent, in such a situation, the interference with the communication. The communication may be interfered with because the interference is essentially with conduct, and the mere fact that it is, the conduct is --

QUESTION : Well, here the conduct is writing and publishing a book. Is that conduct? If it is conduct, then the --

MR. LONDON: Yes, it can be.

QUESTION: -- First Amendment is meaningless.

MR. LONDON: The conduct is the disclosure of the

patient's secrets, the betrayal of the patient's confidence. That is the conduct, Your Honor. And it is accomplished through --

QUESTION: Well, I began with a hypothetical --

MR. LONDON: -- the book. It would be conduct if it was expressed orally, and it doesn't become sacred, because it is a book.

QUESTION: My hypothetical case was one in which there was no violation of any confidences, because there was no disclosure.

Now, if I told you that somebody once told me the following confidential story, and I won't tell you who it was, or when it was, I'm not violating anybody's confidences, am I?

MR. LONDON: I would think so, Your Honor, if you were told not to disclose that story. If you had promised not to tell that story ever.

But may I say that we have a case here in which the question of identification does not exist because, as a matter of law, the patient was identified in this book.

QUESTION: You're saying that the effect of the act of publishing this book -- or I'll put it as a question: Are you saying that the act of publishing this book was the same as taking all of these notes and files and putting them in the public library where everybody could look at them?

MR. LONDON: Certainly, Your Honor.

QUESTION: That's your thesis, that it's conduct not utterance?

MR. LONDON: Yes, Your Honor. Except giving it wider publicity than it might receive if it were merely put into the library.

But may I return to this question --

QUESTION: If you're right, then, this means that there can be no publications of this nature by any psychiatric authors --

MR. LONDON: Of this particular nature, I think not, Your Honor.

QUESTION: By any psychiatric author?

MR. LONDON: Not without the agreement of the patient.

QUESTION: That Freud himself could not have published what he did publish, because he did his very level best to obliterate any identification or identity. This means that New York State, had it wanted to, back in the era when Freud was writing, could have enjoined the publication of everything he wrote?

MR. LONDON: Not at all, Your Honor. I quoted --

QUESTION: Then I misunderstood you.

MR. LONDON: I quoted Mr. -- I've quoted Dr. Freud, to the effect that no matter what happened, one must not do

anything to betray the patient, and that that -- if one is faced with the necessity of not publishing or of betraying the patient, one does not publish.

But again, there is a statute here, and may I speak a little of New York practice? The New York Court of Appeals is a court of very limited jurisdiction, and the Constitution of the State of New York provides that the Court of Appeals may not pass on questions of fact. That, by the way, is set out at page 1a in the appendix.

The Court of Appeals may not review any question of fact at all, unless the Appellate Division, in an interlocutory judgment, finds new facts or, in its order granting leave to appeal new facts are set forth.

Now, I think almost every petitioner in that court knows that rule, and in point -- or should know the rule, and then there is another statute, so that the Court of Appeals may pass upon questions of law in the context of a particular case and in the context of facts. There is a statute, 5612, which is again in the Appendix, which provides that if there are not new findings of fact in the opinion of the court, or in its order, or in the order granting leave to appeal, then the Court of Appeals must assume that those facts were determined in favor of the party who is respondent, who is the patient here.

Unquestionably there is a disputed fact here, or at

least there is disagreement with respect to whether there is identification.

QUESTION: Well, Mr. London, it seems to me that Special Term may have found what I have suggested it found. But it went on to say that it didn't think that these disclosures would really identify the plaintiff as the patient to someone who did not already know the plaintiff was the patient.

Now, that implies that certainly people who knew the patient could identify him.

MR. LONDON: Yes, Your Honor, it does, indeed.

QUESTION: And it seems to me --

MR. LONDON: And there were many who knew of her doctor.

QUESTION: And they might be able to identify the patient through some of these events, but they certainly wouldn't know the -- everything that was disclosed.

So I would suppose you would argue this is, in itself, enough. That there has never been any finding here that there was non-identification.

MR. LONDON: We could, Your Honor, but we could go very much further.

QUESTION: Well, the --

MR. LONDON: Because we say that the patient --

QUESTION: I don't know why you -- I don't know why

you don't stop there for at least -- not -- but just say that that is -- you should be able to win your case on that, on that if you --

MR. LONDON: I think we do, Your Honor, on that alone; but it does go much further, and may I just speak once again for a moment about this statutory presumption that the -- that identification was found, and that the Court of Appeals was bound by that.

Mr. Karpatkin, the attorney for the psychiatrist in this case, wrote a reply brief, in which he complained three times that he's not bound by this section because it wasn't called to his attention, in the Court of Appeals.

Then he says we must have waived that right to rely on this rule of practice, because it wasn't discussed in the Court of Appeals, and he discusses this as a kind of arcadian statute -- that's his word.

Now, there's nothing mysterious or secret about this statute, it's published in all of the books on practice, and in permanent ink. And, in point of fact, we did call Mr. Karpatkin's attention to that section in our Court of Appeals brief, although he three times denied that we did. At page 14 of our brief to the Court of Appeals, we did discuss the section, we said the Court must presume that any question in fact in dispute will resolve by the Appellate Division in favor of the respondent, and then cited Civil

Practice Law and Rules 5612(b).

May I, by the way, have the Court's permission to respond to some errors and misstatements of fact in the Reply Brief by letter to this Court?

QUESTION: Mr. London, before you leave that, I'm puzzled about your ex planation of New York practice. Because I'm inclined to agree with what I think is Mr. Justice White's view, that the Special Term found the issue of disguising against you. It says that --

MR. LONDON: I understood him to say he found it in our favor.

QUESTION: Well, partially. Impliedly there was identification among friends, non-identification with respect to anybody else.

MR. LONDON: Okay. Well --

QUESTION: Now, is it your position that it's that finding that is controlling on us, or is it something more favorable to your --

MR. LONDON: Oh, something --

QUESTION: No, no, wait till I finish my question.

MR. LONDON: Sorry.

QUESTION: -- or is it something more favorable to you happened in the Appellate Division, and that it's that finding that's binding on us? Which?

MR. LONDON: I think it is the much more favorable

finding that is binding upon you.

QUESTION: And that's in the opinion of the Appellate Division?

MR. LONDON: No, no. The fact is that this is by operation of law, it is the contention of the patient here that she is easily identified by a large number of unique facts of her life, so that anyone who knew her and read the book would be able to identify her. And in fact a lady did identify her. We had her as a witness in the case below.

Now, it is that broad question of identification that we say is binding by reason of a statute.

QUESTION: Well, let me give you this example. Supposing that the Special Term had refused an injunction and specifically found there was no irreparable injury, and you went up to the New York courts and consistently disputed whether or not there was irreparable injury, but you never got any finding different from that in the Special Term.

Now, could you come here and say that because that was disputed, even though the Special Term had found it against you, we had to resolve it in your favor?

MR. LONDON: No,Your Honor, because Your Honor is assuming a situation in which I would be representing the appellant, and the appellant is the one that has the facts resolved against the appellant. It is not the respondent -- that doesn't work as against the respondent at all; it works

only in the respondent's favor, where a particular manner and method of appeal is taken.

Now, as a matter of fact, Mr. Karpatkin had the option of requesting findings of fact of the Appellate Division, and invariably they are granted. It may have been those findings would have been against him, and it may be for that reason that he did not want to ask the Court to make specific findings of fact. But he certainly did not make those findings.

And any attorney who wants to go the Court of Appeals and have questions of disputed fact considered by that Court, must raise those questions of fact. And they were not raised by the psychiatrist in this case, and even in the request for leave to appeal to the Court of Appeals.

The request indicates that the appeal was sought only on the question of fact -- I mean on the question of law; I'm sorry. And that no questions of fact were to be -- no disputed questions of fact --

QUESTION: What do you think fact-finding-wise this case comes to us, basedon what you find in Special Term and the Appellate Division's opinion?

MR. LONDON: No, Your Honor.

QUESTION: No. I mean, how does the case come to us, with respect to the facts?

MR. LONDON: The case comes to you --

QUESTION: As to --

MR. LONDON: As to the facts, with the Appellate Division opinion, which modified the Court of Special Term, and, in addition, --

QUESTION: Well, summarize just for me what is the fact-finding with respect to identification?

MR. LONDON: The fact-finding with respect to identification is that the patient was readily identifiable, from the text of the book, that anyone who knew the patient, although her name did not appear in the book, would immediately know that she was the subject of the book.

QUESTION: Well, that's -- that's the extent of it?

MR. LONDON: That is the extent of it. And no less, Your Honor.

QUESTION : I take it that you are arguing from that that this would mean her identity would be widely known in psychiatric circles.

MR. LONDON: Widely known, certainly in any circle, any people who knew her, who knew the events of her life.

QUESTION: Well, but specifically that group, if she was identifiable to some psychiatrists, it would readily expand, I take it, that's part of your case.

MR. LONDON: Well, that would be it, but it would be known, I think, to anybody that knew that her husband was a

man who began the practice of law at the age of fifty, and prior to that time had been a speech writer, and that she had a son who was a musical prodigy. These are rather unique facts.

QUESTION: Now, Mr. London, this gets me back to basics here. Let me ask a question that no one else has asked.

By basics, I mean this: 1257.3 at 28 U.S.C. provides for a petition for certiorari here from a final judgment of a State court. Do you concede there is a final judgment here when we've had no trial as yet?

MR. LONDON: I don't concede that we've had a final judgment, Your Honor, but I think this comes within the exception that case law has made. I think the case is properly before the Court. I did --

QUESTION: Well, it seems to me all these questions are asked because of something less than a -- than what we would have after a full trial.

MR. LONDON: Mr. Rehnquist, there was the key case, the Organization for a Better Austin case, in which a preliminary injunction did in fact come before this Court, and the Court stated that it had jurisdiction. And we are not contesting the jurisdiction of the Court in this case.

QUESTION: Of course, it's not established by stipulation, either.

That doesn't mean that we can't, as Justice Blackmun suggests, conclude that there is no jurisdiction.

MR. LONDON: Certainly the Court can --

QUESTION: Because it was not easy, if you read the Keith case closely, it was not easy for the Court to find jurisdiction there, and I think there was some indication of an almost abandonment by one party of any effort to challenge the temporary injunction.

There's no such factor here.

MR. LONDON: Oh, no, no, there isn't that factor in this case, and we aren't stipulating --

QUESTION: As you say, you've been actively engaged in it until a week ago, wasn't that it?

MR. LONDON: Yes, Your Honor, on the examinations before trial alone.

I understood from Your Honor's nod that we may send you a letter, and I --

MR. CHIEF JUSTICE BURGER: Yes, you may supplement, you may respond to the reply brief.

MR. LONDON: I would just like to add one word with respect to the procedures that are followed before a preliminary injunction is granted.

In New York State a preliminary injunction is merely an adjunct to the final relief, the final injunction that may be granted or denied, and it is a temporary order granted

simply to be certain that if final relief is given to the plaintiff in the case, that final relief will not be meaningless, because if the temporary injunction was not granted, we would have the sale of the book, and it wouldn't have done us any good after a period of time, to get the final injunction.

Now, you did have evidence submitted by affidavit, you did have oral argument, briefs, all the requirements of due process are met, even the demand that a valid cause of action be proved before the injunction can be granted.

There is, as was indicated before, a right even to ask for an evidentiary hearing with respect to any crucial fact, any crucial disputed fact.

And Mr. Karpatkin's only complaint about that right, or about that section allowing the hearing on a disputed fact, is that if he asks for it, the Court might have refused to give it to him, because the facts in this case are complex.

Well, they certainly aren't complex. They couldn't be simpler.

All that we have here is the simple problem of the book, the revelations in the book, and the problem of identification which I think is evident from the book itself.

I thank you.

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

Mr. Karpatkin, you have four minutes left.

REBUTTAL ARGUMENT OF MARVIN M. KARPATKIN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KARPATKIN: Thank you, Mr. Chief Justice.

First, I'm delighted that my learned adversary now agrees that this Court has jurisdiction. One would not have known that from reading his brief in oppostion to certiorari.

With respect to the presumption, it is evident that respondent's position is lost without the presumption, because it's evident that the basic finding in this case is the finding which was made by Mr. Justice Silverman at Special Term, which has in fact been confirmed by the Appellate Division, just modifying the relief granted therefrom, and also affirmed, regrettably without opinion, by the Court of Appeals.

And the most that can be found from that finding, I say, is, as Mr. Justice White observed, is an implication -- but even there, an implication which is insulated by a double negative.

And it is -- it seems to me that if due process means anything, and if the special kind of due process which is necessary before one grants a presumptively unconstitutionally invalid prior restraint --

QUESTION: But, Mr. Karpatkin, it seems to me that you have said, at least, that whether there is identification or not is a rather important fact in arriving

at some resolution of the case.

MR. KARPATKIN: Absolutely.

QUESTION: And if it's awfully hard to tell what the facts are, from the opinions, as the case comes to us, it's rather hard to grapple with some legal issue, isn't it?

MR. KARPATKIN: I do not say that it is awfully hard to tell, what I do say is that it's impossible to --

QUESTION: Well, I know, but at least the Special Term did not find that your client, or that the plaintiff could not be identified among friends.

MR. KARPATKIN: The Special Term did not find that plaintiff could be identified by anyone, Your Honor.

QUESTION: Oh, I know, but --

MR. KARPATKIN: You can't find a line there which even hints at it.

QUESTION; -- but the Special Term did indicate that -- that the normal precautions to avoid identification --

MR. KARPATKIN: Had been taken.

QUESTION: That's right.

MR. KARPATKIN: That it had been taken; that's right.

QUESTION: But --

MR. KARPATKIN: And I think I have to win on that.

QUESTION: Well, I know, but --

QUESTION: He went beyond that. He went beyond that and qualified his finding. And let's assume, hypothetically,

that you went to trial on the permanent injunction, and Mr. London brought in 25 people who had said, Yes, they read this book, without having any knowledge of the background, and from reading that book they could identify the patient.

MR. KARPATKIN: The fact is, Mr. Chief Justice, --

QUESTION: What would you have then?

MR. KARPATKIN: Mr. London had three months, Mr. London and his client had three months, and they submitted one slim affidavit by a friend, and --

QUESTION: You don't always try a permanent injunction on affidavits, do you?

MR. KARPATKIN: That is the customary if not the required practice.

QUESTION: Not always, though.

MR. KARPATKIN: In preliminary injunctions in New York.

QUESTION: I'm speaking of permanent injunctions.

MR. KARPATKIN: No, Your Honor, of course not.

QUESTION: If he could he would be -- he certainly could not be denied the opportunity to bring in 25 witnesses, could he?

MR. KARPATKIN: Of course not, Mr. Chief Justice, but it seems --

QUESTION: Let's assume that, though. Follow the assumption that 25 witnesses said, Yes, I read this book,

I never heard about it before Mr. London asked me to read it; from a reading of that book I put these factors together and I identify this patient as Dr. X.

MR. KARPATKIN: I assume that these witnesses would be subjected to cross-examination, of course.

QUESTION: Oh, of course. Of course they would.

MR. KARPATKIN: And I presume that the trier of the facts would have an opportunity to evaluate this testimony --

QUESTION: Yes, and the trier would, as Mr. Justice White just suggested, presumably make some findings of fact. And then we wouldn't engage in this extensive cross-examination of both of you gentlemen to try to find out some of these things, would we? Wouldn't need to.

MR. KARPATKIN: Mr. Chief Justice, I would say that your argument follows completely, if this were not the case --

QUESTION: The question, maybe, not an argument.

MR. KARPATKIN: I beg your pardon. If this were not the case where there has been a prior restraint against a concededly scientific, non-obscene book, which has now been in effect for more than one year.

And it seems to me that is the crucial First Amendment question which has not received any attention at all by the courts of the State of New York, and which must --

QUESTION: Whose burden was it to hurry that case on for trial? The restraint was against you, your client, was it not?

MR. KARPATKIN: Mr. Chief Justice -- yes, it certainly was. But I saw it as my burden to attempt to relieve the injunction, and to seek whatever tribunals could be found with the power and the authority and the motivation and the understanding of the First Amendment to do it.

QUESTION: Did you -- were any requests for a stay of the injunction turned down, pending appeal?

MR. KARPATKIN: No application was made by me for a stay of the injunction, because --

QUESTION: And you didn't make any -- you didn't make any here?

MR. KARPATKIN: No, Mr. Justice White. But we did go to the Appellate Division and to the Court of Appeals on an expedited preferred schedule.

QUESTION: I take it you're suggesting -- I take it that one of your possible arguments would be that unless and until plaintiff brought this suit, convinces the court to make the kind of findings that wouldwarrant a prior restraint, that there shouldn't be a prior restraint pending an appeal.

MR. KARPATKIN: Certainly unless the findings have been made, yes, Your Honor.

QUESTION: But you haven't asked for any stay.

MR. KARPATKIN: No, I have not asked for a stay.

I have relied on the -- on seeking appeals on the merits as quickly as possible.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:11 o'clock, p.m., the case in the above-entitled matter was submitted.]

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