OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1246

TITLE BOSE CORPORATION, Petitioner v. CONSUMER UNION OF UNITED STATES, INC.

PLACE Washington, D. C.

DATE November 8, 1983

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ALDERSON REPORTING

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

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BOSE CORPORATION, :

Petitioner :

v. : No. 82-1246

CONSUMERS UNION OF UNITED :

STATES, INC. :

- -x

Washington, D.C.

Tuesday, November 8, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:49 p.m.

APPEARANCES:

CHARLES HIEKEN, ESQ., Boston, Mass.; on behalf of the Petitioner.

MICHAEL N. POLLET, ESQ., New York, N.Y.; on behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Hieken, I think you may proceed when you are ready.

ORAL ARGUMENT OF CHARLES HIEKEN, ESQ.,

ON BEHALF OF PETITIONER

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

This case presents the question whether when constitutional rights are involved appellate judges who did not hear the witnesses testify can conduct a de novo review of the cold printed record of a lengthy bench trial unrestrained by the clearly erroneous requirements of Rule 52(a) or the due process requirements of the Fifth Amendment and reverse the findings of the U.S. District Court judge who heard the witnesses testify.

In 1967 Dr. Amar G. Bose, a professor of electrical engineering at the Massachusetts Institute of Technology, invented the 901 loudspeaker system. The design of the 901 loudspeaker system was based on 12 years of research at MIT.

In 1968 Bose began marketing the loudspeaker and the 901 loudspeaker met with success in the market place. The District Court had found that the Bose 901 had received the best reviews which had been given to a loudspeaker product.

Then in 1970 Respondent Consumers Union published an article entitled "Loudspeakers" in its monthly magazine "Consumer Reports" purporting to rate 24 medium priced loudspeakers based on tests and measurements conducted in its laboratories by its engineers including the use of panelists. The article also reported on tests conducted of some higher priced loudspeakers under the heading "Some Loudspeakers of Special Interest".

One of these loudspeakers of special interest was the Bose 901 loudspeaker system. The District Court found that the article as a whole disparaged the 901 loudspeaker system.

In particular the District Court found that one statement was actionable in that it was false and disparaging. Based on observations of panelists playing recordings through the Bose 901 loudspeaker system, the article reported "worse individual instruments heard through the Bose system tended to wonder about the room".

The District Court judge then determined that Bose was a public figure and would be required to meet the actual malice test of New York Times and, therefore, had to prove that CU knew of the falsity of the statement by clear and convincing evidence. What the

District Court judge did was to focus on the knowledge of the author of the statement, A. L. Seligson who was the engineer in charge of conducting the tests and who actually wrote the article.

He was one of the two panelists who participated in th test upon which the false statement was based. Well, hen the article came out Bose complained promptly.

They tried to set up a meeting as soon as possible with CU. Finally in June of 1970 the meeting was held and Dr. Bose went to this meeting. He told the people there, look, it is scientifically impossible for a loudspeaker system to make instruments wonder about the room when heard through a loudspeaker.

So he asked for a demonstration there. They had the loudspeakers there. It would have taken a half hour to set up the demonstration according to the testimony of Seligson who was at the meeting.

But its association technical director, Monte Florman, refused to put on the demonstration. Dr. Bose again asked for the demonstration, and again the demonstration was refused.

So Dr. Bose asked Mr. Seligson to please identify the recordings that had been used to observe the strange phenomena of instruments wondering about the

room. Seligson said that he would supply those recordings but he never did and, therefore, as the District Court found at the conclusion of the damage trial Bose could not refute the false statement by demonstrating to customers and dealers that in fact instruments heard through the Bose system did not wander about the room when using the same recordings that Consumers Union had allegedly used during the test.

Well, Bose sought a retraction. It was refused so Bose sued in 1971. Finally in 1980 there was a trial on the liability question first.

Low and behold at the trial we now learn why CU refused to demonstrate the loudspeakers or to identify the recordings. The reason, because at the trial it came out the panelists never heard instruments through the Bose system that tended to wander about the room.

Now the false and disparaging statement was based on a special listening test conducted in the special listening room that Consumers Union had. It was a room about 18 feet wide and about 24 feet long.

At one end of the room --

QUESTION:. Mr. Hieken.

MR. HIEKEN: Yes, Your Honor.

QUESTION: As to the disparaging nature of the

language which you just referred to both the District Court and the Court of Appeals ruled in your client's favor on that point.

MR. HIEKEN: That is correct, Your Honor, yes.

They had set these loudpeakers at the end of the room about 10 feet apart and supposedly they played recordings through them. At the trial -- By the way, you probably know what stereo sound is that you have a speaker at the left and a speaker at the right just as in this courtroom to the left of the bench there is a column of three speakers and similarly to the right.

QUESTION: You don't sound like you are on stereo.

(Laughter)

MR. HIEKEN: That is probably because we are sending the signals and faced both channels simultaneously so you get mono, right.

But in stereo -- You are exactly right though because now you are observing what happens when both left and right loudspeakers receive sound energy of the same intensity. The sound appears to come fromm the middle.

Now if you were to turn down the loudspeaker at your left you would hear the scund coming from the

right, and if you turned down the intensity of the sound at the right you would hear the sound coming from the left.

That is just what happens in a stereo system. Gradually they raised the level of the left and then in the right and the net impact on you is that you hear instruments that come from various points between the two loudspeakers and that is normal stereo sound. You can try it at home on your own stereo system by taking your balance control and moving it to the left and then to the right. You will get the same effect.

That is basically what Seligson and Lefkow testified they heard at the special listening test. Now they said that they observed movement on only one instrument. That one instrument was the violin sounds, and they said that the movement was restricted to movement between the left and the right loudspeaker.

It did not wander about the room. Now during cross examination Seligson and Lefkow each drew on large charts exactly what they heard during the special listening test and reproductions of those drawings are included in Petitioner's brief after page 12.

One of them is Plaintiff's Exhibit 29. That was the drawing that Seligson made. The loudspeakers are represented as small pentagons at one end of the

wall, and they look much like home plate in a baseball game.

Seligson drew a red line between the loudspeakers with arrowheads at each end and the various violin sounds came from various points on that line between the loudspeakers and from nowhere else. Lefkow drew something somewhat similar on Plaintiff's Exhibit 35 which is a small red rectangle between the left and right loudspeakers, and the sounds came from that region and nowhere else and only on the violin.

The piano sounds did not wander they testify. Well, on cross examination after that drawing was completed Seligson was asked why did you use the words "tended to wander about the room" to describe what you had drawn on the board?

Seligson replied, "Well, "about" meant to me mean about the rear wall between the speakers." What happened, the District Court made specific findings. They said, "Look. People would not be surprised to find movement along the wall betwen the two speakers. That is normal stereo sound basically."

Movement throughout the other areas of the room was not to be expected. Such a bizarre effect is contrary to what listeners are accustomed to and would be objectionable to most listeners.

The District Court, of course, heard Seligson testify on six trial days and he found that Seligson's testimony on "about the room" meaning along the wall between speakers not credible based on his demeanor and Seligson's testimony. In addition, the District Court found that the testimony of CU's technical director who at the time of the tests was associate technical director was wholly untrustworthy and not credible.

At the conclusion of the damage trial there was an appeal and the Court of Appeals as Mr. Justice Rehnquist noticed found the statement disparaging and assumed it was false, but then the Court of Appeals went on and said now what we must do is we must perform a de novo review of the record not limited by the clearly erroneous requirements of Rule 52(a).

Now in the course of this review the Court of Appeals did not mention under the heading "review" the state of mind of the author Seligson but instead it focused on the editorial review and in connection with this editorial review it relied on the testimony of Monte Florman, the associate technical director whose testimony was found by the District Court to be wholly untrustworthy and not credible.

In making reference to well maybe he was only guilty of using imprecise language it appeared to be

relying on the testimony of Seligson to the effect, well, what did you want me to say instead of wandered about the room? Would you be happier if I had said across the wall? I think not.

What the Court of Appeals also did is it said it is not enough for Bose to prove actual malice according to the New York Times test, but Bose had to prove evidence of actual malice by showing evidence of negligence, motive and intent. The Court of Appeals said, well, we are just unable to find clear and convincing proof that Consumers Union knew that the false and disparaging statement that it published was false.

Well, there are a number of errors in the way the Court of Appeals conducted is review. First of all, it made a de novo review of the record to determine if the evidence was clear and convincing to it, not whether it could have been clear and convincing to the United States District Court judge who tried the case, who actually heard the witnesses testify, who was able to observe their demeanor, who when he was troubled on a point was able to question the witness and clarify that point.

QUESTION: May I ask you -- What do you think the Court of Appeals' job was?

MR. HIEKEN: We have set that out in our reply brief I think beginning on page 4. Basically we suggest that the thing to do for a Court of Appeals is (1) look at the findings of fact that the District Court judge found. Do those findings of fact support the judgment? Basically --

QUESTION: Well, are you suggesting that the New York Times standard does not require any different review of factual findings than in any other kind of case?

MR. HIEKEN: In terms --

QUESTION: As I understand the Court of Appeals they said this is a First Amendment case under New York Times against Sullivan. We have a special duty to look at the record more closely than we normally would.

Do you disagree with that?

MR. HIEKEN: No. In New York Times it said that the type of review conducted is an independent examination of the whole record, and it is the whole record. That means --

QUESTION: So that to the extent that the court did independently examine the whole record it did the right thing here.

MR. HIEKEN: If it did that. In conducting a

de novo review --

QUESTION: That part was right.

MR. HIEKEN: Conducting a de novo review in effect disregarding the findings of fact is not correct, and that is not what the Court of Appeals did. It did not examine the evidence to see if the evidence if believed by the District Court could support the findings of fact. That was to be the second point of our suggested test.

After you find the findings of fact that he found support the judgment you want to examine the evidence to see if the evidence if believed by the District Court judge would support those findings and the District Court judge has in a New York Times case has found supported by clear and convincing evidence then you can affirm the judgment. There are --

QUESTION: Let me try.

MR. HIEKEN: Yes, Your Honor.

QUESTION: Do you think the court should have been bound by the findigs of fact?

MR. HIEKEN: Yes, Your Honor, unless clearly erroneous.

QUESTION: He should not read the record?

MR. HIEKEN: No, the Court of Appeals should read the record, Your Honor.

QUESTION: They can set them aside if they found them clearly erroneous.

MR. HIEKEN: Absolutely. Yes, Your Honor.

QUESTION: But you do not think they can set them aside by relying on testimony from a witness that the District Court said he did not believe.

MR. HIEKEN: Absolutely not. Absolutely wrong. That is one of the things --

QUESTION: So you think the Court of Appeals is at least bound by if they can tell by the District Court's rulings on credibility.

MR. HIEKEN: That is correct, Your Honor. Absolutely bound by the rulings on credibility unless the findings on credibility are clearly erroneous.

QUESTION: How can you tell that?

MR. HIEKEN: I do not know.

QUESTION: If the judge says I think you are lying --

MR. HIEKEN: I do not know.

QUESTION: You do not make findings on credibility.

MR. HIEKEN: I do not know.

QUESTION: The judge does not say I disbelieve this witnesses because of factors a, b, c, d.

QUESTION: But if the only evidence in the

case is deposition testimony I suppose the District judge has not got any leverage on the Court of Appeals then.

MR. HIEKEN: I think that is fair to say, Your Honor, but of course that is not this case --

QUESTION: No, I know it is not.

MR. HIEKEN: I know, but I think you are correct on that point.

So --

QUESTION: I take it you are not asking us to cut back on the New York Times?

MR. HIEKEN: That is correct. It is not necessary. At the District Court level we said that it was not necessary for the District Court even to determine whether Bose was a public figure because we could prove by clear and convincing evidence that there was actual malice.

I was going on to the third point which was that the Court of Appeals must not make de novo findngs of fact based on the cold printed record, and the fourth point which really has already been brought out here is it must not rely on testimony which the District Court judge found to be not credible. That is what --

QUESTION: May I just ask because I am really not sure. Are you asking us to cite any novel

proposition of law or are you just basically asking us to take a good hard look at the record here and be sure that the Court of Appeals did its job correctly?

MR. HIEKEN: I think that we are asking you to take a look and see whether the Court of Appeals did its job --

QUESTION: So there really is not any question of law of any particular significance at stake.

MR. HIEKEN: Well, I think there is. I think --

QUESTION: If there is, what is it? That is what I am trying to find out.

MR. HIEKEN: What it is is that the Court of Appeals said it was not bound by the clearly erroneous rule of Rule 52(a), and we submit that that is inconsistent with the trilogy of cases that this Court decided in 1982 beginning with Pullman-Standard v. Swint and followed by Inwood Laboratories or Ives Laboratories --

QUESTION: The other side of that is you say that, therfore, the Court of Appeals could not have, should not have purported to make de novo findings.

MR. HIEKEN: Absolutely. That is correct.

QUESTION: What do we do with the testimony of the witness that the judge said was incredible?

MR. HIEKEN: Not credible?

QUESTION: Yes.

MR. HIEKEN: Disregard it. You have to disregard it.

QUESTION: Can we read it?

MR. HIEKEN: Oh, you can read it, but I think you have --

QUESTION: But that is all?

MR. HIEKEN: Yes.

QUESTION: We cannot do anything about it?

MR. HIEKEN: No.

QUESTION: But read it.

MR. HIEKEN: I think that it should be disregarded when it is not credible.

Now another mistake that the --

QUESTION: What happens if we think it is credible?

MR. HIEKEN: That is not your function.

QUESTION: I mean suppose the testimony of the witness says it is now ten minutes past two and the judge said that is incredible.

(Laughter)

MR. HIEKEN: Then that is --

QUESTION: I cannot recognize that.

MR. HIEKEN: No, I think you may well find the

judge's ruling on that point being clearly erroneous under that circumstance, but anyway --

If I may I would like to focus on another important area where the Court of Appeals missed the boat, and that is that it missed -- It did not consider this Court's decision in the Cantrell v. Forest City Publishing Company case because in that case it said that knowledge of the author of falsity is attributable to the publisher when the author is performing this writing in the course of his employment.

The Court of Appeals did not cite it and instead focused a great deal of attention on the editorial review and most of this editorial review evidence was based on the discredited testimony of Monte Florman. So it is our position that -- What the District Court judge did is said I do not have to look at what the editorial review policy was becuase if the editorial people got a false statement from Respondent's engineer to begin with all they could do was trim it up and it would still be a false statement.

This was a situation of not a music critic. This was a statement that was written by an experienced engineer who had 25 years' of experience in testing loudspeakers.

There is the important aspect in review also

for the opportunity to evaluate the credibility of witnesses, and what is our device for testing credibility of witnesses? It is cross examination.

This Court has regularly held that there is a constitutional right to have cross examination of witnesses. But what is the measuring stick to determine the impact of the cross examination?

The measuring device that we use in the trial courts is the District Court judge in the case of a bench trial or the jury in the case of a jury trial. So if the Court of Appeals is allowed to rely on testimony that was destroyed on cross examination then Petitioner has been deprived of a property right without due process of law.

QUESTION: Well, of course, the Court of Appeals expressly said they were not reviewing credibility determinations.

MR. HIEKEN: They said they were not, but then they went ahead if you will look at what they actually did and so far as we can see they do not mention under the heading "review" of the impact of the testimony of Seligson of what he knew.

He testified as to what he actually heard, and he used language of such a nature that it was perfectly clear that he knew the difference between sounds that

moved back and forth between left and right loudspeaker which was normal stereo sound and this bizarre and grosteque sound that was reported in the article of instruments that tended to wander about the other areas of the room which the District Court judge found to be bizarre and grotesque.

The test that we have proposed here and it is in the reply brief and I have mentioned it is consistent with the requirements of Rule 52(a) with the First Amendment, with the Fifth Amendment. It promotes the confidence of litigants in our judicial system.

It reduces appeals. It allows Courts of Appeal to spend their time on ruling on questions of law so that they can give guidance to us lawyers, and we can advise our clients so as to stay out of litigation. That is, it promotes certainty in our pre-litigation conduct.

There is no constitutional right to lie, and that is what Consumers Union has done here.

QUESTION: Do you have a comment on the Baumgartner case? I do not believe you cited it. It is cited extensively by your opposition.

MR. HIEKEN: May I comment on it after in my rebuttal period because I would like to save five minutes for rebuttal if you do not mind.

QUESTION: I do want to hear from you on it because I find nothing in your briefs about it.

MR. HIEKEN: Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Pollet.

ORAL ARGUMENT OF MICHALE N. POLLET, ESQ.,

ON BEHALF OF RESPONDENT

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

Thirteen years after publication of the disputed article and after the District Court had explicitly rejected numerous charges of product disparagement and bias against Consumers Union and had upheld CU's good faith and integrity against every attack leveled against it this dispute centers around the alleged slip of a single preposition, the word "about" as expressed by Consumers Union in giving its subjective impression of instruments heard through these novel, unique and unconventional loudspeakers.

QUESTION: Mr. Pollet, I did not understand you to challenge in your brief the finding of the District Court upheld by the Court of Appeals that CU's article was in fact disparaging. Are you challenging it now?

MR. POLLET: We do indeed challenge that. We think when properly and fairly read that it is not

disparaging.

QUESTION: You did not cross petition.

MR. POLLET: No, Your Honor, we did not.

But I do believe --

QUESTION: We judged this case on the basis that it was disparaging.

QUESTION: Yes.

MR. POLLET: Well, I do believe we raised that point in the course of our argument in the petition although not as a separate point.

QUESTION: You are relying on the proposition if you cannot sustain your judgment on the ground given maybe you can in this one.

MR. POLLET: That is right.

We believe properly read fairly not --

QUESTION: We agree with your adversary on the other point. Do you want us then to turn to whether or not this was disparaging?

MR. POLLET: Yes. We would welcome such an opportunity and a look at the article in its proper context.

We believe that the --

QUESTION: I gather you argued below that it was not disparaging.

MR. POLLET: Oh, yes, very clearly.

This trivial difference between words found actionable and not accentuates the substantial risks which even a responsible publisher can face in expressing subjective judgments even in the form of mild criticism. We respectfully submit that reversal was proper and under any standard of appellate review.

The issues at stake here are important and significant. They are whether we remain committed to the preservation of First Amendment principles woven into defamation law in Times v. Sullivan.

As the District Court ruling so graphically demonstrates those protections afforded to the press in a public figure libel suit that the plaintiff show falsity and show with convincing clarity that the publisher knowingly lied or in fact had serious doubts of accuracy are fragile indeed and subject to facile or distorted fact finding.

Without the continued ability of our appellate courts to exercise independent constitutional judgment to determine for themselves whether constitutional rules here have been constitutionally applied to undisputed facts, the breathing space which this Court has held necessary if the freedoms of speech are to survive will be lost.

QUESTION: Is it your submission that the

clearly erroneous standard just does not apply in a First Amendment case?

MR. POLLET: It does not apply in any event to the ultimate fact, the question of law --

QUESTION: I asked you does it apply at all.

MR. POLLET: If it applies at all it would apply only to historical facts.

QUESTION: Let's just assume for the moment -- You probably will not agree with it, but let's just assume that the question of knowledge is a historical fact. Would you say that the clearly erroneous standard would apply to that?

MR. POLLET: Are we talking in the context of a defamation suit?

QUESTION: Where the claim is that the person who wrote the article or made the defamatory statement knew that it was false, just knew. Let's assume that is a historical fact. Would the clearly erroneous standard apply to that?

MR. POLLET: No, because that is the ultimate conclusion drawn from historical facts. I do not understand that as being an historical fact --

QUESTION: But if it were you would think that the clearly erroneous standard applied to it.

MR. POLLET: No, because I believe that this

Court recently held in Connick v. Meyers just this past April that the inquiry into the protected status of speech is a matter of law and not subject to the clearly erroneous rule.

QUESTION: So I take it your submission is that the clearly erroneous standard just does not apply at all.

MR. POLLET: It does not apply at all when we are --

QUESTION: In the First Amendment cases.

MR. POLLET: That is right. This Court has made that crystal clear.

QUESTION: What principle of the First Amendment suggests that it is desirable to allow a Court of Appeals such as it did in this case to simply second-guess a trial judge's finding that a witness whom the trial judge heard testify was not credible?

MR. POLLET: Well, with all due deference, Justice Rehnquist, the facts in this case as you have posed them are not as they occurred. The trial judge in this case plainly and clearly articulated his reason, his sole rationale for the finding of so-called incredibilty with was that the author was too intelligent to have made an honest mistake.

That is not a credibility finding. That is an

erroneous application of law.

QUESTION: Each is entitled to his own opinion.

MR. POLLET: The publisher before the Court here is Consumers Union of United States. It is the nation's leading and most prestigious not-for-profit testing organization.

For more than 47 years it has published a monthly magazine "Consumer Reports". In May of 1970 Consumers Union included in a survey of 24 loudspeaker models a seven paragraph evaluation of the unique, unconventional Bose model 901 loudspeaker system.

QUESTION: I suppose by the same token if it is such an authoritative voice it is capable of inflicting great damage.

MR. POLLET: Your Honor, the facts in this case do not show great damage. Within a year or so after publication of the article the Bose 901 according to the record was either first or second in total dollar volume sales in the country. Thus, if Consumers Union may have a great effect it certainly was not a negative effect in this case.

Indeed, the review was in part complimentary and in part cautionary. It attempted to put into words the author's aesthetic perception of a uniquely

subjective impression of an amorphis phenomenon that all parties including the Court had difficulty in describing with precision.

As noted the Review's evaluation opened with praise of the plaintiff's product. It termed the Bose 901 considerably more spacious and reverberant than conventional speakers.

It said that the effect was rather dramatic and was felt from any listening position. After judging various qualities of the Bose system indeed the article concluded not by recommending against purchase of the Bose but by directly telling its readers we think the Bose system is so unusual that a prospective buyer must listen to it and judge it for himself.

The article in addition to the concededly complimentary findings and the encouragement to try the product noted that it was more difficult to pinpoint the location of the instruments with the Bose than with standard speaker systems. That is a finding that was not found false in the District Court.

In specifying what it meant about the localization problems the Review went on to say in a single sentence containing the only phrase found actionable by the District Court "worse individual instruments heard through the Bose systems seem to grow

to gigantic proportions and tended to wander about the room". The immediately following sentence the author put both size and location of the described receptions into context.

It was written, "For instance a violin appeared to be 10 feet wide and a piano stretched from wall to wall." Then the author minimized his judgments by stating "With orchestral music such effects seem inconsequential, but we think they might become annoying when listening to soloists."

The District Court found defamation, disparagement only by breaking the sentence in two, by parsing it artificially. That portion of the sentence which referred to "instruments seeming to grow to gigantic proportions" was held not proven false.

The Court then isolated and wrenched from its context the remainder of the phrase that "instruments tended to wander about the room". As noted the judge found that subjective perception was better expressed as such which tended to wander about or along the wall rather than about the room.

It ignored the word "tended" in the disputed phrase itself. The District Court dismissed the following sentence which placed the effects along the wall by saying that sentence would not thus be

understood by any reasonable reader, and the phrase was found by the District Court to attribute bizarre and grotesque effects to the product despite the plain absence of any such words in the article and the plain language in the article that the effects were inconsequential with orchestral music and only might become annoying when listening to soloists.

Having found the disputed phrase to be false the court disregarded the author's testimony to his good faith belief that the words accurately described what he had just seen.

QUESTION: Do you think falsity is a mixed question of fact and law or is it a historical fact or is it just a straight question of law?

MR. POLLET: I think falsity is at least a mixed question of law and fact if not a pure question of law.

QUESTION: Why would it have any legal implications rather than factual implications?

MR. POLLET: Falsehood?

QUESTION: Yes.

MR. POLLET: Because again it implies and implicates First Amendment freedoms, the right to free speech and free press.

QUESTION: But why does that convert something

that would otherwise be a factual question into a legal question?

MR. POLLET: Because as Justice Frankfurter noted in the Watts case an issue of fact is a code of many colors. When an issue involves a conclusion drawn from uncontroverted happenings and that conclusion implicates fundamental freedoms it is a mixed question of law and fact and not to be treated as an ordinary fact subject to the same limitations that more pedestrian fact finding might involve.

QUESTION: What is your authority for that statement? What case in this Court?

MR. POLLET: With respect to the issue of falsehood?

QUESTION: Yes.

MR. POLLET: Each case in this Court that has considered libel judgments have done it on the issue of actual malice I believe, Justice Rehnquist. I do not believe there is direct authority on the issue of falsehood.

QUESTION: Well, if there is a statement that a certain object is red and somebody else claims it is black and the District judge listens to all the witnesses and finds that the object is black. It was not red at all. Is that a mixed question of law and

fact to find that an assertion that the object is red is false? Isn't that a historical fact?

MR. POLLET: That may be a historical fact, yes, Your Honor. But what is not a historical fact is the ultimate conclusion of actual malice.

QUESTION: I understand that.

MR. POLLET: The finding --

QUESTION: What about the issue of disparagement, the holding that this is a disparaging statement? What is that? Is that an issue of law or fact?

MR. POLLET: I believe that is an issue of law that that is a legal standards which must be measured by --

QUESTION: Can we decide whether or not this was disparaging without addressing the question of what the nature of the review may be?

MR. POLLET: Yes, I believe you can by reading the article.

QUESTION: If we were to agree with you it was not disparaging it would be the end of the case without having to address the other issue?

MR. POLLET: Well, sure.

QUESTION: That is just another reason you say to affirm?

MR. POLLET: Yes.

QUESTION: It is not an issue that would be involed if we just dealt with the issues that were presented on certiorari.

MR. POLLET: No, it would not.

QUESTION: Would you refresh my recollection? Am I correct in recalling that the actual holding of the Court of Appeals was limited to the actual malice issue, that there had been a failure of proof on that issue.

MR. POLLET: That is correct.

QUESTION: So they did not really reach the question of whether it was fact or mixed question on falsity or any of these other points?

MR. POLLET: No. Although the Court of Appeals expressed doubt as to whether the statement was false for the purposes of its opinion it assumed by the statement it was factual and that it was false.

QUESTION: And that it was disparaging.

MR. POLLET: And that it was -- No, it did state separately.

QUESTION: It agreed that it was disparaging?

MR. POLLET: Yes. That is correct although --

QUESTION: But their holding and the question of whether it is fact or mixed question related solely to the malice issue.

MR. POLLET: That is correct.

QUESTION: But aren't there two ways of finding malice? One is to find that there was a knowing falsehood and the other is that there is a wreckless disregard for truth.

MR. POLLET: Yes.

QUESTION: Malice is just a code word for either one of those. If you find that knowing falsehood you have satisfied the burden of proof under New York Times, haven't you?

MR. POLLET: Yes, you do. But that it is that standard --

QUESTION: You really ought to look behind what the particular finding is. Wreckless disregard for truth might be one thing but knowing falsehood is another.

MR. POLLET: Well, I think for these purposes they are both the same thing for the purposes of independent appellate review.

QUESTION: Well, I know that is your submission.

QUESTION: Fact or law?

MR. POLLET: Excuse me, Your Honor?

QUESTION: Fact or law as Justice White has just pointed out.

MR. POLLET: That is right.

QUESTION: Which is it?

MR. POLLET: It is law. It is law or it is an ultimate fact in which a standard of constitutionality --

QUESTION: You do not accept his translation if it is that that malice is just a code word describing either one of those two concepts?

MR. POLLET: No. Malice is a legal construct derived specifically from the Constitution.

QUESTION: Yes, but malice is defined in New York Times as either knowing falsehood or wreckless disregard.

MR. POLLET: It is also defined as a constitutional standard.

QUESTION: It may be but it is not separate from knowledge or wreckless disregard.

MR. POLLET: That is the point, Your Honor, that you cannot separate the constitutional standard from the finding of fact, and the footnote in New York Times in dismissing the Seventh Amendment arguments against independent appellate review pointed out when a federal question, a constitutional right is so intermingled with a findng of fact it is necessary in order to pass on the legal question to analyze the facts that the court must look at the issue independently.

That is the --

QUESTION: Do you think that applies to federal courts as well where you have this Rule 52?

MR. POLLET: Yes. I think it applies more so to federal courts because this Court's and appellate courts' corrective authority over the lower federal courts is larger and less restrictive than it is with respect to state courts or state court juries.

QUESTION: The way you put it you would think that the rule you are talking about applies whenever there is any constitutional issue involved, whenever there is an issue of so-called constitutional fact. Rule 52 is just beside the point.

MR. POLLET: I do not know if we have to go that far certainly not in this case.

QUESTION: Well, that was the way you put it.

MR. POLLET: In this case the precedents in this Court are clear with respect to the court's duty, mandate as to how it shall look at the conclusion of the lower court. It must do so independently because of the nature of the right involved, and it is particularly apposite and appropriate here becuase of the high nature of the standard of proof that it be clear and convincing.

If I might just for a few moments, Your

Honors, turn to what we consider and what we have described as the undisputed established on-record evidence in this case because we believe that when looked at fairly and properly and not mischaracterized that evidence shows that the actual malice finding was not only without support but it was in contradiction to the record evidence.

Looked at it is plain that prior to publication Consumers Union carried out a lengthy, original, extensive research and editorial practices, that it contained numerous checks for review and accuracy, that the research and editing process were adhered to closely. There was no departure from reasonable journalism standards.

The authors were experienced and expert in loudspeaker testing. Mr. Seligson has 25 years' of experience. He is highly respected.

He has extensive educational engineering and journalistic background.

QUESTION: Mr. Pollet, may I ask a question that I think goes to this part of your argument? Your legal postition is that the Court of Appeals must look more closely at the record than in a normal case here.

Now when we are reviewing the Court of Appeals do we have the same obligation to make a rather fresh

examination of the record so we have to have the same detailed understanding of the nuances of the facts that we expect the Court of Appeals in order to decide it?

MR. POLLET: I think you have the same obligation to make an independent constitutional judgment to accept the facts in the record which were admitted, established or undisputed and independently to determine for yourself whether those facts as found can constitutionally support an actual malice finding.

QUESTION: So we need three de novo reviews of this record in effect.

MR. POLLET: Well, it is not a de novo review of the record in the sense that the Court is going to make independent fact finding, find new facts or --

QUESTION: We should do whatever the Court of Appeals did.

MR. POLLET: The Court of Appeals did not --

QUESTION: Well, I know but whatever they did we can do and should do.

MR. POLLET: Yes.

QUESTION: If they were remiss then we should do the job over.

MR. POLLET: Yes, because as this Court has stated that is its obligation in such cases, not merely to elaborate constitutional principles but to make sure

that they do not intrude upon the First Amendment --

QUESTION: Well, the Court said that, of course, in New York Times but that was in the context of a review of a state supreme court decision wasn't it?

MR. POLLET: Yes, it was.

QUESTION: You do not think there is any difference when it comes as this one does?

MR. POLLET: I think if there is any difference that this Court is even freer in such a case. Rule 52 as noted is a rule of federal civil procedure, and it is not of the same magnitude and order as the Constitution.

I think it would be an anomolous situation if this Court had greater authority to review facts found in a state court than it did in a federal court.

QUESTION: Well, there happens to then be the Rule 52. It is the position of a statute. Unless it is unconstitutional it binds us with respect to the facts. Do you think it is unconstitutional, Rule 52, in a First Amendment case?

MR. POLLET: No, I do not think it is unconstitutional because I do not believe it applies, and I do not believe that Rule 52 would --

QUESTION: It does on its face. It applies to all fact finding.

MR. POLLET: All findings of fact except questions of law which actual malice is or a mixed question of law and fact implicating a constitutional standard which this also is.

QUESTION: Or so-called ultimate fact?

MR. POLLET: Yes.

QUESTION: In your view the appellate court's job is the same regardless of whether the First Amendment right was sustained or rejected in the trial court? If you had won in the trial court instead of losing would your opponent have been entitled to the same broad review that you claim to be entitled to?

MR. POLLET: In this case I believe not because this is not a defamation case, a libel suit brought by an individual plaintiff where there may be although I state this only arguendo a more balanced weighing of the rights involved, the reputation of an individual person against the rights of freedom of expression.

In this case this is a product disparagement case where the only interest of the plaintiff involved is the interest of the reputation of its product, an interest which can hardly be said to be at the center of any decent system of ordered liberty.

I would like to turn for a moment back to the

record because the record makes it crystal clear that the District Court found the Consumers Union acted in good faith, that it had no subjective awareness of falsity. Every attack on good faith was rejected by the District Court.

These included testimony by the plaintiff and cross examination of the defendant which took up a lengthy substantial portion of the trial contending that the author was biased against the Bose because of a competing patent which the author held. The District Court specifically on the basis of Mr. Seligson's demeanor ruled out any bad faith on that ground.

The District Court likewise ruled out again on the basis of Seligson's testimony the charge made by the Petitioner that he had fabricated other tests. The Petitioner also charged that Consumers Union was biased towards low priced products.

The District Court again ruled that out. Indeed the District Court specifically found that when the author had the opportunity to exercise subjective judgment in rating the Bose product he upgraded the rating in the important area of sound quality so that everything in the record is quite plain that there was no bad faith.

The District Court in its finding of actual

malice did not point to any evidence, objective or subjective, from which actual malice could be either inferred directly or found directly. It did so and it found actual malice only as a result of an erroneous application of a rule of law.

As ths Court has stated in Pullman-Standard v. Swint if the District Court's findings rest on erroneous view of law they may be set aside on that basis and are not subject to the restrictions of Rule 52. The record is again clear. The District Court opinion is plain that the only reason for findng actual malice, the only reason articulated by the District judge was that the author was too intelligent to have made an honest mistake.

There was nothing else in the record, nothing else relied upon by the District Court for its finding. It was that and that alone. We believe that in doing so the District Court committed plain legal error.

It inferred malice from falsity and applied an objective reasonable person standard which has been forbidden by this Court specifically in Garrison v. Louisiana where the lower court, the state court, there had found actual malice because it said it is inconceivable to me that the defendant could have had a reasonable belief which could be defined as an honest

belief that not one but all eight of these judges were guilty of what he charged them with.

This Court rejected that analysis stating that this is not a holding applying the New York Times test. The reasonable belief standard applied by a trial judge is not the same as the wreckless disregard of truth standard.

The District Court's holding if allowed to stand would in fact turn New York Times on its head. It would effectively impose strict liability upon responsible conscientious publishers such as Consumers Union with hardworking, caring, intelligent writers and editors.

It would render their carefully constructed editorial procedures designed to achieve accuracy irrelevant and meaningless. Indeed, by virtue of these very procedures by virtue of the high standards of journalism which they embody they would be ruled incapable of making an honest mistake and given no breathing space for honest error.

Their words would be placed in the same legal category as which are placed the use of explosives, the harboring of dangerous animals and forms of product liability. A system of freed of expression will surely not tolerate such a result.

The Court of Appeals recognized this erroneous misapplication of the law and faulted the District Court for ist holding that to find actual malice in this case would be to interpret that concept to require little more than proof of falsity. We believe that that holding is eminently correct.

QUESTION: If we disagree with you would the issue of falsity be open in the Court of Appeals?

MR. POLLET: I believe so.

QUESTION: They just assumed. They did not --

MR. POLLET: Yes.

QUESTION: They did not -- But they did reach the defamatory issue.

MR. POLLET: As dictum as an aside they did reach it.

QUESTION: Yes. Thank you.

MR. POLLET: Yes, they did.

We believe that the Court of Appeals acted properly. It did not engage in de novo fact finding. Its role was limited soley to independently weighing the facts and determing whether as applied to the Constitution they met the clear and convincing proof standard.

It seems to us that nothing could be more appropriate for a federal appellate court or this Court

to determine on undisputed facts what the Constitution means. We believe that even more so than the issue of fraud in the denaturalization proceedings before Justice Frankfurter in the Baumgartner case that actual malice is a finding which cannot escape broadly social judgments which is inextricably enmeshed with important fundamental rights, and as in Baumgartner the burden of proof placed upon a plaintiff is to establish its case with convincing clarity.

This constitutional requirement would be forfeit if a Court of Appeals could not exercise independent judgment. The net result would become that in First Amendment cases in public figure defamation cases for all practical purposes the District Courts finding on both factual and legal components would become impervious to review.

That surely is not the intention. We believe that the Addington case is quite pertinent here. As pointed out there the function of the legal process is to minimize the risk of an erroneous decision by requiring proof of more than a mere preponderance by calling upon a public figure libel plaintiff to establish actual malice with convincing clarity. The First Amendment has allocated the risk of error between the litigants. It is plainly recognized that the free

speech and press rights at stake are more substantial than the loss of money.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

MR. POLLET: Thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF CHARLES HIEKEN, ESQ.,
ON BEHALF OF PETITIONER -- REBUTTAL

MR. HIEKEN: If, Your Honor, please. Mr. Chief Justice, and may it please the Court:

I would like to answer your question, Mr. Justice Blackmun, about the Baumgartner case which basically deals with an ultimate finding of fact there which is really a conclusion of law or a mixed question of law and fact and, of course, the Court can always look at the evidence to see if there is enough evidence to be clear and convincing to the trier of fact.

That is a question of law. Whether the trial court found it to be clear and convincing is a question of fact.

In the Woodby case at 385 U.S. 276 on page 367 this Court pointed out there is an elementary but crucial difference between burden of proof and scope of review and that is, of course, commonplace in the law.

It said the difference is most graphically illustrated in a criminal case.

There the prosecution must prove guilt beyond a reasonable doubt, but if the correct burden of proof was imposed at the trial judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of fact was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt but whether the judgment is supported by substantial evidence.

We submit that the same type of review is appropriate here to determine whether the trial court could find by clear and convincing evidence that the statement was actually false. We do not agree with the characterization of the record by the Respondent here, but I believe that we have adequately covered it in our reply brief.

I would like really to kind of conclude here with what I feel is a very important aspect of this case, the proper allocation of busines in the courts, the trial courts into appellate courts. The trial courts' primary function is the finding of facts.

The appellate courts' primary function is rulings of law to check what the trial court did to make sure that rulings of law have been followed. If appellate courts are going to independently reexamine facts then an attorney who has lost a case has no alternative but to go up to the Court of Appeals and hope that he is going to get a new trial on the facts in the Court of Appeals.

We submit that that is inappropriate. It is not conducive to justice and would result in more appeals and less justice.

Accordingly, we submit that the decision of the Court of Appeals should be reversed here, the judgment of liability of the trial court affirmed and the Court of Appeals instructed to review the question of damages in accordance with the clearly erroneous rule.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:47 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

BOSE CORPORATION, Petitioner v. CONSUMERS UNION OF UNITED STATES, INC. #82-1246

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pierce Hammond

(REPORTER)