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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: HARTE-HANKS COMMUNICATIONS, INC., Petitioner
V. DANIEL CONNAUGHTON

CASE NO: 88-10

PLACE: WASHINGTON, D.C.

DATE: March 20, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

HARTE-HANKS COMMUNICATIONS, INC., :

Petitioner :

v. : No. 88-10

DANIEL CONNAUGHTON :

Washington, D.C.

Monday, March 20, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:51 o'clock a.m.

APPEARANCES:

LEE LEVINE, ESQ., Washington, D.C.; on behalf of the Petitioner.

JOHN A. LLOYD, JR., ESQ., Cincinnati, Ohio; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

11:51 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-10, Harte-Hanks Communications v. Connaughton.

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

ORAL ARGUMENT OF LEE LEVINE

ON BEHALF OF PETITIONER

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

Twenty-five years ago this month in New York Times v. Sullivan this Court articulated the central meaning of the First Amendment. It held that if freedom of speech and freedom of the press mean anything in a democracy, it is that criticism of public officials and candidates for public office must be free.

In this case, a $200,000 judgment has been entered against a newspaper because it published statements critical of a candidate for public office in the midst of a hotly-contested election campaign.

We submit that this judgment, that the court of appeals decision affirming a jury's finding that this speech is unworthy of constitutional protection can be affirmed only ignoring the three fundamental safeguards

of political speech articulated in New York Times.

First, that only expression published with actual malice -- that is, despite a high degree of awareness of its probable falsity -- is beyond the scope of Constitutional protection.

QUESTION: Did the Sixth Circuit here say there was actual malice?

MR. LEVINE: It held that a jury could have found actual malice.

QUESTION: And you disagree with that?

MR. LEVINE: We disagree with both the contention that its standard of review was limited to what the jury could have found and with the conclusion that the evidence revealed -- that the evidence in the record reveals actual malice.

The second requirement of New York Times is the proof --

QUESTION: Excuse me. Didn't they go further than just saying the jury could have found actual malice? I thought they found that the jury could have found certain facts, and if the jury found those facts, then there was actual malice.

Didn't they make that judgment themselves, that if these facts existed, there was in their own view actual malice?

MR. LEVINE: Justice Scalia, they added --

QUESTION: That's how I understood it, anyway.

MR. LEVINE: Justice Scalia, they added another step in there. After they found the facts, they drew all conceivable inferences --

QUESTION: Right.

MR. LEVINE: -- from those facts --

QUESTION: Right.

MR. LEVINE: -- in favor of the jury's verdict.

QUESTION: But then taking all those facts and the favorable inferences, they made their own judgment, given those facts and inferences, that there was actual malice didn't they?

MR. LEVINE: That is correct. And that is -- that is in fact the guts of this case, the third point, the third safeguard of free expression identified in New York Times. That is the obligation of appellate courts to undertake a review of the entire record, not simply the evidence favoring the defendant -- or, the plaintiff, and make an independent judgment, drawing its own inferences from the record evidence.

QUESTION: Mr. Levine, the problem I have in applying this standard is what should the Court do where credibility of witnesses is crucial?

MR. LEVINE: Justice --

QUESTION: What standard of appellate review should be applied to subsidiary facts when credibility is crucial?

MR. LEVINE: Justice O'Connor, as this Court held in Bose, the standard of independent review requires that courts give due regard to the ability of factfinders, be they juries or trial judges, to observe demeanor and make credibility assessments. In this case specifically --

QUESTION: Well, what does that mean? Does it mean that you -- if it rests on credibility, there is no review by the appellate court.

MR. LEVINE: With respect to purely --

QUESTION: Right?

MR. LEVINE: With respect to purely factual findings, Justice White. If there is disputed evidence in the record on an issue of material fact, we would say that in the typical case you are required to defer to the jury's credibility findings. Let me summarize --

QUESTION: Was it error to let this go to the jury?

MR. LEVINE: Your Honor, I am unfamiliar with the record as it stood at the time that -- you're talking about -- at a directed verdict stage?

QUESTION: Well, after the close of all the

evidence, should the judge have let this go to the jury?

MR. LEVINE: I do not think the judge should have let this go to the jury. I think --

QUESTION: That has to be your position.

MR. LEVINE: I think that's right. I think a directed verdict should have been granted in this case.

The material facts can be summarized as follows. The Respondent Daniel Connaughton was a candidate for the elected office of Municipal Court Judge in the November 1983 elections in --

QUESTION: I take it you think, then, the district judge in trying the case should -- should independently review the evidence rather than let the appellate court have that duty?

MR. LEVINE: If at the directed verdict stage, as Justice Kennedy was pointing out, the district court looks at the evidence and decides that --

QUESTION: Should not -- should not, in a case like this, draw the inferences in favoring the Plaintiff?

MR. LEVINE: It should resolved disputed issues of material fact in favor of the Plaintiff. But taking those -- those purely factual findings, it should make its own independent determination concerning whether or not there is actual malice.

QUESTION: Which -- which -- but that means --

but that means making its -- drawing its own inferences from the historical facts.

MR. LEVINE: From the historical facts. Yes, that is correct.

QUESTION: Even though the jury might -- even though there might be arguments about what the right inferences are?

MR. LEVINE: That's correct because, as this Court recognized in the Bose decision and in New York Times before it, in some cases where the very drawing of those inferences lead to make up the process of judgment through which the ultimate finding is made, you can't defer it to the findings and inferences that the jury could have drawn. You have to draw your own or else you're eliminating the process of judgment entirely.

QUESTION: So, in order to work the system that you're urging upon us, we have to -- and every district judge would have to -- determine where fact leaves off and inference begins. That's crucial because you accept -- you accept what the jury might find on fact. You give all the benefit of the doubt to the plaintiff on fact. But on inference you make your own judgment.

MR. LEVINE: That's correct.

QUESTION: So, that's the crucial distinction,

the difference between fact and inference.

MR. LEVINE: That's where I would draw the line, Your Honor. I --

QUESTION: Do you think that's a clear line?

MR. LEVINE: I do not think it's a clear line in --

QUESTION: I don't either.

MR. LEVINE: -- all cases and it's --

QUESTION: What's the basis for any sort of line there?

MR. LEVINE: Because at some point in the process, from the ultimate conclusion of actual malice at the one end, to the pure historical facts -- did a meeting take place at a certain date -- at the other end, somewhere along that line robbing an appellate court or a reviewing court of the ability to draw its own inferences necessarily predetermines the result.

QUESTION: Okay. What's the difference -- under your test, the difference between an inference and a factual deduction?

MR. LEVINE: I think that it's hard because you're dealing with labels. And what I might call a factual deduction someone else might call an inference.

QUESTION: Well, then, what's the use of your test?

MR. LEVINE: Because it seems to me that in the basic case, and virtually all cases, where a historical fact -- a what-happened kind of fact -- is susceptible to an inference that is reasonable and apparent, the reviewing court, whether it -- whether the mental process it goes through is, "I'm exercising my own judgment" or "I'm deferring to the jury's finding" is in 99 percent of the cases going to come up with the exact same decision.

But if you -- if you start going down the line where you defer to the jury findings or what the jury could have found on inferences, you're going to eliminate the process of judgment.

QUESTION: I take it you then think that essentially in this kind of a case, malice or not, it can never be a question of fact. It should be treated as a question of law and never presented to the jury.

MR. LEVINE: No, I don't believe that's right, Your Honor, for two reasons. First of all, factual issues do go into the determination of the actual malice question.

QUESTION: Yeah, I know. But I would just want to maybe have a -- just present to the jury a set of instructions as to why we're having to just deal with historical facts.

MR. LEVINE: It may in fact be cleaner and easier to do it that way.

QUESTION: Well, why don't you (inaudible) that judge then (inaudible).

MR. LEVINE: But there is -- there is another issue. And that is in many cases the jury will serve as a safeguard for free expression. We don't want to give unfettered authority to either the jury or the judge to decide that expression may be penalized.

QUESTION: Well, okay. Then so the Constitution requires that a jury give an independent review of a judge's decision.

QUESTION: We'll resume at 1:00.

(Whereupon, at 12:00 o'clock noon, oral argument in the above-entitled matter was recessed, to reconvene at 1:00 o'clock p.m., this same day.)

AFTERNOON SESSION

QUESTION: You may proceed, Mr. Levine.

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

The central difficulty with the court of appeals decision in this case is that it eviscerates both the clear and convincing evidence standard and the rule of independent review set forth in New York Times. It does so by requiring reviewing courts to defer to all conceivable inferences supporting the jury's verdict.

Under the court of appeals analysis, a reviewing court is required to do that even if other inferences, in its own view, are more reasonable or more justified. The court of appeals has, therefore, erected a presumption of actual malice in every case. It has mandated to finding the cumulated inferences that a reviewing court is required to find will add up to clear and convincing evidence. And it has rendered the Constitutional obligation of independent review a mirage.

Independent review is not independent if a reviewing court is required to defer to all findings of fact a jury could have made and then draw all conceivable inferences from those findings in favor of the jury's verdict.

Independent review does not encompass the

entire record if, as the court of appeals held, a reviewing court is required to ignore all evidence favoring the defendant, even undisputed evidence.

An independent review is not review at all, not in any meaningful sense, if a reviewing court is required to defer to an array of hypothetical subsidiary facts that a jury could have found. So viewed, the very process of judgment the Rule of Independent Review presupposes disappears.

In fact, it predetermines the result and it eliminates the process of judgment entirely.

QUESTION: How does one go about separating out the facts that the jury has found from the inferences? I mean, a particular proposition may be established as a fact or it -- from a fact which a jury rejected -- it might have been an inference from that fact. Or, it might have been independently found as a fact rather than as an inference from another fact.

How is -- How is the reviewing court to tell? I mean, you say he has to accept all the findings of fact that the jury made. How do you know which findings of fact they made? All you know is a verdict.

MR. LEVINE: I'm coming to the view, Justice Scalia, that our language doesn't give us the proper labels to put on these things so that we can know which

is which. And, as the Court has pointed out on several occasions, I think we sometime put the label on after the fact to decide -- to justify the result that we've arrived at.

But I think that in this case what we're talking about in the words of the Bose decision are the purely factual findings. The testimony in the record, what the documents say. If there is a dispute about those facts, did a meeting take place?

As in this case, for instance. There is testimony from the mother of the young woman who was the source of the article at issue, saying that the morning after this all-night interview she came home with her sister and she and her sister talked about how they had been promised jobs and trips and vacations. The other sister, Patsy Stephens, got on the stand at the trial and denied that that ever happened.

What I'm submitting is that that's the kind of fact, where there is disputed testimony on both sides, where the reviewing court is required to in most cases assume that the jury found that those statements were never made to the mother.

QUESTION: (Inaudible.)

MR. LEVINE: I think it's not so much the Seventh Amendment, Your Honor, as it is the fact that

the jury has the ability in this case to observe the witnesses, to observe their demeanor.

QUESTION: The Seventh Amendment has no bearing on the issues?

MR. LEVINE: In this case I think it does not. In the typical civil case, yes, it does. But here where you're talking about essentially an issue of Constitutional law --

QUESTION: Well, in (inaudible) Seventh Amendment is put aside?

MR. LEVINE: Only with respect to the issue of actual malice, Your Honor.

QUESTION: You're talking about two Constitutional provisions. One is the First Amendment and the other is the Seventh Amendment.

MR. LEVINE: Your Honor, this Court has twice expressly been presented with that argument, both in New York Times and in Bose, and has twice expressly rejected it. And I think that that's quite right. First of all, you have to keep in mind that we're only talking about facts found by a jury that are relevant to the actual malice inquiry. Not to the array of other facts that are relevant in libel cases. Was it defamatory? Was it published? Was it capable of a defamatory meaning? Were there damages?

We're not suggesting at all the the Seventh Amendment doesn't apply to those issues.

QUESTION: (Inaudible.)

MR. LEVINE: This Court has never reached that issue, Justice White, and it's a tough issue. There is an argument to be made and one that I would support, that the issues of truth and falsity and actual malice are so intertwined that you can't decide one without the other.

But that issue has never been here before. The issue of actual malice, which is the issue in this case, has been here before twice, and the Court has held that the Seventh Amendment does not bar a reviewing court from undertaking independent review.

QUESTION: Well, New York Times wouldn't have involved the Seventh Amendment, would it? Because I thought that came from a state court.

MR. LEVINE: Your Honor, the decisions of this Court are clear that --

QUESTION: Well -- just a minute. I thought you said just a moment ago that in two cases, this Court had confronted a conflict between the Seventh Amendment and the First Amendment, one of those cases being New York Times and the other being Bose. And in both cases they'd ruled in favor of the First Amendment. Was that

your statement?

MR. LEVINE: Yes, sir.

QUESTION: And was that -- was that true? Did that come -- did New York Times come from a federal court?

MR. LEVINE: Your Honor, it came from a state court.

QUESTION: Then how could the Seventh Amendment been involved?

MR. LEVINE: There is a case in this Court's jurisprudence called Chicago B&O Railroad v. Chicago -- City of Chicago -- in which this Court expressly held that, with respect to the second clause of the Seventh Amendment, the one that's at issue here, that cases coming up from state courts for purposes of review are governed by the Seventh Amendment.

And, in fact, that oral argument in the New York Times Justice Goldberg asked counsel for the respondent when he raised that very issue with the Seventh Amendment -- how could apply here -- and was cited to that case.

QUESTION: So we've held the Seventh Amendment does apply to state courts in some situations?

MR. LEVINE: Yes, we have -- you have, Your Honor.

(Laughter.)

MR. LEVINE: And -- And, indeed, in the footnote in New York Times in which that proposition was rejected -- the proposition that the Seventh Amendment posed any conflict with the First Amendment in actual malice determinations -- the Court acknowledged that the Seventh Amendment did apply to that case.

Now, there is another unwarranted byproduct to the court of appeals' decision. And that is that it necessarily credits as determinative evidence of actual malice, evidence of little, if any, probative value on the issue of actual malice. Such as evidence that a newspaper competes for circulation with other media. That it editorially --

QUESTION: Did the court -- did the court define actual malice for the jury to include reckless disregard?

MR. LEVINE: The trial court gave the definition of actual malice to the jury in its charge that included reckless disregard. Yes, Justice Kennedy.

QUESTION: So we're talking about really reckless disregard?

MR. LEVINE: In this case I believe my opponent has suggested that there is direct evidence of an admission of knowledge of falsehood, but I think in

fairness this case is really about whether the circumstantial evidence in the record adds up to reckless disregard for the truth. We think that under any standard of review, even a clearly erroneous standard, the evidence in this record is insufficient, as Judge Guy held in his dissent from the court of appeals' opinion, to justify a finding of actual malice.

QUESTION: But, Mr. Levine, can I come back to your precise example of what's a finding of fact? About the meeting that occurred the next morning and what occurred at that meeting -- you said that would have been a finding of fact.

What about other statements that Thompson made that are not contradicted? There -- there is no evidence contradicting them. But the jury, knowing that Thompson lied about this other one -- about whether the meeting occurred -- and about another number of other things on which there was conflicting testimony, the jury says, "We don't believe Thompson at all, and we reject everything that Thompson said."

Now, how does the court of appeals handle that? Is that a -- Is that an inference from the other findings of facts? Since she lied five times, we assume she lied seven times. I suppose that's an inference.

MR. LEVINE: Your Honor, the answer to that

question depends on who has the burden of proof in the case. In this case, the Plaintiff has the burden of proof. It not only has the burden of proof, but by clear and convincing evidence.

If the Plaintiff put on evidence and had witnesses or the possibility of witnesses within its subpoena power or control that it could have put on to contradict what Thompson had to say, I would grant you that in reviewing --

QUESTION: Well, no, but it didn't. There is no contradictory evidence. I cannot -- I cannot, as an appellate judge, look at the fact that she was contradicted five times in what she said. She said two other things that weren't contradicted, but I can't assume, well, you know, the jury thought she was lying five times, they must have though that she couldn't be relied on at all and therefore they didn't believe her the other two. I can't do that.

MR. LEVINE: In this case what we're suggesting is that a reviewing court is not automatically required to discount that testimony on the basis that it is required to defer to a jury finding that she wasn't believed.

We say, though, an independent review encompasses the entire record. It gives the reviewing

court the right to look at that evidence, assuming that the other party had the burden of proof of proving those facts and proving the ultimate issue of actual malice.

The evidence that the court of appeals credited in this case, competing with other media, endorsing editorially the Plaintiff's opponent, and failing to investigate as thoroughly as the Plaintiff might have preferred prior to publication -- that evidence, this Court has repeatedly held, is of tenuous if any probative value with respect to a motive to falsify.

Yet, the court of appeals' decision effectively requires a reviewing court to draw an inference of actual malice from such testimony in every case in which a jury is found in favor of a political candidate and against a newspaper. In such cases, the newspaper literally starts out with three strikes against it because it will always compete with some other media, it will virtually always endorse candidates for public office, and it will always be subject to second-guessing when the scope of its investigation -- not whether it investigated at all -- judged by 20/20 hindsight.

But the issue in this case is not the abstract relevance of these categories of circumstantial evidence

to the actual malice inquiry. It is, rather, whether the court of appeals analysis which requires that this evidence be credited in every single case is consistent with the Rule of Independent Review.

It most surely is not. The independent review contemplated by New York Times and by Bose is in this Court's own words de novo review. It calls on courts to make a uniquely constitutional judgment, a judgment about whether expression is protected by the First Amendment.

To do that, a court must review the entire record, including undisputed evidence favoring the defendant. To do that, a reviewing court must draw its own inferences from the record evidence and not defer to an array of hypothetical subsidiary facts that a jury could have found.

This Court has been making such determinations and exercising such independent review in First Amendment cases since at least its 1927 decision in Fiske v. Kansas. Such review is not only within the legitimate power of appellate courts, it is a constitutional obligation placed upon appellate courts by the First Amendment itself.

QUESTION: Mr. Levine, you place a great deal of confidence in the Bose case, don't you?

MR. LEVINE: Yes, I do, Your Honor.

QUESTION: I must confess I'm a little puzzled as to why you need it, from your point of view. And maybe you do. Do you concede that the article was false?

MR. LEVINE: Your Honor, for purposes of this proceeding we concede that it is susceptible to a defamatory interpretation which is false. Yes.

QUESTION: It was?

MR. LEVINE: We're conceding it for this purpose. There was an issue submitted to the jury and they found that. But, Your Honor, I agree with you emphatically. That even under a clearly erroneous standard of review, as Judge Guy held in dissent from the court of appeals' opinion, this judgment can't stand.

QUESTION: Suppose the Bose case were not on the books, not decided, what would you be arguing?

MR. LEVINE: I would have no trouble arguing that New York Times itself very clearly and expressly says that appellate courts have a constitutional obligation to undertake just the kind of independent review that Bose talks about.

In my view and in the Court's own view in -- all Bose does is reaffirm New York Times. It doesn't extend it. It doesn't grant the press any more rights than they had under New York Times v. Sullivan. And

that's because New York Times teaches that the actual malice standard by itself doesn't provide sufficient protection against jury verdicts erroneously punishing protected expression.

The Rule of Independent review and the actual malice standard are inextricably intertwined.

QUESTION: I guess what I'm saying is I think you have stronger case without Bose and you don't have to rely on Bose. But, go ahead, do it your own way.

MR. LEVINE: Your Honor, New York Times teaches us that the line separating protected from unprotected expression, which is what New York Times talks about, is a more difficult, a more sensitive line to draw than that that's in the typical civil case separating protected from -- permissible from culpable conduct.

We regularly assign to juries the task of distinguishing, for example, negligent from responsible driving. But the First Amendment withholds from the civil jury final authority to hold the political speeches not worthy of protection by the First Amendment. That task is assigned to appellate courts through the process of independent appellate review.

Most seriously litigated libel cases like this one don't involve readily ascertainable matters of truth

or falsity. They deal, instead, with the quite debatable implications of conflicting versions of controverted events.

It is because of this reality that New York Times places upon the Plaintiff the affirmative burden of proving by clear and convincing evidence that expression is unworthy of First Amendment protection. The burden --

QUESTION: Mr. Levine, why -- why is it so insubstantial a protection to accept jury facts and inferences and then apply that New York Times rule? For example, on the malice issue, if I applied that rule to the facts and inferences here, I wouldn't find malice just -- just from the fact that this was a competing newspaper and it favored the other political candidate.

I wouldn't say that the facts and inferences that are derivable from this record would show, in my judgment, clearly and convincingly that this newspaper really went out to tell a lie.

Or the other question, that is, whether they were careless enough to be reckless about whether it was true or false, that's a much closer question.

But don't you exaggerate it by saying that it's no protection whatever? Especially since the New York Times standard is clear and convincing evidence of

malice? Even if you took all the facts and all the inferences from the jury here, would you acknowledge that there was clear and convincing evidence that your client, in order to gain a competitive advantage over another newspaper, in order to hurt a political candidate they didn't like, intentionally lied?

MR. LEVINE: In this case, Your Honor, no.

QUESTION: Well, I think so, too.

MR. LEVINE: But -- But we're lucky here, Your Honor, for the following reason. We've got a tape recording. We've got a tape recording of an interview with the Plaintiff in which the Plaintiff concedes that these subjects were discussed, that these conversations took place, that what our primary source said had the ring of truth.

When you put that tape recording into the mix, all the inferences that would need to be drawn to get the clear and convincing proof of actual malice get cut off. And I agree with you, that no jury could have found clear and convincing evidence of actual malice on this record.

In the typical case, I'm not so sure that other defendants are going to be that lucky. And if you don't have that evidence which a -- which a court can reach out and touch, you're not going to have the

ability, without drawing your own inferences, to protect speech that ought to be protected by the First Amendment.

If I could reserve the rest of my time.

QUESTION: Very well, Mr. Levine.

Mr. Lloyd.

ORAL ARGUMENT OF JOHN A. LLOYD

ON BEHALF OF RESPONDENT

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

Let me speak first to the issue of whether it was proper for any court, the jury, the trial court, or this Court, to consider whether the motive of a newspaper is one of the kinds of circumstantial evidence that bear upon the question of actual malice. That's all we've said.

And this Court indicated that in Butts and the panel majority in Tavoulareas also reemphasized it. All we say about the motive to compete against the Enquirer and to protect the incumbent judge, that it is a kind of circumstantial evidence which, combined with all the circumstantial evidence in the record and the direct evidence of actual malice, adds up to -- enough to constitute clear and -- excuse me -- clear and convincing evidence of actual malice.

Now, let me next talk about that line of cases

that my colleague believes justifies a kind of independent review that he would have appellate courts engage in in public figure libel cases.

The cases, beginning with Fiske --

QUESTION: Including the trial judge?

MR. LLOYD: Including the trial judge. The line of cases, beginning with Fiske, involving whether there was a clear and present danger, whether material appeals of prurient interest. I'll give you another -- whether the evidence shows there is jury segregation.

All of those cases involve objective questions. Whereas in here, in this case, the question is -- the question is what was in the mind of the publisher of the matter when he decided to put it in circulation. A purely subjective question.

Beyond that, those questions, those cases that he would invoke in support of his position, involve only the ultimate question, not -- in none of those cases did the Court say that exhaustive independent review by appellate courts of the record was justified. And so that we're dealing with different kind of animals. Indeed, Chief Justice Rehnquist in his dissenting opinion in Bose under which we made reference in the brief, noted the vast distinction between that line of cases and this kind of case where the subjective

question is much more difficult to answer than an objective question where a clear and present danger exists.

Now, I think the record in this case --

QUESTION: Mr. Lloyd --

MR. LLOYD: -- disposes of --

QUESTION: May I ask you just one question --

MR. LLOYD: Yes, Justice Stephens.

QUESTION: -- on this subjective point. You're clearly -- I think you're clearly correct when you're asking whether there was actual knowledge of falsity. That would be purely a subjective inquiry.

But if you're asking whether -- given what the record shows the newspaper knew at the time, whether that constitutes reckless disregard, that's certain -- it's arguably an objective inquiry, isn't it?

MR. LLOYD: Well, there always is in this sense, and as Justice White taught us in St. Amant, where someone claims that he acted in good faith and didn't know that something was true and published a harmful article, his professions of good faith are not likely to be very persuasive where their statement is so inherently improbable that only a reckless man would put it in circulation.

So that there is a relationship between an

objective standard, which is applicable if the record permits it, and the kind of subjective determination which the jury had to make in order to make a finding of actual malice under -- under the court.

Now, the test that this court has laid down -- it is stated various ways, but always comes out -- one way it's stated is subjective belief in probable falsity. It is what the state of mind of a publisher is. That's why -- That's why the attack --

QUESTION: But you --

MR. LLOYD: -- which the petitioner's make upon this record is so inherently flawed. They would -- they're asking -- they're asking the appellate court to do something which --

QUESTION: Do you view the jury verdict here as having found that the newspaper actually knew the story was false or that it acted in reckless disregard and didn't --

MR. LLOYD: I view it as in the alternative. I think on this set of facts anyone who was at that trial would have believed that Jim Blount and Pam Long and those people who decided to publish this article knew it was false. Only a reckless could have -- could have believed otherwise.

And I'll tell you why. The argument has been

made here that, after all, negligence is not enough to allow a public figure to prevail under the New York Times. And I don't -- I don't dispute that.

What we're talking about is the kind of evidence we adduced at this trial, that after being told by all six people who were interviewed at this late night conference, that no, Dan Connaughton didn't make any such statements.

And after -- after having known that Alice Thompson was a lady with a psychiatric history, a criminal record, a motive to lie, and other -- and other basis to believe she was undesirable, the decisionmakers consciously avoided talking to Patsy Stephens, who could have corroborated what this lady said, the consciously avoided listening to the tapes of that meeting that was held at Connaughton's house which brought along, asked for -- which Connaughton said, "Here they are. Listen to the tapes. Make up your mind."

That is not negligence. That is perverse, premeditated ignorance. I'm going to stick my head in the sand so nobody can prove I knew it because if I ask one more question, I'm going to find out something that's going to keep me from running the article I'm determined to run in order to ruin Dan Connaughton.

That's not negligence, if this Court please.

That's what distinguishes this from New York Times and from St. Amant, because by any test or under any standard I would have brought this case -- and I believe that a properly instructed jury hearing this evidence would have found that actual malice was proved by clear and convincing evidence.

Then we have all these admissions. The author of the article, Pam Long said, "I made no decision as to whether what she said was true when I ran the article." Jim Blount said, "We didn't determine whether what she said was true." And then -- and then the newspaper's lawyer said it at the pre-publication conference, he was told it was all a matter of misinterpretation.

That's not negligence. That is the most egregious kind of --

QUESTION: You're defending the judgment below in Topra, I guess.

MR. LLOYD: I'm defending the judgment below in Topra and the opinion of the court of appeals. I was not oblivious to what I thought the requirements of Bose were when this case went to the court of appeals, was briefed and argued. And I was -- I was overwhelmed at the exhaustive treatment -- scrutiny of that record which the Sixth Circuit gave it. And it seemed to me that -- that the Sixth Circuit went beyond what this

court requires in Bose. It certainly was entirely faithful --

QUESTION: What about the standard that (inaudible) -- how about its definition of malice? How do you think it defined the actual malice?

MR. LLOYD: I think it defined the actual malice as reckless -- knowledge of probable falsity or reckless disregard for the truth. The Sixth Circuit has been attacked on the ground that it used a prurience -- its prurience standard that the plurality in Curtis Publishing laid down. That is nonsense. But I don't --

QUESTION: Well, saying those words and (inaudible) used reckless disregard.

MR. LLOYD: But that is said -- that demonstrates reckless disregard for the truth. In other words, a massive quantum of circumstantial evidence -- and, by the way, all circumstantial evidence is evidence on which inferences are drawn. As an old time trial lawyer, I have as much trouble as Justice Scalia does deciding the difference between a fact and an inference.

But this massive record of circumstantial evidence of I want to put my head in the sand because I don't want to know why I can't run this article, certainly adds up. That is -- is an extreme departure from journalistic practice. No question. And it does

demonstrate actual malice.

I would think -- I would not be afraid to ask this Court to say -- to affirm this judgment if the standard were beyond a reasonable doubt, as Justice Scalia said, that he thought it might well be in fact in Liberty Lobby. There has never been in any case, including Saturday Evening Post or Curtis -- Curtis Publishing, rather, v. Butts, as massive a record of knowledge of falsity and then reckless disregard for the truth as we showed, as we presented, as the court of appeals looked at, and as is before this Court.

And I've never argued here before, but I never thought I'd be here arguing the weight of the evidence. This is unique to a public figure libel case, and I'm not complaining about it.

My colleague has said a lot of things that I frankly don't understand. I think I understand Bose. I agree with Chief Justice about Bose. But that doesn't matter. I could win this case under New York Times alone. That's -- or St. Amant or -- all the case law combined distill it out that Dan Connaughton make the requisite showing necessary to get a verdict to sustain -- said he made admissions and confessions.

That's absolute nonsense. Dan Connaughton was brought into a meeting where he was told the endorsement

of the newspaper might be on the line. And he was asked, first of all, "Did you say this? Did you say that? Did you say you were going to blackmail a judge?" No. No. Absolutely not. The denials were flat, unequivocable, absolute.

Then he was asked to speculate as why this lady may have said these things. Now, a more seasoned politician would have said, "No, I'm not going to play that game." He didn't. In good faith he tried to figure out why she might have said it.

And that's all there was to it. But in no case can what this man said be equated to admissions of anything. And I frankly submit respectfully that Judge Guy got disoriented when he wrote the dissenting opinion and based it on those statements and said -- and said that they were admissions. They weren't admissions of anything. Asked the man to speculate and the man speculated. And that's all there is to that.

So, coming down finally, the esoteric considerations are interesting, and I will say frankly I quite got lost in some of the colloquy between the court and my colleague on some of these abstractions. I'm an old fashioned trial lawyer. I know what evidence is. I know what interest is. I know what you argue to a jury. I tried this case.

A motion was made rather timidly for a directed verdict but Judge Rubin said --

QUESTION: Mr. Lloyd, could I interrupt you for just a moment?

MR. LLOYD: -- well, I'm not going to listen to that; I will overrule it.

QUESTION: How do you deal with the fact that the dissenting opinion below discussed the interview with your client at great length and the majority virtually ignored it? And, really, on almost each point that tends to look unfavorably toward your client there is at least some factual basis on each of those isolated points.

MR. LLOYD: Well, Justice Stephens I can't tell you why Judge Guy didn't agree with Judge Krupansky and Judge Keith. All I can tell you is that I think Krupansky saw Judge Guy's characterization as a mischaracterization and -- and he identified it as just a way of looking at evidence in the wrong way.

My answer to you, I guess, is that -- that version of the evidence, that contention that my client admitted all of this was argued to the jury, and they didn't buy it. They didn't believe that that's what happened based upon their --

QUESTION: No, but the issue --

MR. LLOYD: -- review of the all the evidence.

QUESTION: The issue isn't whether it happened, but whether those statements made by your client and transcribed provided the newspaper with a sufficient basis for -- for running the story.

MR. LLOYD: Well, and Judge Guy thought they did.

QUESTION: Yeah.

MR. LLOYD: And the majority thought they didn't. And I think that the majority was right and the -- to say the judge was wrong, respectfully.

QUESTION: I mean, some -- the promise of the Florida trip, and he admits they talked about going down to Hilton Head or Florida, and the promise of a job. And admits that it was a deli shop or a gourmet or an ice cream shop.

I mean, you're right if you got the verdict before the jury, but --

MR. LLOYD: You see, what -- where Judge Guy missed the point. And I admire him and I like him, but I must say respectfully he missed the point, and I told him this privately. He -- He didn't understand that the gravamen of the charge were published. The statements made by the Thompson woman were that Dan Connaughton got these two women at his home, he had his tape recorders,

and he turned them off and he made a lot of promises and offers to induce them to testify. He turned the tape back on and he got their statements.

Now, that all this was done as an inducement to get testimony. Then he said, I'm going to blackmail a Judge, and then he got mad, when that didn't work -- and made these charges. Now, that's an enormously --

QUESTION: Yes, but he --

MR. LLOYD: -- hurtful thing to say. Now, his admissions, if Your Honor please, did not go to any of those things. All he said was that, One time when I came to the house my wife was talking to these ladies about something and somebody may have interpreted something. As to whether --

QUESTION: Yes, but isn't it -- it is true, is it not, that the interview lasted much longer than the tape?

MR. LLOYD: That I don't know.

QUESTION: That's the impression I got that -- and that the stuff that was in dispute is what happened on the tape -- was not turned on.

MR. LLOYD: Well, but you see, my client said to the Journal News people at that interview, "See for yourself. Play the tapes. You'll hear." And the head-in-the-sand took over. They didn't want to play

the tapes.

Now, the jury heard the tapes and they heard Dan Connaughton's voice on the tapes. They also heard all the people who were at that meeting, including a lady who herself worked for the Journal News and her husband, the deputy fire chief, say, we were there the whole time and the man never said anything like that.

At that point I think, in my humble opinion, when the Journal News received that report from those people, that should have been the end of the inquiry. A responsible newspaper would have said, Okay, call this one off. And I think -- far beyond that -- that's when he got into reckless regard and that's why the jury brought in a verdict for the plaintiff, and it was upheld by the Sixth Circuit.

Now, I've said a lot of things in my brief. Aside from affirming the judgment, the Petitioner really asks you enact a rule of absolute immunity for -- for the press against -- against litigation by public figures. And if you reverse this judgment, I think the signal that goes out will be, look, public figures can't win libel cases; give up; there's no way to win. The rule exists, but it exists as honored in a breach 25 years after New York Times was announced.

I urge this Court to give it some vitality,

make it mean something. Here is a Plaintiff that won a case against -- if I may use the term from desegregation litigation -- against a loaded game board. He climbed over all these obstacles and prevailed because his evidence was massive and his cause was just. And the court of appeals affirmed. That's all any court of appeals could ever be asked to do, is what the Sixth Circuit has done in this case.

It has been my very great pleasure to argue to this Court. Thank you very much.

QUESTION: Thank you, Mr. Lloyd.

Mr. Levine, you have five minutes remaining.

REBUTTAL ARGUMENT OF LEE LEVINE

ON BEHALF OF PETITIONERS

MR. LEVINE: I'd like just to address a couple of points.

First, in response to Justice Stephens' question of Mr. Lloyd, it is indisputably true and one of those undisputed facts in this record that a reviewing court should credit that this -- the tape recordings of which Mr. Lloyd refers run two hours and 20 minutes. By the shortest estimate of any of the participants in that all-night meeting, that meeting lasted four hours. That means that there is, by my count, an hour and 40 minutes that is unaccounted for.

So, listening to the tapes, in my view, is an incredible red herring in this case. The tape that ought to be listened to, Your Honors, is the tape of the interview that the Journal News conducted with Dan Connaughton, the one that Justice Stephens was talking about. There is a complete transcript of that tape-recorded interview in the Joint Appendix. We understand that the tape recording itself remains in the custody of the district court but is available to this Court upon request.

QUESTION: What about talking to Ms. Stephens? That's -- That's what I really can't understand? Why not talk to the sister before you go to the story?

MR. LEVINE: Your Honor, it is undisputed we did not talk to her and it would have been a better story if we had. But when you take that one fact and all the others that Mr. Lloyd -- pure facts --

QUESTION: It would have been a non-story if you had, not a better story, because she contradicted everything her sister said.

MR. LEVINE: Your Honor, with all due respect I think that if you read Patsy Stephens' testimony in the trial of this case, which is the best indication we have of what she would have said had she been

interviewed, she does not deny. She says, in fact, that it's all a matter of how you interpret it. It's how a person feels within. When someone gives you something out of their heart, that's not -- I don't view that as a promise or an offer.

QUESTION: That -- that isn't a denial that there was an offer by --

MR. LEVINE: It is -- it is a denial that she interpreted it as an offer.

QUESTION: As not? Yes. It's a denial that she did.

MR. LEVINE: But it -- but it doesn't bear at all on the question of whether or not those statements were made --

QUESTION: Well, what did -- what do we do with that testimony? Is that a fact or an inference? Do I -- do I take to be a denial that it occurred or not a denial that it occurred? Is that something I give the jury the benefit of the doubt on or do I decide that for myself?

MR. LEVINE: Justice Scalia, on this record you take the position that Patsy Stephens testified at trial that she did not believe she was promised anything --

QUESTION: Yeah.

MR. LEVINE: -- at that time. And that is a fact that you weigh in the balance. But, even given that, and that is concededly the most harmful piece of evidence in this record -- although I would point the Court to statements in cases from St. Amant v. Thompson that failure to investigate does not constitute actual malice -- that an independent review of this record can leave no doubt that the expression at issue here is protected by the First Amendment.

The article at issue, not the most defamatory interpretations of it that Mr. Lloyd would have you believe -- the article itself is a fair and accurate account both of Alice Thompson's statements and of Mr. and Mrs. Connaughton's responses to them. The article references conversations that Mr. Connaughton concedes took place and subjects that he concedes were discussed. The article was disseminated in the midst of a hotly-contested election campaign.

QUESTION: Well, then where is the falsity?

MR. LEVINE: Your Honor, I see no falsity in this story. And it seems to me that if you look at this article, the article that was actually written, it contains nothing that I would call a material false statement. But this jury found falsity, and we sought independent review only of the actual malice inquiry.

So I'm here on the question of actual malice, not falsity.

What happened here was that this newspaper neutrally put before the voters both the charges made by Alice Thompson and the responses of the Connaughtons to them. It did it unvarnished, without taking sides, without crediting one interpretation or the other. That's not --

QUESTION: Can you do that? Can you put forward charges that you know are irresponsible? That you -- suppose -- suppose they knew the charges were false, that wouldn't be a defense, would it, that you put forward the false charges and you also put forward his denial? You can't do that, can you?

MR. LEVINE: If there was -- If there was evidence like in the Cantrell case that this newspaper knew it was false?

QUESTION: Right. That's no good.

MR. LEVINE: Under the actual malice --

MR. LLOYD: Okay.

MR. LEVINE: -- standard that's no good.

QUESTION: Okay. What if you have reason to suspect very gravely that it's false but you don't bother to check up. Does the situation change? You can say, Well, you know, I really think it's a pack of lies

but I don't know for sure and I'm not going to check. Can you do that so long as you put in the other side?

MR. LEVINE: I missed the first part of -- of your --

QUESTION: Well, you're --

MR. LEVINE: -- what you were --

QUESTION: -- not sure it's false but you suspect it's false. But you say, I'm not going to check any further.

MR. LEVINE: Your Honor, in Garrison v. Louisiana, a jury instruction that said effectively that was held to be unconstitutional -- that you had to have a firm enough reason to believe that it was true. And that, this Court held, was not enough, you have to have a high degree of awareness of probable falsity. That's the definition of actual malice.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Levine.

The case is submitted.

(Whereupon, at 1:37 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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No. 88-10 - HARTE-HANKS COMMUNICATIONS, INC., Petitioner V. DANIEL CONNAUGHT

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BY alan friedman

(REPORTER)