In the

Supreme Court of the United States

MARGARET MAE CANTRELL, et al.,

PETITIONERS,

V.

FOREST CITY PUBLISHING CO., a corporation, et al.,

RESPONDENTS.

No. 73-5520

Washington, D. C.
November 13, 1974

Pages 1 thru 41

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Official Reporters
Washington, D. C.
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MARGARET MAE CANTRELL, et al., Petitioners,	
v.	No. 73-5520
FOREST CITY PUBLISHING CO., a corporation, et al., Respondents.	

Washington, D. C.,

Wednesday, November 13, 1974.

The above-entitled matter came on for argument at 10:53 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:

HARRY ALAN SHERMAN, ESQ., 1709 Boulevard of the Allies, Pittsburgh, Pennsylvania 15219; on behalf of the Petitioners.

SMITH WARDER, ESQ., Arter & Hadden, 1144 Union Commerce Building, Cleveland, Ohio 44115; on behalf of the Respondents.

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'll hear arguments next in Cantrell against Forest City Publishing, No. 73-5520.

Mr. Sherman, you may proceed whenever you're ready.

ORAL ARGUMENT OF HARRY ALAN SHERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHERMAN: Mr. Chief Justice and members of the Court:

May I address myself as quickly as possible to the nature of the case. This is an invasion of privacy, and may I respectfully suggest that it's an invasion of all four types of privacy in one continuous event, or series of events.

Although this is contradicted by the Circuit Court of Appeals, I believe I will point out that they are in error, and by the brief of my distinguished and friendly opponent.

The facts in this case are briefly these:

The Silver Bridge, which was a span crossing the Ohio River from Point Pleasant, West Virginia, to Kanauga, Ohio, and owned by the State of West Virginia, collapsed on December the 15th [sic], 1967, and 46 persons lost their lives in that disaster.

One of the people that was a victim of the collapse was Melvin Aaron Cantrell, the deceased husband of Margaret Mae Cantrell, the widow, who brings this action.

None of the seven children of the Cantrells was anywhere near the collapse of the bridge, and was not involved in any of the news story that naturally followed that disaster.

The period of time between the collapse and the publication of the story, feature article, not a news story, was about eight months, just a little short of eight months.

A reporter of the Plain Dealer, Forest City Publishing Company's paper, and a young photographer came to the premises, which, incidentally, were seven miles off a highway, off a main highway; they had to cross a quarter of a mile of private land to get to the residence on the day of their visit. They were not invited. They were not -- they did not notify anyone that they were going to come onto the premises.

They walked into the living room door, when the young fellow, 13 years old, saw a man walking across their land, opened the door to look out to see, and they walked right in. This is the testimony of our plaintiff's witnesses. That is, David Cantrell.

And the photographer, Conway, one of the defendants, admittedly took fifty pictures. Now, in an hour to an hour and a half -- now, he took more that didn't come out, but fifty that came out. This is admitted.

So he was very busy taking pictures.

Eszterhas, the reporter, supposedly talked to the

older of the children in the house. What he said, nobody knows, because he never showed up at depositions, although he was noticed twice; he was not at the trial, and did not testify.

Conway testified that he did not ask any questions, and he said the arrangements for him being in this private residence, he presumed, were made by the city desk or the reporter. He had nothing to do with that.

So that we have nobody from the defense testifying as to the contents of the story, which was a feature story. Admittedly, several pages of a Sunday supplement, magazine section of the paper, with a little over 400,000 circulation.

Several of these photographs that were taken by Conway on the visit were rather large, they are in Exhibit 2, accompanied the article and showed the children, all in a very, very pathetic light, all barefoot, all dirty, bedraggled, all at home. The mother wasn't there.

The mother had not known that anyone was to come to their premises; did not invite anybody; did not agree to any interview of her children, aged two to sixteen at the time. And they were told immediately, that is, the reporter and photographer, as they walked into the living room, that "mother wasn't there; they didn't know when she would be back."

And the story was written as if on interviewing Mrs. Cantrell, even describing her pathetic appearance, which

is completely fictionalized.

There were a great number of false statements in the article.

Now, of course, it so aroused the community that there was an article printed in a Dayton publication exposing the fallacies, the falseness of the article that was printed in the Plain Dealer.

QUESTION: Dayton, Ohio?

MR. SHERMAN: Yes, Your Honor.

QUESTION: That was hardly the community.

MR. SHERMAN: No, no -- I beg your pardon. It was a Dayton paper, however, that wrote this --

QUESTION: Story from West Virginia.

MR. SHERMAN: -- story about the community's reaction to the article.

QUESTION: I see.

MR. SHERMAN: And that's in evidence, if Your Honor please, in Volume 2.

So that the suit was brought as an invasion of privacy action, and of course the issues presented briefly are these -- I set them forth in more detail in my brief; but, first, when we went into trial, it was to make clear that we were not trying a defamation or a libel suit, we were trying an invasion of privacy, which, incidentally, involved also a publication.

And Judge Krupansky made it very clear that it was not only the false-light publication which was the basis of this action, at page 99 of the Volume 1 of the Appendix, at the top of the page -- District Judge Krupansky said, "It is the conduct of the parties prior to and at the time of the incident that gives rise to the issues in this case."

QUESTION: But he said that Time v. Hill elements had to be established, didn't he?

MR. SHERMAN: Your Honor, he was really, not so sure as to what law he had to apply until --

QUESTION: I know, but right following --

MR. SHERMAN: But he did apply Time vs. Hill, because --

QUESTION: And there was no objection to that, was there?

MR. SHERMAN: As long as I got to the jury in that court, I didn't object to anything.

QUESTION: Yes. But you prevailed before the jury.

MR. SHERMAN: Yes, Your Honor, we --

QUESTION: All right.

MR. SHERMAN: -- on special verdict, suggested by Mr. Warder, I wasn't even present --

QUESTION: I mean but even under the Time v. Hill test, you prevailed on the evidence?

MR. SHERMAN: Yes. Yes, reckless disregard as to the

truth or falsity, as the only basis for our recovery, and the jury found that it was so.

Now, Your Honor, that's very important --in the first place, I wanted to tell you the issues first and then come back, if you don't mind, Mr. Justice Brennan.

The second issue is this --

QUESTION: Mr. Sherman, before you do, may I ask --

MR. SHERMAN: Yes, Your Honor.

QUESTION: There was a directed verdict as to a number of the minor plaintiffs.

MR. SHERMAN: Yes.

QUESTION: And why did they go out and one remain in?

MR. SHERMAN: Well, Your Honor, Judge Krupansky found that, as a matter of law, these children were too young to know whether they were hurt, whether they had any inter-personal feelings about the invasion of their privacy, and therefore, since we --

QUESTION: Well, he left William in, didn't he?

MR. SHERMAN: William, David William was thirteen at the time, and he testified how he was hurt, Your Honor. The others were too young to testify. So he was actually a witness in the case, and I think a critical witness.

QUESTION: Well, Lolita Sue was 17.

MR. SHERMAN: Yes, she was 17, and he just -- he was -- he left them out and I was afraid to argue and carry

that point up because, on the question of damages, it would be strictly a real serious legal question in our minds; I discussed it with Margaret Cantrell. We decided to let well enough alone, without clouding the record, the issue, on any other aspect of the case.

We were not allowed to go to the jury on punitive damages, which I felt we might well go, on the basis of the trespass preceding the publication.

However, in view of the judge's strong feelings, that New York Times vs. Sullivan, and all the other cases that came down since then, that once it's published we're running into freedom of the press, as expanded by the Supreme Court's decisions, and there was -- he was wary of allowing us to go into any punitive damages.

So we were confined to actual damages, and the jury verdict was $60,000; 45 for the mother, 15 for the boy.

The next issue that I'm raising is: in such a case where we are really basing our concept of the case on the Supreme Court decisions, especially in Katz vs. United States, where it says we have the evolving law of privacy at the State level, and we're on a diversity basis; aren't we entitled to a Seventh Amendment right to jury trial, to make a determination of the issues of fact? And that's one of the issues that I raise on the appeal.

And the last one -- and this one, I think, is

devastating when the Sixth Circuit says that when there is a conflict between the right of privacy admittedly, and the freedom of the press; the right of privacy must give way to freedom of the press. Because right of privacy isn't mentioned in the Constitution, and freedom of the press is. This is the wording of the Court.

So that that's another issue that I raise, and I believe, in all fairness to my opponent, I should tell you the issues as the respondents have raised them.

First of all, in their brief in opposition to the grant of certiorari, they raise one question: Should certiorari be granted in an action for invasion of privacy based upon the publication of an article concerning a matter of public interest, where the lower courts correctly applied the constitutional standard in accordance with the controlling cases of this Court, and where the lower courts found no evidence of known falsity or reckless disregard of the truth?

Now, that's not exactly what the court found. The court found no malice, period. The jury found that there was a reckless disregard.

But then, in their brief, they say, very simply: Does the First Amendment protect publication of a non-defamatory, newsworthy article from a claim for false-light invasion of privacy, absent proof of calculated falsehood?

Now, Your Honors, I'll point out that no one decided

that there was any newsworthy article here. Although the Sixth Circuit points out that the difficulty for courts in deciding what's newsworthy, saying that the editors, the publishers, should primarily be the judges as to what's newsworthy.

But the editors and publishers in this case, not one word was spoken in evidence, or anywhere in pleadings, that this was newsworthy. It wasn't newsworthy, there was no news article, no news event. They admitted it was a creative feature article written by a smart young writer, who made good copy; and that's all there was to it.

QUESTION: Well, that concept is almost self-defining, isn't it?

MR. SHERMAN: Yes, Your Honor.

QUESTION: If it's printed in the newspaper, some editor has decided that it's newsworthy, --

MR. SHERMAN: May I respectfully --

QUESTION: -- and it's not for the courts to review that judgment. It's a self-defining concept, isn't it?

MR. SHERMAN: Mr. Justice --

QUESTION: If it's in the newspaper, it's newsworthy, because --

MR. SHERMAN: I was a newspaperman and an editor for sixteen years, and may I respectfully say, sir, that that is just not the way they look at it.

Feature articles are completely one category of publication, with all the protection of the First Amendment rights to feature articles, and the creative literature. There's no question about that.

But, newsworthy? No, Your Honor. There is a definition of news and there's a definition of newsworthiness, and the Supreme Court of the United States has made that definition very clear, as I pointed out in my Reply Brief, if Your Honor please, in the classical -- in a case that was decided here between International News Service and Associated Press, there was a definition: news belongs to the public; news is not the property of anyone. And feature articles are protected, literary writings are protected, copyright laws, and all the other things that go along with it.

We have a very definite distinction in the field of journalism, as between editorials, news, feature articles, so that -- and entertainment and other features of a publication.

Now, Your Honor, I'm not saying that the broad -- that the broad basic constitutional right does not apply to all; but, as far as news is concerned, I think that the primary purpose of the First Amendment is to protect the public's right to know events, and shape their thinkings and judgments in accordance with the events that shape the news, so to speak.

Now, with --

QUESTION: Mr. Sherman, --

MR. SHERMAN: Yes, Mr. Justice.

QUESTION: -- did you file a Reply Brief?

MR. SHERMAN: Yes, Your Honor. Oh, yes. Yes, there's a -- I'm sorry. There's a reply brief, Mr. Justice Blackmun.

QUESTION: Filed on September 6.

MR. SHERMAN: Immediately --

QUESTION: Thank you. I don't have one, but I'll have to get it.

MR. SHERMAN: -- about a week after I got their brief.

QUESTION: While you're stopped, supposing here for a moment --

MR. SHERMAN: Yes, Your Honor?

QUESTION: -- is there not some kind of a -- or is there some kind of a public interest in the consequences of a great tragedy of this kind, 46 people killed, that might in turn have an impact on the Legislatures, Governors, Mayors, everyone else, to see that old bridges are replaced, for example, or kept in repair so that these tragedies aren't repeated?

Is that in here somewhere?

MR. SHERMAN: Mr. Chief Justice, ideally it certainly should be. Ideally. Practically, I'm the attorney also that's

trying the Silver Bridge death cases in the State of West Virginia; and they've got a new bridge. But that's over the hill, and now they're just on regular business. They don't -- these things are not remembered.

The rights, if any, must be intact in the judicial process, or they're forgotten until another tragedy occurs.

QUESTION: Would they not remember perhaps a little more if someone writes about them?

MR. SHERMAN: If they write this way --

QUESTION: Dramatizes them.

MR. SHERMAN: -- if they write the way these fellows did, no. Because they're calling them "hill billies", people that had "nothing to live for anyway"; "they had wives and whildren, but that's all they had." That's quotes from the article.

"Hill billies bury their dead; the hill folk bury their dead." To a Cleveland audience, to a metropolitan audience outside the hills of West Virginia, no, Your Honor, I respectfully say that the history of these things show that interest is personal and interest is in the curiosity of the satisfying of one's own reading appetites, but not in doing anything to protect the poor folk that were the victims of a tragedy of this sort.

We have to depend on justice, not history, to correct its own errors, and especially when we have to look

to political changes in order to effect such history. We can't wait for the democratic process to enlighten all our populace that serves on juries, for example.

But, Your Honor, I'm sorry, I went perhaps beyond, in my philosophical statement, your question.

Nothing of that sort specifically was brought into the case as such, except in the Answer, where they did raise public interest as one of the privilege bases for printing.

Okay. Now, there's no question that there could be a legitimate public interest in the truth. And I would subscribe to that, of course.

There might be a very, very definite way of actually interviewing Mrs. Cantrell.

The interesting thing in this case is that the reporter, who never showed up to explain why he went there uninvited, and a new theory was interjected on the trial, this absent report, all of a sudden, becomes a man who is free-lancing. Now, there was no affirmative defense that there was no employment. There was an admission that there was an employment in the Answer.

Then, all of a sudden, on trial he's free-lancing, to separate the publication and the publisher from the illegitimate trespass of the reporter.

QUESTION: Well, that defense, if you can call it

that, didn't seem to have much impact on the jury, so it isn't a factor in the case.

MR. SHERMAN: Because, Your Honor -- because, Your Honor, I happen to have taken the deposition of Conway, who clearly -- well, he talked one way in court, but the deposition just destroyed his credibility, because he said he got authority from the City Desk, and he was working as -- he was taking pictures, not for Eszterhas but as a photographer for the Plain Dealer. That's what he was doing there.

And, therefore, Your Honor, credibility was an important element in the determination of the jury. And that's, of course, I think, fact-finding as to -- is for the jury, as my very strong and --

QUESTION: Mr. Sherman, if I don't interrupt you --

MR. SHERMAN: Of course, Your Honor.

QUESTION: -- would you help me with something? In the Court of Appeals opinion, at page 125 --

MR. SHERMAN: Yes.

QUESTION: Notwithstanding what we saw earlier as to the instructions that were given at page 99, --

MR. SHERMAN: Right.

QUESTION: -- there is this statement at the bottom of the page:

"In the present case the District Judge made a finding that there was no evidence to support the claim that

an invasion of privacy was done maliciously 'within the legal definition of that term'."

And over on the next page:

"Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth, the District Court should have granted the motion for a directed verdict as to all defendants."

Now, where -- I can't seem to find in this record -- where is there any District Court finding that there was no evidence?

MR. SHERMAN: There was a District Court denial of our right to punitive damages on the basis of no malice, and I'll -- that is --

QUESTION: Why type of malice? New York Times malice or State --

MR. SHERMAN: Yes.

QUESTION: Or was that State malice?

QUESTION: State malice.

MR. SHERMAN: No, it didn't say.

QUESTION: Well, I think it makes a lot of difference.

QUESTION: I should think your case here would be, Mr. Sherman, that the trial court instructed the jury precisely in terms of Time vs. Hill, and that the jury brought in its verdict, and that's the end of the matter.

QUESTION: Unless there was no evidence to support

a finding of Time v. Hill malice.

MR. SHERMAN: Except, in Time vs. Hill, you had only the publication, had no invasion, no trespass, no -- nothing like that --

QUESTION: That's not my point, Mr. Sherman. The point is, I just don't know where there is any finding that there was no evidence. And it seems --

QUESTION: Well, where is it in the record?

MR. SHERMAN: No, he doesn't make such a finding.

QUESTION: Well, where is it in the record that he denied your right to punitive damages? Where is that?

I don't find it in the printed record, it must be in the transcript.

MR. SHERMAN: Yes, it's in the printed record.

QUESTION: It's there, but there's no finding. I found it a minute ago.

MR. SHERMAN: I beg your pardon, I --

QUESTION: Page 117.

MR. SHERMAN: A hundred and --

QUESTION: Let me ask you. In your State, doesn't punitive damages depend upon the traditional kind of malice of ill will and intent to do wrong, do harm? Isn't that what malice usually is meant in libel cases?

MR. SHERMAN: Yes, Your Honor. That's exactly it.

In other words, whether it does harm or not is --

QUESTION: Where there's ill will --

MR. SHERMAN: Unless you can prove that there was some motivation to do harm, no malice, as such.

QUESTION: Well, that's different, that's a different kind of malice than New York Times kind of malice.

MR. SHERMAN: Yes.

QUESTION: And you have to prove New York -- or Time v. Hill, same thing, kind of malice even to get a compensatory judgment, irrespective of punitive damages. And you got one.

MR. SHERMAN: Yes.

QUESTION: And he refused to set it aside, which certainly implies that he thought there was evidence enough to support the finding that he told the jury they must find.

MR. SHERMAN: Yes.

QUESTION: And yet the Court of Appeals says that he made a finding there was no evidence.

MR. SHERMAN: Well, there is no such finding, and may I, at this point --

QUESTION: Well, it's in quotation marks on page 125.

QUESTION: That's right.

QUESTION: I can't find it, either.

MR. SHERMAN: "Within the legal definition of that term."

QUESTION: Right.

MR. SHERMAN: Well now, --

QUESTION: -- is gone, I guess.

MR. SHERMAN: Well, that's about the extent of the quotation, "within the legal definition of that term."

QUESTION: No. He imputes at the top of page 126, "Having correctly determined that there was no evidence of known falsity or reckless disregard of the truth," -- that's the Time v. Hill standard --

MR. SHERMAN: Yes.

QUESTION: -- "the District Court should have granted the motion for a directed verdict."

MR. SHERMAN: It made no such finding, Your Honor. There's absolutely no such finding.

QUESTION: Well, I can't find it.

QUESTION: Well, maybe your colleague will tell us where it is.

MR. SHERMAN: And I'm sorry they can't -- I was sure I had it, everything cataloged, but I just can't find it quickly enough.

QUESTION: I suppose the transcript is here, isn't it?

MR. SHERMAN: Yes, Your Honor, this is -- the total trial is in Volume 1.

QUESTION: There's no other -- these are the entire proceedings?

MR. SHERMAN: Except Volume 2 is exhibits; that's

right. This is --

QUESTION: You mean this is all the evidence?

MR. SHERMAN: Yes, Your Honor.

And there's -- you'll find that this was a case that was right down to the bone, it was -- there was no fat on it, it simply had, we had to avoid arguments on what -- when the Judge said, this is it, this is how I'm letting it go to the jury, and only this. All right. What am I going to do?

Anyway, Your Honors, I feel that there is one thing that really has to be aired, and that is this:

The second issue that is raised by the opponent, that Mrs. Cantrell, in effect, waived the trespass. There is no such thing. She was asked a specific question by my distinguished friend here, at page 35 of the record. In cross-examination he said -- the Sixth Circuit says that she said these things, but it isn't, it's in the question, it's a double question. And this is a woman remote in the hills of West Virginia, without any education:

"So isn't it fair to say, Mrs. Cantrell, that you objected to the Plain Dealer article not because of the publicity but because of what it said?

"Answer: Yes, sir."

Now, which question is she saying "yes, sir" to? There is only one -- the publicity is the article, and what is says is "the article", "yes, sir"; and they say because she --

he implies that she didn't object to the publicity as distinguished from the article, that therefore that was somehow a waiver of the trespass.

And the Sixth Circuit says specifically that the men might have been guilty of a trespass, but the case went to the jury only as a flase-light trespass on the publication. Did not. Page 102-103, as well as 99, which I pointed out to Your Honors before.

The case went to the jury as a total package, all the evidence went in on the basis of the intrusion of these young men into the home, without any explanation or justification.

QUESTION: Mr. Sherman, --

MR. SHERMAN: Yes, Mr. Justice Rehnquist.

QUESTION: --this was a diversity case.

MR. SHERMAN: Yes, sir.

QUESTION: Were you proceeding under Oahio law privacy or West Virginia law?

MR. SHERMAN: Both. They are the same.

QUESTION: They're the same?

MR. SHERMAN: It's admitted that they were the same.

And, of course, now, there is at this point it was -- especially since Your Honors have decided the Gertz case, and I studied that in its totality, because I am learning, as everybody else is learning in the United States, and

especially your lower court judges, as to where we go from here on some of these cases, which the common law has always made rather solid.

I want you to know that we got exactly and only what was granted as compensatory award for pain and suffering. Here we have three years after the event, Mrs. Cantrell is in the courtroom and she's asked about the effect on the children. They come home crying and so forth. And she's embarrassed everywhere she turns. "And how long did that go on?" "It still goes on", three years later.

Now, 400-and-some thousand publication of a newspaper and these remote people -- you can't get any more private than the Gallipolis hills of West Virginia, if Your Honors please -- and here's a family that had enough tragedy in its life, and she has problems raising seven children, and she's doing well, very, very proud lady, a lady, and working as a waitress in a restaurant and doing well; asking nothing of anybody, refusing welfare and so forth.

And while she's away at work, her family is intruded upon and is exposed, hung up to dry, because some young enterprising, creative fiction writer decided to make a microcosm out of the Cantrell family's experience for all the world to believe that all of the families had the same result.

Now, may I, in closing, just call Your Honors' attention to the very important case, Stanford vs. State of

Texas, where the Supreme Court points out very definitely the history of how we got personal liberty, before the Constitution, how we got privacy before the Constitution, and the two English cases, which wiped out writs of assistance and similar warrants that gave broad authority to the agents to go into anybody's home and search for evidence and to deny any privacy to anybody; and here we are with a Sixth Circuit Court, in 1974, cowed by what the law had become under the confusion following New York Times vs. Sullivan, and I respectfully say that it was only that,granting a license to private reporters and photographers -- the second word is even more ominous than the first -- to do the same thing that was wiped out 200 years ago, before we became a nation, and let them have any access without any answerability in damages in a court of law in the United States.

Thank you.

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

Mr. Warder.

ORAL ARGUMENT OF SMITH WARDER, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I think the passage that the Court wants is found on page 60 of the Appendix, where the trial court finds there

has been no evidence in support of the charges that the invasion of privacy, if in fact an invasion of privacy occurred, was done maliciously within the legal definition of that term.

QUESTION: Now, where is that?

MR. WARDER: Page 60 of the Appendix.

QUESTION: Yes. All right.

That's at the close of the plaintiffs' case?

MR. WARDER: At the close of the plaintiffs' case, yes, sir, and that's where the court threw out the claim of punitive or exemplary damages, because of the absence of malice under the Time, Inc. standard, but erroneously sent it to the jury on compensatory damages.

QUESTION: Well now, he said under the -- he said lack of malice, what do you suppose he -- you say he meant the Time, Inc. --

MR. WARDER: In the context, if you read the record, this is the only malice we were discussing. We never even discussed the common law standard of malice.

All we discussed was Time, Inc.

QUESTION: Well, the common law standard of malice has always had to do with the punitive damages; that's what this was about: punitive damages. And that depends, as I understand it, under West Virginia and Ohio law, upon proving conventional malice, i.e., ill will. Which is quite a different thing from New York Times or Time v. Hill kind of

malice.

MR. WARDER: You Honor, if you will compare the court's definition of malice in the charge he gave the jury with this statement, I think it will become apparent that he was not talking common-law malice.

QUESTION: Well, --

MR. WARDER: He just wasn't.

QUESTION: Why, then, did it go to the jury?

MR. WARDER: He mistakenly thought --

QUESTION: Why did he require you to go on with your defense?

MR. WARDER: I beg your pardon, Your Honor?

QUESTION: Why did he require you to go on with your defense? Because if this were related to Time v. Hill malice, that's the end of the case.

MR. WARDER: It should have been, and that's what the court --

QUESTION: But I don't see any objection to going on with the defense. You went on with it.

MR. WARDER: We moved for a directed verdict, and we renewed it.

QUESTION: I know, but he said, "With that ruling, gentlemen, Mr. Warder, you may proceed with your defense." And you did.

Now, if you're right in what you tell us is the

interpretation of that, you should have --

MR. WARDER: I should have --

QUESTION: Furthermore, after trial he denied your -- he granted in part your motion NOV and denied it in part.

MR. WARDER: No. He overruled it in its entirety, Your Honor.

Remember, Your Honor, --

QUESTION: All right, then that's even more clear that he thought there was enough evidence for the jury. And this was after the verdict.

MR. WARDER: On compensatory damages. Of course he did.

QUESTION: Well, but that depended on so-called New York Times malice.

MR. WARDER: But this is the confusion that was in the trial court's mind.

Now, if I can get back to Your Honor's question. I am a trial advocate, I am faced with the proposition that the court says, I am going to the jury on compensatory damages; I submit, it is most dangerous not to put in a defense, because I'm going to that jury anyway.

QUESTION: Do you think the District Court may have foreseen our Gertz case before it was handed down?

MR. WARDER: I don't think so, Your Honor, in all fairness.

QUESTION: Well, does Gertz really have anything to do with this case? This is a privacy case.

MR. WARDER: Tangentially yes, Your Honor, as I shall come to.

Remember, despite the protestations of my learned opponent, this is a false-light privacy case. On page 35 of the record, the petitioner admitted that she was not offended by the existence of publicity but by its nature. And if you will read the question preceding the excerpt which my opponent read, this becomes perfectly clear.

Now, --

QUESTION: Well, that's parsing it pretty finely.

MR. WARDER: No, there are --

QUESTION: When you're talking to a lay person who is not well educated, and I submit that it's pretty difficult for me to understand your --

MR. WARDER: Well, let's approach it from the other way, Your Honor.

It's not a commercial exploitation case. It is not a case of the disclosure of embarrassing private facts. Neither is it a case of an unwanted intrusion.

Now, there are only four types of privacy, and this is all that remains. It has to be.

For that matter, commercial exploitation, as I understand it, was laid to rest by this Court's decision in

the Pittsburgh Press case.

But this is a privacy case which, had it been brought as a libel case, would not have gone to the jury, because it is not libelous, per se, and there is no proof of special damages as is required in a libel case.

Now, Your Honor, I would like to compare the state of the law in right of privacy and in libel and slander. In a right of privacy case, truth is not a defense. In a libel case, it is.

At common law, in a privacy case, it is a complete defense at common law, if the matter is one of public interest.

QUESTION: Mr. Warder, I notice in the complaint in a action for malicious and defamatory libel. What happened to that aspect of it?

MR. WARDER: That was dismissed and abandoned. It just never went to the jury, it was tried on a simple privacy theory and counsel admitted that in his opening argument.

QUESTION: Was there an amended complaint, or is that the only complaint?

MR. WARDER: That's the only one.

QUESTION: I see.

MR. WARDER: Now, --

QUESTION: But everybody seems to agree that the

complaint was, perhaps implicitly amended to --

MR. WARDER: Right.

QUESTION: And I notice, incidentally, in the complaint, that on punitive damages, the allegation is, "The said publication ... maliciously, falsely, wantonly and scandalously portrays plaintiffs' decedent" -- that's a different kind of malice, isn't it, than Time v. Hill malice?

MR. WARDER: Yes, it is.

QUESTION: What page is that on?

QUESTION: That's at page 4, paragraph six.

QUESTION: Thank you.

MR. WARDER: Now, in a libel case, in the light of Gertz, I have some doubts and so does the bar at large and the courts as to whether being a matter of public interest is any longer a defense, when we are discussing private persons.

Now, let's see where this diagrams out. As to privacy and libel, if there is a matter of public interest involved, and if it be true, plaintiff can recover under either of these; but if it is not a matter of public interest, and if it is false, if it's de famatory, then you can recover in libel. If it is nondefamatory, then you can still recover in a privacy action.

Now, somehow here it seems to me that in this narrow context, freedom of press just does not exist.

Going further, if it's a matter of public interest and false, you can recover in libel, but as I understand Gertz, only if it is defamatory on its face.

And, finally, if it's not a matter of public interest, and if it's true, you can still recover in a privacy action.

Now, there is something wrong here, and it seems to me the touchstone, if I am sitting at the editor's desk, if there is something in this article that rings the alarm that tells me this article has a propensity to offend, then perhaps I publish at my peril, and I think I should.

But if I read an article that rings no alarm, that carries with it no warning, if thereafter some jury is to tell me I owe damages, I have become liable without fault.

QUESTION: But you postulated a subjective test there, some things would ring a bell with some editors and other editors wouldn't hear any bell at all.

MR. WARDER: Well, if the alarm is there, he had better hear the bell. I think it's an objective test. It would be tested in the court by the judge that reads it and tells him that there's an alarm in it.

That you can't get away from.

QUESTION: Then that's what you meant when you said the editor reads it at his peril.

MR. WARDER: Right.

QUESTION: Because he's got to wait and see what a

jury and what ultimately this Court does here.

MR. WARDER: No. No, I said he publishes at his peril, if the alarm is there. And I do not think it would be a defense to the paper if the editor was deaf and couldn't hear the alarm.

I think, so long as the alarm is there, then perhaps liability is warranted. But absent an alarm, when you are publishing, you read this article, you do not see any propensity to defame or to offend, and you publish, and after the fact you get caught. This is hardly consistent --

QUESTION: Well, are you suggesting, then, that even a right of privacy consistent with the opinion in Time v. Hill violates the First Amendment?

MR. WARDER: I am contending that in a false-light case, -- well, what I'm really coming to, Your Honor, is I think the Constitution prohibits a false-light privacy case, per se.

QUESTION: That would certainly go further than Time v. Hill, wouldn't it?

MR. WARDER: It would go a little further. Here --

QUESTION; It would overrule Time v. Hill.

MR. WARDER: No. Time v. Hill was under -- was decided under a special statute, whereunder truth was a defense. You see, I'm dealing with common-law privacy, where

truth is not a defense.

QUESTION: Well, that's not very clear to me about your argument. As you're parsing this down, I'm not clear whether you're talking about the common law of defamation --

MR. WARDER: I'm talking common law.

QUESTION: -- or are you talking about the constitutional limitations upon the common law of defamation?

MR. WARDER: I'm talking the common law of defamation and the constitutional limitations, as I understand them, on the cause of action for libel.

And, Your Honor, to develop the thought: as I understand it, in a false-light privacy case, there is never an alarm bell. If there were, it would be a cause of action for libel.

This whole concept of a false-light privacy is a concept designed by the common law courts to give a plaintiff a cause of action who could not win his case if it were brought in libel.

QUESTION: Well, let me -- I think you're talking -- we might be talking about two different things, without distinguishing them.

You're suggesting that perhaps an editor wouldn't have an alarm bell in terms of whether this might embarrass a person, but if you -- there's another aspect to it: whether or not there might be an alarm bell as to whether the statement

is false.

Now, it might -- there might be an alarm bell if it's false, but no alarm bell that it would make any difference even if it was.

MR. WARDER: I want to make myself clear, Your Honor, --

QUESTION: Now, Time v. Hill said there had to be -- at least recklessness with respect to truth or falsity.

MR. WARDER: Right.

QUESTION: Now, this jury found, as it had to under its instruction, that there was at least recklessness in terms of truth or falsity.

MR. WARDER: Right.

QUESTION: Now, you could be absolutely right in what you've said so far, but you haven't gotten to whether or not there's an alarm bell with respect to truth or falsity.

MR. WARDER: I am speaking as to truth or falsity only. I do not think it matters whether there is an alarm bell as to the propensity to offend. If an editor never published anything offensive, he would have a namby-pamby paper.

I submit that the original Watergate story was offensive to many, and still is to some, but wouldn't it have been horrible had it not been published?

You have to publish offensive things.

No, I'm speaking strictly of whether it's --

QUESTION: Well, I don't understand how you distinguish between libel and false-light cases in terms of the constitutional protection.

MR. WARDER: I am trying to make it the same, Your Honor. I'm not distinguishing in terms of their constitutional protection, I am distinguishing in terms of the old common law.

This is -- what I am urging is that the constitutional protection in a false-light privacy case should be as broad as it is in a libel case.

QUESTION: Didn't you get the protection of those kinds of instructions here?

MR. WARDER: Your Honor, of course I did. And the jury licked us. And the Sixth Circuit held that there was no evidence upon which the jury could base their verdict.

QUESTION: I think if the Court of Appeals was right, you win; but what if they're wrong about the evidence?

MR. WARDER: That is a question, you review the record, if the evidence is there --

QUESTION: Do you lose, then?

MR. WARDER: I think we would, Your Honor; but I don't think the evidence is there.

A reckless disregard or knowledge of the falsity.

QUESTION: Are you saying, Mr. Warder, that we abandon the issue in this case as to whether or not there was

sufficient evidence to support the jury verdict?

MR. WARDER: I think that we have to come to it. We think it's a matter of law that under the Time-Hill standard there was no evidence of malice. We think that --

QUESTION: You do not object to the instruction given by the court, as I understand it.

MR. WARDER: No. We took no exception to the instructions.

QUESTION: Right.

MR. WARDER: That is correct.

You know, Your Honor, in reflecting on this matter, there's another anomaly here. Somehow the law is wrong. If Eszterhas had stood on the street corner in Gallipolis and said orally what he wrote for the paper, there would have been no cause of action for privacy, and no cause of action for slander. The words are not slanderous, per se, there are no special damages.

Also there would have been no cause of action because Eszterhas is protected by the freedom of speech clause of the First Amendment.

Somehow you put it in the paper, you remember that the newspaper has two defenses: one, freedom of speech; second, its own special freedom of the press.

And to get an opposite result from the printed word rather than the oral statement, to me makes no sense.

Now, I submit, I don't have all the answers.

QUESTION: A good many decisions in this Court, I think, that properly analyzed, to indicate that the two guarantees are not cognate, that you might very well get a different result under a Free Press case than you would under a Free Speech case.

And isn't it true that invasion of privacy generally is something to which only media, publishers, are liable.

MR. WARDER: Generally, yes.

QUESTION: By definition. Because it involves publicizing rather than merely an individual speaking.

?

MR. WARDER: Professor Heckman even makes that flat statement in his book on Torts.

I don't think it's any longer true. I have in mind the electronic devices which might now constitute an invasion of privacy, but which are beyond the scope of this case, in which we need not consider.

QUESTION: Mr. Warder, I have problem with "this material was gained by trespass". Is that right?

MR. WARDER: No, Your Honor, there --

QUESTION: There wasn't a trespass?

MR. WARDER: No, Your Honor, had this been an action in trespass, there wouldn't have been the jurisdictional malice for a diversity case.

These gentlemen were seen approaching here.

QUESTION: Well, was this a State trespass case?

MR. WARDER: There's no trespass case at all. A man is not a trespasser until it is made known to him that his presence is unwanted. Up till that point he is at worst a licensee.

These people are no more trespassers than the book salesman --

QUESTION: How can he be a licensee when the mother wasn't there?

MR. WARDER: The children were there. They were in charge.

QUESTION: Well, they couldn't give license.

MR. WARDER: They were in charge of the property, of course they could.

QUESTION: They couldn't give -- children could give license?

MR. WARDER: Certainly, Your Honor.

QUESTION: The two-year-old?

MR. WARDER: No, but the seventeen-year-old.

QUESTION: Is that the law of Kentucky?

MR. WARDER: Well, I don't know what the law of Kentucky is, but I know that if I leave my children with a seventeen-year-old baby sitter, she's in charge of that house till I get back.

QUESTION: And she can give license?

MR. WARDER: I would think so. She is the possessor of the real estate until my return.

QUESTION: But I thought the child said deliberately, "Mother is not here".

MR. WARDER: He said "mother was not here", yes, but --

QUESTION: Well, I interpret that as saying the whole license is not here.

MR. WARDER: No, they didn't say, Don't come in.

QUESTION: The licensor is not here.

MR. WARDER: They didn't say, Don't come in. They didn't say, Please get off the property.

QUESTION: They just said -- well, why did they say, Mother was not here?

MR. WARDER: Because they asked for her, the reporters asked for Mrs. Cantrell.

QUESTION: And you don't think that was a trespass?

MR. WARDER: Not at all.

QUESTION: Isn't a case sounding in violation of privacy in the nature of trespass concept?

MR. WARDER: Oh, of the old common --

QUESTION: Trespass on the person's privacy, as those --

MR. WARDER: The old common law concept, of course; I was thinking of terms of trespass to real property, and I

think that's what has been argued to Your Honor.

QUESTION: Her whole complaint here is that the -- your client trespassed on her privacy and her household and her family and her tragedy. That's the essence of it, isn't it?

MR. WARDER: No. Her complaint is that we published false statements concerning her. That's her complaint.

QUESTION: Well, you trespassed and then published --

MR. WARDER: Right.

QUESTION: -- the results of what you found. Or thought you found.

MR. WARDER: Well, Your Honors, I see I have some time left, but I have nothing to add to these remarks. And if there are no further questions, I'll waive my right to proceed.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Sherman, you have used all your time.

REBUTTAL ARGUMENT OF HARRY ALAN SHERMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SHERMAN: Mr. Justice, if Your Honor please, I want to point out that my friend -- my friend's statement on the alarm situation: First of all, there is no denial of the falsity. Our plaintiffs' case went down the line to prove that the articles, that the contents of the article were false, absolutely false.

There was no denial of anything that we said was false.

Secondly, on page 102 and 103 --

QUESTION: Well, does that become important after the jury has returned a verdict under these instructions?

MR. SHERMAN: No, Your Honor, as far as I'm concerned; but when he argued that, somehow or other, that if they publish a story, the editor can't be held for falsity. They didn't deny it was false.

Secondly, that the -- Judge Krupansky told the jury that if they found -- they had to find that the trespass and the actions of Conway and Eszterhas were within the scope of their employment, that they were sent there, rather than they did it on their own. At page 102 and 103.

So I wanted to just point that out, Your Honor.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:45 o'clock, a.m., the case in the above-entitled matter was submitted.]

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