ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1491

TITLE PHILADELPHIA NEWSPAPERS, INC., ET AL., Appellants V. MAURICE S. HEPPS, ET AL.

PLACE Washington, D. C.

DATE December 3, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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PHILADELPHIA NEWSPAPERS, :

INC., ET AL., :

Appellants, :

v. : No. 84-1491

MAURICE S. HEPPS, ET AL. :

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Washington, D.C.

Tuesday, December 3, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:59 o'clock a.m.

APPEARANCES:

DAVID H. MARION, ESQ., Philadelphia, Pennsylvania; on behalf of the Appellants.

RONALD H. SURKIN, ESQ., Philadelphia, Pennsylvania; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Marion, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID H. MARION, ESQ.,

ON BEHALF OF THE APPELLANTS

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

Good morning.

Unlike the preceding case, this is a private individual's libel case, and also unlike the preceding case, there has been a full trial and a jury verdict in the court below. When I say that this is a private individual's libel case, I hasten to add that it also involves matters of public concern.

The jury verdict was for the defendants below. It was reversed by the Pennsylvania Supreme Court because the trial judge, in attempting to apply this Court's judgment in Gertz v. Welch instructed the jury that the burden of proving falsity was on the plaintiff, and the plaintiff had to prove both falsity and negligence in failing to discover the truth.

The Supreme Court of Pennsylvania reversed, applying instead a Pennsylvania statutory provision which the court below held codified common law, which puts on the defendant the burden to prove truth It is

our position, if it please the Court, that the Pennsylvania statutory scheme constitutes a conscious determination by the state to err on the side of punishing truthful speech on public matters, or speech that may be true, rather than allowing speech that may be false but was not proven false to go unpunished.

In other words, we have to look at what the burden of proof does in a case. The burden of proof decides the close case, and most libel cases that are fully litigated, as was this one, are the close cases on issues of falsity. The burden of proof says if you have a case where the evidence of truth or falsity is exactly equal, or if you have a case where there is no evidence on either side on the issue of truth or falsity, if the defendant has the burden, the speech of the defendant will be punished even though it may very well have been true and has not been proven false. It is this rule which we contend turns First Amendment law upside down.

Now, why do I say it turns First Amendment law upside down? Simply because in Pennsylvania the rule is instead of protecting some false speech in order to be sure we are protecting true speech that counts, that matters, Pennsylvania is willing to punish some true speech that matters in order to punish some false speech. In Garrison and Sullivan, this Court clearly

held 21 years ago that truthful discussion of public affairs cannot be the subject of criminal or civil sanctions. And the courts -- this Court since those holdings have been wrestling with the problem that the protection of truthful speech about public affairs is so important that we must also protect some false speech. That's why we have the rule for a public figure that even if the speech was false, we protect it unless it was knowingly false or recklessly false.

And Gertz says for a private figure case, even if the speech was false, we protect that speech unless it was at least negligently false.

QUESTION: Mr. Marion, here we have a private figure case, and as I understand it, the defamatory statement was couched in very broad, general terms, something to the effect that federal investigators have found connections between Thrifty and underworld figures, something about that broad.

MR. MARION: That --

QUESTION: Now, Pennsylvania has a shield law, as I understand it, so that the plaintiff, the private figure plaintiff here would be unable to in the course of deposition and discovery find out the source of those broad allegations. That makes it a pretty tough proposition in a case like this, doesn't it?

MR. MARION: Well, I must respectfully take issue with Your Honor on both premises of your question. In the first place, this was not a generalized statement that was libelous. The statements were very specific. The defendant said that the plaintiff companies had used organized crime influences to approach a named state senator and get him to influence the legislature and the governor.

QUESTION: Well, what if the allegation were as broad as I read to you, and in a jurisdiction where there is a shield law? Now, how is the plaintiff going to disprove?

MR. MARION: Very simple, Your Honor. Even assuming that the allegation was broad, let's say the allegation was so broad as simply to say the plaintiff had connections with organized crime, and we're not gong to tell you how we know, it seems to me, Your Honor, that in that case, just as in this case, in the court below, the plaintiff always knows whether or not there are connections with organized crime. The plaintiff can take the stand and testify, as this plaintiff did, I had no connection with organized crime. A good plaintiff's lawyer can ask him a series of questions, how did you conduct your business, did you conduct it lawfully, and so forth. Just by taking the stand and asserting his

honest conduct of business, his lack of any connections with organized crime, as a practical matter, that plaintiff shifts the burden of production of evidence to the defendant because if the defendant sits silent after the plaintiff comes and says what the facts are, the defendant runs a very real risk if not of defaulting on the case, of losing on the case, and no defendant will do it, and this defendant didn't do it.

This defendant came up with item after item of specific information of what the connections were. If you look in the record, in the Joint Appendix at page A-59, you will see a chart which shows all of the connections to organized crime by the name of the person and what his connection was. He was an employee, he was getting consulting funds and so forth. All of these things were specifically revealed --

QUESTION: Mr. Marion, may I interrupt you for a moment, Mr. Marion?

MR. MARION: Certainly.

QUESTION: It seems to me this cuts in the other direction because if the allegedly defamatory statement is that Thrifty has connections with organized crime, and the issue is whether -- say there is no doubt about the persons with whom Thrifty had connections. It had connections with Mr. A, Mr. B, and Mr. C, and the

issue is whether Mr. A, B, and C are members of organized crime or not, and you have indicated that the newspaper has all sorts of proof on that issue, but conceivably the Plaintiff might not know. He might say yes, I know Mr. A, B, and C very well, but as far as I know they don't have anything to do with organized crime.

Now, how can you say he's better able to prove that issue?

MR. MARION: If Your Honor please, in this case as in every case, the plaintiff has broad discovery rights. There was discovery in which, even though there was a shield law, all 15 sources were identified, the key sources were identified, and the basis on which the newspaper reporter said there were connections with organized crime was all laid out. It was laid out in the articles --

QUESTION: Well, that goes to whether they were negligent or not. The question that we are talking about, though, was whether in fact A, B, and C were members of organized crime, and who has more information on that subject?

MR. MARION: Well --

QUESTION: I mean, you -- everybody admits he has these connections, but are they the kind that

justified that comment?

MR. MARION: Well, in this case there was a Pennsylvania Crime Commission in existence which spends its entire existence studying organized crime and issues a report every year. That report -- and by the way, this wasn't disputed at all below --

QUESTION: No, but I'm suggesting that that kind of information is more apt to be available to the newspaper than it is to the individual who may or may not read all this stuff.

MR. MARION: Well, with discovery -- with discovery it is equally available to both sides, and it was in this case, and the plaintiff, by the plaintiff saying I know of no connections, you know, I dealt with A, B, and C, they're honest people, they're good people. I know of no connections to organized crime, that shifts the burden of production to the defendant, and in this case the defendant did come forward and say precisely what the connections were; it's all in the record; and why they were said to have the connections.

QUESTION: But all that seems to be persuasive to me of the point that you're perfectly able to discharge this burden of proof if it's placed on you. I don't see how that goes to the question of how the burden of proof shall be allocated.

MR. MARION: Because in a general matter, this case has to set a rule for all cases, and generally --

QUESTION: Everybody wants us to decide some other case. We have to decide this case.

MR. MARION: Well, if Your Honor please, in this case, looking only at this case, if you say to the jury the plaintiff said I know of no connections with organized crime, the defendant comes forward and says here are the connections, boom, boom, boom, one after another, the jury says I'm perplexed. He says I have no connections, the defendant says these were connections; what do I do? That's where the burden --

QUESTION: Well, that's what juries do every day.

MR. MARION: Exactly, sir, and every day in every tort that I know of, whether by common law or statute, the plaintiff has to prove the elements of his case every day.

QUESTION: Well, that's not -- that's not true. Well, to say that the plaintiff has to prove the elements of his case is a truism. The question is what are the elements of the plaintiff's case, and if you take res ipsa loquitur from tort law, there the law has allotted the burden to the defendant because the defendant is in possession of the information in a way

the plaintiff isn't, and it seems to me that's pretty much what your Supreme Court held here.

MR. MARION: I don't think so. Res ipsa loquitur has a rational connection between you have to establish certain facts, that the defendant was in control of the situation, and therefore it's more likely, there's some rational connection between the facts established and the fact presumed. Here there's no rational connection at all.

QUESTION: Well, isn't there a rational -- wouldn't it be rational for the law to say that the person who makes the accusation should have the burden of proving it's true rather than the person against whom the accusation is made should have the burden of proving its falsity?

MR. MARION: Well, it depends what accusation we are talking about. In every libel suit, as in this one, the plaintiff is the one that drives the defendant into court and accuses the defendant of lying. You liked about me. That's what the plaintiff's counsel said to the jury in this case. I will prove that what the defendant said about the plaintiffs was dastardly false. They lied.

QUESTION: Well, perhaps that's in the opening statement, but that doesn't mean that that's how the

burden of proof is allocated.

MR. MARION: The burden of proof, Your Honor, must be allocated to protect truthful speech about public affairs. That is the essence of the First Amendment, and if you say that if the evidence is balanced we're going to err on the side of punishing speech that may be true, you are depriving both the defendant and the public of the flow of truthful information about public affairs.

QUESTION: Well, but certainly this Court hasn't ruled thus far on the point you're making here.

MR. MARION: The Court -- no, this -- the Court has not ruled. The Court has made many statements which I would regard as dictum, including Justice White's statements in Herbert v. Lando, where he said in the old days the plaintiff had a presumption of falsity and the defendant had to prove truth, but now-a-days, with Gertz and with Sullivan and with Butts, the plaintiff must prove falsity and a standard of care with respect to that falsity that was breached.

QUESTION: Well, that's a -- that is the plaintiff's burden in some states, isn't it?

MR. MARION: Oh, yes. I think --

QUESTION: But it isn't in Pennsylvania?

MR. MARION: That is correct.

QUESTION: And so normally it may be that the state rules are that way, but it may not be that they are required by constitution, by the Constitution.

MR. MARION: Well, I submit to Your Honor --

QUESTION: That's the issue.

MR. MARION: -- that is the issue. Normally there are many procedures which we would not say rise tc constitutional level, but here for two reasons, both under the First Amendment and the Fourteenth Amendment, the burden of proof on falsity does rise to the constitutional level for this reason: number one, falsity is the line that divides protected speech from unprotecte speech, and this Court has always held that --

QUESTION: Of course, that wasn't a rule of common law, I take it.

MR. MARION: The common law had no regard for truth or falsity.

QUESTION: Exactly. It just said that there was a libelous publication, and that was it, if it was --

MR. MARION: That was it.

QUESTION: And if you say to me are you asking us to abrogate the common law in another respect --

QUESTION: Well --

MR. MARION: Indeed I am.

QUESTION: Well, it's already been done. That's already been done.

MR. MARION: I think it has.

QUESTION: As far as truth being a defense.

MR. MARION: And I would say let us not grieve for the common law of libel.

QUESTION: No, I am -- however that may be, but we've never said that not only is truth a complete defense, but that the plaintiff must prove falsity. We haven't said that.

MR. MARION: Well, I submit my reading of Your Honor's statement in Herbert v. Lando --

QUESTION: That was a Court statement, counsel.

MR. MARION: Court's -- was that that was the rationale for saying we must give the plaintiff discovery, and indeed, the plaintiff does have broad discovery. So there's a due -- Speiser v. Randall, normally it's all right to place the burden of proof on a taxpayer to prove that he doesn't owe the tax, but in that case the burden of proof was penalizing speech, and that was the difference, and this Court held there that when you're determining whether certain speech falls within the protected zone or the unprotected zone, you cannot put the burden on the speaker. The rule of the

Pennsylvania court thus violates that Fourteenth Amendment rule as well as the First Amendment rule that we must protect speech that was true or that may be true, and we have to have a margin of error. We have to have some breathing space. So we have to protect some falsity.

Now, the -- I've made two arguments --

QUESTION: Well, you have certainly by -- if there's a -- if there's a malice requirement -- is there a malice requirement here or not?

MR. MARION: No, sir. This is a Gertz case --

QUESTION: Because the negligence.

MR. MARION: The lowest level --

QUESTION: There's the negligence --

MR. MARION: -- of fault, negligence.

QUESTION: So you can negligently lie and still not be liable. Now, that's certainly a cushion, isn't it?

MR. MARION: Well, I think, Your Honor, there's a --

QUESTION: You want more than that.

MR. MARION: We could negligently lie --

QUESTION: And be -- and get off.

MR. MARION: That's true. That's true.

QUESTION: That's part of the elbow room that

you're talking about?

MR. MARION: Exactly, exactly. I think in my opponent Mr. Surkin's brief there's a beautiful hypothetical which I think illustrates the issue in the case. He says suppose with absolutely no supporting information a reporter writes that a private citizen bribed a state official -- this is on page 20 of the appellate -- Appellees' brief, in Footnote 9. I think this is the hypothetical that's bothering the court.

Suppose with no basis a reporter says the plaintiff bribed a state official to get a zoning variance. How did the reporter come up with it? Divine inspiration, a hunch, I have a feeling something's fishy, but in complete irresponsibility publishes it with no basis. And Mr. Surkin also hypothesizes it happens that that's true. He says the reporter was negligent but lucky.

Now, how should that case be decided? That is the crux of this case. And I say to you that case should be decided for the defendant, and I'd like to explain why.

The reason I say that is this: what interests are we trying to protect? We don't care about that reporter because he was worse than negligent, he was malicious. He was completely irresponsible. But he

reported the truth. There was a bribe of a public official.

We don't care particularly about the interests of the plaintiff in that case because he was a briber. Why should he get a windfall libel recovery simply because the defendant can't prove the truth.

Let us assume in that hypo that just as the reporter had no basis for his story when he wrote it, he has no basis to prove the truth of it at trial. Therefore, there is no proof that it was true.

QUESTION: But if he isn't lucky what do you say?

MR. MARION: Well, even if he is lucky, Your Honor --

QUESTION: Well, what if he is not lucky and it's not true?

MR. MARION: If it's not true, I say the plaintiff who wants to recover the damages should prove that it's not true. If it is true and he was lucky, I say that public interest, forgetting the parties, the public interest is that the truthful information about governmental corruption should get out to the people. That's what the First Amendment is designed to protect. Even though we don't want to --

QUESTION: Mr. Marion, you are -- it seems to

me you are changing your hypothetical. You are assuming it's true. It seems to me the assumption has to be --

MR. MARION: That's his hypothetical.

QUESTION: I know, but the assumption for your argument has to be we really can't tell whether it's true or not.

MR. MARION: Exactly.

QUESTION: It may be true and it may be false. The reporter was totally irresponsible in publishing it. And you're saying that when the scales are equally balanced as to whether it's true or false, you know it's going to libel somebody seriously, you should go ahead and publish. That's your point.

MR. MARION: I'm not saying he should go ahead and publish.

QUESTION: Oh, that's exactly what you said.

MR. MARION: No, I'm saying --

QUESTION: He comes to you as a client and says do I or do I not publish it, and you say, well, if you've got a 50-50 chance of proving it's true you should publish.

MR. MARION: If he comes to me as a client, I tell him not to publish unless he has some basis. But that's not the hypothetical. He's already published.

QUESTION: He's got a 50-50 basis.

MR. MARION: No. He's got to have some basis, Your Honor. I don't know what 50-50 means.

QUESTION: Well, that's a pretty good basis, there. You've got a 50-50 chance, and the public is surely entitled to this information you said.

MR. MARION: The public is entitled to it. What I'm saying is you can't penalize it if it may be true. It's got to be proven false, and the final argument I would make on that issue is I'd like to discuss the relationship between falsity and fault, which is raised by the Gertz case, falsity and fault.

We recognize that it's possible to isolate falsity and speak about it separately from fault. But the question we ask the Court, does that make sense, is it rational? And the way to decide whether it makes sense is to say what is the purpose of the fault requirement to begin with?

Now, Justice Powell, concurring in Cox Broadcasting, after the Gertz opinion had been written, said that our -- that the Court's opinions dealing with the First Amendment limitations on state defamation actions have undertaken to identify a standard of care with respect to the truth of the published facts that will afford the required breathing space for First Amendment values. And let me repeat that. What we are

doing, what this Court has been doing is establishing a standard of care with respect to the truth. We are not interested in a standard of care and fault in a vacuum. It's fault in failing to ascertain the truth that is the issue before the Court in every libel case, and that's why the trial judge's charge to the jury, which is in the Joint Appendix in this case, was the rational way for the jury to consider these issues, not to say that in such an intertwined issue as truth as fault, care in ascertaining truth, to say on the care part of that the plaintiff has the burden, but on the ascertaining the truth or the truth, the defendant has the burden. That makes no sense, it's irrational, it puts too great a burden on the jury.

First the jury should find whether the plaintiff proved falsity. If it's not false, it doesn't matter how careless or reckless the defendant was in the abstract; the fault we are interested in is fault in failing to discovery the falsity. And that is why I believe Justice White said what I think is obvious in Herbert v. Lando that the plaintiff, that he's got to establish fault. If that's the floor, the threshold for liability to protect First Amendment rights, then he must also establish falsity. Falsity is the essential element of a libel case. It's the dividing line between

protecting speech and not protecting speech, and what this case comes down to, I respectfully suggest, is what is it more important to protect? If you put the burden of proof on the plaintiff, some defendants will go unpunished, even though they made false statements that the plaintiff can't prove to be false. That is unfortunate, but that is not unconstitutional.

If on the other hand you put the burden on the defendants will be punished for making truthful statements that they are unable to prove are true, and that is not only unfortunate but unconstitutional as a violation of both the First and Fourteenth Amendments.

Therefore, we urge this Court to invalidate the Pennsylvania statute that puts the burden on the defendant and reinstate the jury verdict for the defendant below.

CHIEF JUSTICE BURGER: Mr. Surkin?

ORAL ARGUMENT OF RONALD H. SURKIN, ESQ.,

ON BEHALF OF THE APPELLEES

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

The Philadelphia Inquirer argues that every private figure libel plaintiff in every case to which the rules of Gertz v. Robert Welch applies must have the burden of proving falsity as a matter of federal

constitutional law, and that a 140 year old Pennsylvania rule codified by statute which places the burden of proving truth on the defendant is therefore unconstitutional.

Its contention is not supported by history or precedent or policy. The issue of truth or falsity is very different from the issue of fault. The two are not intertwined. The proper balance between the fundamental societal interests in free press and protection of private reputation will not be achieved if in addition to proving fault the private figure libel plaintiff is required to prove that the defamatory statements publicly made about him are untrue.

Since 1790 the Pennsylvania constitution has explicitly provided that the rights of acquiring, possessing and protecting reputation are inherent and indefeasible rights, just as are those of enjoying and protecting life, liberty and property. The constitution also provides, and I quote, "every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law."

Based upon these important Pennsylvania constitutional provisions, the Pennsylvania Superior Court in 1898 in the case of Commonwealth v. Swallow, held that the rights of the publisher and of the person

defamed, and again I quote, "rest on the same constitutional ground and demand an exact balance of the scales of justice."

The balance of rights which had existed in Pennsylvania, that is, between free press and protection of private reputation which is required by the Pennsylvania constitution, was seriously upset by the ruling of the trial court in this case declaring that the Pennsylvania statute placing the burden of proving truth on the defendant was unconstitutional. It was unnecessary for the trial court to have done that because --

QUESTION: Mr. Surkin, you referred to a decision of a Pennsylvania superior court.

MR. SURKIN: Yes, sir.

QUESTION: Is the decision of th Pennsylvania Supreme Court in this case the first time it has ever so ruled?

MR. SURKIN: No, sir. The Pennsylvania Supreme Court I believe in an earlier case, in 1885 -- it didn't say it in exactly the same language, but it was a case called Meese v. Jackson, which is 185 Pennsylvania 12, an 1898 case also, said that reputation is in the same class of rights with life, liberty and property. Now, the -- that --

QUESTION: But it took a long time for the Supreme Court to make the flat statement, didn't it?

MR. SURKIN: Yes, sir, it hadn't come up, quite frankly. The issue had never arisen since then. The Pennsylvania Supreme Court in -- during the 1970s in two other cases has relied upon this Pennsylvania constitutional provision for certain explicit reasons. One is n a case called Moyer v. Phillips, a 1975 case, the Pennsylvania Supreme Court rules that the right of defamation, to claim a cause of action of defamation, must survive the death of either the plaintiff or the defendant because the cause of action of defamation is protected by the Pennsylvania Constitution and stands on the same basis with other causes of action.

There was another case in 1978 where the Pennsylvania Supreme Court was ruling on an issue where somebody was illegally committed to a mental institution, and when that person was found that the commitment was illegal, and then that person petitioned to have the records of his commitment destroyed, and the court held that because the right of reputation is so important, the court would order destruction of those records.

Those to my knowledge are the only times that this specific provision has been construed by the

Pennsylvania Supreme Court.

So the question I think that we have to face here is whether the rule of Gertz, which says that the states may not impose liability without fault, also means that the private plaintiff must, in addition to proving fault, prove falsity, and I think the answer to that is an unequivocal no.

Falsity can be proved without resort to proof of fault, and fault can be proved without resort to evidence of falsity. The two are not intertwined. Mr. Marion gave the example that I have in my brief of what I call the lucky reporter, and I think that's an important example to keep in mind. It shows how the two issues are very separate from each other, and I think going beyond that point, we have a question of whether the Court wants to create rules that might encourage the reporter to act like this lucky reporter. We could very well have a situation where a reporter does what the reporter did in my case, and the reporter happens to be working for the New York Times or the Philadelphia Inquirer, the two most important newspapers in their respective cities, each of which have a substantial amount of credibility within their communities.

In Pennsylvania we have an extremely broad shield law, as has been indicated. If it turns out that

the private -- that that report is untrue, the private plaintiff gets on the witness stand and he says I didn't pay that bribe, or perhaps the public official gets up and he says I never accepted the bribe, that would be the only evidence that we could put forth in that type of case. The reporter gets on the stand and says I have a confidential source, an extremely reliable confidential source in city government who I have relied upon dozens of times in the past, and he told me that the bribe had been paid and he saw the money change hands. I can't tell you who it is because it's a confidential source, but I can tell you that he's extremely reliable.

In that type of a case, when the jury retires, they have Mr. Nobody literally, on one side, a private person saying I didn't pay the bribe, although he did get the variance, the fact is he got the variance, and the reporter, backed by the credibility of his newspaper on the other side --

QUESTION: It is said, however, that the shield law is not particularly important because you are concerned here with information, not source.

What comment do you have about that argument?

MR. SURKIN: The Pennsylvania shield law, Your Honor, has been construed to apply to any information or

any source which the reporter has chosen not to publish. It is an extremely broad construction of our shield law by our Pennsylvania Supreme Court. If the reporter has information which he chooses not to publish, he cannot be compelled to disclose the nature of that information, nor can he be compelled to disclose the identity of any sources, nor can he be compelled to disclose the existence of any documents he might have.

And by the way, it doesn't matter if those sources are considered to be confidential in Pennsylvania. In other words, the reporter did not have to promise his source that you will give me this information on a confidential basis. It is entirely within the reporter's discretion in Pennsylvania, and this is the way our supreme court has interpreted our shield law, and it applies in every type of legal proceeding, whether that be criminal, civil or administrative, and even legislative, it seems.

QUESTION: Well, I can accept all that, but why is the source so important when you are concerned with information, is my question.

MR. SURKIN: Well, it was important in the sense that -- of the example that I gave, we have a situation, we are assuming a situation where the reporter had no source, he made it up. But then he gets

on the witness stand and he says he did have a very reliable source, and because of the shield law, there is no way to disprove that. It can't be challenged. That's my point.

We can't get beyond that shield law to take additional discovery to find out if he did have a source, and if he did have a source, whether the source really said that.

QUESTION: Mr. Surkin, do you think that the existence of the shield law in Pennsylvania is something that can be factored into the federal constitutional equation in a ay that Pennsylvania can allocate the burden of proof the way it has in this case, at least where there's a shield law, even though perhaps some other state that didn't have a shield law might not for First Amendment purposes be able to have the burden of proof that way?

MR. SURKIN: I believe that that's a possible decision, conclusion that this Court could come to in this case, that in those states that do have shield laws, it would be unconstitutional and an improper balance of the rights to put the burden of proving falsity on the plaintiff, but I don't believe that the Court's decision should be based upon that because I believe under Gertz and the other decisions of the Court

since Gertz that entire area should be left to the states to balance as they see fit, as long as they do not impose liability without fault.

Now, the proof of fault that I was talking about before, fault focuses on how the reporter developed his story, and how his editors, on reviewing a potentially defamatory story, satisfied themselves that the reporter had a reasonable basis for believing that what he wrote was true. We are talking here about who and what were the sources. Were the sources credible? Why were they credible? Did the reporter get both sides of the story? Did the reporter bother to interview the person he was about to defame? Was it a hot news piece or was it an investigative piece? Were there confidential sources relied upon, and if so, was their information confirmed or confirmable? We might have expert testimony from a journalist saying what a reasonable journalist in the community would have done by way of investigation under the circumstances.

None of that evidence involves evidence of falsity. Evidence of falsity I think is entirely distinct from that. Essentially, it will come out either by the plaintiff or his witnesses testifying directly and producing documents that can show, depending on the type of defamatory statement involved,

that can show directly that the statements were untrue. Or it might just be the plaintiff and his witnesses taking the stand and denying the allegations in the story, which, as Justice O'Connor pointed out, is essentially what could be -- the best that could be done in this case, to deny that one is connected with organized crime. You can't very well subpoena the membership lists of organized crime --

QUESTION: Mr. Surkin, if this weren't a private plaintiff but a public figure, what about the burden then?

MR. SURKIN: I think in a public figure case, Your Honor, the burden of proving falsity is on the plaintiff, and I think because in that case the issue of falsity is inextricably intertwined with the issue of actual malice. You have to prove what the reporter actually knew and that he knew something different than what he published.

QUESTION: But you think you can separate the two in a private case?

MR. SURKIN: I think clearly they can be separated, Your Honor, and I would also say that a jury can separate them because I think if special interrogatories were submitted to a jury and you submitted the issue of falsity to the jury and

negligence to the jury, and the jury found falsity but not negligence, or vice versa, I don't believe a court would overturn that as being inconsistent.

I could easily see a situation where a jury found that the plaintiff's witnesses were more credible than the defense witnesses.

QUESTION: So a witness -- so the plaintiff and his side of the case is in a sense saying all I have to do is just claim that these were true, and I am favored by a presumption, and so his case goes forward on the basis of the --

MR. SURKIN: The plaintiff claiming that they're true or false, sir?

QUESTION: That they're false.

MR. SURKIN: Yes.

QUESTION: He says they're false, and I have a presumption that they're false, and he goes forward on the basis, if these statements are false, there was negligence.

MR. SURKIN: That's correct. He could -- a plaintiff could conceivably prove his case in that way in Pennsylvania.

QUESTION: Well, then, if he hasn't got the burden, that's probably the way he does it.

MR. SURKIN: Well, I think as a practical

matter, Your Honor, most plaintiffs will try to prove falsity.

QUESTION: On their side.

MR. SURKIN: If they can, on their side of the case, rather than waiting for rebuttal.

QUESTION: Then he will ask for instructions; the instructions are that the defendant has the burden.

MR. SURKIN: That's right, and that makes a big difference, Your Honor. I think it makes a big difference in a trial, it makes a big difference in the balance of rights in the close cases, as I agree, Mr. Marion points out that it does make a difference, and that's what we are arguing about here, but it makes a difference because of the rights that we are balancing here. That's the decision that the Court has decided to make.

What Gertz involves is an issue of balancing the rights of free speech and free press with the rights of the individual, private reputation, both of which are considered to be important, and you have to give some breathing space which you do through the fault or the negligence requirement, but at the same time, you have to give the plaintiff a fair chance to prove his case because his rights are important as well.

Now, the fact that the two -- the two rules,

that there's the burden of proving truth being upon the defendant and the burden of proving fault or negligence being on the plaintiff is not logically inconsistent, as evidenced by Pennsylvania law itself. We've had those rules in Pennsylvania since 1885. The -- in Pennsylvania, which has a libel law which has not run in the mainstream, it has been the burden of the plaintiff to prove negligence and the burden of the defendant to prove truth, if he defends on truth, and he doesn't have to, but if he does, and those two have coexisted since 1885 without conceptual difficulty.

I think my reading of Gertz, that Gertz, the requirement of fault does not also require falsity, is also supported by the majority opinion of this Court in Cox Broadcasting versus Cohen where the Court one year after Gertz said that the Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person.

Now, if the Court has not decided that issue as of that time, which was after Gertz, it certainly could not have decided that the Plaintiff must have the burden of proving falsity.

Pennsylvania libel law, I believe, represents

a textbook example of the proper balance of the fundamental rights that have to be accommodated in a private figure libel case. It's structure fits comfortably within the substantial latitude which Gertz extended to the states in fashioning their libel laws. It maintains a permissible balance between equally fundamental rights which are protected equally under the Pennsylvania Constitution, and it is not inconsistent with the federal constitutional requirement that the plaintiff prove fault.

Now, I've mentioned a few aspects of the matrix of Pennsylvania law, and I think it's important just to highlight them again. We have for a long time had the burden of proving truth on the defendant if it's raised as a defense, and it is only one of many, many defenses that a defendant has. We've had the burden of proving fault or negligence placed on the plaintiff. We have the shield law because the plaintiff has to sustain his burden of proving negligence without necessarily being able to require the reporter to divulge any sources that he chooses not to divulge. And the Inquirer in this case is asking for a rule of general application where in some future case you may be faced with the precise issue that Justice O'Connor raised, where no sources are disclosed, and it's just the bare

case of we had good sources, we had reliable sources. We're not going to tell you who they are, but we'll tell you they're reliable, and we've used them in the past. And then you go and ask the plaintiff to prove he's not connected with organize crime.

I think the factual context of this case, how this case arose, is also important for the Court to understand. We go back to Monday, May 5, 1975 when Maurice Hepps opened his copy of the Philadelphia Inquirer, which was one of 800,000 copies distributed that day, and he read on the front page a story, the thrust of which was that he and his chain of beer distributorships, Thrifty Beverage, was tied to or infiltrated by organized crime. Similar stories repeating, developing, and expanding on that defamatory theme, appeared four more times during the ensuing year. On September 15, 1975 the Inquirer wrote "Federal authorities," who by the way they have refused to identify to this day, "Federal authorities have found connections between Thrifty and underworld figures." On May 2, 1976 they wrote unequivocally that Thrifty Beverage beer chain had connected itself with organized crime. The May 2 article was the last article. This lawsuit was filed two days thereafter.

After each particle was published Mr. Hepps

telephoned the reporter. He denied the allegations were true. He offered to meet with the reporter. He offered to open his entire books and records to the reporters for examination. The denials were never published. The reporter declined the invitation to examine the books and records. At trial the reporter, Mr. Ecenbarger in this case, said he saw no need to do so because he knew in his own mind that the articles that he had written were true.

During the questioning, the cross examination of the other reporter, Mr. Lambert, there was this exchange. "Question: Would you think there is an obligation on the part of a reporter at least to meet and talk with the person about whom an article has been written, which person calls the reporter and says what you wrote about is untrue?"

Mr. Lambert said no. He went on to explain why. He said it's like asking a man if he beats his wife. The answer is an automatic no. No one would ever admit he was associated with a friend of an organized crime figure. So, in other words, why should we bother asking? We know what the answer is going to be already. So we won't try to get that side of the story.

QUESTION: Is there any evidence in this

record negating the suggestion that federal authorities were the source of this, that is, by bringing in the FBI and whoever else is involved and having them state that they gave no such information?

MR. SURKIN: Your Honor, we don't know who gave the information. The Inquirer reporters would not disclose who that was. They were sources connected with the federal government, and we don't know if it was FBI, we don't know if it was a grand jury marshal, for example.

QUESTION: Was there anything to prevent you from, or the plaintiff from calling the FBI and the CIA and the United States Marshal and the prosecutor one by one and having them deny they ever gave any such information?

MR. SURKIN: No, but that would have involved having to call an enormous amount of people, Your Honor, because we don't even know who they had spoken to. Mr. Lambert said he had a source in Washington who told him that. There was a grand jury investigation going on in Philadelphia. Mr. Lambert's source, he said, was a source from the Department of Justice in Washington, and that's all we knew about it. It was a practical impossibility.

QUESTION: I imagine you found a certain

reluctance on the part of some of those sources to come and testify.

MR. SURKIN: I'm sure, Your Honor, that were we to subpoena any of those people, we would get objections, motions to quash those subpoenas, invasion of grand jury secrecy, a variety of other things, claims that we were trying to somehow get into the grand jury to use it in our civil case or some other civil case, and I think as a practical matter, given that type of a situation --

QUESTION: It would be one way of proving the man was a liar, wouldn't it be, however cumbersome?

MR. SURKIN: It would be a way, but it would be enormously cumbersome and I think practically impossible in any given case, Your Honor.

Now, we did know who some of the sources were in this case, and some of those sources came in to testify, but we didn't by any means know all of the sources, and we didn't know who we considered to be crucial sources. The reporters invoked the shield law 20 times during the course of the trial, 20 separate occasions which the judge supported, and we don't know who that information came from, whether that information even existed, and certainly what it was. We do know in one case, one time Mr. Ecenbarger testified he wrote in

his article that the particular state senator involved, a Senator Frank Mazzei, had no "visible," the word "visible" I believe was in quotes, financial links with Thrifty or financial ties with Thrifty. We did ask Mr. Ecenbarger what that was based on and he said, well, federal authorities, federal authorities thought he had financial ties with Thrifty but they couldn't find any.

So he wrote they have no visible financial links with Thrifty, and that's how that came out. But that's the extent of the information that we were able to get from the federal sources, whoever they might have been.

Now, after these articles appeared, the chain stopped growing. Some stores left the chain, other stores lost business. There was evidence at trial of damages exceeding $5 million from this defamation. There was a strike force grand jury investigation. The Internal Revenue Service audited ten years of Thrifty's records. No indictment was ever issued after the grand jury investigation. The IRS concluded its audit by determining that the government owed Thrifty $278. Even though the Inquirer published the fact of the existence of these investigations, it never published how the investigations terminated.

So when Hepps sued for libel, he of course

tried to prove that what was written about him and his chain was untrue. But he was stymied because of the amorphous nature of the charges and because of the invocation of the shield law.

Now, the Inquirer and its amici in this case suggest that even if the Gertz rule of fault does not include falsity, that the Court should fashion a new constitutional rule to give more protection to the press than the protection that Gertz allows, and we believe that this argument fails for three reasons. It fails first because it fails to give adequate or sufficient constitutional weight to reputation, which is also entitled to protection. It fails second because it lacks fundamental fairness. And it fails third because there is no compelling evidence that the press is not adequately protected under Gertz.

The court has repeatedly reaffirmed the importance of individual private reputations in Gertz, again in Dun & Bradstreet, on numerous other occasions. The Court has quoted Justice Stewart's statement in Rosenblatt v. Baer that the individual's right to protect his own good name is a concept at the root of any decent system of ordered liberty and a basic of our constitutional system. In Palko v. Connecticut, Justice Cardozo used substantially identical words, the words

implicit in the concept of ordered liberty to describe First Amendment rights.

We believe this is not a coincidence. The Bill of Rights reflects the concept of the essential dignity and the worth of every individual. From that concept there flows a variety of rights which this Court has deemed to be essential, and as long as a proper balance is maintained among those various rights, the underlying concept of human dignity will remain viable. When one right is -- no one of these rights should be favored without compelling reason to the virtual exclusion of any of the other rights.

With regard to the issue of fairness, there is much in the briefs on both sides on whether it is more fair to have the plaintiff prove falsity, more fair to have the defendant prove truth. I don't want to restate those arguments. What I want to do is add something else into the equation.

The Inquirer is part of a powerful, increasingly consolidated industry which has created a virtual daily newspaper monopoly in substantially every city in the nation. The significance of that fact in this case is that the preferred means for any individual, especially the private person, to defend himself against a barrage of defamatory statements, that

is, by responding to words with words, is essentially unavilable. Philadelphia, although it has two newspapers, is basically a one newspaper town. Philadelphia Newspapers, Inc. owns both of the newspapers, and that is only one example.

The saying that the press is indeed free to everybody who owns one is not without relevance in this discussion. It will be recalled that in this case, even though Mr. Hepps called the Inquirer reporters after each of the articles appeared, the reporters refused to talk to him despite his requests, and they never published his denials.

On the issue of self-censorship, I would submit, which is raised by the Inquirer in its brief, I would submit that that's not truly an issue here. We have to keep in mind that regardless of what the Court decides in this case, on the issue before the Court, a defendant who reasonably believes that what he wrote was true will never have liability. A defendant who has published truth is, if he has acted in a reasonable manner, will either be able to prove truth or prove that he had a reasonable basis for believing that it was true. If he can't prove either of those, he is probably in the situation of the reporter who is publishing based on no substantial facts at all, and I don't believe the

Court should fashion a rule that would encourage that kind of conduct.

Those statistics that are available would indicate that the press has fared reasonably well under Gertz. In the summer-fall 1984 issue of the Libel Defense Resource Center Bulletin, it was found that of the few cases that went to trial, 56 percent of private figures were successful versus 55 percent of public figures, and 50 percent of public officials. The consistency of those statistics would indicate that a negligence standard has not created an open season on the media.

Also, at least as of mid-1974, the last time that I have seen statistics available, there has not been one million dollar judgment yet affirmed in a libel case.

The case before this Court involves a newspaper which defamed a private citizen through guilt by association of connections to the amorphous entity called organized crime, and of illegal and immoral business conduct. It did so without getting his side of the story in advance, and it refused to print or even to listen to his side afterwards. Although it was the accuser, its lawyer told the jury, and I quote from Mr. Marion's closing argument to the jury, "We do not have

to put on any evidence. We have no burden on us."

Now it comes to this Court and it says ignore the history of libel law. Ignore the Pennsylvania constitution which in Article 1, Section 1 explicitly protects reputation as an inherent and indefeasible right. Ignore the rights of the states under the Ninth and Tenth Amendments to fashion appropriate remedies for libel. Ignore all these things and require the private plaintiff to prove that he is not guilty of the charges we have leveled against him.

Ever since Gertz, this Court has consistently resisted efforts to further constitutionalize the law of private figure libel. It has done so in proper deference to the fundamental value of a private individual's reputation and the freedom which the Constitution grants to the states in our federal system to protect private reputation through the experimental laboratory of its courts and its laws.

Explicit in these rulings is the understanding that the need to protect private reputation and the right to freedom of speech are themselves inextricably intertwined. They both support and they both give meaning to the concept of individual dignity.

Accordingly, absent a truly compelling showing of necessity for the sweeping new rule which the

Inquirer is seeking here, which simply has not been made in this case, the factors of policy, history, basic fairness and interests of federalism all point to the conclusion that the Court should continue to allow Pennsylvania the latitude to allocate the burden of proving truth or falsity in a private figure libel case as it sees fit, keeping in mind that whatever it decides on that issue, it will not be imposing liability without fault.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF DAVID H. MARION, ESQ.
ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. MARION: Yes, Your Honor. I believe I reserved a few moments.

CHIEF JUSTICE BURGER: Yes, you have.

MR. MARION: I would like to face this issue of the shield law directly.

There are two answers to it. Number one, in this case and in most cases it is a completely phony issue. This is proved if you look in the joint appendix at page A-91. The plaintiff had a point for charge to the jury in which the plaintiff set forth the four assertions it claimed were false. None of these

assertions is amorphous, as Mr. Surkin says. Each claimed false statement is detailed. Secondly, none of those four statements has anything to do with confidential sources. There was no obstacle in proving the falsity of them by the fact that the shield law was involved in this case.

For example, the first one is the Thrifty chain had been banished by order of the Court of Common Pleas of Lancaster County. That's a matter of court record. The court records of Lancaster County were put into evidence. The jury could decide whether it was fair or not fair to say that the Thrifty chain had been banished. There is no source issue involved.

QUESTION: Mr. Marion, tell me again, how long has Pennsylvania had its shield law?

MR. MARION: 1937, I believe, and it's been re-enacted --

QUESTION: So it's an old one.

MR. MARION: It's an old one. It has been re-enacted as recently, I believe, as 1978. And it was re-enacted after the Pennsylvania Supreme Court gave the broadest possible interpretation of it.

But I say to this court, how can we fashion a rule of federal constitutional law based on Pennsylvania shield law? I don't think we can.

And secondly, the issue of falsity is not dependent on who the sources were. It is dependent on what the assertions are and can you prove them false. And if you look on A-91, you will see all of these assertions were provable.

And I ask you another thing. We have to be practical. If you were a defense lawyer, would you rather go before the jury and say I got this information from a source; I can't tell you who it is, or would you rather be able to bring in the FBI, the organized crime strike force, the CIA and so forth and have them say yes, I gave this information to this reporter? No defendant wants to try his case and rely on the shield law if he doesn't have to because it invites the argument which Mr. Rome made vigorously in the trial court. Maybe they're making it up. How do we know? And what's the answer to maybe they're making it up? It's like any other question of jury credibility, jury determination of witness credibility. The plaintiff in this case spent 80 transcript pages taking every statement alleged by him to be false and telling what the truth was, 80 pages. The plaintiff in its case then put Mr. Ecenbarger, the reporter, on the stand for seven trial days under cross examination, about six days on cross, one on redirect, seven trial days the reporter

was on the stand, and the jury could determine the credibility of the plaintiff and of the reporter? Was he making up the sources? Obviously the jury didn't believe so, and obviously the key contended areas of falsity had nothing to do with confidential sources, as you will see when you read page A-91 of the record.

So the shield law s a phony issue.

Now, the common law issue, I made somewhat of a facetious statement in my argument which I didn't have a chance to follow up about not grieving for the common law of libel, but seriously, the common law of libel we know goes back to the days when we had an environment of absolute government, not democracy. The common law of libel was used to suppress speech, not to encourage truthful speech on public affairs as our Constitution does. The common law of libel said all the plaintiff has to do is show that he's insulted, and immediately --

QUESTION: Well, are you talking about the common law of England? Is that what you're talking about?

MR. MARION: The common law of England and carried forward right into America until Sullivan.

QUESTION: When did -- how did truth come to be a defense?

MR. MARION: Truth came to be a defense by common law development because --

QUESTION: Fox's libel law. Wasn't it Fox's libel law?

MR. MARION: Yes, I believe so, and it was a common law decision that a plaintiff --

QUESTION: Had to prove.

MR. MARION: No, the defendant had to prove truth because a plaintiff was unworthy to recover if it was true.

QUESTION: But the fact that truth was a defense came about as a common law development.

MR. MARION: It came late in the common law development. Originally the saying was the greater the truth, the greater the libel because libel law was used to suppress dissent.

QUESTION: So you don't want that part of the common law to die.

MR. MARION: To die?

QUESTION: That truth is a defense.

MR. MARION: I say it's not enough to say that truth is a defense when you're talking about speech, when you're putting the burden on the speaker to prove that he's within the protected zone of constitutional protection, and I say that this Court cannot now march

backward to the 18th century to resurrect Pennsylvania common law when it has recognized the constitutional interest in a democracy of free speech on public affairs.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:57 o'clock a.m., the case in the above-entitled matter was submitted.)

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#84-1491 - PHILADELPHIA NEWSPAPEPS, INC., ET AL., Appellants V.

MAURICE S. HEPPS, ET AL.

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BY Paul A. Richardson

(REPORTER)