ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: .	)	
	)	
HUSTLER MAGAZINE AND LARRY C. FLYNT,	)	
	)	
Petitioners,	)	
	)	
v.	)	No. 86-1278
	)	
JERRY FALWELL.	)	

Pages: 1 through 48

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Petitioners, :
V. : No. 86-1278
JERRY FALWELL :

Washington, D.C.
Wednesday, December 2, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ALAN I. ISAACMAN, ESQ., Beverly Hills, California;
on behalf of the Petitioners.

NORMAN ROY GRUTMAN, ESQ., New York, New York;
on behalf of the Respondent.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 86-1278, Hustler Magazine and Larry C. Flynt versus Jerry Falwell.

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

ORAL ARGUMENT OF ALAN L. ISAACMAN

ON BEHALF OF PETITIONERS

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

The First Amendment protects all speech except for certain narrowly drawn categories. For example, the First Amendment does protect false statements of fact made with requisite fault. The First Amendment doesn't protect obscene speech. The First Amendment doesn't protect fighting words made in the presence of the person to whom the words are addressed and likely to incite violence.

This cases raises as a general question the question of whether the Court should expand the areas left unprotected by the First Amendment, and create another exception to protected speech. And in this situation, the new area that is sought to be protected is satiric or critical commentary of a public figure which does not contain any assertions of fact.

QUESTION: Are you suggesting that would be a change in our constitutional jurisprudence to protect that?

MR. ISAACMAN: Yes, sir, I am. I am suggesting that.

In a specific way, the question becomes: is rhetorical hyperbole, satire, parody, or opinion protected by the First Amendment when it doesn't contain assertions of fact and when the subject of the rhetorical hyperbole is a public figure. Another way of putting this case is, can the First Amendment limitations which have been set out in New York Times versus Sullivan and its progeny be evaded by a public figure who instead of alleging libel or instead of alleging invasion of privacy, seeks recovery for an allegedly injurious falsehood by labeling his cause of action intentional infliction of emotional distress.

In judging the publication that's at issue here, I think it's important to look at the context in which it appeared. The speaker of course was Hustler Magazine, and Hustler Magazine is known by its readers as a magazine that contains sexually explicit pictures, and contains irreverent humor. As an editorial policy, it takes on the sacred cows and the sanctimonious in our society. It focuses on three subject areas primarily. It focuses on sex, it focuses on politics and it focuses on religion.

Hustler Magazine has been the target of attacks and critical commentary by Jerry Falwell for years and for years prior to this ad publication. Hustler Magazine is at the other

end of the political spectrum from Jerry Falwell. On the other hand, Jerry Falwell filling out the context of this speech, is the quintessential public figure. It's hard to imagine a person in this country who doesn't hold political office who can has more publicity associated with his name than Jerry Falwell.

Jerry Falwell is the head of the moral majority. The moral majority, he testified at the trial, numbers some six million people. It's a political organization, he indicates. It was set up to advance certain political views. One of the foremost views is to attack what he considers to be pornography, and to attack kings of porn, in his words. And foremost among those kings of porn in his mind is Larry Flynt. He includes in that group others as well, such as Bob Guccioni of Penthouse and such as Hugh Hefner of Playboy.

The moral majority and Jerry Falwell also attack sexual conduct that they don't consider appropriate. He has spoken on the subject of extramarital and premarital sex. He doesn't approve of heterosexuals living together outside of wedlock. He also doesn't approve and condemns homosexuality. Now, these aren't private views he has kept to himself or just shared with his family. These are views that he's gone on the political stump and tried to convince other people about.

He has been known in his words, as he testified, by the Good Housekeeping magazine which did a survey as the

second-most admired man in the United States, next to the President.

QUESTION: Well, Mr. Isaacman, is the fact that you claim Mr. Falwell is a public figure in dispute in this case?

MR. ISAACMAN: It isn't in dispute at all.

QUESTION: Well, then, I guess we could move on to the arguments, because apparently your remarks are for the purpose of demonstrating he's a public figure. Is that right?

MR. ISAACMAN: Justice O'Connor, it's to really to fill out the political context and the fact that what we have here are people who are at opposite ends of the political spectrum, engaging in the uninhibited robust and wide open debate in New York Times v. Sullivan.

QUESTION: Does the State have an interest in protecting its citizens from emotional distress, do you suppose?

MR. ISAACMAN: Clearly, the State has an interest in protecting its citizens from emotional distress.

QUESTION: And perhaps that's an even greater interest than protecting reputation.

MR. ISAACMAN: I would submit that it is not a greater interest than protecting reputation, because in the area of reputational injury, libel as we know it, for example, when it's in written form, emotional distress is an element of recovery as well as damage to reputation, and reputation

affects what other people think of you. It affects what goes on in the minds of other people as well, and not just the minds of one citizen. So reputation in a sense covers a lot more territory than emotional distress does.

And the point of what I'm trying to make is that we really have people who are engaging in political debate in a way that involves vehement caustic and sometimes unpleasantly sharp language, as the New York Times v. Sullivan used.

Now, this speech is protected as rhetorical hyperbole, it's protected as satire and parody and as the expression of opinion.

QUESTION: Would this be a different case if the jury had found that the allegations could be considered factual?

MR. ISAACMAN: It certainly would be a different case. It certainly would be a different case.

We think that even in that situation, this Court should find that these allegations could in no way be perceived as factual as a matter of law, and in exercising its obligation under Bose, I think the Court would have to do an independent review of the record to determine that constitutional fact, that is to say, that there was no actual malice in this case because this can't be perceived.

Just as in Letter Carriers v. Austin, calling the plaintiffs there a traitor to their God, their country, their family, saying they have a corkscrew soul, saying that instead

of a heart they have tortured principles, was considered by this Court to be rhetorical hyperbole, and not to be taken literally.

Similarly, there's nothing in this ad parody that can be taken as a statement of fact. And we're in an unusual situation where the jury has made that determination for us. So we now know that even this jury, which should never have been allowed to consider this.

QUESTION: Well, do you think that finding by the jury has opened for this Court to consider again de novo?

MR. ISAACMAN: No, we don't think it is. We don't think it is because --

QUESTION: I thought you were suggesting that in the First Amendment context, we'd have to consider those issues again.

MR. ISAACMAN: Justice O'Connor, I suggest that in the First Amendment context, when a determination is made by a jury that's adverse to speech, and when a jury finds that the speaker made statements that could be construed as statements of fact and were knowingly false, then it is incumbent upon the Court to take that review for the purpose of protecting the speaker. And that's what the First Amendment says, that you have to protect the speaker.

QUESTION: You think Bose is a one-way street, then?

MR. ISAACMAN: Your Honor, I do think it's a one-way

street. Bose is intended to protect the speaker, it's not intended to protect the emotionally distressed interest that the State is seeking to protect in the area of intentional infliction of emotional stress or in the area of libel. And not only that, but we have a situation where there hasn't been an appeal from the determination in the jury, so that's res judicata yet.

QUESTION: This is all matter that isn't really directly involved in your case. I mean, you have a favorable determination from the jury.

MR. ISAACMAN: Yes, sir, that's correct.

Now, going on, we not only have the example of Letter Carriers, but we have the example of Greenbelt v. Bresler where the plaintiff in that case was accused of being engaged in blackmail. And the Court said that that can't be taken literally because that was just intended to describe his negotiating position, and that is hyperbole.

And we have ample lower court precedents on the subject, such as the Pring case, which was a Penthouse article about a Miss Wyoming which attributed certain sexual activities on her part, and she sued for libel, intentional infliction of emotional stress, and other causes of action. And the Tenth Circuit, after an adverse jury determination to Penthouse, the Tenth Circuit reversed and dismissed that case, saying that that's rhetorical hyperbole. That article couldn't be

perceived as describing actual facts about the plaintiff in that case, or actual events in which she participated. Same finding that the jury made in this case.

And the Court then went on to say that since it's rhetorical hyperbole and protected by the First Amendment against a libel claim, it's also protected against an intentional infliction of emotional distress claim which there was called outrage under Wyoming law because the same constitutional defenses apply.

And earlier this year in the First Circuit in the L.L. Bean v. Drake Publishers, the Court there said that parody is protected speech, and even though the plaintiff in that case complained about the sexual parody that occurred of L.L. Bean's Catalog, that was protected speech and the case was found in favor of the speaker in that situation.

Beyond that, Jerry Falwell as a public figure should not be permitted to evade the First Amendment limitations that have been set forth in New York Times v. Sullivan, and many many other cases with respect to his claim for an allegedly injurious falsehood. The California Supreme Court recently, through Justice Mosc, determined in Blatty v. New York Times, that where the gravamen of a complaint is allegedly injurious falsehood, it doesn't matter what you call your claim, because the First Amendment covers that area.

QUESTION: Mr. Isaacman, what the New York Times rule

provides is not an absolute protection, but what a knowing element, an element of specific intent to create a falsehood. It doesn't give an absolute privilege to state falsehood. It just says the falsehood is okay unless there's an intent.

Now, here we have a State Tort that is specifically an intentional Tort. There must be an intent to create the emotional distress, so it really is not quite the same category of opening up that you're making it out to be. It's just the issue is whether the intent element is enough to provide a major exception from New York Times is also enough to make a major exception for purposes of this tort action. Isn't that right?

MR. ISAACMAN: Justice Scalia, we have a lot of cases including New York Times v. Sullivan, including Garrison v. Louisiana, and say it's not the intent to cause harm. It's not the hatred, it's not the ill will, it's not the spite that the First Amendment is directed at. It's intent to cause harm through knowing falsehood or reckless falsehood. Garrison v. Louisiana is a perfect example.

QUESTION: I understand you can draw the line there. But all New York Times says is if you state falsehood with knowledge of the falsehood intent to be false, the First Amendment does prevent it. All I'm asking you is why can't that principle be extended to say you can cause emotional harm to your heart's content, just as you can state falsity to your

heart's content, but where you intend to create that emotional harm, we have a different situation.

Isn't that a possible line?

MR. ISAACMAN: I don't think that any reasonable reader of any of the speech that has occurred in the cases including New York Times v. Sullivan, Garrison and all the other cases that have come down, Letter Carriers I gave as an example, could ever say that the speaker did not intend to cause harm.

When you say something that somebody has a corkscrew soul and has tortured principles for a heart and is a traitor, who can believe that person doesn't intend to cause harm. People intend the natural consequences of their actions. And they intend when they say something critical, they intend that that's going to cause some harm or some distress. And that speech has to be protected, or all we're going to have is a bland, milquetoast kind of speech in this country.

QUESTION: That may well be. My only point is New York Times, it seems to me, doesn't speak to it. New York Times says intent is okay, is enough to get you out of it. What you're saying is, this kind of intent shouldn't be enough, intent to cause harm shouldn't be.

MR. ISAACMAN: That's correct. Knowing falsity may be enough.

QUESTION: But even in the New York Times sense, if

what the asserted facts here were known to be untrue, I mean, one who knew nothing about Mr. Falwell or anything about the background could read this and think there might be some individual that this was a factually correct statement about. So that these are statements that were knowingly false, so they really satisfied the New York Times standard in that sense.

MR. ISAACMAN: Justice Stevens, the response to that is really that there were no facts asserted.

QUESTION: Well, I understand what your argument is, but to the extent that there are factual statements, they satisfy the New York Times standard because everybody knows they're false, including the speaker.

MR. ISAACMAN: If you change what this article means, and you say this article's capable of being interpreted as an assertion of fact, then you've kind of set the stage differently from what it is, and from what the jury determined. If you say that in Letter Carriers, that the person who made that comment was really saying --

QUESTION: Really, all I'm suggesting is pretty much the same thing Justice Scalia is. I'm not sure New York Times speaks to the problem we have before us in this case.

MR. ISAACMAN: It speaks in a sense that a knowing falsity, a reckless falsity is required. And that requires that there be a false statement of fact. And the cases indicate that. Garrison indicates that. Letter Carriers

indicates that. Before there can be a false statement of fact, there has to be a false statement, and without a false statement, there can be no false statement of fact.

QUESTION: Well, that gets us back to Bose and whether we have to reexamine this statement for ourselves to determine whether it's a factual statement.

MR. ISAACMAN: Well, that brings me back to my response, Justice O'Connor, that if there were an adverse determination to the speaker, this Court would have an independent obligation to examine.

QUESTION: I don't think Bose spelled it out that way. I don't read that necessarily into Bose. So you may be asking us to move on to another step beyond that case.

MR. ISAACMAN: Well, the only thing I would say is the only case I saw that dealt with that is Brown v. KNB Corporation, a Connecticut Supreme Court case decided August 18, 1987. And my reading of that case is that the independent review goes one way and it goes to review the adverse determination against the speaker. It doesn't go to review a finding that there was --

QUESTION: I suppose that Connecticut case isn't binding on us.

MR. ISAACMAN: That's correct. That's correct.

QUESTION: Well, even accepting what the jury found, that there was no reputational injury here because there was no

believable fact asserted, for you to win, you have to say that opinion or parody is never actionable, even though it's done intentionally for the purpose of inflicting emotional distress. That's your proposition, isn't it?

MR. ISAACMAN: Well, Justice White, my proposition is --

QUESTION: Isn't it, or not?

MR. ISAACMAN: No, no. As you stated, Your Honor, no, it isn't.

QUESTION: What is it, then?

MR. ISAACMAN: Because what that leaves out is opinion or parody that does not contain anything that can be reasonably understood as a statement of fact.

QUESTION: All right. I agree with that, because that's what the jury found.

MR. ISAACMAN: The second thing that your hypothetical left out, your proposition left out was that this is a public figure who is bringing this action, somebody whose supposed to have a thick skin.

QUESTION: All right. Include that, and then you say, parody or opinion about a public figure is never actionable even though it's done intentionally for the purpose of causing emotional distress, that's your proposition.

MR. ISAACMAN: And even though it contains nothing that can be understood as a false statement of fact.

QUESTION: Sure, sure.

MR. ISAACMAN: Including that, I agree, yes. That's my proposition.

QUESTION: That's your proposition.

MR. ISAACMAN: You cross the line when you say something that can be understood as a false statement of fact. Otherwise, you're not going to have the uninhibited robust --

QUESTION: Well, I take it certainly it's arguable that we must judge this case on the basis that there was no fact involved. You say the jury said there wasn't.

MR. ISAACMAN: The jury said there was nothing that could be perceived, could be understood as a fact.

QUESTION: If we judge the case on that basis, then your proposition is there can't be any liability here at all, --

MR. ISAACMAN: That's correct.

QUESTION: -- if there's a public figure involved. Would you say if there wasn't a public figure involved, that we could sustain this judgment?

Let's assume it was not a public figure. No believable or nothing that was said that could be interpreted as a fact, and so there would be no libel, no reputational injury. If there was not a public figure involved, you would say the judgment would stand, or not?

MR. ISAACMAN: Fortunately, that's not my case. But

I will answer that. We don't have to deal with that case in resolving this one.

QUESTION: Well, you haven't mentioned it, yet.

MR. ISAACMAN: I would say that if it does not contain a false statement of fact, or something that can be perceived as a false statement of fact, then even it's a private figure, it's protected speech.

QUESTION: At common law, I suppose the exception was just for fair comment, wasn't it?

MR. ISAACMAN: Common law in the?

QUESTION: In this tort of emotional distress, that there was leeway for some kind of fair comment?

MR. ISAACMAN: Well, this tort of emotional distress is really such a new tort that there is, to my knowledge, not a lot of decisions on point. And in Virginia -- and I don't mean to evade your question and I'll try to answer it -- but in Virginia, itself, we found no case that allows intentional infliction of emotional distress cause of action in this arena, and we pointed that out in our brief.

And the only case we did find was this Mitchell v. Dameron case, that indicated that you cannot sue for intentional infliction of emotional stress when you're suing on what is considered to be an allegedly injurious falsehood that gives rise to a claimed libel action. Because that would make that tort duplicative and would give the opportunity for

plaintiff to get around the First Amendment limitations.

QUESTION: Mr. Isaacman, you puzzled me with your answer to Justice White, and assuming there's no public figure involved, and you've admitted there's a public interest in protecting the citizenry from emotional distress, what's the public interest in protecting speech that does nothing else?

MR. ISAACMAN: There is a public interest in allowing every citizen of this country to express his views. That's one of the most cherished interests that we have as a nation.

QUESTION: Well, what view was expressed by this?

MR. ISAACMAN: By this ad parody, or your example?

QUESTION: Well, either one, other than something that just upsets the target of the comment?

MR. ISAACMAN: What view is expressed by the ad parody is really a couple fold view, two views or more. In the first place, we have to understand that we're talking about one page out of 150 pages in the magazine.

QUESTION: I understand.

MR. ISAACMAN: So it's not a treatise or a novel that's gone into a long development. It is a parody of a Compari ad, number one, if it does that.

QUESTION: I understand.

MR. ISAACMAN: And that's a legitimate view for it to express. And we all can understand how it parodied the ad.

It is also a satire of Jerry Falwell, and he is in

many respects the perfect candidate to put in this Compari ad because he's such a ridiculous figure to be in this ad. Somebody who has campaigned against alcohol, campaigned against sex and that kind of thing.

QUESTION: Well, is the public interest that you're describing, you're building up here that there's some interest in making him look ludicrous or is it just there's public interest in doing something that people might think is funny?

What is the public interest?

MR. ISAACMAN: There are two public interests. With respect to Jerry Falwell alone, there are two public interests. One is there is a public interest in having Hustler express its view that what Jerry Falwell says as the rhetorical question at the end of the ad parody indicates is B.S. And Hustler has every right to say that somebody who's out there campaigning against it saying don't read our magazine and we're poison on the minds of America and don't engage in sex outside of wedlock and don't drink alcohol. Hustler has every right to say that man is full of B.S. And that's what this ad parody says.

And the first part of the ad parody does, it puts him in a ridiculous setting. Instead of Jerry Falwell speaking from the television with a beatific look on his face and the warmth that comes out of him, and the sincerity in his voice, and he's a terrific communicator, and he's standing on a pulpit, and he may have a bible in his hand, instead of that

situation, Hustler is saying, let's deflate this stuffed shirt, let's bring him down to our level, or at least to the level where you will listen to what we have to say.

(Laughter)

MR. ISAACMAN: I was told not to joke in the Supreme Court. I really didn't mean to do that.

QUESTION: That's the answer to the first half of my question. What's the public interest in the case involving a private figure?

MR. ISAACMAN: In the case of a private figure, the public interest is admittedly less.

QUESTION: Less? What is it?

MR. ISAACMAN: There is still interest in expressing your views, there's still an interest in people being able to express their views, apart from the fact that the public may not have any great interest in hearing those views.

QUESTION: Mr. Isaacman, to contradict Vince Lombardi, the First Amendment is not everything. It's a very important value, but it's not the only value in our society, certainly. You're giving us no help in trying to balance it, it seems to me, against another value which is that good people should be able to enter public life and public service.

The rule you give us says that if you stand for public office, or become a public figure in any way, you cannot protect yourself, or indeed, your mother, against a parody of

your committing incest with your mother in an outhouse.

Now, is that not a value that ought to be protected? Do you think George Washington would have stood for public office if that was the consequence? And there's no way to protect the values of the First Amendment and yet attract people into public service? Can't you give us some line that would balance the two?

MR. ISAACMAN: Well, one of the lines was suggested by a question earlier, and that is in the private figure of public figure area, if the Court really wants to balance. But somebody whose going into public life, George Washington as an example, there's a cartoon in I think it's the cartoonist's society brief, that has George Washington being led on a donkey and underneath there's a caption that, so and so whose leading the donkey is leading this ass, or something to that effect.

QUESTION: I can handle that. I think George could handle that. But that's a far cry from committing incest with your mother in an outhouse. I mean, there's no line between the two? We can't protect that kind of parody and not protect this?

MR. ISAACMAN: There's no line in terms of the meaning because Hustler wasn't saying that he was committing incest with his mother. Nobody could understand it to be saying that as a matter of fact. And what you're talking about, Justice Scalia, is a matter of taste. And as Justice

Scalia, you said in Pope v. Illinois, just as it's useless to argue about taste, it's useless to litigate it, litigate about it. And what we're talking about here is, well, is this tasteful or not tasteful. That's really what you're talking about because nobody believed that Jerry Falwell was being accused of committing incest.

The question is is this in good taste to put him in this, draw this image, paint a picture. If you charge a man with a crime, Your Honor, and it's an assertion that he committed a crime, --

QUESTION: If it's against a public figure, it's okay.

MR. ISAACMAN: No.

QUESTION: No?

MR. ISAACMAN: If it's a knowing false statement of fact, if you're charging him with a crime and it's perceived that you're charging him with a crime, and you're doing it with knowledge that that's false, it's not okay against a public figure.

QUESTION: Well, isn't that this case?

MR. ISAACMAN: No, it isn't this case.

QUESTION: You say they didn't charge him with incest?

MR. ISAACMAN: Justice Marshall, they did not charge him with incest, and a jury determined --

QUESTION: Why did they have him and his mother together?

MR. ISAACMAN: They had him and his mother together to what's called in literary forum, travesty, to put somebody in a ridiculous unbelievable setting for purposes of effect. They put him in this situation knowing nobody would really perceive that that's what he's actually doing. But to say we're going to deflate this man who is so self-righteous in the area of sex and telling everybody else what to do, as well as telling them what to read.

QUESTION: And what public purpose does that serve?

MR. ISAACMAN: It serves the same public purpose in a sense of having Trudeau in Doonesbury call George Bush a wimp. What public purpose does that have? It makes people look at that and maybe think of George Bush a little bit differently. And somebody who is out there telling other people how to live and being very serious and sober about it and acting as though he has more knowledge than they do about how they live their lives, Hustler has a right to make comments about it and make him look ridiculous as long as they don't state false statements of fact knowingly or recklessly.

QUESTION: Well, it was a false statement of fact that he was in the outhouse with his mother. That was a false statement of fact.

MR. ISAACMAN: It was not a statement of fact, Your

Honor, and the jury so found.

QUESTION: Well, what was it?

MR. ISAACMAN: What was it? It was hyperbole.

QUESTION: Hyperbole?

MR. ISAACMAN: Just as calling somebody a blackmailer was not saying he's a blackmailer. It was saying that he was engaged in --

QUESTION: If you charge somebody with say, if you don't pay me money, I'll report you, that's blackmail.

MR. ISAACMAN: That's correct.

QUESTION: Well, that's the same as this was.

MR. ISAACMAN: That's correct. But in Greenbelt, saying that somebody was a blackmailer --

QUESTION: Oh, you mean, they had to say that he was guilty of incest, in quotes? Is that right? Is that right?

MR. ISAACMAN: No, it is not right, Your Honor.

QUESTION: How close would they have to get to that?

MR. ISAACMAN: They would have to say it in a way that a reasonable reader would perceive that that's what Hustler was saying, that he is guilty of incest. And this jury that was certainly not a jury that came from Hustler's background in any way, said that no reasonable reader could perceive this as a statement of fact.

And in summing up, what I would like to do is say this is not just a dispute between Hustler and Jerry Falwell,

and a rule that's applied in this case is not just that Hustler Magazine can no longer perform what it does for its readers, and that is produce this type of irreverent humor or other types of irreverent humor. It affects everything that goes on in our national life. And we have a long tradition, as Judge Wilkinson said, of satiric commentary and you can't pick up a newspaper in this country without seeing cartoons or editorials that have critical comments about people.

And if Jerry Falwell can sue because he suffered emotional distress, anybody else whose in public life should be able to sue because they suffered emotional distress. And the standard that was used in this case, does it offend generally accepted standards of decency and morality is no standard at all. All it does is allow the punishment of unpopular speech.

QUESTION: How often do you think you're going to be able to get a jury to find that it was done with the intent of creating emotional distress. I mean, there is that finding here.

MR. ISAACMAN: Every time. Almost every time that something critical is said about somebody, because how can any speaker come in and say I didn't intend to cause any emotional distress, and be believed. If you say something critical about another person, and if it's very critical, it's going to cause emotional distress. We all know that. That's just common sense. So it's going to be an easy thing to show, intent to

harm. That's why that's a meaningless standard. Incidentally, it was a negligence standard in this case.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Isaacman. We'll hear now from you, Mr. Grutman.

ORAL ARGUMENT OF NORMAN ROY GRUTMAN

ON BEHALF OF RESPONDENT

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

Deliberate, malicious character assassination is not protected by the First Amendment to the Constitution. Deliberate, malicious character assassination is what was proven in this case. By the defendant's own explicit admission, the publication before this Court was the product of a deliberate plan to assassinate, to upset the character and integrity of the plaintiff, and to cause him severe emotional disturbance with total indifference then and now to the severity of the injury caused.

When the publication was protested by the bringing of this lawsuit, the unregenerate defendant published it again. Justice Scalia, I'd like to answer a question that you raised with my adversary. How often are you going to be able to get proof like this. I dare say, very infrequently, and I dare say that the kind of behavior with which the Court is confronted is aberrational. This is not the responsible publisher. This is the wanton, reckless, deliberately malicious publisher who sets

out for the sheer perverse joy of simply causing injury to abuse the power that he has as a publisher.

QUESTION: Mr. Grutman, I guess there are those who think that the conduct of certain newspapers in pursuing Mr. Hart recently was of the same unwarranted character. Should that result in some kind of liability?

MR. GRUTMAN: I don't think so in that case because what was being done by the newspapers in that case was reporting the truth, the truth about a public figure who was a candidate for public office. The context in which the publications about Gary Hart appeared cannot really be compared favorably with what was done here.

QUESTION: So you would limit the recovery for the tort of emotional distress to recovery for a falsehood?

MR. GRUTMAN: No.

QUESTION: No?

MR. GRUTMAN: Under the theory of the intentional infliction of emotional distress, even the truth can be used in such a way if it is used in some outrageous way, it must be something which is so repellent --

QUESTION: And what if the jury were to determine that what the newspapers did with regard to Mr. Hart fell in that category? Is that recoverable?

MR. GRUTMAN: If the jury were able to find from the evidence, Justice O'Connor, that the publication was outrageous

-- I would doubt that they would find that because it is not that kind of conduct -- reporting the truth.

QUESTION: But you would say it's open to a jury determination?

MR. GRUTMAN: Only in a highly theoretical sense, if the animating purpose behind the publisher was simply to inflict intense and severe emotional distress upon Gary Hart. But I think that's really not the issue. The focus in this Court, which is not the Court of libel, the focus is on the harm which is inflicted on the victim.

QUESTION: Well, do you think a vicious cartoon should subject the drawer of that cartoon to potential liability?

MR. GRUTMAN: Only in the event that the cartoon constitutes that kind of depiction which would be regarded by the average member of the community as so intolerable that no civilized person should have to bear it. That's the definition of the Court.

QUESTION: Well, Mr. Grutman, you're certainly posing a much broader proposition than is necessary for you to win this case.

MR. GRUTMAN: Indeed, but I was answering the question of Justice O'Connor.

QUESTION: Well, the way you put it from the very outset, you put it the same way. We're judging this case on

the basis that the jury found that no one could reasonably have believed that this was a statement of fact. That's the way we judge this case.

MR. GRUTMAN: No. I'd like to address that point, Justice White, because I think a kind of semantic conundrum has been presented here when counsel says that there was no statement of fact.

There was a statement of fact. Just as we argued in our brief, you could state gravity causes things to fly upward. That is a statement of fact. It's just a false statement of fact. And if one consults the record --

QUESTION: What do you make out of the special verdict the jury returned?

MR. GRUTMAN: I make out of it the fact that the jury said that this was not describing actual facts about the plaintiff or actual events in which the plaintiff participated. That is a finding that what the statement was in the publication was false.

Perhaps we should have appealed that. That's a finding of falsity which is all that we needed to prove to sustain libel. But we did not appeal that, and that question is not before the Court.

But in answer to your question, I find that the meaning of the answer to that question only goes to the issue of whether the jury thought that Reverend Falwell --

QUESTION: I don't know why you insist on this because if there's anything factual about this statement, you certainly have to contend with New York Times. And if there's nothing factual about it, you don't have to contend with it at all. All you have to say or all you have to win, which is plenty, that using opinion or parody to inflict emotional distress is not protected by the First Amendment, which is a considerably different proposition than what you've been pushing.

MR. GRUTMAN: I agree that parody or so-called satire, whatever it calls itself, is not necessarily protected speech when the purpose of the publisher is to inflict severe emotional distress. And while the contention is made in the argument that you've heard this morning that this was a parody, I think that the jury could properly examine this and recognize it for what it is. A fig leaf isn't going to protect this kind of a publication from being recognized as the kind of behavior with which the tort of the intentional infliction of emotional distress is intended to deal.

QUESTION: But you would subject, though, the range of political cartoonists, for example, to that kind of jury inquiry, whether it was vicious enough to warrant recovery.

MR. GRUTMAN: No. Two things must conjoin. What you have to have is an irresponsible intention on the part of the defendant to inflict injury. That's only one half of it.

The other is that what the cartoonist, the writer or the speaker does, constitutes in the mind of the community, an utterance of such enormity, such a heinous kind of utterance, usually false, that nobody should have to bear that if the purpose was to inflict severe emotional injury, and severe emotional injury results.

QUESTION: What about a cartoonist who sits down at his easel, or whatever cartoonists sit down at, and thinks to himself, a candidate acts for the presidency as just a big windbag, a pompous turkey and I'm going to draw this cartoon showing him as such. You know, part of his intent, he enjoys cartooning and just likes to make people look less than they are, to show up the dark side of people. But he knows perfectly well that's going to create emotional distress in this particular person.

Now, does that meet your test?

MR. GRUTMAN: No. It does not, unless what he depicts is something like showing the man committing incest with his mother when that's not true, or molesting children or running a bordello or selling narcotics.

QUESTION: What about the state of mind required from the defendant?

MR. GRUTMAN: Well, the state of mind is precisely what we're concerned with.

QUESTION: What about the state of mind I've

hypothesized to you. Does that satisfy your test for the constitutional, or not?

MR. GRUTMAN: No, it would not. If the man sets out with the purpose of simply making a legitimate aesthetic, political or some other kind of comment about the person about whom he was writing or drawing, and that is not an outrageous comment, then there's no liability.

QUESTION: Even though he knows it will inflict emotional distress?

MR. GRUTMAN: It has to be -- correct, because you cannot have emotional distress for mere slights, for the kinds of things which people in an imperfect world have got to put up with, calling somebody some of the epithets that were mentioned in the opposing argument, blackmailer, or some other conclusory and highly pejorative terms, an epithet, but when you say not that you are some foul conclusory term, but when you depict someone in the way in which Jerry Falwell was depicted with all of the hallmarks of reality including the pirated copyright and the pirated trademark so that the casual reader looking at it could think this is for real, that rises to the level of --

QUESTION: That's a different argument.

QUESTION: Yeah, that doesn't go to the question of intent.

What about a case in which another magazine publisher today decided I think I could sell a lot of magazines by

reprinting this very parody here because it's gotten so much publicity and some people may think it's funny and so forth, I don't care if it hurts Mr. Falwell, but it will cause precisely the same harm as this one.

Is there recovery in that case or not?

MR. GRUTMAN: I do not think so, or it's a much harder case.

QUESTION: So it's free game now. Anybody can publish this other than Mr. Flint?

MR. GRUTMAN: Justice Stevens, Mr. Flint republished it for a third time after the jury verdict.

QUESTION: I understand. But what you're telling me under your test, anybody else may publish it without incurring liability.

MR. GRUTMAN: Liability requires an intent.

QUESTION: But you do agree with what I said?

MR. GRUTMAN: I do, I do Mr. Justice Stevens. I agree that intent -- this is why this is such a rare tort. This is, as I've suggested, an intersticial tort.

QUESTION: Mr. Grutman, you've given us a lot of words to describe this: outrageous, heinous, --

MR. GRUTMAN: Repulsive and loathsome.

QUESTION: Repulsive and loathsome. I don't know, maybe you haven't looked at the same political cartoons that I have, but some of them, and a long tradition of this, not just

ion this country but back into English history, I mean, politicians depicted as horrible looking beasts, and you talk about portraying someone as committing some immoral act. I would be very surprised if there were not a number of cartoons depicting one or another political figure as at least the piano player in a bordello.

MR. GRUTMAN: Justice Scalia, we don't shoot the piano player. I understand that.

QUESTION: But can you give us something that the cartoonist or the political figure can adhere to, other than such general words as heinous and what not. I mean, does it depend on how ugly the beast is, or what?

MR. GRUTMAN: No, it's not the amount of hair the beast has or how long his claws may be. I believe that this is a matter of an evolving social sensibility. Between the 1700s and today, I would suggest, that people have become more acclimatized to the use of the kinds of language or the kinds of things that had they been depicted at an earlier age would have been regarded as socially unacceptable. And while that evolutionary change is taking place, and it's a salutary thing, there are certain kinds of things. It's difficult to describe them.

This Court struggled for years to put a legal definition on obscenity, and Justice Stewart could say no more than, I know what it is when I see it.

Well, this kind of rare aberrational and anomalous behavior, whatever it is, whatever the verbal formulation that the nine of you may come upon, clearly it can be condensed in the form of words that I used, which are not mine -- they belong to the oracles of the restatement -- who have tried to say that it is for the jury to decide whether or not what is being depicted is done is so an offensive, so awful and so horrible a way, that it constitutes the kind of behavior that nobody should have to put up with.

QUESTION: Well, Mr. Grutman, in today's world, people don't want to have to take these things to a jury. They want to have some kind of a rule to follow so that when they utter it or write it or draw it in the first place, they're comfortable in the knowledge that it isn't going to subject them to a suit.

MR. GRUTMAN: I frankly think that it isn't too much to expect, Justice O'Connor, that a responsible author, artist, or anyone would understand that attempting to falsely depict as a representational fact that someone is committing incest with his mother in an outhouse and saying that she's a whore, and that when the person involved is an abstemious Baptist Minister, that he always gets drunk before he goes into the pulpit, it isn't too much to say that anybody who would do that ought to take the consequences for casting that into the stream.

QUESTION: Well, the say you put it, we don't need any new law for that. That's just -- New York Times wouldn't insulate any statement of fact like that.

MR. GRUTMAN: Justice White, I don't think this case is governed by the New York Times rule. When I tried this case, we were living in the heyday of Gertz and we had not yet had this Court's decision in Dunn & Bradstreet or in Philadelphia Newspaper v. Hepps. I would suggest to this Court that we are covered by your decisions in those cases.

This is not speech that matters. This is not the kind of speech that is to be protected. The New York Times rule is not a universal nostrum. It is a rule that you formulated to meet a constitutional crisis in which truth, which is irrelevant here.

QUESTION: Well, if these were factual statements like you mentioned, you could win under New York Times any time.

MR. GRUTMAN: Yes, we could win under New York Times, but I'm suggesting that as a jurist prudential matter, the New York Times formulation of actual malice is inappropriate and irrelevant for this tort for the reason that when you're dealing with the tort of libel, the focus of inquiry, the gravamen is on the issue of true or falsity in which facts become the measure of what is true or false, or something which has been dealt with recklessly.

The gravamen of this, as I say, intersticial tort is on the harm that was inflicted on the victim, and the consitutional measure here is intentionality. It's what this Court said in the dissent of Chief Justice Rehnquist, we're really dealing with whether you call it, scienter or mens rea.

QUESTION: Well, Mr. Grutman, there's plenty of malice here all right. I mean, I don't think that's your problem. But the jury said this can't be reasonable viewed as making a factual allegation.

MR. GRUTMAN: I disagree, Justice O'Connor, and if you'll give me a moment -- that is the easy way of looking at it, but that's not what they said.

The question answered is, can this be understood as describing actual -- meaning truth -- actual facts about plaintiff or actual events in which plaintiff participated. And they said, no. That to me means that they said this is not a true statement of fact, but it's nonetheless a statement of fact for the purposes of New York Times or for the purposes of this case.

QUESTION: Give me a statement that isn't a statement of fact.

MR. GRUTMAN: Pardon?

QUESTION: Give me a statement that isn't a statement of fact in your interpretation of what statement of fact means. I mean, when you say, statement of fact, it means true fact, or

it means nothing at all.

MR. GRUTMAN: No. That is the aristotelian interpretation of a statement of fact as propounded by Professors Wexler and Michael in their famous monograph, but in the common parlance in which we speak, a statement of fact is an utterance about either an event or a thing or a person which can be proven either true or false. If it's true, then it's a true fact, but if it's false, like gravity causes things to float upward -- that's a statement of fact, but it's manifestly false.

QUESTION: So there's no statement that is not a statement of fact is what you're saying.

MR. GRUTMAN: That's correct. However, there may be statements -- that's an interesting philosophical question that we could explore endlessly, but --

QUESTION: Mr. Grutman, that's not the way the Fourth Circuit interpreted the finding in this case. They interpreted it, as I read their opinion, the majority, to mean that the jury understood it was not a statement of factual statement about him. They didn't admit that they thought the statement was false. So you're urging on us, a meaning that's not been accepted by any of the Courts that have had the case so far.

MR. GRUTMAN: Candidly, I must say that I do not think that the Fourth Circuit made the point which I first tried to make to Justice O'Connor, and which I am making to

you: in retrospect, I believe we could have appealed this as a proper basis for libel with that finding.

QUESTION: You could, but you didn't.

MR. GRUTMAN: But I didn't and that's therefore it wasn't before the Fourth Circuit, and it's not before you now.

QUESTION: Not only that, but the purpose in the jury instruction was to ask that question as a predicate to the second question which related to malice which wouldn't have had any purpose to it unless it's interpreted the way --

MR. GRUTMAN: That is the way it looks in the cold light in the Supreme Court today. I remember that at the time that those jury instructions were being fought over in the pit of the trial, it really had to do with a certain contention the Judge Turc was flirting with about the meaning of Pring as to whether or not what was done in Pring constituted some basis -

QUESTION: Yes, but your second question all goes to whether the New York Times malice standard, and that just isn't even implicated unless it's a false statement of fact.

MR. GRUTMAN: Justice Stevens I agree that maybe I should have done something different, but I thought at the time that the damages we were seeking to recover were equally recoverable under the intentional infliction of emotional stress.

QUESTION: May I ask a different question that just troubles me a little bit about the case. Your tort is one, I

gather, that's founded on Virginia law. This is a diversity case, is it not?

MR. GRUTMAN: This is a Virginia Tort.

QUESTION: And so the contours of this tort presumably we would find in some Virginia decisions?

MR. GRUTMAN: Yes.

QUESTION: And the latest decision that's cited in your opponent's reply brief is a lower court decision which seems to say there's no tort of this kind at all. You didn't comment on that.

MR. GRUTMAN: That case which I saw when I received their brief I believe yesterday, I noticed was a Court of inferior jurisdiction.

QUESTION: Right.

MR. GRUTMAN: I do not think that it is controlling on this Court. I do not think that it is good law.

QUESTION: Well, if it correctly describes Virginia law, it is controlling. In terms of what the Virginia law is, we don't decide that.

MR. GRUTMAN: I understand that but I believe that there are other cases in Virginia, which have been cited in our brief, which support the validity of the proposition that we are asserting that Virginia recognizes this as a separate and independent tort. Now, that's a lower court case and it may be appealed or it may not, but there are higher authorities within

the State of Virginia which support the position that we're advancing here.

QUESTION: Which are cited in your brief?

MR. GRUTMAN: Yes, they are, Justice Stevens.

Now, Hustler contends that the actual malice test of libel law preempts the field and must be applied universally and literally to all dignitary torts involving speech. And I suggest that the Dunn & Bradstreet decision and the Hepps decision reject that.

This Court has not treated that as a universal nostrum. This Court has recognized differences in speech and has granted less First Amendment protection, and sometimes no First Amendment protection.

In this case, subjective awareness of falsity or reckless disregard of truth are an appropriate way of examining actual malice when the gravamen of the tort is falsity as in libel. However, here with the intentional infliction of emotional distress which has also been described as outrageous conduct, --

QUESTION: Mr. Grutman, is libel, per se, recognized in Virginia when you charge somebody with a crime?

MR. GRUTMAN: I believe so.

QUESTION: Well, nobody pays any attention to that at all.

MR. GRUTMAN: No one pays it?

QUESTION: Any attention to that fact.

MR. GRUTMAN: In this case?

QUESTION: Yes.

MR. GRUTMAN: In retrospect, I understand what you're saying about that, Justice Marshall, but I was fighting in that case, the suggestion that this was hyperbole or the expression of an opinion, and Judge Turc would not accept the view that the accusation of incest is a crime which constitutes libel per se, and so I was unable to try the case in that posture.

As I was pointing out to the Court, the harm done to the individual is the focus of this tort. It's not a new tort. It's been in existence for a hundred years.

QUESTION: It's certainly a new tort when applied to the press.

MR. GRUTMAN: No, it is not a new tort, because there have been cases that have been decided in a number of States in which the press has been held libel for this tort, not only for the intentional infliction --

QUESTION: Yes, but how recent are those cases?

MR. GRUTMAN: Well, the Florida case that I speak of is a 1984 case.

QUESTION: What I said was it's only recently, isn't it, that the courts have been bringing activities of the press within this expanding tort of intentional infliction of emotional distress?

MR. GRUTMAN: To that extent, I agree with you, Mr. Chief Justice. This is for this Court a tabula rasa, not exactly, however, terra incognita because in this connection, you are guided by the principles that the Court has developed in constitutional interpretations certainly over the last 23 years when what has been described as the federalization of the law of libel first began in a commendable context, and has now spread to the point where I believe you are considering either dismantling or discarding Gertz. And the reason for that is that the press, the press that clamors here for a universal exemption so that they should have license to do what these people have done, and that it should be condoned and considered just a trivial or trifling incident of being a public figure.

In Mr. Justice Powell's decision in Gertz, he talked about protecting speech that mattered.

QUESTION: Wasn't that before --

MR. GRUTMAN: Yes, it was. But in the opinion that Mr. Justice Powell wrote for the Court --

QUESTION: Lawyers always personalize these opinions, and they are Court opinions.

MR. GRUTMAN: I apologize to the other members of the Court to whom I meant no slight, but it's an opinion I'm sure --

QUESTION: Of course, I was in dissent.

MR. GRUTMAN: In my view, Mr. Justice White, that

dissent either is or may become, or should become the law of the land.

QUESTION: I doubt it.

MR. GRUTMAN: Because well, I don't know any place else to suggest that it ought to be. But I do think that what experience has shown us has been the unworkability of that rule.

For example, in Time v. Hill, which was twenty years ago, footnote 7, Justice Brennan quoting a Second Circuit case, I think it's called the Sidis case, said speaking about even true revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency.

So this is a problem that was foreseen more than twenty years ago, and now the problem is with us.

QUESTION: Mr. Grutman, I think it would be a different -- you know, if there were a Virginia statute saying, you know, it's tortious to depict someone as committing incest, then you know, the cartoonist knows that he's up against. But just to say heinous and just leave it to the jury. You think, for example, it isn't only the incest that offends you, you think that portraying a Baptist minister as having taken a shot or two before he went on to the pulpit, that that would qualify in your notion as heinous?

MR. GRUTMAN: I think particularly it would satisfy.

QUESTION: You don't think that's debatable?

MR. GRUTMAN: All these questions are debatable. That's why they go to juries for determination. But I think it is highly unrealistic that a legislature should sit down and write a deck log or a catalogue of prohibitions to constitute guidelines for people exercising free speech.

As a judge said in another case, the common law has been sufficient not to muzzle the press, and the common law is already --

QUESTION: The common law hasn't had this tort.

MR. GRUTMAN: This is a common law tort. Downton v. Wilkinson was a common law tort.

QUESTION: Since 1984 as applied to this field do you tell us?

MR. GRUTMAN: No. I said in 1984 when I started to quote these cases to Mr. Chief Justice Rehnquist, there was a Florida case in 1984, there was a Missouri case in 1982, there was a case in Wisconsin in 1970, another in 1982, and there have been cases in New Hampshire, Ohio and the District of Columbia, including one in 1929, which is Perry v. Capital Traction Corporation, in which this Court denied cert.

QUESTION: This isn't Blackstone I mean, this is pretty new, all of it, isn't it?

MR. GRUTMAN: The memory of man runneth contrary perhaps to a time when this was a tort. I think the tort

originated in the early 1900s. It originated in England. It's present here. It has been a subject of the Restatement First. And a subject of the Restatement Second. Perhaps it's something that becomes more prevalent in our society because of the irresponsibility of certain aberrant publishers.

This is an established tort under the law of Virginia and under most of the States. And I believe as a constitutional rule, the protection of the individual's interest in his own sense of worth and dignity and to be free from this kind of gratuitous onslaught and damage to his feelings is something that ought properly to be left to the States.

Hustler and Judge Wilkinson argued that there is some new kind of category that this Court ought to establish called the political public figure. That is a figure unknown in any other decision and certainly not in this Court, and I would surely argue against it. Because this Court has said that by becoming a public figure, a person does not abdicate his rights as a human being.

And if libel will not protect someone who is subjected to this utterly not dubious but worthless kind of verbal assault, then the tort of the intentional infliction of emotional distress which Virginia recognizes is a tort which deserves support and endorsement in this case and in this Court.

This case is no threat to the media. It will be the rare case indeed where this kind of behavior will ever be replicated, but where it occurs, it deserves the condemnation which the jury gave it, which the Fourth Circuit found, and which I respectfully submit this Court should affirm.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Grutman.

The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: December 2, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court and that this is a true and accurate transcript of the case.

Date: 12/2/87

Margaret Daly

Official Reporter

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